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ALLAHABAD SERIES

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(2024) 3 ILRA 11
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 10 of 2021

Sandeep Kumar ...Revisionist
Versus
The State & Anr. ...Opposite Party

Counsel for the Revisionist:
Ajay Kumar

Counsel for the Opposite Parties:
G.A., Abhishek Dwivedi, Anjani Kumar Misra, Jagat Pal Singh, Nadeem Murtaza, Puneet Saxena, Santosh Kumar Tirpathi, Surekha Patel

Criminal Law -Juvenile Justice (Care and Protection of Children) Act, 2000 – Section 7A, Rule 12(3) of 2007 Rules – Juvenile Justice (Care and Protection of Children) Act, 2015 – Section 94 – Determination of Juvenility – Priority of Educational Documents – Evidence Act, 1872 – Sections 35 & 114 – Criminal Revision – Section 397/401 Cr.P.C.
The revisionist challenged the orders dated 01.12.2020 (Additional Sessions Judge/Special Judge POCSO Act, Lucknow) and 22.12.2020 (Juvenile Justice Board, JJB) determining the opposite party No. 2 as a juvenile in Case Crime No. 2013 of 2015 under Sections 302/120B IPC. The revisionist's FIR alleged that the opposite party No. 2, his uncle, murdered his father. The opposite party No. 2 claimed juvenility, supported by school records initially showing his date of birth as 07.07.2002, later corrected to 12.07.1997 due to an error. The JJB initially ordered a medical examination, which estimated the age as 25 years, suggesting majority on the incident date (18.05.2015). The appellate court set aside the JJB's order, prioritizing educational records under Section 94 of the 2015 Act (or Rule 12(3) of 2007 Rules under the 2000 Act, applicable at the time), and remanded the matter. The JJB then declared the opposite party No. 2 a juvenile based on the corrected date of birth (12.07.1997). Held: The court, citing Ashwani Kumar Saxena Vs St. of M.P. ((2012) 9 SCC 750), Abuzar Hossain Vs St. of W.B. ((2012) 10 SCC 489), Rishipal Singh Solanki Vs St. of U.P. ((2022) 8 SCC 602), and Manoj Vs St. of Har. ((2022) 6 SCC 187), upheld the priority of educational records under Rule 12(3)(a) over other evidence like voter lists or medical opinions, unless proven fabricated. The headmistress's correction was credible, and the parivar register's vague entry was insufficient. Sections 35 and 114 of the Evidence Act supported the reliability of school records. The JJB's order, compliant with the appellate remand and Rule 12(3), was lawful.

Revision was dismissed.

Case Law Cited:

1. Ashwani Kumar Saxena Vs St. of M.P., (2012) 9 SCC 750

2. Abuzar Hossain Vs St. of W.B., (2012) 10 SCC 489

3. Rishipal Singh Solanki Vs St. of U.P., (2022) 8 SCC 602

4. Manoj Vs St. of Har., (2022) 6 SCC 187

5. Babloo Pasi Vs St. of Jharkhand, (2008) 13 SCC 133

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

1. Heard Sri Ajay Kumar, the learned counsel for the revisionist, Sri Anurag Verma, the learned AGA-I for the State and Sri Santosh Kumar Tripathi, the learned counsel for the opposite party no. 2.

2. By means of the instant revision filed under Section 397/401 Cr.P.C., the revisionist has challenged validity of an order dated 01.12.2020 passed by the

Additional Session Judge/Special Judge POCSO Act, Lucknow in Criminal Appeal No. 251 of 2020 whereby the appeal was allowed, the order dated 09.10.2020 passed by the Juvenile Justice Board in Misc. Case No. 11/2020 arising out of Case Crime No. 2013 of 2015, under Section 302/120B IPC, Police Station Chinhat, Lucknow, was set aside and the matter was remitted to the Juvenile Justice Board to decide the age of the delinquent on the basis of his date of birth mentioned in his educational certificate, unless the same is not believable for any cogent reason, in accordance with the provision contained in Section 94 of the Juvenile Justice Act, 2015. The revisionist has also challenged validity of the order dated 22.12.2020 passed by the Juvenile Justice Board in the aforesaid case deciding the claim of juvenility of the accused in furtherance of the remand order dated 01.12.2020 and holding him to be a juvenile.

3. Briefly stated, facts of the case are that the revisionist had filed FIR No. 192/2015 in Police Station Chinhat, Lucknow under Sections 302, 120-B IPC against the respondent no. 2 and his father Awadh Ram, alleging that the opposite party no. 2 is uncle of the revisionist, the revisionist's father had sold away some land for a very meager consideration, due to which the revisionist was annoyed and he came to the complainant's house at about 01:30 p.m. on 18.05.2015 and asked the revisionist's father that the temple's priest was calling him and he took the revisionist's father with him. The revisionist and his brother were also following them and they saw that the opposite party no. 2 assaulted the revisionist's father with a Banka (a sharp edged tool) on his neck. The revisionist alleged that the opposite party no. 2 had killed his father under a conspiracy with the father of the accused.

4. The opposite party no. 2 claimed that he was a juvenile whereas the revisionist opposed this claim. The juvenile justice board decided this issue by means of an order dated 09.10.2020 wherein it is recorded that the headmistress of Primary School Saraisheikh, Chinhat had produced the original admission form, transfer certificate and admission register before the Juvenile Justice Board and had stated that as per the aforesaid documents, the date of birth of the opposite party no. 2 is 07.07.2002. However, the headmistress of the aforesaid school appeared again and stated that the date of birth of the revisionist as entered in the school records is 12.07.1997 and she stated that earlier she had erroneously produced the documents of another student Shahiba Khatoon.

5. The revisionist filed an application for summoning the parivar register of the respondent no. 2. He submitted copies of voter list of Gram Panchayat Saraiksheikh as per which the age of the opposite party no. 2 was 23 years. The revisionist also produced a list of Pradhan Mantri Jan Aryogya beneficiaries which mentioned the age of the opposite party no. 2 to be 26 years.

6. The board allowed the application for summoning of pariwar register and the Gram Panchayat Vikas Adhikari, Gram Panchayat Saraisheikh Block Chinhat Lucknow appeared before the Board and produced pariwar register, in which the date of birth/ age of the revisionist was mentioned as 17 years. However, the said witness stated that he does not know as to when this entry was made in the register.

7. The Juvenile Justice Board took into consideration the discrepancy in the

date of birth of the opposite party no. 2 mentioned in various records and found that his date of birth mentioned in the educational documents i.e. 12.09.1997, is not believable and the opposite party no. 2 should be examined by a medical board to ascertain his age.

8. The Medical Board examined the opposite party no. 2 on 16.10.2020 and opined his age to be about 25 years, from which it appears that on the date of the incident, the accused a major.

9. The accused challenged the aforesaid order dated 09.10.2020 passed by the Juvenile Justice Board by filing Criminal Appeal No. 251/2020, which was decided by the learned Additional Sessions Judge/ Special Judge POCSO Act, Lucknow by means of the impugned judgment and order dated 01.12.2020.

10. The appellate court held that the headmistress of the primary school had earlier stated the date of birth of the opposite party no. 2 to be 07.07.2002 but later she clarified that the aforesaid date was mentioned erroneously on the basis of the documents of another student Sahiba Khatoon. She corrected the mistake and said that as per the school records, date of birth of the applicant is 12.07.1997 and the opposite party no. 2 had taken admission to the school on 07.07.2002. The appellate court found the testimony of the headmistress and the documents produced by her to be believable.

11. The appellate court further held that Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides that for determination of age of juvenile, the date of birth mentioned in the educational documents will be given priority above other evidences and the Juvenile Justice Board does not have an option to ignore this evidence and to proceed to ascertain the date of birth of the accused on the basis of material which finds place at lower priority in Section 94 of the Act. Accordingly, the appellate court set aside the order dated 09.10.2020 passed by the Juvenile Justice Board and remanded the matter to the Board, for deciding it afresh keeping in view the date of birth of the accused mentioned in his educational documents, unless the same are not believable for any valid reason.

12. In compliance of the aforesaid order dated 01.12.2020, the Juvenile Justice Board passed the impugned order dated 22.12.2020 holding the date of birth of the accused to be 12.07.1997 as mentioned in his educational documents.

13. The learned AGA hs placed reliance on a decision of the Hon'ble Supreme Court in the case of **Manoj v. State of Haryana:** 2022 6 SCC 187.

14. The incident, from which the present case arises, took place on 18.05.2015. The Juvenile Justice (Care and Protection of Children) Act, 2015 came into force on 15.01.2016 VideS.O. 110(E), dated 12.01.2016. On the date of the incident, Juvenile Justice (Care and Protection of Children) Act, 2000was in force and the following provision of the Act are relevant for the present matter: -

(k) "juvenile" or "child" means a person who has not completed eighteenth year of age;

(l) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;

* * *

7-A. Procedure to be followed when claim of juvenility is raised before any court.—(1) *Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:*

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.

15. From a reading of Section 7A, it becomes obvious is that whenever a claim of juvenility is raised, an inquiry has to be made and such inquiry would take place by receiving evidence which would be necessary, so as to determine the age of such person.

16. The procedure to be followed for the determination of age is provided under Rule 12(3)(b) of the 2007 Rules, which reads as:

"12. Procedure to be followed in determination of age.*—(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—*

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and,

while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

17. Sub-clause (3) of the aforesaid Rule clearly mandates that while conducting an inquiry about the juvenility of an accused, the Juvenile Justice Board would seek evidence by obtaining the matriculation or equivalent certificates and

in the absence whereof the date of birth certificate from the school first attended and in absence whereof the birth certificate given by a corporation or a Municipal authority or a Panchayat. It is made clear by sub-clause (b) that only in the absence of the aforesaid three documents, medical information would be sought from a duly constituted Medical Board which will declare the age of the juvenile or child. Thus, it is only in the absence of the aforesaid documents that the Juvenile Justice Board can ask for medical information/ossification test.

18. In **Ashwani Kumar Saxenav.State of M.P.,**(2012) 9 SCC 750, the Hon'ble Supreme Court held that:—

"32."Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. ***Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable.*** *In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.*

* * *

34.Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. ***There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.***

* * *

41.This Court in Babloo Pasiv.State of Jharkhand*(2008) 13 SCC 133held, in a case where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The Court held that:*

"22. ... The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence."

This Court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to redetermine the age of the accused."

(Emphasis supplied)

19. It is also relevant to note of the provisions contained in Sections 35 and 114 of the Evidence Act, which provide as follows:—

"35. Relevancy of entry in public record or an electronic record], made in performance of duty.—*An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact.*

* * *

114. Court may presume existence of certain facts.—*The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

Illustrations

The Court may presume—

* * *

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it—

as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances;

as to illustration (f)—the question is whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

* * *

20. Thus the entry made in the School Records of Government Primary School in which the accused has studied, will not only be relevant as per the provision contained in Section 35 of the Evidence Act, it will be presumed to be correct under Section 114 of the Evidence Act. As the date of birth has been certified by the Head Mistress of the primary school in which the accused had studied, which is mentioned in Rule 12 (3) (a) (ii), the Court or the Juvenile Justice Board could not have proceeded to consider the birth certificate given the panchayat or the medical opinion.

21. In **Abuzar Hossain v. State of W.B.**,(2012) 10 SCC 489, the Hon'ble Supreme Court summarized the legal position in this regard in the following words:—

"39.5.The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. ***The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.***

(Emphasis supplied)

22. Although **Rishipal Singh Solankiv.State of U.P.**,(2022) 8 SCC 602is a case involving the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, the following general principles of law summarized in that case would serve as guiding principles which would apply to the present case also:—

"33.3.When a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the court to discharge the initial burden. However, ***the documents mentioned in Rules 12(3)(a)(i), (ii) and (iii) of theJJ Rules, 2007made under theJJ Act, 2000or sub-section (2) of Section94of theJJ Act, 2015, shall be sufficient for prima facie satisfaction of the court. On the basis of the aforesaid documents a presumption of juvenility may be raised.***

33.4.*The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.*

* * *

33.6. *It is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.*

33.7.*This Court has observed that* ***a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.***

33.8.If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. *This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.*

33.9*.That* ***when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.***

33.10. *Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.*

33.11. Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section94(2)of theJJ Act, 2015."

(Emphasis supplied)

23. In **Manoj v. State of Haryana**: (2022) 6 SCC 187 relied upon by the learned A.G.A., it was held that: -

"41.…the plea of juvenility has to be raised in a bonafide and truthful manner. If the reliance is on a document to seek juvenility which is not reliable or dubious in nature, the appellant cannot be treated to be juvenile keeping in view that the Act is a beneficial legislation. As also held inBabloo Pasi v.State of Jharkhand, (2008) 13 SCC 133, the provisions of the statute are to be interpreted liberally but

the benefit cannot be granted to the appellant who has approached the Court with untruthful statement."

24. When we examine the facts of the present case in light of the law laid down in the above mentioned cases, it appears that the Primary School Saraisheikh, Chinhat had produced the original admission form, transfer certificate and admission register before the Juvenile Justice Board and had stated that as per the aforesaid documents, the date of birth of the opposite party no. 2 is 07.07.2002. However, the headmistress of the aforesaid school appeared again and stated that the date of birth of the revisionist as entered in the school records is 12.07.1997 and she stated that earlier she had erroneously produced the documents of another student Shahiba Khatoon.

25. The parivar register mentions the age of the accused as 17 years, without mentioning the date or year in which this entry was made and, therefore, this entry does not prove the age of the accused on the date of the incident.

26. The discrepancy in date of birth mentioned in school records as mentioned in Rule 12 (3) (a) (ii) of the 2007 Rules with the age of the accused as per the Voter List or the List of Pradhan Mantri Jan Aryogya beneficiaries will not invalidate the date of birth, as the later documents do not find place in Rule 12 (3) of the 2007 Rules. The opinion of Medical Board regarding age of the accused could only have been called for in case any documents mentioned in Rule 12 (3) (a) was not available, which is not the case here.

27. The appellate court had held that the headmistress of the primary school had earlier stated the date of birth of the opposite party no. 2 to be 07.07.2002 but later she clarified that the aforesaid date was mentioned erroneously on the basis of the documents of another student Sahiba Khatoon. She corrected the mistake and said that as per the school records, date of birth of the applicant is 12.07.1997 and the opposite party no. 2 had taken admission to the school on 07.07.2002. The appellate court found the testimony of the headmistress and the documents produced by her to be believable. The appellate court had set aside the order dated 09.10.2020 passed by the Juvenile Justice Board and remanded the matter to the Board, for deciding it afresh keeping in view the date of birth of the accused mentioned in his educational documents, unless the same are not believable for any valid reason. This order was not challenged by the revisionist.

28. In compliance of the aforesaid remand order dated 01.12.2020 passed by the appellate Court, the Juvenile Justice Board passed the impugned order dated 22.12.2020 holding the date of birth of the accused to be 12.07.1997 as mentioned in his educational documents, which finding is in accordance with the provisions contained in Rule 12 (3) (a) of the Rules of 2007.

29. Therefore, there is no illegality in the impugned order dated 22.12.2020 passed by the Juvenile Justice Board warranting interference by this Court in exercise of its Revisional Jurisdiction.

30. The revision lacks merits and the same is hereby dismissed.

(2024) 3 ILRA 19
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.10.2023
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 105 of 2021

Akhilesh ...Revisionist
Versus
The State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Dinesh Kumar Yadav, Sri Atmaram Nadiwal

Counsel for the Opposite Parties:
G.A.

Juvenile Justice – Juvenile Justice (Care and Protection of Children) Act, 2000 – Section 2(l) – Juvenile Justice (Care and Protection of Children) Rules, 2007 – Rule 12(3) – Age Determination – Revisionist challenged appellate order dated 04.12.2020 setting aside Juvenile Justice Board's order dated 03.04.2015, which declared him juvenile – Held, Juvenile Justice Board correctly relied on High School marksheet (DOB: 24.09.1997) and medical board report (age ~18 years in 2015) to determine revisionist's age as 16 years, 4 months, and 7 days on date of incident (01.02.2014), declaring him juvenile – Rule 12(3) prioritizes matriculation certificate for age determination; only if forged or unavailable can school first attended records or medical opinion be considered – No finding that High School marksheet was forged, rendering appellate court's reliance on primary school records (DOB: 07.02.1995) and revisionist's affidavit in unrelated proceedings erroneous – *Parag Bhati Vs St. of U.P.* and *Meghraj Sharma Vs St. of U.P.* followed, emphasizing matriculation certificate's primacy unless proven fabricated – Medical report, consistent with High School marksheet, supports juvenility; benefit of lower age margin (within one year) applies per Rule 12(3)(b) – Appellate court's order set aside, Juvenile Justice Board's order declaring revisionist juvenile affirmed. (Para 19-30)

Criminal revision allowed.

List of Cases Cited:

1. Meghraj Sharma Vs St. of U.P.; Criminal Revision No. 3449 of 2019, decided on 14.07.2021

2. Parag Bhati (Juvenile) Vs St. of U.P.; (2016) 12 SCC 744

3. Ashwani Kumar Saxena Vs St. of M.P.; (2012) 9 SCC 750

4. Hari Ram Vs St. of Raj.; (2009) 13 SCC 211

5. Om Prakash Vs St. of Raj.; (2012) 5 SCC 201

6. Abuzar Hossain Vs St. of W.B.; (2012) 10 SCC 489

7. Rajendra Chand Vs St. of Chhattisgarh; (2002) 2 SCC 287

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Learned counsel for the revisionist and learned A.G.A. for the State-respondent are present.

2. None appeared on behalf of respondent No.2.

3. Notice has been served on respondent Nos. 1. Notice has also been served upon respondent No.2, through A.G.A. as well as C.J.M. concerned.

4. The instant Criminal Revision has been preferred by the revisionist/accused against the judgment and order dated 04.12.2020 passed by learned Session

Judge, Maharajganj in Criminal Appeal No.32 of 2019 Smt. Kumari @ Phul Kumari Vs. State of U.P. and another, whereby the order dated 03.04.2015 of Juvenile Justice Board, Maharajganj, District Maharajganj has been set-aside and the application of the revisionist for declaration of his juvenility is rejected. The accused has been declared as major on the date of incident dated 01.02.2014. Ramakant, father of the revisionist is deponent in present revision.

5. Heard learned counsel for the revisionist as well as learned A.G.A. appearing for the State and perused the material available on record.

6. The factual matrix of the case in brief are that First Information Report dated 22.03.2014 was lodged at the instance of mother of the victim against named accused Akhilesh under Section 363, 366 of I.P.C. in Case Crime No.296 of 2014 and after investigation accused has been chargesheeted under Sections 363, 366ka, 376 of I.P.C. and Section 3/4 of POCSO Act, P.S. Maharajganj with the allegation that accused enticed away his minor daughter aged about 14 years studying in Class IXth, in the night of 01.02.2014 at around 10 PM; both victim and accused belonged to schedule caste. She searched for her daughter for many days, but could not trace her out. Her daughter also took away some ornaments and cash with her. Police submitted chargesheet against the accused under Section 363, 366Ka and 376 of I.P.C. and Section 3/4 of POCSO Act placing reliance on statement of victim under Section 164 Cr.P.C. as well as other evidences collected during the investigation.

7. The accused moved an application before the Juvenile Justice Board, Maharajganj, with averment that on the date of alleged incident dated 01.02.2014 he was declared juvenile. As his date of birth is mentioned as 24.09.1997 in his High School Marksheet, the said marksheet has been issued by Janta Uchchatar Madhyamik Vidyalaya, Harpur Pakadi, District Maharajganj. The Juvenile Justice Board placed reliance on date of birth mentioned in the High School Marksheet of the accused which was verified by evidence of the clerk of said school by his sworn testimony before the court. He also produced scholar register of the accused in which his name is mentioned at Serial No.5341, where he received education from class VIth to Xth and his date of birth is mentioned as 24.02.1997 therein. The said clerk also produced High School marksheet, transfer certificate, attendance and fee registers and filed photocopies of the same with his attestation. He was also cross-examined by the counsel for informant in juvenile inquiry proceedings, whereas the stand of the informant was that the accused received his elementary education in Primary School, Harpur Pakadi, Maharajganj, wherein his date of birth is mentioned as 17.02.1995, and to prove that document acting Headmaster Prathmik Vidyalaya, Harpur Pakadi, Sri Manish Kumar was examined as P.W.1. As two different documents were produced with regard to date of birth of the accused, a medical board was constituted on orders of Juvenile Justice Board, wherein the age of accused was ascertained around 18 years in its report dated 25.03.2015.

8. Learned Juvenile Justice Board also observed that on the basis of date of birth mentioned in the High School marksheet of the accused his age comes to 16 years 4 months and 7 days on the date of incident, which has been certified by CW1 and

CW2. The report of Chief Medical Officer dated 25.03.2015 also corroborates the age of the accused which is calculated on the basis of date of birth mentioned in High School marksheet. The Juvenile Justice Board also observed that the age determination report of medical board has been filed after one year of the incident, therefore, in all probability the accused was below 18 years of age on the date of incident and declared him juvenile in conflict of law under Section 2(L) Juvenile Justice (Care and Protection of Children) Act, 2000 by order dated 03.04.2015.

9. Feeling aggrieved by the age determination report and declaration of the accused as juvenile in conflict of law, the informant filed a Criminal Appeal before Session Judge, Maharajganj which was **allowed** by impugned order, and the application for declaration of juvenility moved by the revisionist was rejected and accused was declared major.

10. Learned counsel for the revisionist submitted that the approach of learned appellate court is contrary to settled law, as the date of birth mentioned in High School marksheet of the accused as well as the age determination report of medical board both fairly suggests that accused was below 18 years of age on the date of incident. However, learned appellate court placed reliance on age of the accused as stated by him before this Court in Civil Misc. Writ Petition No.9053 of 2014 (Smt. Radhika and others Vs. State of U.P.), in which he has stated his age as 24 years in affidavit on the basis of his Voter Identity Card as well as his date of birth mentioned in the record of Primary School Harpur Pakadi, Ghivhan as 07.02.1995.

11. He further contended that the impugned order passed by learned court below is not sustainable under law and deserves to be set-aside. He also contended that learned appellate court has failed to consider the provisions of Rule 12(3) of Juvenile Justice (Care and Protection of Children), Rules 2007 in which the guidelines for age determination of a juvenile in conflict of law are clearly mentioned. Learned appellate court also placed reliance on the judgment of this Court in **Meghraj Sharma vs State Of U.P. And Anr. in Criminal Revision No.3449 of 2019 decided on 14.07.2021,** wherein this Court in paragraph No.44 observed as under:-

"44. On the basis of interpretation of law by Apex Court and discussed above, the salient features that can be culled out for determination of age of a juvenile under the 2007 Rules are:

(i) If Matriculation Certificate is available, only the same is to be relied upon for determination of age.

(ii) Matriculation Certificate can be disbelieved only if it is forged or fabricated which has to be adjudicated after enquiry and sufficient evidence to be dealt with in accordance with procedure established to hold a document as forged and fabricated.

(iii) If Matriculation Certificate is not available or in its absence alone can resort be taken to determination on basis of date of birth certificate from school first attended (Rule 3 (a) (ii) of the Rules 2007.)

(iv) If date of birth certificate is not available or is disbelieved if found to be forged and fabricated after the adjudication and considering the evidence and following the procedure for holding the document as forged and fabricated.

(v) Resort can be taken to the birth certificate given by the corporation or a municipal authority.

(vi) If the said birth certificate given by the corporation or a municipal authority is not available or is held to be forged and fabricated and not worthy of reliance after conducting the enquiry on the basis of evidences adduced, resort can be taken to Clause 12 (3) (b) of the Rules 2007."

12. Per contra, learned A.G.A. submitted that there is no infirmity or illegality in the impugned order passed by the learned court below, whereby the accused-revisionist has been declared major and the order passed by Juvenile Justice Board, Maharajganj in regard to his juvenility has been set-aside.

13. He further submitted that the Investigating Officer had not initiated any action to get the accused declared as juvenile by moving appropriate proceedings. The victim was aged about 14 years at relevant time and student of Class IX. The date of birth of the revisionist is mentioned as 07.02.1995 in school records of Primary School, Harpur Pakadi Ghivhan and same has been proved by the informant before Juvenile Justice Board by producing headmaster of said school as court witness at the instance of the first informant who proved this case on the basis of school records and stated that the revisionist studied in his school, where his date of birth is recorded as 07.02.1995. The deponent Ramakant, father of the revisionist appeared as witness before the Juvenile Justice Board and stated that date of birth of his son as 24.09.1997, and in support of this statement he produced High School Marksheet and Transfer Certificate of the revisionist. Inasmuch as in affidavit filed before this court in some other proceedings it is stated by the revisionist in affidavit that he is aged about 22 years. Therefore, the impugned order need no warrant any interference on the basis of his own admission before this Court in other proceedings arising out of said offence and date of birth recorded in school first attended by the revisionist.

14. In chargesheet filed against revisionist for offence under Sections 363,366 and 376 of I.P.C. and Section 3/4 of POCSO Act by the Investigating Officer, his age is mentioned as around 18 years. This chargesheet has been filed on 06.06.2014, whereas the date of offence is mentioned 01.02.2014 in FIR, therefore the chargesheet has been filed after four months of the incident.

15. Learned appellate court has set-aside the order passed by learned Juvenile Justice Board dated 03.04.2015, whereby the revisionist has been declared juvenile on the ground that his date of birth is mentioned as 17.02.1995 in records of school first attended by him and the same has been proved by evidence of the headmaster of the said school, which is a Government Primary School.

16. The accused has also stated his age about 24 years in a Writ Petition filed in the year 2014. Therefore, the date of birth mentioned in High School marksheet of the 2012 becomes perfectly doubtful, and learned appellate court has declared the accused as major on the date of offence i.e. 01.02.2014, and sent back the record to the Juvenile Justice Board for necessary action.

17. Learned appellate court has placed reliance upon a judgment of the Apex Court in **Parag Bhati (Juvenile) Through Legal Guardian-Mother Smt. Rajni Bhati Vs. State of U.P. and another (2016) 12 SCC 744,** the Hon'ble Apex Court decided an

appeal directed against the final judgment and order passed by the leaned Single Judge of this Court, whereby the revision filed by the appellant claimed to be juvenile against the judgments of Juvenile Justice Board and Additional Sessions Judge, Meerut rejecting his claim of juvenility. The accused was charged for the offence under Sections 302, 394, 504 and 506 of IPC, he was arrested and produced before the Juvenile Court and was remanded and kept in juvenile home. The Juvenile Justice Board after considering the evidence on record came to the conclusion that the date of birth as recorded in various schools certificate submitted by the father of the accused-appellant on his behalf, is doubtful and the juvenile was referred to the Medical Board for determination of his age. The Chief Medical Officer, Meerut on 23.08.2011 opined that the age of the appellant-accused is about 19 years.

18. The chargesheet in above case was filed before The Juvenile Justice Board, Meerut. The Board placing reliance on the opinion of the Medical Board, vide order dated 07.09.2011 held that appellant-accused is major and accordingly transferred the case before the Chief Judicial Magistrate, Gautam Buddha Nagar. Aggrieved by the order dated 07.09.2011 the appellant-accused preferred an appeal before the court of District and Sessions Judge, Meerut. Learned Additional Session Judge, Meerut dismissed that appeal filed by the appellant-accused vide order dated 04.10.2011. Being aggrieved by the orders dated 07.09.2011 and 04.10.2011 passed by the court below the appellant-accused preferred revision before the High Court, however, the same was dismissed vide order dated 24.05.2013, which was under challenged before the Apex Court.

19. The point for determination before the Apex Court was whether on the facts and circumstances of the present case when the date of birth mentioned in the Matriculation Certificate is doubtful, the ossification test can be the last resort of proof of juvenility of the accused. The Hon'ble Apex Court in the case of Parag Bhati Vs. State of U.P. and another (Supra) discussed the statutory provisions of Juvenile Justice (Care and Protection of Children) Act, (2000) and Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, (2007) and some case laws such as **Ashwani Kumar Saxena Vs. State of M.P. (2012) 9 SCC 750, Hari Ram Vs. State of Rajasthan and another (2009) 13 SCC 211, Om Prakash Vs. State of Rajasthan and another (2012) 5 SC 201 and Abuzar Hossain alias Gulab Hossain Vs. State of West Bengal (2012) 10 SCC 489** and held as under:-

"24. While considering a similar question, this Court in Ashwani Kumar (supra) held as under:-

"32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are

unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

33. Once the court, following the above mentioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

25) In Abuzar Hossain (supra), wherein a three-Judge Bench of this Court has already summarized the position regarding what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The credibility and/or acceptability of the documents would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected and if such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the appellant.

26) It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

27) The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence

regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be ***allowed*** *to come to his rescue.*

28) It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain (supra), an enquiry for determination of the age of the accused is permissible which has been done in the present case.

29) In view of the foregoing discussion, we do not find any illegality in the orders passed by the Board and the Court of Sessions and also of the High Court which requires our interference."

20. The Hon'ble Apex Court in **Rajendra Chand Vs. State of Chattisgarh and others (2002) 2 SCC 287** held that while dealing with question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases.

21. As the matter relates to the year 2014, Juvenile Justice (Care and Protection of Children) Act, 2000 will be applicable in the case. Model Central Rules i.e. Juvenile Justice (Care and Protection of Children) Rules, 2007. Rule 12(3) of Rules 2007 reads as under:-

"In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a) *(i) the matriculation or equivalent certificates, if available; and in the absence whereof;*

(ii) *the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*

(iii) *the birth certificate given by a corporation or a municipal authority or a panchayat;*

(b) *and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.*

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof,

clause (b) shall be the conclusive proof of the age as regards such child or Ihe juvenile in conflict with law."

22. In present case there is variation in date of births of the accused/appellant mentioned in school records of Janta Uchchatar Madhyamik Vidyalaya, Harpur Pakdi,District Maharajganj, from where he passed his High School examination in the year 2012 as well as Basic Primary School, Harpur Pakadi Ghivhan where he received primary education. In former his date of birth is mentioned as 24.09.1997, on which reliance has been placed on Juvenile Justice Board, wherein latter is date of birth is mentioned as 07.02.1995, whereon reliance has been placed on by appellate court. However, the parties have not specifically taken stand that the date of birth mentioned in school record relied by other side is fake or forged. The simple issue in this case is that two date of births are mentioned in regard to the revisionist who has claimed to be juvenile on the date of alleged offence. In his two school records, the school from which he passed High School examination as well as the school which is said to be first attended by him. The date of birth mentioned in both the schools although different, yet is proved by evidence of officials of respective schools by producing the relevant records in this regard.

23. In this context the provisions of Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007 become relevant, which provides that if Matriculation Certificate is available, only the same is to be relied upon for determination of age concerning the child juvenile.

24. This Court in **Meghraj Sharma vs State Of U.P. And Anr. (supra)** held that Matriculation Certificate can be disbelieved only if it is forged or fabricated which has to be adjudicated after enquiry and sufficient evidence to be dealt with in accordance with procedure established to hold a document as forged and fabricated. If Matriculation Certificate is not available or in its absence alone can resort be taken to determine the age on basis of date of birth certificate from school first attended and in absence of the documents mentioned in Clause (a) of Rule 3 of the Rules 2007, only the medical opinion will be sought from a duly constituted medical board, which would declare the age of juvenile a child.

25. In the case in hand, according to date of birth mentioned in High School examination record of the revisionist his age was calculated by Juvenile Justice Board as 16 years 4 months and 7 days on the date of alleged offence i.e. 24.09.1997. Whereas on the basis of date of birth mentioned in primary school records of the revisionist, which is 17.02.1995, the appellate court has held that he was more than 18 years of age, and on the basis of said documents as well as his own admission made before the High Court in writ petition has held him major on the date of offence.

26. The learned appellate court has lost sight of the fact that admission of a person claiming himself to be juvenile before any judicial proceedings or collateral proceedings arising out of same offence is not illustrated, as a ground for determination of age of a person claiming himself to be a juvenile neither under the Act of 2000 nor Model Central Rules framed in the year 2007. In absence of any finding of court's below that the date of birth mentioned in High School record of

the revisionist are forged, his date of birth recorded in school first attended cannot be resorted to for determination of the age of the revisionist. Inasmuch as, the medical determination of age of the revisionist, learned Chief Medical Officer has opined in his report dated 25.03.2015 that he was around 18 years of age on the basis of physical appearance as well as the ossification test conducted by radiologist.

27. Thus, according to medical age determination report, which has been filed after one year of the incident, the revisionist should be held to be juvenile and below the age of 18 years. In Rule 12(3) of Rules 2007, it is provided that in absence of the documents mentioned in Clause (a) of Medical Board will declare the age of juvenile a child. In case of exact assessment of the age it cannot be done, the Court or the Board or, as the case may be, the committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. Thus, according to this sub-rule, the age of the revisionist can be held as around 17 years, on the date of alleged incident which is in consonance with his date of birth recorded in his High School Examination Marksheet.

28. There is consistency and conformity between the age determination report of the revisionist issued by the Chief Medical Officer and his date of birth is mentioned in his High School records and both of these strongly suggests towards juvenility of the revisionist on the date of alleged incident. According to the above rules, the date of birth of the revisionist mentioned in his High School records will have privacy over his date of birth mentioned in records of school of first attended.

29. On the basis of foregoing discussions, this Court is of the considered opinion that the approach of Juvenile Justice Board while declaring the revisionist as juvenile on the basis of his medical age determination report as well as his date of birth mentioned in High School records of the school concerned is in conformity with the law laid down under statutory Rules of 2007, as well as various judicial pronouncements cited and discussed as above.

30. Learned appellate court has committed legal error while setting-aside the finding and order of Juvenile Justice Board dated 03.04.2015, declaring the revisionist as major on the basis of his date of birth mentioned in the records of school first attended as well as his admission in affidavit filed before this Court in support of Civil Misc. Writ Petition No.9053 of 2014 (Smt. Radhika and others Vs. State of U.P.).

31. Consequently, the impugned judgment and order passed by learned Session Judge is set-aside and the order dated 01.02.2014 passed by Juvenile Justice Board declaring the revisionist as juvenile is affirmed. Revision stands **allowed**, accordingly.

32. Let the copy of this judgment be certified to Juvenile Justice Board concerned to proceed with the matter accordingly.

(2024) 3 ILRA 28
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 228 of 2024

Km. Ruchi Tripathi ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Santosh Srivastava

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 397, 401, 227 & 228 – Revision against order dated 01.02.2022 rejecting discharge application in Sessions Trial No. 2567 of 2022 under Section 306 IPC – Held, revisionist's application for discharge rightly rejected as suicide note and video message by deceased categorically implicated revisionist for abetting suicide – Prima facie case established based on material indicating revisionist's alleged threats and abusive conduct – Court not required to delve into deep inquiry at discharge stage, only to ascertain if sufficient ground exists for proceeding – No error in trial court's order. (Para 19-21)
Revision dismissed at admission stage.

List of Cases Cited:

1. Naresh Kumar Vs St. of Har., Criminal Appeal No. 1722 of 2010, decided on 22.02.2024

2. Kumar @ Shiva Kumar Vs St. of Karn., Criminal Appeal No. 1427 of 2011, decided on 01.03.2024

3. Stree Atyachar Virodhi Parishad Vs Dilip Nathumal Chordia, (1989) 1 SCC 715

4. Rajbir Singh Vs St. of U.P., (2006) 4 SCC 51

5. Chitresh Kumar Chopra Vs St. (NCT of Delhi), (2009) 16 SCC 605

6. Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460

7. St. of Maharashtra Vs Som Nath Thapa, (1996) 4 SCC 659

8. St. of M.P. Vs Deepak, (2019) 13 SCC 62

9. P. Vijayan Vs St. of Kerala, (2010) 2 SCC 398

10. Asmathunnisa Vs St. of A.P., (2011) 11 SCC 259

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

1. Heard Sri Santosh Srivastava Advocate, the learned counsel for the revisionist, Sri Anant Pratap Singh, the learned Additional Government Advocate and Ms. Neetu Shukla, the learned counsel for the opposite party No.2 and perused the record.

2. By means of the instant revision filed under Section 397/401 Cr.P.C. the revisionist has assailed the validity of the order dated 01.02.2022 passed by the learned Additional Sessions Judge/F.T.C.-1, Lucknow in Sessions Trial No.2567 of 2022 arising out of Case Crime No.79 of 2018 under Section 306 IPC, Police Station Gazipur, Lucknow whereby the application for discharge of the revisionist has been rejected.

3. The aforesaid case has been initiated on the basis of an FIR lodged by opposite party No.2 on 05.02.2018 against the applicant and her sister, stating that the complainant's son was in a relationship with the revisionist. Negotiations for settlement of the marriage of complainant's son with some other girl were going on and

upon coming to know about it, the accused persons threatened to defame him in the society, to stop his marriage and to entangle him in a rape case, due to which the complainant's son committed suicide by hanging himself inside his room at 09:30 PM on 30.01.2018.

4. The deceased has left a suicide note stating that the revisionist was responsible for putting the deceased in agony; that he too could have defamed the revisionist, but he would not do so; that the revisionist had compelled him to commit suicide and that the deceased too had some intimate pictures but that would not be seen by any other person. The deceased had recorded a video massage prior to committing suicide wherein he categorically stated that the revisionist alone was responsible for his death and she had ruined his life. She had done extremely bad things against him and had insulted him beyond limits. He too could have defamed the revisionist but he refrained from doing so.

5. A charge-sheet for commission of offence under Section 306 IPC was submitted against the revisionist alone and her sister was exonerated by the investigating officer.

6. The revisionist filed an application for her discharge stating that the deceased and the revisionist were descendents of a common ancestor and they were related as brother and sister and they resided in same village. The deceased was infatuated to the revisionist. On 30.01.2018, he had made a telephone call to the revisionist and had asked about her final decision regarding the marriage. She declined to marry him and thereafter he committed suicide. It was also stated in the application seeking discharge that the deceased was an ambitious person, he was not satisfied with his job, he was disturbed for numerous reasons and he was suffering from depression, due to which he had become habitual of consuming alcohol and sleeping pills. The discharge application further stated that no expert hand-writing opinion has been obtained regarding the suicide note.

7. The trial court rejected the application for discharge by recording that the investigating officer has mentioned in the case diary that from an examination of the Whatsapp Chat in the mobile phone of the deceased, it transpired that the revisionist used to abuse the deceased. Some independent witnesses have stated that she had asked the deceased to commit suicide. From the aforesaid material a *prima facie* case of trial of the revisionist is made out. Correctness of the allegations can only be ascertained after conclusion of the trial. In view of the facts and circumstances of the case, no case for discharge of the revisionist without her trial is made out.

8. The learned counsel for the revisionist has submitted that the allegations leveled in the FIR and the material collected during investigation merely indicate that the deceased and the victim were in some kind of relationship and the deceased committed suicide after the revisionist declined to marry him. He has submitted that there is absolutely no evidence to even *prima facie* establish that the revisionist had incited or abetted the deceased to commit suicide. He has placed reliance on the decision of the Hon'ble Supreme Court in **Naresh Kumar vs State of Haryana :** Criminal Appeal No.1722 of 2010 decided on 22.02.2024, wherein it has been held that: -

"in order to convict a person Under Section 306 of the Indian Penal

Code there has to be a clear mens rea to commit the offence. Mere harassment is not sufficient to hold an Accused guilty of abetting the commission of suicide. It also requires an active act or direct act which led the deceased to commit suicide. The ingredient of mens rea cannot be assumed to be ostensibly present but has to be visible and conspicuous."

9. The learned Counsel for the revisionist has also placed reliance on a judgment of the Hon'ble Supreme Court in **Kumar @ Shiva Kumar versus State of Karnataka :** Criminal Appeal No.1427 of 2011 decided on 01.03.2024, in which it has been held that: -

"31. In India attempt to commit suicide is an offence under Section 309 IPC. This section provides that whoever attempts to commit suicide and does any act towards the commission of such offence, he shall be punished with simple imprisonment for a term which may extend to one year or with fine or with both. But once the suicide is carried out i.e., the offence is complete, then obviously such a person would be beyond the reach of the law; question of penalising him would not arise. In such a case, whoever abets the commission of such suicide would be penalised under Section 306 IPC. Section 306 IPC reads as under:

306. Abetment of suicide- if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

31.1. Thus, as per Section 306 of IPC, if any person commits suicide, then whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

32. The crucial word in Section 306 of IPC is 'abets'. 'Abetment' is defined in Section 107 of IPC. Section 107 of IPC reads thus:

107. Abetment of a thing- A person abets the doing of a thing, whoFirst-Instigates any person to do that thing; or

Secondly-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.- Whoever, either prior to or at the time of the commission of an act, does 30 anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

32.1. From a reading of Section 107 IPC what is deducible is that a person would be abetting the doing of a thing if he instigates any person to do that thing or if he encourages with one or more person or persons in any conspiracy for doing that thing or if he intentionally aids by any act or illegal omission doing of that thing. Explanation 1 clarifies that even if a person by way of wilful misrepresentation or concealment of a material fact which he is otherwise bound to disclose voluntarily causes or procures or attempts to cause or

procure a thing to be done, is said to instigate the doing of that thing. Similarly, it is clarified by way of Explanation-2 that whoever does anything in order to facilitate the commission of an act, either prior to or at the time of commission of the act, is said to aid the doing of that act.

* * *

47. Human mind is an enigma. It is well neigh impossible to unravel the mystery of the human mind. There can be myriad reasons for a man or a woman to commit or attempt to commit 43 suicide: it may be a case of failure to achieve academic excellence, oppressive environment in college or hostel, particularly for students belonging to the marginalized sections, joblessness, financial difficulties, disappointment in love or marriage, acute or chronic ailments, depression, so on and so forth. Therefore, it may not always be the case that someone has to abet commission of suicide. Circumstances surrounding the deceased in which he finds himself are relevant.

10. Both the aforesaid judgments relied upon by the learned Counsel for the revisionist were passed in Criminal Appeals filed against orders passed by the High Courts affirming the conviction of the accused after a full fledged trial by the High Court and none of those considered the scope of interference at the stage of discharge of an accused without trial. As the impugned order has been passed under Section 227 Cr.P.C., it will be appropriate to have a look at the aforesaid provision before proceeding further. The aforesaid provision reads as follows: -

"227. Discharge.—*If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."*

11. In **Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia,** (1989) 1 SCC 715, the Hon'ble Court while examining the scope of Section 227 held as under: -

"14. ... Section 227 itself contains enough guidelines as to the scope of inquiry for the purpose of discharging an accused. It provides that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The "ground" in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate inquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record, if generally accepted, would reasonably connect the accused with the crime.'

12. In **Rajbir Singh v. State of U.P.,** (2006) 4 SCC 51 it was held that in accordance with Section 227, the High Court must ascertain whether there is "sufficient ground for proceeding against the accused" or there is ground for "presuming" that the offence has been committed.

13. In **Chitresh Kumar Chopra v. State (NCT of Delhi)**, (2009) 16 SCC 605, wherein it was held that: -

"25. It is trite that at the stage of framing of charge, the court is required to

evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offence or offences. For this limited purpose, the court may sift the evidence as it cannot be expected even at the initial stage to accept as gospel truth all that the prosecution states. At this stage, the court has to consider the material only with a view to find out if there is ground for "presuming" that the accused has committed an offence and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

14. The difference between the approach with which the Court should examine the matter in while considering an application for discharge under Section 227 Cr. P.C. and while framing charge under Section 228 of the Code has been explained by the Hon'ble Supreme Court in **Amit Kapoor v. Ramesh Chander,** (2012) 9 SCC 460, in the following words:—

"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

* * *

30. We have already noticed that the legislature in its wisdom has used the expression "there is ground for presuming that the accused has committed an offence". This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in State of Maharashtra v. Som Nath Thapa (1996) 4 SCC 659 referred to the meaning of the word "presume" while relying upon Black's Law Dictionary. It was defined to mean "to believe or accept upon probable evidence"; "to take as proved until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and

delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence."

15. Thus the law regarding the approach to be adopted by the court while considering an application for discharge of the accused persons under Section 227 and approach while framing charges under Section 228 of the Code, is that while considering an application for discharge of the accused under Section 227 of the Code, the Court has to form a definite opinion, upon consideration of the record of the case and the documents submitted therewith, that there is no sufficient ground for proceeding against the accused. However, while framing charges, the Court is not required to form a definite opinion that the accused is guilty of committing an offence. The truth of the matter will come out when evidence is led during the trial. Once the facts and ingredients of the Section exist, the court would presume that there is ground to proceed against the accused and frame the charge accordingly and the Court would not doubt the case of the prosecution.

16. The learned A.G.A. has relied upon the judgment in the case of **State of M.P. v. Deepak,** (2019) 13 SCC 62, which was passed in an appeal against a judgment of the Madhya Pradesh High Court, discharging the respondent from charges framed by the trial Court under Section 306 IPC and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The victim had consumed poison at her residence, she was immediately moved to the District Hospital for treatment, where her dying declaration was recorded. The relevant part of the dying declaration is extracted below:

"Question : What has happened to you?

Answer : I have consumed poison.

Question : Why you have consumed poison?

Answer : I am not able to get the job, wherever I go, Deepak Bhamawat R/o Jeeran, gets me sacked out from the job. Earlier he had molested me, on which, I had instituted a case against him, since then, he is harassing me.

Question : Whether you want to say anything else?

Answer : No."

17. While setting aside the order of the High Court discharging the accused, the Hon'ble Supreme Court held that: -

"10. The High Court did not at all apply the relevant test, namely, whether there is sufficient ground for proceeding against the accused or whether there is ground for presuming that the accused has committed an offence. If the answer is in the affirmative an order of discharge cannot be passed and the accused has to face the trial. The High Court after merely observing that 'as the firing was aimed at the other persons and accidentally the deceased Pooja Balmiki was passing through that way and she was hit' and further observing that 'the applicant neither intended to kill the deceased nor was she aimed at because of the reason that she was a Scheduled Caste' set aside the order by which the charges had been framed against Respondent 2. There can be no manner of doubt that the provisions of Section 301 IPC have been completely ignored and the relevant criteria for

judging the validity of the order passed by the learned Special Judge directing framing of charges have not been applied. The impugned order is, therefore, clearly erroneous in law and is liable to be set aside."

18. In **State of M.P. v. Deepak** (Supra), the Hon'ble Supreme Court reiterated the well established principle of law that: -

"16. It was also noted that at the stage of framing of charges, the Court has to consider the material only with a view to find out if there is a ground for "presuming" that the accused had committed the offence"

19. When we examine the facts of the present case in light of the law laid down by the Hon'ble Supreme Court in the above mentioned cases, it appears that the categorical assertions made by the deceased in his suicide note and in the video message recorded by him immediately before committing suicide, which have been referred to above, a case for trial of the applicant for the offence under Section 306 I.P.C. is made out, as there is no ground for presuming that she has not committed the offence.

20. There is no error in the impugned order which may call for interference by this Court in exercise of its revisional jurisdiction.

21. In view of the aforesaid discussion, the revision is dismissed at the admission stage.

(2024) 3 ILRA 34
REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 28.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 312 of 2024

Smt. Seeta Devi ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Ambika Prasad Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code, 1973 – Sections 397, 401 & 156(3) – Revision against order dated 21.12.2023 rejecting application under Section 156(3) Cr.P.C. – Allegations of rape and assault by opposite parties on revisionist's minor daughter – Held, trial court rightly rejected application due to unnatural circumstances, lack of witnesses, absence of medico-legal evidence, and significant delay in reporting (two months) without explanation – Allegations appear motivated to counter FIR against revisionist's son under Section 306 IPC – Judicial mind applied as per *Priyanka Srivastava* guidelines – No illegality in trial court's order. (Para 7-10)

Revision dismissed.

List of Cases Cited:

1. Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287

2. Lalita Kumari Vs Government of Uttar Pradesh, (2014) 2 SCC 1

3. Anju Chaudhary Vs St. of U.P., (2013) 6 SCC 384

4. Ramdev Food Products (P) Ltd. Vs St. of Gujarat, (2015) 6 SCC 439

5. Vinod Raghuvanshi Vs Ajay Arora, (2013) 10 SCC 581

6. Sakiri Vasu Vs St. of U.P., (2008) 2 SCC 409

7. Dilawar Balu Kurane Vs St. of Mah., (2002) 2 SCC 135

8. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335

9. Madhu Bala Vs Suresh Kumar, (1997) 8 SCC 476

10. Ram Singh Vs St. of U.P., (2010) 15 SCC 149

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

1. Heard Shri Ambika Prasad Mishra, learned counsel for the applicant and Shri Abhishek Kumar Singh, learned counsel for the State.

2. By means of this instant revision filed under Section 397/401 Cr.P.C. the revisionist has challenged the validity of the order dated 21.12.2023 passed by the Special Judge, POCSO Act/Additional District and Session Judge, Lucknow in Criminal Misc. Case No.1268 of 2023 whereby an application under Section 156(3) Cr.P.C. filed by the revisionist has been rejected. In the application under Section 156 (3) Cr.P.C., the revisionist had alleged that younger brother of opposite party No.6 was having a love affair with a girl. However, marriage of that girl was settled with some other person, due to which the younger brother of opposite party No.6 had committed suicide in the month of June' 2023. An FIR was lodged in this regard on 01.07.2023 against the complainant's son Anil Kumar Kanojia. On 03.07.2023, the opposite party Nos.6, 7 & 8 entered the revisionist's house at about 04:30 PM, her 15 years old daughter was alone in the house, the aforesaid persons started searching for the revisionist's son Anil Kumar Kanojia and when her daughter objected against it, the opposite party No.6 molested and raped her and the opposite party Nos.7 & 8 had beaten her and had bitten on her cheeks. A complaint in this regard was given to the police on 03.07.2023 itself and thereafter complaint were sent to various authorities through registered post on 30.08.2023.

3. The trial court took into consideration the facts averred in the application under Section 156(3) Cr.P.C. and noted that although the revisionist has alleged that she had given information of the incident at the police station on 03.07.2023 but information was given to the police Commissioner through registered post only on 30.08.2023. On 01.07.2023, a case was lodged against the complainant's son for abetting the brother of opposite party Nos.6, 7 & 8 to commit suicide. The allegation of commission of rape merely two days thereafter appears to be wholly unnatural. There are no witnesses of the alleged incident. There is no medico-legal examination report to support the allegation. Relying upon the law laid down by the Hon'ble Supreme Court in the case of **Priyanka Srivastava Versus State of U.P.**: 2015 (6) SCC 287, the trial Court rejected the application under Section 156 (3) Cr.P.C.

4. While challenging the validity of the order rejecting the application under Section 156 (3) Cr.P.C., the learned counsel for the revisionist has placed reliance upon a Constitution Bench judgment in the case of **Lalita Kumari Vs. Government of Uttar Pradesh**: (2014) 2 SCC Page 1, wherein the Hon'ble Supreme Court had held that :-

" Conclusion/Directions

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

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

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

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

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

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

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

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

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

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

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

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

5. However, the judgment in **Lalita Kumari** (Supra) was considered and explained in a later decision in **Priyanka Srivastava** (Supra), and the relevant passage of the judgment is being reproduced below: -

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

"(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have

a complaint immediately investigated upon allegations being made; and

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

Answering the questions posed, the larger Bench opined thus:

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

***

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

***

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

***

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

emphasis in original)

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

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

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

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

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

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

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

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

6. After considering the dictum laid down in **Lalita Kumari** (Supra), the Hon'ble Supreme Court held in **Priyanka Srivastava** (Supra) that: -

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that ***the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order.***

* * *

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same."

(Emphasis supplied)

7. When we examine the facts of the present case in light of the law laid down in **Priyanka Srivastava** (Supra), it appears that the revisionist had alleged in the application under Section 156 (3) Cr.P.C., that Amit Kumar Kanaujia, a younger brother of opposite party No.6, was having a love affair with a girl named Manisha. However, marriage of that girl was settled with some other person, due to which reason Amit Kumar Kanaujia had committed suicide and an FIR was lodged in this regard on 01.07.2023 against the complainant's son Anil Kumar Kanojia. On 03.07.2023, the opposite party Nos.6, 7 & 8 entered the revisionist's house at about 04:30 p.m., her 15 years old daughter was alone in the house, the aforesaid persons started searching for the revisionist's son Anil Kumar Kanojia and when her daughter objected against it, the opposite party No.6 molested her and raped her by putting a finger in her vagina and threatened to tear away her vagina and the opposite party Nos.7 & 8 had beaten her

and had bitten on her cheeks. It is alleged in the application that a complaint in this regard was given to the police on 03.07.2023, regarding which there is no documentary proof and the complaint to various authorities was sent through registered post only on 30.08.2023, i.e. about two months after the alleged incident.

8. The trial Court has considered the facts stated in the complaint in a judicial manner and has come to a conclusion that it is wholly unnatural that the persons, whose brother had committed suicide merely two days ago, will go to the accused house and commit a sexual offence. There are no witnesses of the alleged incident. There is no medical examination report to support the allegation. There are no witnesses of the incident. In these circumstances, the Magistrate has rightly come to a conclusion that it appears that the complainant has been lodged in order to put pressure on the applicants in the case under Section 306 I.P.C. lodged against the complainant's son by using her minor daughter as a victim in an attempt to protect the complainant's son.

9. There appears to be no illegality in the aforesaid well reasoned order dated 21.12.2013 passed by the Special Judge warranting interference by this Court in exercise of its revisional jurisdiction.

10. The revision lack merit and the same is hereby ***dismissed*** at the admission stage.

(2024) 3 ILRA 39
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2024
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 316 of 2023

Brijendra Swaroop Jaiswal ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Raj Kumar Pandey

Counsel for the Opposite Parties:
G.A., Sri Nagendra Nath Mishra, Sri Nityanand Mishra

Criminal Law - Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471, 504 & 409 - Code of Criminal Procedure, 1973 - Sections 227, 239 & 240 - Revisionist challenged dismissal of discharge application by Additional Chief Judicial Magistrate in Criminal Case No. 5289 of 2017 for alleged financial irregularities, forgery, and criminal breach of trust as Head Master of a school. Court held: (1) Allegations of tampering, trespass, abuse, and misplacement of documents lacked specificity; no particular forged document or misappropriated property identified. (2) Signing attendance register during suspension was misconduct, not an offence under IPC. (3) Magistrate's order dismissing discharge application lacked reasoned analysis, failing to address grounds raised or specify material evidence supporting charges, violating principles under Section 239 Cr.P.C. (4) Right to seek discharge is valuable; trial court must provide reasoned order (St. By S.P. Through SPE CBI Vs Uttamchand Bohra, (2021) Criminal Appeal No. 1590; Central Bureau of Investigation Vs K. Narayana Rao, (2012) 9 SCC 512). Revision allowed; impugned order set aside; matter remanded to Magistrate for fresh consideration of discharge application with reasoned order. (Paras 7-8, 15-17)
Revision Allowed.

Case Law Cited:

1. St. By S.P. Through SPE CBI Vs Uttamchand Bohra, Criminal Appeal No. 1590 of 2021 (Para 7, 8)

2. Central Bureau of Investigation Vs K. Narayana Rao, (2012) 9 SCC 512 (Para 7)

3. P. Vijayan Vs St. of Kerala, (2010) 2 SCC 398 (Para 7)

4. Ramesh Singh Vs St. of U.P., (1977) 4 SCC 39 (Para 7)

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the revisionist, learned counsel for the opposite party No.2 as well as learned AGA for the state and perused the material placed on record.

2. By means of instant criminal revision, the accused-revisionist has assailed impugned order dated 12.11.2022, passed by Additional Chief Judicial Magistrate, Second, Gorakhpur, in Criminal Case No.5289 of 2017 (State vs. Brijendra Swaroop Jaiswal), under Section 419, 420, 467, 468, 471, 504, 409 IPC, Police Station Shahpur, District Gorakhpur, whereby the discharge application moved by the revisionist has been dismissed.

3. The factual matrix of the case in brief, relevant for the present revision are that the informant, who is respondent No.2 before this Court, lodged an FIR on 14.4.2017 against revisionist accused with averment that he is Manager of Kanhaiya Junior High School, Shahpur, Geeta Vatika, Gorakhpur. He had arrayed Brijendra Swaroop Jaisawal, as accused, who was posted as Head Master in said school on 8.11.2016 for committing indiscipline and financial irregularities. However, he appended his signature on attendance Register during period of suspension on 17.3.2017 and trespassed into office and abused the clerk and assistant Head Master. The suspended Head Master Sri Brijendra Swaroop Jaisawal was asked to open Head Master room on many times but he did not made the key of the chamber available. The manager/informant brought this fact to the knowledge of Sub Divisional Magistrate, Gorakhpur and departmental officers. On directions of SDM, Sadar, Sri Shashank Shekhar Rai, Nayab Tehsildar, Gorakhpur visited the office of the school and got the chamber of Head Master unlocked on 22.3.2017. On intensive inquiry of said room, many documents related to school work were not found therein. The suspended Head Master misplaced the files relating to approval of service book of ten employees, scholarship distribution register, records relating to recognition, with malafide intention, which amounts to criminal breach of trust. Many fake and forged documents were found during inspection of Head Master's chamber, which were sealed in the presence of Magistrate. The FIR was lodged against the revisionist under Section 419, 420, 467, 468, 471, 504, 409 IPC and the police investigated the case and recorded statements of the informant- Acting Head Master, Sri Chandrabhan Singh, Teacher of Kanhaiya Junior High School and Sri Anil Chaudhary, Sri Krishna Kant Sharma, Sri Ram Surat Patel- office clerks, Sri Inarmal Prasad, Sri Rajesh Maurya, office attendants and other witnesses and collected some documents during investigation and after finding the complicity of the accused, submitted chargehseet against him with prayer to prosecute him before the court in said sections.

4. Learned Magistrate took cognizance of the offence on 3.6.2017 and issued process to the accused. The accused was enlarged on bail. He assailed the chargesheet and cognizance taking order as well as entire criminal proceeding pursuant

to criminal Case No.5289 of 2017, under Section 419, 420, 467, 468, 471, 504, 409 IPC, Police Station Shahpur, District Gorakhpur, before this Court, which was dismissed by this Court with observation that on perusal of FIR and material collected by Investigating Officer, on the basis of which the chargesheet has been submitted, it makes out a prima facie case against the accused at this stage and the Court did not find any justification to quash the chargehseet or the cognizance or the proceeding against the applicant arising out of them. The accused moved an application for discharge before the court below at the stage of commencement of trial on 18.8.2022 on grounds that the informant is real younger brother of the accused-applicant, who has lodged a false FIR against him to grab the property of the school. The Investigating Officer has submitted the chargesheet against the applicant without carrying out proper and fair investigation and in absence of any evidence, the applicant has not committed any false impersonation or he has not derived any unlawful gain by cheating anyone. There is no evidence that he has committed any offence. There is no any document on record which can be termed as a forged document. No document has been placed on record in respect of the alleged forgery, which is said to have been committed or the applicant nor he has used any forged document as genuine. Even there is no specific allegation against the applicant that he abused any particular person and specific works used in abusing have also not been brought on record on the basis of entire record. It is obvious that there is no evidence available against the applicant as to what short of property was entrusted to the applicant and by which act he has committed criminal breach of trust. No offence is made out against the applicant and he deserves to be discharge from said charges.

5. Learned court below by impugned order dismissed the said application for discharge, which is maintainable under Section 239 Cr.P.C., with observation that the applicant is charged for committing trespass in the office of the school after his suspension, abusing the Acting Head Master and causing documents related to school missing as well as committing forgery with respect to certain documents. The matter is of serious nature. Whether the accused is involved in said offence or not, can only be adjudicated on tendering of evidence during trial. On the basis of material available on record, a prima facie case is made out against the applicant, which shows his complicity in the offence and the facts brought against him, prima facie appears to be true. There is sufficient ground to proceed against the accused. Therefore, the application for discharge moved under Section 239 Cr.P.C. is hereby dismissed.

6. Learned counsel for the revisionist, while pressing grounds taken in discharge application moved by the revisionist before the court below, further submitted that the revisionist has been Head Master of Kanhaiya Junior High School, Shahpur, Geeta Vatika, Gorakhpur and has retired from his services after obtaining age of superannuation on 31st March, 2021. The school is an institution on grant-in-aid from the State Government, at its Junior High School Level. The opposite party No.2, the complainant, is Manager of the Managing Committee of the institution. The institution is recognized under the provisions of U.P. Basic Education Act and provisions of Uttar Pradesh Recognized Basic Schools (Junior High School)

Recruitment and Conditions of Service of Teachers Rule, 1978, are fully applicable to the institution. In the year 2016, soon after the resuming the charge of the Manager of the Committee of Management, the respondent No.2 started to make attempts to earn money by adopting illegal means and in this direction, he started issuing orders to the revisionist to take admission of girl students in the institution as well as to admit students in the primary classes in the institution. In this respect, an order dated 24.4.2016, issued by respondent No.2 to the revisionist directing him to take admission of girl students in the institution has been filed as Annexure No.1 to the affidavit. The revisionist on getting copy of the order dated 24.4.2016, communicated to respondent No.2, vide his letter dated 2.5.2016 that according to the order of Basic Education Officer, Gorakhpur, dated 9.12.1998, the institution is only recognized as an educational institution of boys wherein only boys can be admitted as student. The respondent No.2 did not relished this reply of the revisionist to his order dated 24.4.2016 and started issuing show cause notices on different grounds to the revisionist only to harass him (victimize him). Vide order dated 25.6.2016, directions were issued to the revisionist by respondent No.2to run primary classes in the institution, whereupon the revisionist communicated him that vide directions issued by Basic Education Officer, Gorakhpur, dated 20.7.1998, primary classes could not be **allowed** to run in the institution in view of the fact that recognition to this effect has already been cancelled. The respondent No.2 got annoyed with the replies given by the revisionist to his illegal orders issued from time to time in this context. Ultimately, took a decision vide order dated 8.11.2016 to place the revisionist under suspension and directions was issued to him to handover the charge of his office to Senior Assistant Teacher namely Sri Kapil Dev Singh. The respondent No.2 after placing the revisionist under suspension and giving the charge of Office of Head Master to Senior Assistant Teacher namely Sri Kapil Dev Singh, started running primary classes in the institution and also starting taking the admission of girl students in the institution, illegally and against the mandate of order of Basis Education Officer, Gorakhpur. The revisionist reported all these illegal activities carried out by respondent No.2 to Director of Basic Education vide his application dated 17.8.2017. In response of which, an order dated 6.9.2017 was issued to make appropriate inquiry into the matter and submit a report regarding action action taken into the matter within a week. However, no action in pursuance of order dated 6.9.2017 passed by Director of Basic Education was taken by B.S.A., Gorakhpur. Respondent no.2 filed a frivolous and false complainant against the revisionist before the District Basic Education Officer, Gorakhpur during his period of suspension with allegation that the revisionist is not handing over the charge of his Office to Senior Assistant Teacher, Sri Kapil Dev Singh, after his suspension. Further allegations were also made that the revisionist has locked his Office and was not opening the lock despite several orders passed in this effect and therefore, a request was made by respondent No.2 to District Magistrate to nominate any Magistrate in presence of whom, the lock of the Office of Principal of Insitution could be broken open. Resultantly, the alleged lock was broken open in presence of Nayab Tehsildar, respondent No.2 and his staff. Inventory of items found in the chamber of Head Master was prepared on 22.3.2017, soon after the opening of the lock. The

photocopy of the inventory has been filed as Annexure No.9 to the affidavit, in which routine documents/articles are shown. Some material and files belonging to some other institution are also shown to be recovered in the inventory. However, it is not specified therein that any forged document was found therein. The FIR dated 14.4.2017 was lodged by respondent No2 on the basis of alleged recovery, having been made from the office of Head Master on 22.3.2017, after opening the lock of the office. The Investigating Officer carried out the investigation after lodging of the FIR. He recorded statement of PW-2 under Section 161 Cr.P.C., in which he almost repeated the FIR version. The Investigating Officer submitted chargesheet against the revisionist whereupon cognizance was taken by the court below and revisionist was summoned to face trial. He has already been released on bail in said criminal case by learned Sessions Judge. The impugned order passed by learned court below is outcome of non application of mind and non consideration of grounds taken in discharge application

7. Learned counsel for the revisionist placed reliance on a judgement of Hon'ble Apex Cort in **The State By S.P. Through SPE CBI vs. Uttamchand Bohra, in Criminal Appeal No.1590 of 2021, dated 9th December, 2021**. In this case, Hon'ble Apex Court placed reliance on its previous judgement in **Central Bureau of Investigation vs. K. Narayana Rao, (2012) 9 SCC 512**, wherein Hon'ble Supreme Court summarized the principles of discharge under Section 227 Cr.P.C. in the following terms:-

"13. Discharge of the accused under Section 227 of the Code was extensively considered by this Court in P. Vijayan [(2010) 2 SCC 398 wherein it was held as under: (SCC pp. 401-02, paras 10-11) 5 (2012) 9 SCC 512 "10. ... If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words 'not sufficient ground for proceeding against the accused' clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

12. The first decision in Ramesh Singh [(1977) 4 SCC 39] relates to interpretation of Sections 227 and 228 of the Code for the considerations as to discharge the accused or to proceed with trial."

8. In **Uttamchand Bohra's case (supra)**, Hon'ble Apex Court has observed as under:-

"21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

9. Per contra, learned AGA as well as learned counsel for the opposite party No.2 supported the impugned order and submitted that there is no infirmity or illegality in the impugned order passed by the learned court below. The charge can be framed even on the basis of a strong suspicion and meticulous examination of evidence collected during investigation is not required while framing of charge. A clear, prima facie, case is made out on the basis of FIR version and material collected during investigation against the revisionist and learned court below issued summon to him after finding sufficient grounds to proceed against him and discharge application moved by the revisionist has been dismissed on the ground that a, prima facie, case has been made out to frame charges against accused/revisionist. The revisionist was found guilty of various irregularities and misconduct committed by

the him while carrying out his duties as Head Master of said institution, who was placed under suspension and an inquiry was instituted against him.

10. Learned counsel for the opposite party No.2 further submitted that he got appointment as Assistant Teacher and thereafter as Head Master without having requisite qualification in violation of the rule 4(2) and 4(2)-Kha of U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978. The deficiencies in connection with his appointment were found correct in departmental enquiry by Enquiry Committee and his services are terminated by orders of Managing Committee and approved by B.S.A. His termination order was issued on 30.6.2020 by the Authorized Controller.

11. As the offence is in the nature of warrant trial, which is triable by a Magistrate and in case of a prayer for discharge made by the accused, Section 239 Cr.P.C. is applicable, which provides as under:-

"239. When accused shall be discharged. -If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

12. Section 240 Cr.P.C. reproduced as under:-

240. Framing of charge. *(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.*

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

13. Section 227 Cr.P.C. reproduced as under:-

227. Discharge. - *If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*

14. On perusal of FIR and material on record, it appears that following allegations are made against the revisionist in present matter:-

(1) He committed tempering in records, indiscipline and financial irregularities while posted as Head Master of Kanhaiya Junior High School, Shahpur, Geeta Vatika, Gorakhpur, and for that reason, he was placed under suspension on 8.11.2016;

(2) He trespassed into the office of the School, misbehaved with and insulted the acting Head Master and office clerks and also abused them;

(3) He signed the attendance register in unauthorized manner;

(4) He locked the Head Master's room on being placed under suspension and

even after many requests, he abstained from opening the lock and ultimately the matter was reported by the Manager to higher authorities and lock was broken open on 22.3.2017, in presence of a nominated Executive Magistrate (Nayab Tehsildar) and videography was conducted.

(5) Large number of files and other documents were found in the locked office of Head Master, which included files regarding approval of service book of ten employees, files relating to payment, files relating to grant in aid, scholarship distribution recognition, sheets of examination result of students, files relating to correspondence;

(6) The revisionist misplaced certain important documents/records, which were entrusted to him dishonestly and some forged and fake documents were found while conducting search of the office.

14. So far as, appending signature on attendance register by the revisionist during period of suspension is concerned, this is not an offending act but obviously this is an official misconduct. In statement of the informant as well as witnesses, no document has been specified regarding which forgery has been committed by the revisionist. It is also not specified as to what short of documents were stolen or misplaced by the revisionist. Even it, it is accepted that the document found in the Office of the Head Master at the time of conducting search comes within the purview of property and being Head Master, these documents were entrusted to him, are will be presumed to be under constructive entrustment of the revisionist by the institution. It cannot be discerned that the misappropriated these documents only due to the fact that he had locked these documents in his Office room after being placed under suspension and avoided opening the lock on being required to do by the Management.

15. The allegations with regard to fraud, forgery and criminal breach of trust must be specific and not vague. Learned Magistrate while dismissing the application for discharge has not properly addressed the grounds taken in discharge application and only narrating the allegations made against the revisionist in FIR and case diary, he opted to dismiss the discharge application, while observing that the prima facie case is made out against the revisionist for framing charge and his discharge application is liable to be dismissed. No doubt, the meticulous analysis and examination of material collected during investigation is neither called for nor required for framing of charge or adjudicating the issue of question of discharge raised by the accused, yet charge cannot be made only on the baiss of bald allegations and there must be some material in respect of the said allegations. Learned Magistrate failed to specify the material collected during investigation in support of the allegations and charge made against the revisionist. Therefore, the impugned order is not supported with well considered reasons and established principles of law regarding framing of charge and discharge of the accused.

16. In view of foregoing discussions and the case law cited above, this Court is of considered opinion that the learned court below has failed to pass a reasoned and speaking order addressing the grounds taken in discharge application. The right of seeking discharge is a valuable right of the accused and trial court is atleast under obligation to address the grounds taken in discharge application in the light of

material collected during investigation. Therefore, the revision is liable to be allowed and the impugned order deserves to be set aside.

17. Accordingly, present revision stands **allowed** and the impugned order passed by learned Additional Chief Judicial Magistrate, Second, Gorakhpur, is hereby set aside and the matter is remanded back to learned Magistrate to hear and decide the application for discharge moved by the revisionist afresh, strictly, in accordance with law as well as in the light of observations made in present revisional order.

(2024) 3 ILRA 47
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 378 of 2021

Smt. Alka & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Ram Jee Saxena, Sri Raghuvansh Chandra

Counsel for the Opposite Parties:
G.A., Sri Ashok Kumar Pandey

Criminal Law - Indian Penal Code, 1860 - Sections 323, 504, 500, 166, 166-A, 409 & 120-B - Code of Criminal Procedure, 1973 - Sections 190, 197, 397 & 401 - State challenged order dated 17.02.2021 by Chief Judicial Magistrate, Barabanki, rejecting final report, accepting protest application, and taking cognizance against public servants (C.D.O., S.P., S.H.O., I.O.) under Sections 120-B and 166-A IPC without sanction under Section 197 Cr.P.C. Court held: (1) Cognizance against public servants (C.D.O., S.P., S.H.O., I.O.) for acts in discharge of official duties invalid without prior government sanction under Section 197 Cr.P.C. (2) No specific allegations or material evidence supported cognizance under Section 409 IPC for embezzlement; mere discrepancies in reports insufficient. (3) FIR for non-cognizable offences (Sections 323, 504, 500 IPC) wrongly registered under Section 154 Cr.P.C.; trial as St. case illegal. (4) Section 166-A IPC inapplicable as failure to register FIR under Section 409 IPC not covered. (5) Magistrate's order lacked prima facie satisfaction of offence ingredients, rendering it unsustainable (Amod Kumar Kanth Vs Assn. of Victim of Uphaar Tragedy, 2023 SCC Online SC 578; St. of Orissa Vs Ganesh Chandra Jew, (2004) 8 SCC 40; Gauri Shankar Prasad Vs St. of Bihar, (2000) 5 SCC 15; St. of U.P. Vs Ram Swaroop, (1974) 4 SCC 764).
Revision allowed.

Case Law Cited:

1. Amod Kumar Kanth Vs Assn. of Victim of Uphaar Tragedy, 2023 SCC Online SC 578 (Para 16, 21)

2. St. of Orissa Vs Ganesh Chandra Jew, (2004) 8 SCC 40 (Para 23)

3. Gauri Shankar Prasad Vs St. of Bihar, (2000) 5 SCC 15 (Para 22)

4. St. of U.P. Vs Ram Swaroop, (1974) 4 SCC 764 (Para 13)

5. P. Ravindran Vs St., 2010 SCC Online Mad 1709 (Para 11, not binding)

6. Revision Allowed; Impugned Order Set Aside.

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

1. Heard Sri Vinod Kumar Shahi, the learned Additional Advocate General assisted by Sri Anurag Verma, the learned A.G.A.-I appearing on behalf of the State - Revisionist, Sri Krishna Gopal, the learned Counsel for the opposite party no.2 and perused the records.

2. By means of the instant revision filed under Section 397/401 Cr.P.C. the State has challenged the validity of an order dated 17.02.2021, passed by learned Chief Judicial Magistrate, Barabanki (hereinafter referred to as 'the C.J.M.') in Case No.717 of 2021 - Ram Pratap Versus Anup Kumar Singh and others, whereby while deciding a protest application filed by the opposite party no.2 against a final report submitted by the Investigating Officer the learned trial court has not only accepted the protest application and rejected the final report and taken cognizance of offences under Sections 323, 504, 500 and 166 I.P.C. allegedly committed by the persons named in the F.I.R., but at the same time has taken cognizance of offence under Section 120-B I.P.C. against Megha Roopam - the then Chief Development Officer (hereinafter referred to as 'the C.D.O.'), Sri. Arvind Chaturvedi – the then Superintendent of Police (hereinafter referred to as 'the S.P.') and Sri. Zaid Ahmad - the Investigating Officer/Sub-Inspector of Police (hereinafter referred to as 'the I.O.). Cognizance of offence under Section 166-A I.P.C. has also been taken against Sri. Prakash Chandra Sharma - the then Station House Officer (hereinafter referred to as 'the S.H.O.'). Copies of the order were directed to be sent to the Principal Secretary of Government of U. P. (without specifying the department) and to the District Magistrate for initiating departmental action against the then Chief Development officer, the then S.P. and the then S.H.O., Dewa, Barabanki for submitting a final report in the matter for giving wrongful benefit to the accused persons under a conspiracy and a copy was ordered to be sent to the S.P. for taking action against the S.H.O. for his omission to register a case regarding embezzlement of government money.

3. Briefly stated, the facts of the case are that the opposite party no. 2 had filed an application under Section 156 (3) Cr.P.C. against (i) Anup Kumar Singh, Block Development Officer (hereinafter referred to as 'the B.D.O.'), (ii) Beena, Village Panchayat Officer, alleging that the complainant is a former Village Pradhan. The complainant had given a complaint to the District Magistrate alleging that the work of construction of toilets was being carried out in the village against the prescribed standards. Thereupon an enquiry was conducted through the C.D.O., Barabanki and the Sub Divisional Magistrate, Nawabganj, District Barabanki and both the aforesaid officers had submitted reports containing different findings. The complainant on his own got an enquiry conducted by the Village Panchayat Officer and he gave an application to the Sub Divisional Magistrate, Nawabganj, Barabanki. The complainant had gone to some office on 05.08.2019 where the Village Development Officer was also present. Both the accused persons alleged that the complainant was a tout and this was the reason behind his making the complaints. When the complainant objected, the Block Development Officer Anup Kumar Singh slapped him and pushed him out of the office and the other co-accused person stated that she had seen many village pradhans like the complainant and she asked him to go away else the consequence will not be good. The complainant stated that the use of word tout was intended to cause disrespect to the complainant, from which he suffered mental and physical agony.

4. On 04.08.2020 the C.J.M., Barabanki passed an order stating that from the facts, circumstances and documents available, the matter appears to be of embezzlement of public money, which prima facie appears to be a cognizable offence. The C.J.M. directed the S.H.O., Dewa, Barabanki to register a case against appropriate persons in appropriate sections and to submit a compliance report within seven days.

5. In furtherance of the aforesaid order dated 04.08.2020 passed by the C.J.M., F.I.R. No.326 of 2020 was registered in Police Station Dewa, Barabanki against (1) Anup Kumar Singh and (2) Beena, for offences under Sections 323, 504, 500 and 166 I.P.C., all of which are non-cognizable offence and no F.I.R. could have been registered under Section 154 Cr.P.C. in respect of non-cognizable offence(s).

6. After investigation, the Investigating Officer submitted a final report on 20.09.2020, stating that from the statement of the complainant, statements of some independent witnesses and from the report submitted by the C.D.O., Barabanki as well as the statement of one of the accused persons no offence was made out.

7. On 08.02.2021, the opposite party no. 2 filed a protest application against the final report, a certified copy whereof has been annexed with the revision. It bears the title – Application for rejecting the Final Report and Summoning the Accused Persons, and thereafter the words and figures 'under sections 409/500/504/166/323 IPC' have been added by hand and this interpolation has not been authenticated by the signature of the applicant or any person. Page 1 of the application does no bear the signature of any person and in this manner the complainant has the liberty to disown the contents of page 1 of the application at his sweet will.

8. It is stated in the application that he had lodged the report for embezzlement in construction of toilets, whereas there is absolutely no whisper of embezzlement in the application under Section 156 (3) Cr.P.C. The complainant alleged that the Investigating Officer has not recorded the statements of the persons who were present on the spot of occurrence and the offence under Section 409 I.P.C. was also made out against the accused persons. He stated that there were discrepancies in the enquiry report submitted by the C.D.O., Barabanki and Sub Divisional Magistrate, Nawabganj, Barabanki and that the Village Panchayat Officer has stated in her report that 511 toilets had been constructed whereas in the report submitted by the S.D.M. in furtherance of the application dated 24.06.2019 it was stated that 150 toilets were incomplete and 40 toilets had not been constructed.

9. The complainant further alleged that the Block Development Officer had stated in his report dated 22.07.2019 that the complainant was giving repetitive complaints for the reason of him being a tout, has damaged his reputation in the society and has defamed him. He alleged that the accused Anup Kumar Singh has made a wrong entry in lock book (*Sic* log-book). The complainant alleged that the accused persons had shown construction of 511 toilets on paper and misappropriate the entire amount whereas about 400 toilets had not been constructed in the village of the complainant.

10. While deciding the protest application, the learned C.J.M. held that the matter involved embezzlement of public money but the F.I.R. was registered only for offence of causing hurt, abusing and defaming the complainant. The Magistrate found that the administrative enquiry conducted by the C.D.O.after registration of the F.I.R. was interference in the criminal case after registration of the F.I.R., which was not proper. The court found that from the statement of the complainant

recorded under Section 161 Cr.P.C. and other documentary evidence, it was apparent that illegalities were committed in construction of toilets and when the complainant made enquiry regarding it, he was beaten up, abused and disrespected. Therefore, there was sufficient reason for taking cognizance of the offence under Sections 409, 323, 504, 500 I.P.C. against the named accused persons.

11. The learned counsel appearing on behalf of the opposite party no.2 raised a preliminary objection regarding *locus standi* of the State to file the instant revision when the impugned order has not been passed against the State. He has relied upon the a decision of a Single Judge Bench of the Hon'ble High Court of Madras in the case of **P. Ravindran Vs. State:** 2010 (3) CTC 73 = 2010 SCC OnLine Mad 1709, wherein it was held that: -

"29. It is a settled preposition of law that a criminal proceeding cannot be used as an instrument of wrecking a private vengeance either on political reason or otherwise by a third party to the criminal proceeding. .... Considering the vital legal aspects, in the light of the various rulings of the Honourable Supreme Court, I am of the view that the petitioner/third party to a criminal proceeding is not legally entitled to maintain criminal revision against discharge or acquittal recorded by the trial court, unless he is also an aggrieved person."

12. The aforesaid decision of a Single Judge Bench of the Madras High Court is not a binding precedent. Moreover, it does not lay down any proposition of law which may apply to the facts of the present case.

13. Per contra, the learned Additional Government Advocate appearing on behalf of the State has submitted that the State has the responsibility to ensure prosecution of accused persons as also to protect its officers from frivolous prosecutions. He has placed reliance on a decision of the Hon'ble Supreme Court in **State of U.P. Versus Ram Swaroop:** (1974) 4 SCC 764, in which it was held that: -

"37.Thelocus standiof State Governments to file appeals in this Court against judgments or orders rendered in criminal matters, particularly those commenced otherwise than on private complaints, has been recognised over the years and for a valid reason. All crimes raise problems of law and order and some raise issues of public disorder. The effect of crime on the ordered growth of society is deleterious and the State Governments are entrusted with the enforcement and execution of laws directed against prevention and punishment of crimes. They have, therefore, a vital stake in criminal matters which explains why all public prosecutions are initiated in the name of the Government."

14. The allegation of the complainant in the application under Section 156 (3) Cr.P.C. was against the (i) Anup Kumar Singh, Block Development Officer, (ii) Beena, Village Panchayat Officer, alleging that the complainant is a former Village Pradhan. There was no allegation against the C.D.O., the Superintendent of Police, the S.H.O. or the Investigating Officer. Yet while allowing the protest petition filed against the final report submitted after investigation, the learned C.J.M. has taken cognizance of offences regarding which there was no factual averment and has summoned the C.D.O., the Superintendent of Police, the S.H.O. and the Investigating Officer for being tried without sanction of

the State Government. The aforesaid persons summoned by the C.J.M. are public servants and, therefore, the State has an interest in protecting its officers from any frivolous prosecution launched without its sanction.

15. Therefore, I find no merit in the preliminary objection raised by the learned Counsel for the opposite party no. 2 regarding *locus standi* of the State Government and I hold that the State has the right to assail validity of the impugned order and I proceed to examine the revision on its merits.

16. The learned Additional Advocate General has submitted that the C.J.M. has no authority in law to take cognizance of offences allegedly committed by the C.D.O., the Superintendent of Police, the S.H.O. and the Sub-Inspector / Investigating Officer, all of whom are public servants, without a prior sanction for their prosecution granted by the Government. In support of this submission, he has placed reliance on the decision in the case of **Amod Kumar Kanth v. Assn. of Victim of Uphaar Tragedy,** 2023 SCC OnLine SC 578.

17. Section 197 Cr.P.C. provides as follows: -

"197. Prosecution of Judges and public servants.—*(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanctionsave as otherwise provided in theLokpal and Lokayuktas Act, 2013—*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article356of theConstitutionwas in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section166-A, Section166-B, Section354, Section354-A, Section354-B, Section354-C, Section354-D, Section370, Section375, Section376,Section376-A, Section376-AB, Section376-C, Section376-D, Section376-DA, Section376-DB or Section509of theIndian Penal Code (45 of 1860).

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public

order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

* * *"

18. The C.D.O. and the S.P.are public servants who are not removable from his office save by or with the sanction of the Government and undisputedly they have the protection of Section 197 Cr.P.C.

19. So far as the S.H.O. and the Investigating Officer are concerned it is to be noted that the State Government has issued a Notification No. 1841 (3)/VI-538-71 dated 30.01.1975, which reads as under: -

"Grih Vibhag (Police), Anubhag-9, Notification No. 1841 (3)/VI-538-71, dated January 30, 1975:-

In exercise of the powers conferred by sub-section (3) of Section 197 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), the Governor is pleased to direct that the provisions of sub-section (2) of the aforesaid section shall apply to all members of the following forces of the State, charged with the maintenance of public order wherever they may be serving, namely: (i) U.P. Police Force (ii) U.P. Pradeshik Armed Constabulary"

20. Therefore, there is a specific bar against taking cognizance of offences by any member of U. P. Police Force – including the S.H.O. and the Sub-Inspector - Investigating Officer, without previous sanction of the State Government.

21. The phrase *"any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty"* occurring in Section 197 (1) Cr.P.C. have been the subject matter of discussion in various precedents. In **Amod Kumar Kanth v. Assn. of Victim of Uphaar Tragedy** (Supra) it was held that: -

"32.Here we may notice one aspect. When the question arises as to whether an act or omission which constitutes an offence in law has been done in the discharge of official functions by a public servant and the matter is under a mist and it is not clear whether the act is traceable to the discharge of his official functions, the Court may in a given case tarry and allow the proceedings to go on. Materials will be placed before the Court which will make the position clear and a delayed decision on the question may be justified. However, ***in a case where the act or the omission is indisputably traceable to the discharge of the official duty by the public servant, then for the Court to not accept the objection against cognizance being taken would clearly defeat the salutary purpose which underlies Section197of theCr. P.C.*** *It all depends on the facts and therefore, would have to be decided on a case to case basis."*

(Emphasis supplied)

22. In **Gauri Shankar Prasad v. State of Bihar**, (2000) 5 SCC 15, it was held that: -

"7.Section 197 CrPC affords protection to a Judge or a magistrate or a public servant not removable from his office save by or with the sanction of the Government against any offence which is alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The protection is provided in the form that no

court shall take cognizance of such offence except with the previous sanction of the Central Government or the State Government as the case may be. ***The object of the section is to save officials from vexatious proceedings against Judges, magistrates and public servants but it is no part of the policy to set an official above the common law. If he commits an offence not connected with his official duty he has no privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction. Section 197 embodies one of the exceptions to the general rules laid down in Section 190 CrPC, that any offence may be taken cognizance of by the Magistrates enumerated therein.*** *Before this section can be invoked in the case of a public servant two conditions must be satisfied i.e. (1) that the accused was a public servant who was removable from his office only with the sanction of the State Government or the Central Government; and (2) he must be accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.*

8.What offences can be held to have been committed by a public servant while acting or purporting to act in the discharge of his official duties is a vexed question which has often troubled various courts including this Court. Broadly speaking, it has been indicated in various decisions of this Court that ***the alleged action constituting the offence said to have been committed by the public servant must have a reasonable and rational nexus with the official duties required to be discharged by such public servant."***

(Emphasis supplied)

23. In **State of Orissav.Ganesh Chandra Jew**,(2004) 8 SCC 40, the Hon'ble Supreme Court explained the underlying concept of protection under Section 197 and held as follows: -

"9…The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is, if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. …. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. ***The mandatory character of the protection afforded to a public servant is brought out by the expression "no court shall take cognizance of such offence except with the previous sanction". Use of the words "no" and "shall" makes it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. The very cognizance is barred.*** *That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty."*

(Emphasis supplied)

24. The learned C.J.M. has found that the administrative enquiry conducted by the C.D.O.after registration of the F.I.R. was interference in the criminal case after registration of the F.I.R., which was not proper. However, this administrative enquiry was conducted by the C.D.O. in discharge of his official duty. The C.D.O. had sent the report to the Superintendent of Police, who forwarded the same to the S.H.O. in discharge of his official duty. The investigating officer took into consideration S.H.O. had also acted as per the instructions of his superior officer, i.e. the Superintendent of Police, in discharge of his official duty. Megha Roopam - the then C.D.O., Sri. Arvind Chaturvedi – the then S.P.and Sri. Zaid Ahmad - the Investigating Officer/Sub-Inspector of Police. Cognizance of offence under Section 166-A I.P.C. has also been taken against Sri. Prakash Chandra Sharma - the then S.H.O.

25. Therefore, all the aforesaid persons have acted in discharge of their official duty while committing the alleged offending acts and the cognizance of the act committed by them, even if it amounts to an offence, cannot be taken without previous sanction of the Government.

26. Therefore, the impugned order dated 17.02.2021 passed by the C.J.M. taking cognizance of offence allegedly committed by the C.D.O., the Superintendent of Police, in discharge of their official duty, is unsustainable in law.

27. The C.J.M. found that from the statement of the complainant recorded under Section 161 Cr.P.C. and other documentary evidence, it was apparent that illegalities were committed in construction of toilets and when the complainant made enquiry regarding it, he was beaten up, abused and disrespected and that there was sufficient reason for taking cognizance of the offence under Sections 409, 323, 504, 500 I.P.C. against the named accused persons.

28. Section 409 I.P.C. provides punishment for the offence of Criminal breach of trust by public servant, or by banker, merchant or agent. Criminal breach of trust is defined in Section 405 I.P.C. as follows: -

"405. Criminal breach of trust.— *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*

* * *

29. The C.J.M. has not recorded any prima facie satisfaction regarding the role of the Block Development Officer and the Village Panchayat Officer in construction of toilets. For taking cognizance of the offence under Section 409 I.P.C. or for any other offences there should be a specific allegation of commission of some act which prima facie make out commission of the alleged offence. There appears to be absolutely no factual allegation made in the complaint or in the protest petition and no material to prima facie establish 'entrustment' of any property to any of the accused persons or to the effect that any of them have dishonestly misappropriated or converted to his own use that property, or

has dishonestly used or disposed of that property in violation of any direction of law. Merely because the accused persons were holding some office, they cannot be tried for commission of any offence without any specific allegation of commission of any act on their part make out the ingredients of the offence.

30. The C.J.M. has taken cognizance of the offences under Section 190 (1) (b) Cr.P.C., which provides as follows: -

190. Cognizance of offences by Magistrates.— *(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—*

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) ...”

31. The police report submitted in this case mentioned that no offence took place and no such fact has been stated in the police report as may make out cognizance of any offence. In absence of the police having reported such facts, as make out commission of any offence, the C.J.M. could not have taken cognizance of any offence under Section 190 (1) (b) Cr.P.C. The order taking cognizance of offence under Section 190 (1) (b) Cr.P.C. is bad in law for this reason.

32. The report dated 20.08.2020 submitted by the C.D.O. to the S.P., which was annexed with the police report, stated that the B.D.O. had submitted a report stating that the complainant claims himself to be a former village pradhan whereas in the letter dated 14.06.2019, the complainant has claimed himself to be the husband of a former village pradhan, which contentions are self contradictory and misleading. Regarding the complaint that toilets had not been constructed, the B.D.O. informed that the complainant’s complaint dated 17.06.2019 was uploaded on IGRS Portal on 18.06.2019 and an enquiry was conducted by the District Panchayat Raj Officer and the enquiry report dated 17.07.2019 was also uploaded on the portal, as per which out of total 511 toilets, 421 had been constructed and the incentive for construction of the remaining private toilets had been paid to the beneficiaries. As per the report of the S.D.M., 150 toilets had not been finished and work had not commenced on 40 toilets, although the date of enquiry conducted by the S.D.M. is not available on record. The Village Panchayat Secretary Ms. Beena had produced the digital diary of each of the toilets alongwith its beneficiary, which established that all the toilets had been completed.

33. Regarding the incident of beating and abusing etc. that allegedly occurred on 05.08.2019, the B.D.O. had produced a copy of the log-block of his official vehicle to prove that he had not gone to Dewa on the date of the alleged incident and he was present in Development Block Harakh. Regarding the report that alleged that the complainant was a tout, it was stated that the said report did not bear the signature of the B.D.O. and it was not issued under his authority.

34. It is significant to note that in the entire application under Section 156 (3)

Cr.P.C., there was no mention of any embezzlement of public money and the only allegation was that there was some discrepancy in two reports submitted by two different officers, but the discrepancy in the reports was not specifically mentioned in the application. The findings of the reports or the discrepancies in the reports were not mentioned in the order. The findings of the report dated 20.08.2020 submitted by the C.D.O. have been mentioned above. The date of the report of the S.D.M. is not available on record and there is a possibility that the two reports mention the situation existing on two different points on time. Besides stating that the matter involves embezzlement of public money, there are no particulars in the order as to who has committed the embezzlement of public money and in what manner.

35. Neither the application under Section 156 (3) Cr.P.C. made a mention of any specific offence committed by the accused persons, nor any specific offence were mentioned in the order dated 04.08.2020, passed by the C.J.M., Barabanki.

36. Therefore, there was absolutely no material before the C.J.M. justifying cognizance of any offence under Section 190 (1) (b) Cr.P.C. Criminal prosecution cannot be initiated merely on an assumption that an offence has been committed, but the Magistrate has to arrieve at a prima facie satisfaction from a complaint of facts which constitute such offence or from a police report of such facts or by an information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. In the present case, no such material was available before the C.J.M. as would warrant taking cognizance of any offence. In case the C.J.M. was not satisfied with the police report, he could only have passed an order for further investigation regarding the allegations.

37. Moreover, the offences punishable under Sections 323, 504 and 500 I.P.C. are non-cognizable offences and a trial in respect of those offences can only be instituted and continued as such and only a complaint can be registered in respect of those offences. The trial Court has acted illegally in directing trial of the accused persons for the aforesaid offences as a state case.

38. It appears that the Magistrate has passed the impugned order having been swayed by the impression created by the complainant that some illegalities had been committed in construction of toilets. However, every dereliction of duty would not make out a case of trial, unless the essential conditions for initiating the trial are fulfilled and the C.J.M. has not taken care to examine whether the essential ingredients of the offence and other prerequisites for taking cognizance are fulfilled or not.

39. The C.J.M. has summoned the S.H.O. to face trial for the offence under Section 166-A I.P.|C. for his failure to register F.I.R. under Section 409 I.P.C. which reads as under: -

"166-A. Public servant disobeying direction under law.— Whoever, being a public servant,—

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

(c) fails to record any information given to him under sub-section (1) of Section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to cognizable offence punishable under Section 326-A, Section 326-B, Section 354, Section 354-B, Section 370, Section 370-A, Section 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB], Section 376-E or Section 509,

shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine."

40. The S.H.O. had registered the F.I.R. and had entrusted investigation to the Investigating Officer, who conducted investigation and found that the offences alleged was not made out. The investigation was carried out in compliance of the order passed by the Magistrate, although that order was not in accordance with law as it had directed investigation by the police without recording a prima facie satisfaction that a cognizable offence had been committed warranting investigation by the police. The S.H.O. obeyed the order of the C.J.M. concerned, registered a case and got the same investigated. Merely because the court is not convinced with the findings of the S.H.O. it cannot be said that the S.H.O. has not obeyed direction of the C.J.M., although it was not in accordance with law.

41. Failure to register an F.I.R. is an offence under Section 166-A I.P.C. only if the report was regarding commission of offences under Section 326-A, Section 326-B, Section 354, Section 354-B, Section 370, Section 370-A, Section 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB], Section 376-E or Section 509. Failure to register F.I.R. for offence under Section 409 would not be an offence under Section 166-A, I.P.C.

42. In view of the aforesaid discussions, the impugned order dated 17.10.2021 passed by the C.J.M. suffers from patent illegalities and it is unsustainable in law. The continuance of prosecution on the basis of such an order would clearly be an abuse of the process of law, warranting interference by this Court in exercise of its revisional powers.

43. Accordingly, the revision is **allowed**. The impugned order dated 17.02.2021, passed by learned C.J.M., Barabanki in Case No.717 of 2021 - Ram Pratap Versus Anup Kumar Singh and others, is hereby **set aside.**

(2024) 3 ILRA 57
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2024
BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 462 of 2023

Pinki Vishwakarma & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Shailendra Kumar Rai, Sri Hari Keshav

Counsel for the Opposite Parties:
G.A., Sri Pradeep Kumar Rai

Criminal Law - Criminal Procedure Code, 1973 – Sections 397, 401 & 125 – Revision

against order dated 06.12.2022 rejecting maintenance application – Held, trial court erred in dismissing application based on unproved ultrasound report and alleged prior marriage of revisionist no. 1 – Ultrasound report not duly proved, presumption under Section 112 of Indian Evidence Act applies, establishing revisionist no. 2 as legitimate child of opposite party no. 2 – Revisionist no. 1's separation justified due to dowry harassment and opposite party's second marriage – Trial court's findings perverse, impugned order set aside – Matter remanded for fresh consideration with directions to ascertain opposite party's income per *Rajnesh Vs Neha.* (Para 12-23)

Revision allowed.

List of Cases Cited:

1. Rajnesh Vs Neha, (2021) 2 SCC 324

2. Shamima Farooqui Vs Shahid Khan, (2015) 5 SCC 705

3. Savitaben Somabhai Bhatiya Vs St. of Guj., (2005) 3 SCC 636

4. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316

5. Sunita Kachwaha Vs Anil Kachwaha, (2014) 16 SCC 715

6. Badshah Vs Urmila Badshah Godse, (2014) 1 SCC 188

7. Chanmuniya Vs Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141

8. Dwarika Prasad Satpathy Vs Bidyut Prava Dixit, (1999) 7 SCC 675

9. Kamala Vs M.R. Mohan Kumar, (2019) 11 SCC 491

10. K. Srinivas Rao Vs D.A. Deepa, (2013) 5 SCC 226

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

Heard Sri Hari Keshav, Advocate, holding brief of Sri Shailendra Kumar Rai, learned counsel for the revisionists and Sri Pradeep Kumar Rai, learned counsel for the opposite party no. 2.

2. This criminal revision has been instituted against judgement and order dated 06.12.2022 passed by learned Principal Judge, Family Court, Ghazipur in Criminal Misc. Case No. 838 of 2020, Pinki Vishwakarma and Another Vs. Ashok Kumar Vishwakarma u/s 125 Cr.P.C.

3. By the impugned order, Principal Judge, Family Court, Ghazipur, dismissed the misc. case filed by applicants/revisionists for maintenance.

4. It has been submitted by learned counsel for the revisionists that the learned Principal Judge, Family Court, Ghazipur, acted mechanically and vide impugned judgement and order dated 06.12.2022 rejected her application u/s 125 Cr.P.C. in a routine manner without considering the facts and circumstances of the case and without perusing the evidence on record. It has also been submitted that the impugned judgement was passed on the basis of forged certificate issued by the President of Maa Sheetla Sanrakshak Pujari Samiti, Sultanpur, Chunar, Mirzapur, wrongly showing that the revisionist no. 1, Pinki Vishwakarma was earlier married with one Raju Vishwakarma, son of Late Uma Vishwakarma. The impugned judgement and order dated 06.12.2022 passed by learned Principal Judge, Family Court, Ghazipur, is bad, wholly illegal and arbitrary, which is not sustainable in the eyes of law. It has also been submitted that the trial court has passed the impugned judgement and order on the basis of unproved documents produced by opposite party no. 2. It has also been submitted that the learned Family Court wrongly

calculated the period of pregnancy of revisionist no. 1 on the basis of forged medical documents produced by the opposite party no. 2 and came to the conclusion that revisionist no. 1 was pregnant before her marriage with opposite party no. 2. The Medical Officer who had prepared the documents was not examined before the Family Court. It has also been submitted that the learned trial court has ignored the fact that the revisionist no. 1 is the legally wedded wife of the opposite party no. 2 and she is unable to maintain herself along with her minor daughter. Therefore, she could have been granted maintenance for herself as well as her daughter. The learned Family Court has committed manifest illegality causing irreparable loss and damage to the revisionists. Therefore, the impugned order should be set-aside by this Court. It has also been submitted that the revisionist no. 1 after her marriage to opposite party no. 2 went to her matrimonial home and stayed there for 1½ months with opposite party no. 2 and his family members. During this period, she got pregnant with her relation with opposite party no. 2. At her matrimonial home, opposite party no. 2 and his family members pressurized her to bring Rs.2,00,000/- cash, her father's truck and plot of 3 biswa land situated in front of Government Hospital on the Ghazipur-Varanasi main road. When revisionist no. 1 and her family members refused to fulfil the demands of dowry of opposite party no. 2 and his family members, they harassed her, beat her and threatened to murder her and at 8 p.m., they turned her out of her matrimonial home after snatching her jewellery, clothes and other items. Since then, revisionist no. 1 is staying in her parental home. In her parental home, revisionist no. 1 gave birth to her daughter. During her stay at her parental home, opposite party no. 2 did not provide any maintenance to revisionist nos. 1 and 2. Therefore, she filed application u/s 125 Cr.P.C. for maintenance.

5. Per contra, learned counsel for the opposite party no. 2 while opposing the revision, has submitted that prior to the marriage with opposite party no. 2, revisionist no. 1 had solemnized her marriage with Raju Vishwakarma on 02.05.2004. Without obtaining divorce from her first husband and with a view to grab the property of opposite party no. 2 and extort money in the name of alimony, she married opposite party no. 2. The revisionist no. 1 stayed only for 4 days with opposite party no. 2 and then she left. After that she is living with her first husband. It has also been submitted that after obtaining Rs.1,00,000/- from opposite party no. 2, revisionist no. 1 has taken divorce on 15.03.2008 with him before Panchayat members. The revisionist no. 2, Vaishnavi was not born from her wedlock with opposite party no. 2 but she was born out from the wedlock of first marriage with Raju Vishwakarma. It has also been submitted that revisionist no. 1 married with opposite party no. 2 on 12.12.2006. She got her ultrasound done by Dr. Usha Gupta at Aashirvaad Hospital and Research Centre, Mehmudganj, Varanasi on 09.02.2007. According to the ultrasound, medical paper no. 113(b) in remark 9, it is specifically mentioned that ultrasound gestation age is 10 weeks. It means that the revisionist no.1 had carried a foetus of 70 days at the date of 09.02.2007. Hence, on this basis it can be concluded that on the date of her marriage with opposite party no. 2, i.e., 12.12.2006, the revisionist no.1 had carried a foetus of 11 days. It has also been submitted that the revisionist no. 1 has admitted in her cross-examination that she

had filed medical papers annexed to her application u/s 156(3) Cr.P.C. for registration of case u/s 498-A I.P.C. She has also admitted that before marriage, she had no acquaintance with opposite party no. 2. It has also been submitted that since revisionist no. 1 had admitted the medical paper regarding her ultrasound in her examination-on-oath, thus these papers under the provisions of Section 58 of Evidence Act can be considered as admissible in evidence without being proved. It has also been submitted that opposite party no. 2 had filed application no. 136-b on 25.02.2019 for summoning the doctor for proving the medical paper and application no. 128-b on 27.02.2018 for conduct of DNA test of revisionist no. 1 but his application was rejected by the trial court vide orders dated 25.02.2019 and 17.10.2018 respectively. It has also been submitted that the trial court, after considering the evidence on record as well as the legal provisions applicable thereto, had passed the impugned judgement and order and there is no illegality in it and the revision should be rejected.

6. In its impugned judgement and order dated 06.12.2022, the Principal Judge, Family Court, after discussing the pleadings of the parties and documentary and oral evidence on record, has alluded that the marriage of revisionist no. 1 was solemnized with opposite party no. 2 on 12.12.2006 according to Hindu rites and customs and after the marriage, she came to her matrimonial home and started living with opposite party no. 2.

7. In the impugned judgement and order dated 06.12.2022, the trial court has mentioned that opposite party no. 2 has filed original certificate, paper no. 1, 48-b which shows that revisionist no.1, Pinki Vishwakarma, daughter of Shyam Deo Vishwakarma, resident of Nandganj, Ghazipur was married to Raju Vishwakarma son of late Uma Vishwakarma, village- Varapur, Nandganj, Ghazipur, on 02.05.2004 in the courtyard of Sheetala Dham Mandir, Adalpura, Mirzapur in the presence of priests. It has also been mentioned that opposite party no. 2 who produced the documents in the Court has stated in his evidence that this original document was given to his father, Subhash Vishwakarma, in the year 2018 by Chandrama Vishwakarma, father-in-law of revisionist no. 1's brother, Babulal, whose daughter Sunita was married to Babulal. The trial court has mentioned that since revisionist no. 1 did not file any document in rebuttal of this certificate, the contents of the documents was considered as proved and relied upon.

8. The trial court has also mentioned that the revisionist no. 1, Pinki Vishwakarma had on the advice of Dr. Usha Gupta of Aashirvaad Hospital and Research Centre, Mehmudganj, Varanasi, got her ultrasound done on 09.02.2007 at the Diagnostic Ultrasound unit of aforesaid hospital regarding her pregnancy. In its medical report dated 29.11.2006, it was mentioned that the foetus is 10 weeks old. Therefore, the conceivement had taken place 70 days before from 29.11.2006 i.e. before the date of her marriage 12.12.2006 with opposite party no. 2. The Principal Judge, Family Court, has also mentioned that the revisionist no. 1 admitted in her evidence that she had submitted her medical report with her application u/s 156 (3) Cr.P.C. for registration of first information report. She had also admitted that she obtained the aforesaid medical report from the file of misc. case u/s 156 (3) Cr.P.C. and she had filed it in the case

of maintenance u/s 125 Cr.P.C. On the basis of the aforesaid evidence, the learned Principal Judge, Family Court, concluded that since the ultrasound report has been admitted by the revisionist no.1, it can be considered as proved and can be relied upon against revisionist no. 1. On the basis of the aforesaid evidence, the trial court has concluded that before her marriage with opposite party no. 2, Ashok Kumar Vishwakarma, the revisionist no.1 had illicit relation with some other person from which revisionist no. 1 was conceived. Since revisionist no. 1 has admitted that before her marriage with opposite party no. 2, she did not have any acquaintance with him, the trial court concluded that revisionist no. 1 was not pregnant with her relation with opposite party no. 2 and revisionist no.2 was not born from the wedlock of revisionist no. 1 with opposite party no. 2.

9. After the aforesaid discussions, the trial court has dismissed the application u/s 125 Cr.P.C. filed by the revisionist no. 1 on the ground that :-

(i) revision no. 1 had adulterous relationship with some other person before her marriage to opposite party no. 2, and,

(ii) the revisionist no. 2 was not conceived from the wedlock of revisionist no.1 with opposite party no. 2 but from some other person, therefore, she was not entitled to maintenance u/s 125 Cr.P.C.

(iii) the revisionist no. 1 is staying separately from opposite party no. 2 without any reason after staying in her matrimonial home of 1½ month with him.

10. Regarding conceivement of revisionist no. 1 before her marriage to opposite party no. 2, Ashok Kumar Vishwakarma, the trial court has relied on the ultrasound report dated 09.02.2007 regarding the foetus of revisionist no. 1 in which the age of the foetus is shown as 10 weeks which is equal to 70 days. Therefore, on the date of her marriage to opposite party no. 2 i.e. on 12.12.2006, the revisionist no. 1 was bearing the foetus of 11 days. The trial court has mentioned in its judgement that the revisionist no. 1 had admitted the medical papers in her cross-examination. Therefore, it can be presumed as duly proved and can be relied upon as evidence. The alleged ultrasound report dated 09.02.2007 which was prepared on the basis of the ultrasound of revisionist no.1 done at Aashirvaad Hospital and Research Centre, Mehmudganj, Varanasi under the supervision of Dr. Usha Gupta which is mentioned in the judgement as paper no. 113-b has not been proved by the evidence of Dr. Usha Gupta or any other person of the ultrasound centre who was familiar with the handwriting and signature of Dr. Usha Gupta.

11. Since opposite party no. 2 did not file any criminal revision in the Hon'ble High Court against rejection of his aforesaid application, therefore, the aforesaid order of the trial court rejecting his application has become final and the opposite party no. 2 cannot raise any objection against the aforesaid orders at this stage in this revision.

12. Now, it has to be seen whether the ultrasound report dated 09.02.2007 regarding the age of the foetus of revisionist no. 1 can be considered as admitted and proved and can be relied upon by the trial court for passing the impugned order. The trial court has alluded in its judgement that revisionist no. 1 has admitted the genuineness and contents of the ultrasound report in her cross-

examination. The above referred cross-examination of P.W.1 Pinki Vishwakarma is filed at page nos. 98 and 99 of Annexure No. 6 to the revision which is reproduced as hereunder :

मेरी बच्ची का नाम वैष्णवी विश्वकर्मा है। मेरी बच्ची दिनांक 16.09.2007 को पैदा हुई। यह बच्ची प्रतिभा मैटरनिटी एण्ड आई रिसर्च सेन्टर मऊ में पैदा हुई। मै अपना इलाज कराने बनारस भी गयी थी। मैने आर्शीवाद रिसर्च सेन्टर में डा० उमा गुप्ता के यहां से मैने अपना ईलाज कराया था। दहेज के रूप में मेरे ससुर व मेरे पति के नाम से पचास हजार के चेक लिये गये। चेक का नम्बर मै नही बता सकती। मेरे दहेज में कोई एन०एस०सी० नही दिया गया था। दोनो अस्पतालो के जांच रिपोर्ट में मेरे गर्भवती होने की जो तिथि बतायी गयी, मुझे याद नही है। मैनें 156(3) सी०आर०पी०सी० के मुकदमें में सारे मेडिकल रिपोर्ट लगाये है।

मैं शादी के पूर्व गर्भवती नही थी। मेरा कोई पूर्व पति नही है। एन०एस०सी० का भुगतान मैने करा लिया है मैं अपने पति अशोक की शादी के पूर्व नही जानती थी।

शादी के बाद मै डेढ माह तक अपने ससुराल में रही थी।

13. From the perusal of the above-mentioned cross-examination dated 06.03.2020 of P.W.1 Pinki Vishwakarma, it transpires that during the cross-examination, the ultrasound report regarding her foetus was neither shown to P.W.1 nor she has proved the aforesaid ultrasound report after its perusal in the Court. She has deposed in her evidence that she had attached all medical papers in her application u/s 156(3) Cr.P.C. During her cross-examination, her application u/s 156(3) Cr.P.C. or the medical paper attached to it has not been shown to her. Thus, it cannot be inferred that P.W.1 Pinki Vishwakarma after perusal of the medical report/ultrasound report attached to her application u/s 156(3) Cr.P.C. admitted its genuineness and ultrasound report was duly proved according to law. The aforesaid ultrasound report has not been exhibited after allegedly being proved by P.W.1 Pinki Vishwakarma.

14. Under these facts and circumstances of the case, it cannot be considered that the ultrasound report dated 09.02.2007 which has shown the age of foetus to be 10 weeks old has been duly proved. Since the ultrasound report has not been duly proved, it cannot be considered as proving the fact of the age of her foetus on the date of ultrasound i.e. 09.02.2007. Thus, it cannot be concluded that revisionist no. 1 was bearing an 11 days foetus at the date of her marriage with opposite party no. 2 i.e. on 12.12.2006.

15. Thus, it cannot be said that revisionist no. 2 was not begotten with revisionist no. 1 relation with opposite party no. 2. Since revisionist no. 2, Vaishnavi, was born on 16.09.2007 i.e. after 9 months 4 days after marriage of revisionist no.1 with opposite party no. 2, she will be considered to have been begotten by revisionist no. 1 with opposite party no. 2 during the continuance of her marriage with him.

16. Section 112 of the Indian Evidence Act provides that birth of a child during continuance of valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried shall be conclusive proof of legitimacy of the son. Section 112 is as follows :

112. Birth during marriage, conclusive proof of legitimacy – The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at

any time when he could have been begotten.

Section 112 of the Indian Evidence Act provides in itself that how this presumption about legitimacy of a child can be rebutted by the opposite party. For its rebuttal, it should be shown that parties to the marriage had no access to each other at the time when the child could have been begotten.

17. From the above discussion, it is proved that revisionist no. 2, Vaishnavi was born after 9 months and 4 days of the marriage of revisionist no.1 with opposite party no. 2 which is less than 280 days. Therefore, the presumption u/s 112 of the Indian Evidence Act is applicable on the birth of revisionist no. 2 and provides legitimacy to her birth and raises a presumption that she is a legitimate child of revisionist no.1 and opposite party no. 2. The opposite party no. 2 has failed to rebut the presumption arising out of Section 112 of Indian Evidence Act by proving that revisionist no.1 was bearing a foetus before her marriage with opposite party no. 2. Therefore, it cannot be considered that revisionist no. 2 was not conceived from the wedlock of revisionist no.1 with opposite party no. 2 but from some other person. Since, revisionist no. 2 is a legitimate child from revisionist no.1 with opposite party no. 2, she is entitled to maintenance u/s 125 Cr.P.C. from opposite party no. 2.

18. The other ground which has been relied upon by the trial court for rejecting the application of revisionist no. 1 u/s 125 Cr.P.C. is that she was residing separately from opposite party no. 2 without any reason. Thus, she is dis-entitled from obtaining maintenance u/s 125 (4) Cr.P.C. from opposite party no. 2. P.W.1 Pinki Vishwakarma has deposed that after her marriage with opposite party no. 2, she resided in her matrimonial home for 1½ months. During this period, opposite party no. 2 and her family members pressurized her to bring Rs.2,00,000/- cash, her father's truck and plot of 3 biswa land situated in front of Government Hospital on the Ghazipur-Varanasi main road. They harassed her, beat her and threatened to murder her and at 8 p.m. turned her out of her matrimonial home after snatching her jewellery. The opposite party no. 2 has deposed that neither any demand of dowry was made from the revisionist no.1 nor she was harassed or beaten by his family members at her matrimonial home. She left her matrimonial home after living there for 4 days only. P.W.1 Pinki Vishwakarma has also deposed in her evidence that her father and brother made efforts for settlement with opposite party no. 2 for 3 times but they did not agree to let her stay at her matrimonial home without fulfilling the dowry demand.

19. D.W.1 Ashok Kumar Vishwakarma has admitted in his evidence that revisionist no. 1 has filed application u/s 156 (3) Cr.P.C. regarding cruelty and harassment for dowry against him as well as his family members. Admittedly, opposite party no. 2 has filed a Hindu Marriage Petition No. 31 of 2008, Ashok Kumar Vishwakarma Vs. Pinki Vishwakarma u/s 13 of the Hindu Marriage Act for divorce against revisionist no. 1. The opposite party no. 2 has entered into second marriage with daughter of Ram Prasad Vishwakarma who is resident of Chandausi. The name of her brothers are Swagat and Pradeep. The revisionist no. 1 could not recall the name of second wife of opposite party no. 2 but did mention that

the name of her brothers are Swagat and Pradeep. The revisionist no. 1 also deposed that since opposite party no. 2 had married another woman, she is not prepared to live along with her. From the analysis of the above oral and documentary evidence, it can be concluded that due to harassment and cruelty met by Pinki Vishwakarma from Ashok Kumar Vishwakarma and his family members and his marrying another woman, she is living separately from him. Therefore, it cannot be concluded that she is staying separately from Ashok Kumar Vishwakarma without any reason. Thus, finding in this regard arrived at by the trial court is perverse and cannot be accepted.

20. From the perusal of the impugned judgement and order, it transpires that the trial court has not given any finding on the income of Ashok Kumar Vishwakarma. The trial court has rejected the application u/s 125 Cr.P.C. merely on the basis of above-mentioned three grounds that firstly, revisionist no. 1 was pregnant at the time of her marriage to opposite party no. 2, secondly, revisionist no. 2, Vaishnavi is the daughter born from the wedlock of revisionist no. 1 and opposite party no. 2 and thirdly, revisionist no. 1 is living separately from her husband without any reason, therefore, she is entitled for maintenance.

21. From the above discussion of the evidence on record, the Court is of the considered view that illegality has been committed by the trial court by rejecting the misc. case and application u/s 125 Cr.P.C. by the impugned order. The impugned order is liable to be rejected.

22. Accordingly, the criminal revision is **allowed.** The impugned judgement and order dated 06.12.2022 passed by learned Principal Judge, Family Court, Ghazipur, is hereby set-aside.

23. This Court is of the view that the trial court be directed to order afresh on application u/s 125 Cr.P.C. in the light of the observations made in this judgement and after ascertaining the income of opposite party no. 2, pass order for maintenance allowance in favour of revisionist nos. 1 and 2 according to law. The trial court shall direct both the parties to submit affidavit regarding their income in the light of the directions given by Hon'ble Apex Court in **Rajnesh Vs. Neha and Another, (2021) 2 SCC 324** within one month and decide the application u/s 125 Cr.P.C. within a period of 4 months. The parties shall appear in the trial court on 15.03.2024.

24. The copy of the judgement be forthwith sent to the trial court for compliance.

(2024) 3 ILRA 64
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2024
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 617 of 2024

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

Counsel for the Revisionist:
Sri Dan Bahadur, Sri Nand Lal Yadav

Counsel for the Opposite Parties:
G.A.

Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015 -

Sections 2(14), 27, 29, 30, 36, 37, 40, 101 & 104 - Revisionist (alleged father-in-law) challenged CWC order (09.02.2023) directing a juvenile victim girl to be kept in a Women Protection Home, Prayagraj, and appellate court's order (08.01.2024) dismissing his appeal under Section 101 at admission stage. Victim, recovered after an FIR under Section 363 IPC, was declared a child in need of care and protection under Section 2(14) as her family refused custody. CWC's order lacked proper inquiry under Section 36 and social investigation report, deemed superficial. Revisionist, not having applied for custody before CWC, was not an aggrieved person but permitted to apply under Section 104 for amendment of CWC's order. Appellate court's dismissal, citing lack of jurisdiction under Section 27(10), was erroneous as Section 101 allows appeals to Children's Court for all CWC orders except those related to foster care or sponsorship aftercare. Appellate order set aside, revisionist granted opportunity to apply to CWC, which must decide within one month, uninfluenced by court observations. CWC's superficial approach criticized, emphasizing principles of best interest, family responsibility, safety, and restoration under Section 3. Revision disposed of with directions for circulation to District Judiciary and CWC for guidance. (Paras 5-18)

Revision Disposed of .

Case Law Cited:

1. Smt. Soni Saxena @ Neetu Saxena Vs St. of U.P., Criminal Revision No. 6033/2023 (Para 10)

2. Girish Kumar Vs St. of U.P., 2022:AHC:206879 (Paras 11, 12)

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

1. Heard Sri Nand Lal Yadav, learned counsel for the revisionist and Sri L.D. Rajbhar, learned A.G.A. for the State and perused the record.

2. By means of this criminal revision, the revisionist Ram Bahadur Singh has challenged an order passed by the C.W.C. dated 09.02.2023 by which victim girl, a juvenile has been ordered to be kept in a 'woman protection home' and further an order passed by the appellate court dated 08.01.2024, whereby the appeal moved by the instant revisionist under Section 101 of J. J. Act, 2015 was dismissed at the stage of admission.

3. The relevant facts are that an F.I.R. came to be lodged against unknown person as regard missing of 15 year old daughter of the first informant under Section 363 I.P.C. The girl was recovered and was produced before the C.W.C. The C.W.C. enquired into the matter and found that her family members refused to appear before the C.W.C. for her custody and, therefore, with an unanimous opinion, she was directed to be kept in a Women Protection Home at Prayagraj. Ram Bahadur Singh filed an appeal challenging the aforesaid order under Section 101 of the J.J. Act, 2015.

4. The main submissions of the revisionist are:- First that he is father-in-law of the detenue and that because her husband (i.e. his son) has been charge-sheeted and is facing trial in the instant case, therefore, she may be released from protection home into his custody; In the given circumstances he is better entitled to claim her custody and that her welfare can only be looked after by him; and that her own parents never came forward to take her into their custody; and that the girl herself wanted to remain in her in-law's family. It is further submitted that she did not give any evidence against her husband and that she does not face any threats from him and that CWC ignored all the facts and circumstances of the matter and passed an order of sending her to a protection home in an arbitrary manner. It is contended in

addition that the appeal filed by her father-in-law Ram Bahadur Singh has been dismissed without taking into account the relevant facts and circumstances and that the appellate court passed the order in a mechanical manner.

5. Before any legal or factual issue is considered in this matter, it is important to notice that the instant revisionist- alleged father-in-law of the detenue, admittedly never moved any application before the C.W.C, for obtaining her custody. Obviously this question arises that when he did not move any application to obtain her custody, how can he be treated as an aggrieved person and therefore, whether any appeal could have been filed by him challenging the impugned order passed by the C.W.C.? At this stage I prefer to leave aside such issues and deal with certain other issues of greater importance arising in this case.

6. The J.J. Act, 2015 is a comprehensive act dealing with two types of juveniles first those who are treated as **"child in conflict with law"**, secondly, those who are treated as **"child in need of care and protection"**.

Certain things are noticeable viz.-:

• Separate chapters deal with two types of children. The Chapter VI of the J.J. Act, 2015 has provisions which specifically apply to latter type i.e. "child in need of care and protection".

• When a child shall be treated as a 'child in need of care and protection' is provided in section 2 (14) of the Act which broadly provides that any child who has parents or guardian and such parents and guardian are found to be unfit to take care for and protect the safety and well being of a child or where a child does not have parents and no one is willing to take care of him/her, or where a child has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts, may also be treated as child in care of need and protection, besides children falling in several other categories.

• The Child Welfare Committees have been constituted for children in need of care and protection under the Act.

• Chapter VI of the J.J. Act, 2015 provides for procedure beginning from production of such child before such a committee and also provides for procedure to hold inquiry under section 36 of the J.J. Act, 2015 and the orders which may be passed with regard to such a child under section 37 of the J.J. Act, 2015.

• Section 37 of the Act importantly provides that the committee, on being satisfied on the basis of inquiry held by it, declare that a child is in need of care and protection.

• The committee has power to place the child in a protection home of the nature as provided in section 37 of the J.J. Act, 2015 and it may also restore the child to parents or guardians or family with or without supervision of Child Welfare Officer. Further the Committee has power to restore the child in need of care and protection to his parents, guardian or fit person as the case may be, after determining suitability of the parents or guardian or fit person and give them suitable directions as provided in section 40 of the Act.

• Another very important provision is under section 104 of the J.J. Act, 2015. Section 104 of the J.J. Act is as below:

Section 104- Power of the Committee or the Board to amend its own orders.

"(1) Without prejudice to the provisions for appeal and revision contained in this Act, the Committee or the Board may, on an application received in this behalf, amend any orders passed by itself, as to the institution to which a child is to be sent or as to the person under whose care or supervision a child is to be placed under this Act:

Provided that during the course of hearing for amending any such orders, there shall be at least two members of the Board of which one shall be the Principal Magistrate and at least three members of the Committee and all persons concerned, or their authorised representatives, whose views shall be heard by the Committee or the Board, as the case may be, before the said orders are amended.

(2) Clerical mistakes in orders passed by the Committee or the Board or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Committee or the Board, as the case may be, either on its own motion or on an application received in this behalf."

7. This is quite significant to note that this provision gives very wide and ample powers to the committee to amend its own order, wherever required, for any good reason which, in my opinion, may include change in circumstances. Section 104 of the J.J. Act, 2015 prescribes a procedure before an order already passed can be amended. It says that "all persons concerned" or their authorised representatives shall be heard by the committee before such an order is amended.

8. A bare look on the relevant provisions of the J.J. Act, 2015, gives an impression that any detention in a protection home, of a child in need of care and protection is purely temporary in nature and rightly so. This fact should not be relegated to the background that the J.J. Act, 2015 has been enacted keeping in mind the general principles, as have been enumerated in Chapter II of the Act itself. The general principles include the ***principles of best interest, principle of family responsibility, principles of safety, principle of institutionalization, principle of repatriation and restoration.*** All the aforesaid principles are guiding factors for the Board as well as for the C.W.C. while implementing the provisions of this Act. These principles may act as a becon light while considering and deciding upon the matter of lodging a child, particularly a child in need of care and protection, in a juvenile home or when releasing her/him in care or custody of any suitable person or a family member. In my opinion the committee is expected to take a reasoned decision, after due deliberations as regard where it would be best suited to lodge a "child in need of care and protection" in the facts and circumstances of a case and that where his best interest shall be served and therefore, which institution or which person/family member shall be in better position to take care of his well being. The C.W.C. may also review or revise its own order where circumstances prompt for such an action or where any new development takes place, compelling it to take a different stand/view. Such powers have been vested in C.W.C., notwithstanding the powers of appellate court or the revisional court. I hasten to add that this is not to say that appellate court or the revisional court can not exercise its powers wherever it can and ought to.

9. There are several significant issues involved and mixed up in this matter which

need to disentangled for future guidance of all concerned.

• First, the alleged father-in-law– the instant revisionist never moved any application before the C.W.C. either before passing of the impugned order dated 09.02.2023 or after the same, hence, the C.W.C. obviously could not decide the matter in the light of his submissions. In my opinion there is no bar for him to apply to C.W.C., even if he had no opportunity to move such an application, before impugned order was passed. Still, in case, such an application is now moved, the same can be decided in the light of provisions of Section 104 of the J.J. Act, 2015.

• Secondly, I am constrained to notice that the impugned order has been passed by the C.W.C. in a most superficial, cursory and cavalier manner. No proper inquiry has been made as is enjoined upon the C.W.C by law. In my opinion the C.W.C. is enjoined by law to conduct proper enquiry as provided in section 36 and then pass an order under section 37 of the J.J. 2015. It may also be noted that no social investigation report appears to have been submitted before the Committee for passing a final order as is required by section 36 (2) of the J.J. Act, 2015.

• In a number of cases, coming before this Court this is being noted that C.W.C. is passing superficial orders without conducting proper inquiry and disposing of the matters with nonchalance. The custody or detention of victim in a protection home are not trivial matters. The very first requirement is to declare him/her as a child in need of care and protection and second is to conduct a proper enquiry as regard his/her lodgement or care and custody keeping in mind the need and suitability of juvenile home/person to whom he/she is entrusted.

• Next important question which cannot be ignored is as regard the jurisdiction of the appellate court as provided under section 101 of J.J. Act, 2015. In this case the appeal has been dismissed at the stage of admission by passing a cryptic order as below:

" किशोर न्याय (बालकों की देखरेख और संरक्षण) अधिनियम 2015 की धारा 101 के अन्तर्गत पोषण, देखरेख एवं प्रवर्तकता संबंधी निविश्चयों के सिवाय अपील जिला मजिस्ट्रेट को होने का प्राविधान किया गया है। इस संदर्भ में नियम 27 के अन्तर्गत बाल कल्याण समिति के आदेश विनिश्चय के विरूद्ध अपील जिला मजिस्ट्रेट के समक्ष होने का प्राविधान किया गया है।

बाल कल्याण समिति प्रयागराज द्वारा मामला संख्या- 1979/2022/23 के संदर्भ में अपील सुने जाने का क्षेत्राधिकार जिला मजिस्ट्रेट को होने के संदर्भ में मुन्सरिम आख्या प्रस्तुत की गयी है।

उपरोक्त तथ्यों के आधार पर आवेदक की ओर से प्रस्तुत प्रकरण को अंगीकरण के स्तर पर निस्तारित किया जाता है।"

10. During my working, I have come across a number of such orders where appeals have been dismissed referring to **Section 27** of J.J. Act 2015. A similar question arose before this Court in ***Smt. Soni Saxena @ Neetu Saxena vs. State of U.P. and 4 other, Criminal Revision No.6033 of 2023***. The Court observed in paras 4 and 5 as below-:

"4. The appellate court seems to have passed the order in the light of the provisions of ***section 27****(10) of the J.J. Act, 2015.* ***Section 27*** *deals with the Constitution of the Child Welfare Committee, the qualifications of a person as regard eligibility of the person to be appointed as a member of a Committee, disqualifications, the tenure of the members, the procedure for inquiry as regard termination of the members etc.* ***Section 27(10)*** *of the J.J. Act, 2015*

empowers the District Magistrate to entertain any grievance arising out of functioning of a Committee. This section further empowers the affected child or any one connected with the child, as the case may be, to file a complaint before the District Magistrate for the purpose that he may take suitable action as regard the complaints or the grievances which an affected person may have against the Committee. These provisions definitely do not deal with legal challenge to the orders passed by the Committee. An aggrieved person can challenge the order passed by the Child Welfare Committee under section 101 of the Juvenile Justice Act, 2015.

***Section- 101** of the Juvenile Justice Act, 2015 is as below:-*

*"(1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the **"Children's Court", except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate."***

11. Faced with a similar case, this Court in ***Girish Kumar vs. State of U.P. and 3 Others, 2022:AHC:206879 decided on 25.11.2022,*** with reference to provisions of section 101 of the J.J. Act, 2015, observed in Para no. 6 as below:-

"6. It is quite clear from this provision of law that appeal shall lie to the District Magistrate with respect to decisions by the Child Welfare Committee relating to foster care and sponsorship after care only. The appeal in respect of other orders passed by the Child Welfare Committee shall lie to the 'Children's Court' within 30 days from the date of order. *Before analysing this provision, it will be appropriate to peruse the order passed by the Child Welfare Committee to decide upon whether this order falls in the category where the appeal may lie to Children's Court or in the category where appeal shall lie to District Magistrate."*

12. In the same case this court further observed in Para nos. 10 and 11 as below:-

"10. I went through the material on record in the light of submissions before this Court. As per scheme of the Juvenile Justice Act, the Child Welfare Committee, irrespective of any other law, has power to deal exclusively with all proceedings relating to 'children in need of care and protection' under Section-29 of the Juvenile Justice Act, 2015. The functions and responsibilities of Committee include taking cognizance of and receiving the child produced before it, conducting inquiry on all issues relating to safety and well being of a child as well as ensuring care, protection, appropriate rehabilitation and most importantly restoration of 'children in need of care and protection' (Section-30 of the Juvenile Justice Act, 2015). Section-37 of the Juvenile Justice Act, 2015 empowers the Committee, after being satisfied through an inquiry, consideration of social investigation report submitted by Child Welfare Officer and taking into account the child's wishes, in case the child is sufficiently matured, to take a view and pass one or more of following order, namely:-

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialized Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) .....;

(h) .....

10. On perusal of the above provisions of Juvenile Justice Act, 2015, it is demonstrated that Child Welfare Committee is given vast powers on the principles of best interest of a child, a thread which goes through the whole of the scheme of the Juvenile Justice Act, 2015. It has been specifically provided by the section-3 of the Juvenile Justice Act, 2015 that Central Government, State Governments, the Board and other agencies, as the case may be, while implementing the provisions of the Act, shall be guided by the fundamental principles which include principles of best interest, principle of family responsibilities, the principle of safety, the principles of repatriation and restoration and several others.

11. The provisions of law as aforesaid are being reproduced here with the twin object; firstly, that when an order is passed of the7 nature as is under challenge before this Court, the appeal shall be entertainable by the Children's Court and not by the District Magistrate; the District Magistrate is empowered to hear appeals only against the decisions of the Committee relating to foster care and sponsorship after care. The order in question does not fall in this category. The appellate court was thus wrong in holding that appeal did not lie before it. Therefore, the impugned order is liable to be set-aside; secondly, it may be noted that when a child in need of care and protection is lodged in any shelter home, it is a measure of temporary nature; the Child Welfare Committee is fully empowered to take a decision where it is found no more necessary to detain her. It may be noted that legally a child in need of care and protection may be detained for a further period even if he/she has attained majority if it is found that it will not be in his/her best interest to release him/her immediately."

13. The learned appellate court instead of deciding the matter on merits, declined to exercise its powers on patently wrong assumptions. It is difficult to understand how such a view has been taken by the appellate court that it had no jurisdiction to hear the challenge to an order of this nature passed by the Child Welfare Committee, in appeal. As is quite obvious, an appeal shall lie to children court against all the orders passed by the Child Welfare Committee except where order has been passed relating to foster care or sponsorship foster care.

14. In view of the legal provisions as mentioned above, the revisionist is granted opportunity to move an application before the C.W.C. In case, such an application is moved, the C.W.C. shall decide the same in accordance with law, preferably within a month of moving such an application. It is made very clear that this Court has not

touched upon merit of the claim of the applicant/revisionist in any manner. The C.W.C. shall decide the matter uninfluenced by observations, if any, made on facts, by this Court as regard his claim.

15. As the revisionist has been given opportunity to move a fresh application before the C.W.C. hence, there is no need to set aside the earlier order passed by the C.W.C., however, as far as order passed by the appellate court is concerned, it is patently against law, hence, it is set aside.

16. Accordingly, this revision is finally ***disposed of.***

17. The copy of this order be transmitted to CWC concerned.

18. Let a copy of this order be circulated for the benefit of District Judiciary and also to C.W.C. for necessary guidance.

(2024) 3 ILRA 71
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2024
BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 1012 of 2023

Urmila Devi ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Ankit Agarval, Sri Dilip Kumar Patel

Counsel for the Opposite Parties:
G.A.

Criminal Law -Code of Criminal Procedure, 1973 - Section 319 & 397 - Summoning Additional Accused - Revision Against Rejection of Application - Revisionist challenged trial court's order (05.12.2022) rejecting application under Section 319 Cr.P.C. to summon Mohit Mandal, Krishna Mandal, and Sheela Devi in S.T. No. 631/2018 (arising from Case Crime No. 301/2017, Sections 306, 506 IPC) for abetment to suicide of revisionist's son, Manoj Kumar. FIR alleged that co-accused Khudiram and proposed accused extorted money, took free goods from deceased's shop, and defamed him, leading to his suicide by hanging on 22.10.2016. Trial court, after evaluating depositions of P.W.1 (scribe), P.W.2 (doctor), P.W.3 (revisionist-mother), and P.W.4 (father), found insufficient evidence of instigation by proposed accused, noting inconsistencies in claims of financial demands and lack of positive assertion of abetment. Supreme Court rulings in Hardeep Singh Vs St. of Punj. (2014) 3 SCC 92, S. Mohammad Ispahani Vs Yogendra Chandak (2017) 16 SCC 226, Rajesh Vs St. of Har. (2019) 6 SCC 368, and Yashodhan Singh Vs St. of U.P. (2023) 9 SCC 108 clarify that Section 319 Cr.P.C. requires evidence stronger than a prima facie case but short of conviction-level satisfaction, and can be based on examination-in-chief or material collected before trial. Trial court's reasoned order, finding no cogent evidence against proposed accused, upheld as no illegality or irregularity found. Revision dismissed. (Paras 3-17)

Revision Dismissed.

Case Law Cited:

1. Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460 (Paras 8, 9)

2. Hardeep Singh Vs St. of Punj., (2014) 3 SCC 92 (Paras 10, 11, 12, 15)

3. S. Mohammad Ispahani Vs Yogendra Chandak, (2017) 16 SCC 226 (Para 13)

4. Rajesh Vs St. of Har., (2019) 6 SCC 368 (Para 14)

5. Yashodhan Singh Vs St. of U.P., (2023) 9 SCC 108 (Para 15)

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

This criminal revision has been filed for challenging the impugned judgement and order dated 05.12.2022 passed by the Sessions Judge, Gautam Buddh Nagar in S.T. No.631 of 2018 (State vs. Khudiram) arising out of Case Crime No. 301 of 2017, under Sections 306 and 506 I.P.C., Police Station-Sector-20, Noida, District-Gautam Buddh Nagar.

2. By the impugned order, the trial Court had rejected the application No.31 Ka filed by the revisionist under Section 319 Cr.P.C. for summoning Mohit Mandal, Krishna Mandal, Arjun Mandal and Sheela Devi in S.T. No.631 of 2018 arising out of Case Crime No.301 of 2018, under Sections 306 and 506 I.P.C., Police Station Sector-20, District Noida.

3. It has been submitted by learned counsel for the revisionist that learned Sessions Judge vide order dated 05.12.2022 has illegally rejected the application filed by the revisionist under Section 319 Cr.P.C. without considering the evidence on record. It has also been submitted that on the basis of deposition of P.W.1-Sachin Kumar, P.W.2-Dr. Sanjeev Kumar, P.W.-3 Smt. Urmila Devi and P.W-4.-Kaleshwar there was sufficient evidence to summon the opposite party Nos.2 to 4, namely, Mohit Mandal, Krishna Mandal and Sheela Devi under Section 319 Cr.P.C. for trial with charge-sheeted accused, namely, Khudiram. It has also been submitted that impugned order is based on surmises and conjectures and is against the perverse and against the evidence on record and same may be set-aside.

4. Per contra, learned A.G.A. for the State submitted that trial Court has passed reasoned order after discussing the deposition of P.W.1 to 4 and considering the other documentary evidence. There is no illegality or irregularity in the impugned order, hence, no interference in the impugned order is warranted.

5. Heard Sri Ankit Agarwal, learned counsel for the revisionist and Sri Alok Sharma, learned A.G.A. for the State.

6. The brief facts of the case is that First Information Report was lodged on the application of the revisionist, under Section 156 (3) Cr.P.C. with the averments that his son, namely, Manoj Kumar, who is aged about 24 years running a grocery shop. Co-accused, namely, Khudiram, who was of criminal nature, used to extract money from Manoj Kumar for running the shop in the area and his relatives, who are brothers-in-law and sister-in-law, namely, Mohit Mandal, Krishna Mandal and Sheela used to take free commodities from the shop of deceased Manoj Kumar and on being asked for payment of the commodities, they threatened him to defame his reputation. On 22.10.2016 at about 5:00 P.M., sister-in-law of co-accused-Khudiram entered into the shop of deceased Manoj Kumar and closed the shutter and thereafter, son of the revisionist was forced to drink intoxicating substance administered by co-accused Khudiram, therefore, he became unconscious. Co-accused- Khudiram started shouting in front of his shop that son of the revisionist has closed his sister-in-law in his shop and trying to outrage her modesty. On being conscious, son of the revisionist somehow came out through drain from behind the shop. Meanwhile, Khudiram, Mohit Mandal, Krishan Mandal with common intention entered into the house of revisionist/informant and made false allegation that his son was making indecent gesture with Sheela Kumari and they started beating him. Upon hearing the

noise, Manju, Geeta and some other person of the locality reached there and saved them, then accused persons ran away from the place of occurrence after giving threat. On the same day at about 7:00 P.M., son of the revisionist committed suicide by hanging due to anguish of being falsely defamed by the accused persons. The suicide note was recovered, in which, accused persons were made responsible for his abetment to commit suicide. In this regard, revisionist had given application to the concerned Police Station, but no action was taken.

7. Before examining the merits of the present case, the ambit, scope and power of the Sessions Court under Sections 397 as well as 319 Cr.P.C. should be discussed and ascertained.

8. The Hon'ble Apex Court in **Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460** in paragraph nos.12 and 13 of its judgement has narrated the scope of revision by the High Court u/s 397 Cr.P.C. which is as follows :

"12.Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13.Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

9. In paragraph nos.17 and 19 of the aforesaid judgement, the Hon'ble Apex Court has narrated that before framing a charge, what documents should be considered by the trial court. It has also provided about the extent of evidence required for framing of a charge. In paragraph no.20 of the aforesaid judgement, the Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. and Section 482 Cr.P.C. which is given hereunder :

"20.The jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may

be. Though the section does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maximquando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potesti.e. when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The section confers very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused."

10. The Hon'ble Apex Court in para 117.3 and 117.4 in the case of Hardeep Singh vs. State of Punjab; (2014) 3 SCC 92 has explained the meaning of word 'evidence' as used under Section 319 Cr.P.C.. The relevant paragraphs of the judgement reads as under:-

"117.3. In view of the above position the word "evidence" in Section 319CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)—Whether the word "evidence" used in Section 319(1)CrPC could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?Answer

117.4. Considering the fact that under Section 319CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4)CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination."

11. The Hon'ble Apex Court in para 117.5 of the case of ***Hardeep Singh (supra)*** has also explained the nature of satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused. The relevant paragraph of the judgement reads as under:-

"117.5. Though under Section 319(4)(b)CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319CrPC would be the same as for framing a charge.The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different."

12. The scope and ambit of Section 319 Cr.P.C. has been well-settled by the

pronouncement of Constitution Bench of the Hon'ble Apex Court in ***Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92*** and paras 105 and 106 which are relevant for the purpose are reproduced hereunder :

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

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

13. In ***S. Mohammad Ispahani Vs. Yogendra Chandak (2017) 16 SCC 226***, this Court has observed and held as under :

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

14. In the case of ***Rajesh Vs. State of Haryana (2019) 6 SCC 368***, after considering the observations made by this Court in ***Hardeep Singh (supra)*** referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.c. and even those persons named in the F.I.R.

but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

15. The Hon'ble Apex Court in the case of **Yashodhan Singh and others vs. State of Uttar Pradesh and Another; (2023) 9 SCC 108** has explained the law purported by the Hon'ble Apex Court in the case of ***Hardeep Singh (supra)*** regarding the evidence required the satisfaction of the Court for summoning a person under Section 319 Cr.P.C. The paragraph Nos. 22.6, 22.7 and 22.8 which are relevant for the purpose are reproduced hereunder :

"22.6. It was also observed by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that apart from evidence in the strict legal sense recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319CrPC. Holding that the expression "evidence" must be given a broad meaning, it was observed that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. Such material would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have been suppressed or had escaped the notice of the court. Therefore, any material brought before the court even prior to the trial can be read within the meaning of the expression "evidence" for the purpose of Section 319CrPC. While considering the evidence that emanates during the trial, it was observed by this Court that evidence recorded by way of examination-in-chief and which is untested by cross-examination is nevertheless evidence which can be considered by the court for the exercise of power under Section 319CrPC so long as, it would appear to the court that some other person who is not facing the trial, may also have been involved in the offence.

22.7. Further, Section 319CrPC also uses the words "such person could be tried", which means not to have a mini-trial at the stage of Section 319CrPC by having examination and cross-examination and thereafter coming to a prima facie conclusion on the overt act of such person sought to be added. Such a mini-trial will affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all. As under Section 319(4)CrPC, such a person has the right to cross-examine the prosecution witnesses and examine the defence witnesses and advance his arguments. It was further observed that the power under Section 319CrPC can be exercised even after completion of examination-in-chief and the court does not have to wait till the said evidence is tested on cross-examination, for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other persons, not facing the trial in the offence.

22.8. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to

conviction. Therefore, such satisfaction is sine qua non for exercise of power under Section 319CrPC. Ultimately, the exercise of power is for the trial of such persons summoned together with the accused already on trial and not for conviction with the accused. Therefore, at that stage, the court need not form any definite opinion as to the guilt of the accused."

16. The trial Court has discussed the evidence on record and given reasons arriving at the conclusion, which are as follows:-

" The inquest of the dead body was conducted on 22.10.2016 at 21:40 Hrs in presence of Pawan Kumar, Kaleshwar, Rambabu, Suneel Kumar and Satish Kumar, wherein they have opined that the death of Manoj Kumar was due to hanging inside the room.

The postmortem reveals Lacerated Mark 28 cm 4cm below right ear and 7 cm below from chin and 7 cm below from left ear; gap 11 cm. In the opinion, the death was asphyxia due to antemortem hanging.

In the present matter Sachin Kumar the scribe of chik FIR has deposed as P.W.1 that on the basis of order dated 09.03.2017 of Chief Judicial Magistrate on application under Section 156 (3) Cr.P.C. the FIR has been registered on 19.03.2017 on the basis of which the GD has been entered.

P.W.2, Dr. Sanjeev Kumar has stated that he has conducted the postmortem and found that the death has been caused due to hanging. During his cross-examination he has stated that while conducting postmortem he did not found any traces that the deceased was in influence of any intoxicant.

P.W.3, Smt. Urmila Devi, mother of the deceased has stated that Krishna Mondal, Mohit Mondal brothers of Sheela have accused her son of having illicit relations with Sheela and called the police when they found Sheela Devi in the shop with shutter down. It is further stated that the accused came and ask her son to marry Sheela.

P.W.4, Kaleshwar, father of the deceased has stated that he was not at the place of incident and went to AIIMS for his medicine. He further stated that the constable has asked him to call his son otherwise they will register the FIR against him.

P.W.5 Pawan Kumar, brother of the deceased has stated that the accused have falsely targeted the deceased in the garb of free grocery.

The witnesses of fact have not deposed in regard to the positive assertion on instigation against the proposed accused but have only stated that the accused have asked the deceased to marry Sheela for having found from the shop of deceased, who was already married. So far as taking of free grocery is concerned , the same is stated differently, as P.W.3 stated it as of Rs.80,000/- and according to P.W.5, it was Rs.20,000/-"

17. From the perusal of the aforesaid reasons given by the trial Court in the impugned order, the statements of prosecution witnesses on record as well as law laid down by the Hon'ble Apex Court in the aforesaid decisions, it appears that trial Court has not committed any illegality or irregularity in arising at the conclusion that there is no sufficient ground to summon the opposite party Nos.2 to 4 for trial with the co-accused Khudiram. Hence, I do not find any merit in the revision

which is liable to be dismissed and is hereby **dismissed** accordingly.

(2024) 3 ILRA 78
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 1021 of 2023

Rasheed Ahmed ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Amit Chaudhary, Mahendra Kumar Yadav

Counsel for the Opposite Party:
G.A.

Criminal Law - Public Gambling Act, 1867 - Section 13 - Code of Criminal Procedure, 1973 - Sections 397, 401 & 360 - Probation of Offenders Act, 1958 - Sections 4 & 12 - Criminal Revision - Rasheed Ahmed Vs St. of U.P., Criminal Revision No. 1021 of 2023 - Revisionist challenged conviction under Section 13 for gambling, sentenced to Rs.100 fine and custody till court rising, alleging denial of probation benefits and improper conviction. Court held: (1) FIR alleged gambling inside a private hut, not a public place as required under Section 13, rendering offence not made out. (2) Conviction based solely on confession invalid, as it was made due to poverty and inability to contest, not voluntary understanding of charges. (3) Trial court failed to assess if prosecution allegations constituted offence, mechanically taking cognizance on proforma. (4) Sentence of both fine and imprisonment illegal under Section 13 (U.P. amendment), which allows either fine (Rs.50-250) or imprisonment (up to one month) for first offence. (5) Denial of probation under Section 4 of the 1958 Act without reasons violated Section 361 Cr.P.C. Revision allowed; conviction and sentence set aside; revisionist acquitted. (Paras 16-24)

Revision Allowed.

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

1. By means of the instant criminal revision filed under Section 397/401 Cr.P.C. the revisionist has challenged the validity of the judgment and order dated 05.11.2020, passed by the learned Chief Judicial Magistrate, Faizabad in Criminal Case No.11109 of 2018 arising out of Case Crime No.52 of 2018, under Section 13 of the Gambling Act, Police Station Kotwali Rudauli, District Faizabad, whereby the revisionist has been convicted for the aforesaid offence on the basis of his confession and has been sentenced to pay a fine of Rs.100/- and to remain in custody till the rising of the Court, only to the extent that it denies the benefit of Probation of Offenders Act, 1958 to the revisionist.

2. Sri. Amit Chaudhry, the learned counsel for the revisionist has submitted that the revisionist has no criminal history and, therefore, he was entitled to be granted benefit of provisions of Section 4 of the Probation of Offenders Act, 1958 (hereinafter referred to as the 'Act of 1958'). In that case the revisionist would be entitled to the benefit of Section 12 of the Act, 1958, which provides that a person found guilty of the offence and dealt with under the provisions of Section 3/4 of the Act, 1958 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

3. The learned counsel for the revisionist has submitted that Section 361 Cr.P.C. provides that whether a court could have dealt with an accused person under the provisions of Section 360 Cr.P.C. or provisions of Act, 1958, but it has not done

so, it shall record in its judgment the special reasons for not having done so, whereas no reason has been recorded in the impugned order for denial of benefit of Section 4 of the Act, 1958 to the revisionist.

4. *Per contra*, the learned A.G.A. – I has submitted that Section 4 of the Act of 1958 merely provides for release of the offender on probation of good conduct, but it does not provide for setting aside his conviction.

5. In reply to this submission of the learned A.G.A.-I, the learned Counsel for the revisionist has submitted that Section 12 of the Act of 1958 provides that a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer any disqualification attaching to a conviction of an offence under such law. Therefore, he confines his submission for the revisionist being granted the benefit of Section 4 of the Act of 1958, which would result in removal of the disqualification attached with the applicant being guilty of committing an offence.

6. Having heard the submissions of the learned Counsel for the revisionist and the learned A.G.A.-I, I proceeded to peruse the record of the case. In the memo of the revision, the validity of the order of sentence has also been challenged on the ground that the fine imposed by the trial Court exceeds the maximum fine of Rs.50/- permissible under Section 13 of the Public Gambling Act.

7. Section 13 of the Public Gambling Act, 1867 provides as follows: -

"13. Gaming and setting birds and animals to fight in public streets.—*A police-officer may apprehend without warrant—any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming, used in playing any game not being a game of mere skill in any public street, place or thoroughfare situated within the limits aforesaid, or*

any person setting any birds or animals to fight in any public street, place or thoroughfare situated within the limits aforesaid, or

any person there present aiding and abetting such public fighting of birds and animals.

Such person when apprehended shall be brought without delay before a Magistrate, and ***shall be liable to a fine not exceeding fifty rupees, or to imprisonment, either simple or rigorous, for any term not exceeding one calendar month;***

Destruction of instruments of gaming found in public streets*.—Any such police-officer may seize all instruments of gaming found in such public place or on the person of those whom he shall so arrest, and the Magistrate may on conviction of the offender order such instruments to be forthwith destroyed."*

8. The provisions of Section 13 have been amended in their application to the State of U.P. by U. P. Act No. 21 of 1961 and Section 13 of the Gambling Act 1867, as it applies to the State of Uttar Pradesh, provides as follows: -

"13. Gaming and setting birds and animals to fight in public streets.*—A police-officer may apprehend without warrant—any person found gaming in any public street, place or thoroughfare situated within the limits aforesaid, or*

any person setting any birds or animals to fight in any public street, place

or thoroughfare situated within the limits aforesaid, or

any person found in any public street, place or thoroughfare within the limits aforesaid with any instruments of gaming; or;

or any person there present making preparation for or aiding or abetting such gaming orpublic fighting of birds or animals.

Such person when apprehended shall be brought without delay before a Magistrate, and ***shall be liable - in the case of a first offence to a fine not exceeding two hundred and fifty rupees nor less than fifty rupees; or to rigorous imprisonment for a term not exceeding one month;*** *and*

in the case of any subsequent offence to a fine not exceeding five hundred rupees nor less than one hundred rupees and rigorous imprisonment for a term not exceeding six months nor less than one month.

Destruction of instruments of gaming found in public streets.*—Any such police-officer may seize all instruments of gaming found in such public place or on the person of those whom he shall so arrest, and the Magistrate may on conviction of the offender order such instruments to be forthwith destroyed."*

9. The maximum fine that can be imposed under Section 13 of the Gambling Act for an offence committed in the State of Uttar Pradesh, is Rs.250/-. Therefore, the fine of Rs.100/- imposed on the revisionist does not exceed the maximum permissible limit of fine.

10. However, the conviction and the sentence imposed appear to be illegal for other reasons which are being stated hereinbelow.

11. The impugned judgment does not contain any narration of the prosecution case and it has held the revisionist guilty merely on his admission.

12. The present matter arose from F.I.R. No. 50 of 2018 lodged by a Sub-Inspector of Police in Police Station Kotwali Rudauli, District Barabanki, on 09.02.2018 at 20:30 hours, alleging that upon receiving information from a *Mukhbir* (informer), that some persons were gambling inside a hut in the grove of one Anjum, a police team reached there and found that four persons, including the revisionist, were playing a game of cards involving gambling. All the four persons were arrested on the spot. Rs.1,400/- were recovered from the revisionist, Rs.1,000/- were recovered from Mohammad Shafeeq, Rs.800/- were recovered from Mohammad Abid and Rs.1,200/- were recovered fro Salauddeen. 52 playing cards and Rs.1,900/- were recovered from a polythene sheet laid there. Although several persons had gathered there, no person witnessed the recovery.

13. As per the entry made in the General Diary of the police station, the accused persons were arrested at 18:30 p.m. on 09.02.2018, they were lodged in the lock-up at 20:29 hours on 09.02.2018. The revisionist was released on bail at 08:17 hours on 10.02.2018.

14. A charge-sheet was submitted on 14.03.2018 stating that from the statement of the complainant, statement of the witnesses, spot inspection and the recovery made, offence under Section 13 of the Public Gambling Act, 1867 is established against all the accused persons. However, no statement recorded by the Investigating Officer has been annexed with the charge-sheet.

15. The trial Court took cognizance of the offence by means of an order dated

15.06.2018 on a printed proforma stating that the Court perused all the prosecution documents and there was sufficient ground to take cognizance of the offence.

16. Section 13 of the Public Gambling Act provides that *"A police-officer may apprehend without warrant—* ***any person found gaming in any public street, place or thoroughfare*** *situated within the limits aforesaid.."* The F.I.R. in the present case stated that the accused persons were gamling inside a hut situated in the grove on one Anjum, which was not a public street, place or thoroughfare situated within the limits of any public place. Therefore, from the allegations made in the F.I.R. itself, the offence under Section 13 of the Public Gambling Act, 1867 is not made out. The Investigating Officer has not carried out any investigation and he has submitted a charge-sheet in a mechanical manner.

17. The Trial Court also did not apply his mind to record a prima facie satisfaction as to whether the alleged offence was made out even if the F.I.R. allegations were assumed to be true and passed the order taking cognizance of the offence and summoning the accused persons, by filling up the names of the accused persons and other particulars on a printed proforma, which practice has been deprecated by the Superior Courts time and again.

18. The revisionist appeared before the trial Court on 05.11.2020 and he filed an application stating that he is a poor person and he is unable to contest the case. For this reason, he stated that he wanted to get the case disposed off on the basis of his confession and it would be in the interest of justice that the case be disposed off by imposing the minimum fine against him.

19. In the impugned order dated 05.11.2020, the trial Court has recorded the aforesaid fact and has held the revisionist guilty on the basis of his confession. Such a confession made because of the compelling circumstance of the accused being unable to contest the case because of his poverty, is no confession in the eyes of law, particularly when the Court itself had not cared to examine that even if the prosecution allegations were taken to be true, the offence under Section 13 of the Public Gambling Act 1867 was not made out against the revisionist.

20. The sentence order records the submission of the revisionist that he was a poor and destitute person and he was accordingly sentenced to pay a fine of Rs.100/- and to remain in custody till the rising of the Court. The revisionist had already been in custody for a period since 18:30 p.m. on 09.02.2018 till 08:17 hours on 10.02.2018 of about 2 years.

21. An offence under Section 13 committed in the State of Uttar Pradesh carries a maximum punishment of fine of an amount between Rs.50/- and Rs.250/- or imprisonment for a maximum period of one month. The trial Court could not have punished the revisionist with fine and imprisonment both.

22. The Courts are always under an obligation to ensure that no injustice is caused to any person and that no person is denied the Fundamental Right of equal protection of laws When an accused person makes a confession for the reason that he is unable to defend the prosecution case because of his poverty and destituteness, the Court's duty to ensure that no injustice is caused to him and the equal protection of the laws is not denied to him, becomes even more onerous. The Court must consider whether the allegation against the

accused make out a case for his conviction and sentence and whether the accused has made the confession after understanding the nature of allegation made against him and after understanding its consequences.

23. In view of the aforesaid discussion, the order of conviction and sentence imposed upon the revisionist on the basis of his confession only, when the offence is not made out even if the prosecution case is accepted to be true, is unsustainable in law and the same deserves to be set aside.

24. Accordingly, the revision is allowed and the judgment and order dated 05.11.2020, passed by the learned Chief Judicial Magistrate, Faizabad in Criminal Case No.11109 of 2018 arising out of Case Crime No.52 of 2018, under Section 13 of the Gambling Act, Police Station Kotwali Rudauli, District Faizabad, whereby the revisionist has been convicted for the aforesaid offence on the basis of his confession and has been sentenced to pay a fine of Rs.100/- and to remain in custody till the rising of the Court, is hereby set aside and the revisionist is acquitted of the charges.

(2024) 3 ILRA 82
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 1059 of 2023

Juvenile 'X' ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Abhinav Srivastava, Rahul Srivastava

Counsel for the Opposite Party:
G.A.

Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015 - Sections 94, 102 & 18(3) - Indian Penal Code, 1860 - Sections 363, 302, 201, 376 & 511 - POCSO Act, 2012 - Sections 7/8 - Juvenile revisionist challenged order dated 07.07.2023 by Children's Court, dismissing appeal against Juvenile Justice Board's order (19.04.2022) to try him as an adult for heinous offences (kidnapping, murder, attempted rape, sexual assault on a 3.5-year-old girl). Court held: (1) Juvenile Justice Board's age determination (16 years, 6 months) based on school certificate (DOB 10.03.2001) under Section 94(2)(i) was final, as unchallenged. (2) Revisionist's claim of being 13 years, 11 months based on High School marks-sheet not substantiated; original certificate's authenticity upheld. (3) Board's decision to try juvenile as adult considered psychiatric report, physical/mental capacity, and gravity of offence, upheld by Children's Court. (4) No evidence of arbitrary or illegal judicial process; revisionist's grounds misconceived. (5) Heinous nature of offence (murder, attempted rape) warranted no leniency (Rishipal Singh Solanki Vs St. of U.P., (2022) 8 SCC 602; Sanjeev Kumar Gupta Vs St. of U.P., (2019) 12 SCC 370; St. (UT of J&K) Vs Shubam Sangra, 2022 SCC OnLine SC 1592; Manoj Vs St. of Har., (2022) 6 SCC 187; Jyoti Prakash Rai Vs St. of Bihar, AIR 2008 SC 1696). Revision dismissed. (Paras 9-22)
Revision Dismissed.

Case Law Cited:
1. Rishipal Singh Solanki Vs St. of U.P., (2022) 8 SCC 602 (Para 10)

2. Sanjeev Kumar Gupta Vs St. of U.P., (2019) 12 SCC 370 (Para 11)

3. St. (UT of J&K) Vs Shubam Sangra, 2022 SCC OnLine SC 1592 (Para 12)

4. Manoj Vs St. of Har., (2022) 6 SCC 187 (Para 13)

5. Jyoti Prakash Rai Vs St. of Bihar, AIR 2008 SC 1696 (Para 14)

6. Parag Bhati Vs St. of U.P., (2016) 12 SCC 744 (Para 12)

7. Babloo Pasi Vs St. of Jharkhand, (2008) 13 SCC 133 (Para 13)

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

1. Heard Sri Abhinav Srivastava, the learned counsel for the revisionist, Sri Anurag Verma, the learned A.G.A.-I appearing on behalf of the State and perused the records.

2. By means of the instant revision filed under Section 102 of Juvenile Justice Act, 2015 the revisionist has made following prayers:

"Wherefore it is prayed that the present Criminal Revision may kindly be allowed and the impugned order dated 07.07.2023 a Criminal Appeal 29/2023 Ram Pratap (Changed Name) vs. State of U.P. by the Learned Court of Additional District Judge/Special Judge (POCSO) Ayodhya, in so far as it relates to the present revisionist may kindly be set-aside.

It is further prayed that during the pendency of this Criminal Revision before this Hon'ble Court, the proceedings of the case in the court below may kindly be stayed.

It is further prayed that any other relief which this Hon'ble Court deems fit and proper in the circumstances of the case may also kindly be granted to the revisionists."

3. The impugned order dated 07.07.2023 is an order passed by the Presiding Officer, Children's Court, Faizabad/Ayodhya dismissing the appeal filed by the juvenile-delinquent against an order dated 19.04.2023, passed by Juvenile Justice Board holding that the juvenile-delinquent needs to be tried as an adult and referring the matter to the Children's Court.

4. The aforesaid order dated 19.04.2022 was passed by the Juvenile Justice Board in furtherance of an order dated 18.04.2022 whereby the revisionist was declared to be a juvenile in conflict with law and it was held that on the date of the incident he was about 16 years, 6 months of age.

5. The order dated 18.04.2022, passed by the Juvenile Justice Board was not challenged by the revisionist and it has attained finality. The order dated 19.04.2022, by which the matter was referred to the Children's Court, has also not been challenged in this revision.

6. The revisionist has merely challenged the appellate order dated 07.07.2023 on the grounds that the decision is bad in law, the impugned order has been passed without application of mind to the facts and circumstances of the case and material available on record and it is illegal, arbitrary and without any application of judicial mind. It has further been contended that as per the High School marks-sheet of the revisionist, he was about 13 years, 11 months and 10 days at the time of the incident and that the Sessions Court has not considered the provisions contained in Section 94 (2) (i) Juvenile Justice (Care and Protection of Children) Act, 2015.

7. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides as follows: -

***"94. Presumption and determination of age.**— (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person*

brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

the birth certificate given by a corporation or a municipal authority or a panchayat;

and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

8. A bare reading of Section 94 (2) (i) of the Juvenile Justice (Care and Protection of Children) Act, 2015 indicates that the date of birth certificate from the school or the matriculation or the equivalent certificate from the concerned examination board, have been given equivalent weight.

9. In the order dated 18.04.2022, the Juvenile Justice Board has mentioned that as per the marks-sheet of the revisionist of the High School examinations held in the year 2018, his date of birth was 12.05.2004 and he has passed the High School examination at the age of less than 13½ years. The date of the incident is 22.04.2018. The prosecution has produced a certificate dated 10.08.2018 issued by Modern School, Poora-1, Faizabad, wherein the date of birth of the juvenile-delinquent is mentioned to be 10.03.2001. Therefore, it was a document mentioned in Section 94 (2) (i) Juvenile Justice (Care and Protection of Children) Act.

10. The learned counsel for the revisionist has relied upon a decision of the Hon'ble Supreme Court in the case of **Rishipal Singh Solanki Vs. State of U.P.:** (2022) 8 SCC 602, wherein the Hon'ble Supreme Court referred to numerous precedents on this point and summarized the law in this regard as follows: -

"33. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

33.1. A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

33.2. An application claiming juvenility could be made either before the court or the JJ Board.

33.2.1. When the issue of juvenility arises before a court, it would be

under sub-sections (2) and (3) of Section 9 of the JJ Act, 2015 but when a person is brought before a committee or JJ Board, Section 94 of the JJ Act, 2015 applies.

33.2.2. If an application is filed before the court claiming juvenility, the provision of sub-section (2) of Section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of Section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

33.2.3. When an application claiming juvenility is made under Section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a court, then the procedure contemplated under Section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence ***the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the criminal court concerned, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending*** *(vide Section 9 of the JJ Act, 2015).*

33.3. That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the court to discharge the initial burden. However, ***the documents mentioned in Rules 12(3)(a)(i), (ii) and (iii) of the JJ Rules, 2007 made under the JJ Act, 2000 or sub-section (2) of Section 94 of the JJ Act, 2015, shall be sufficient for prima facie satisfaction of the court. On the basis of the aforesaid documents a presumption of juvenility may be raised.***

33.4. The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

33.5. That the procedure of an inquiry by a court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the criminal court concerned. In case of an inquiry, the court records a prima facie conclusion but ***when there is a determination of age as per sub-section (2) of Section 94 of the 2015 Act, a declaration is made on the basis of evidence.*** *Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus,* ***the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.***

33.6. That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7. This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8. If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ

Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, ***the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.***

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.

33.11. Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

11. In **Sanjeev Kumar Gupta v. State of U.P.**, (2019) 12 SCC 370, the High Court had held that the accused was a juvenile on the basis of the date of birth entered in his matriculation certificate. In appeal, the Hon'ble Supreme Court scrutinized the evidence and found that the date of birth in the matriculation certificate was recorded on the basis of the date of birth recorded in the previous school where the accused was a student from Class V to Class X and it was recorded without any underlying document. On the other hand, there was a clear and unimpeachable evidence in the form of the date of birth recorded in the records of Saket Vidya Sthali School. The Hon'ble Supreme Court reversed the order of this High Court based on the findings recorded on the basis of the matriculation certificate. Thus the legal position is that the date of birth entered in the High School certificate has not to be believed blindly, if the date of birth entered in the records of the school that was first attended by the accused is to the contrary. In such circumstances, the school record has to be considered for ascertaining the date of birth of the accused.

12. In **State (UT of J&K) v. Shubam Sangra,** 2022 SCC OnLine SC 1592, the Hon'ble Supreme Court held that: -

73. Thus, it is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor on the date of the incident and the documentary evidence at least prima facie establishes the same, he would be entitled to the special protection under the Juvenile Justice Act. However, ***when an accused commits a heinous and grave crime like the one on hand and thereafter attempts to take the statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of a common man in the institution entrusted with the administration of justice.*** *As observed by this Court in Parag Bhati [Parag Bhati v. State of U.P., (2016) 12 SCC 744], the benefit of the principle of benevolent legislation attached to the Juvenile Justice Act would thus be extended to only such*

cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence inspiring confidence regarding his minority ***as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he is alleged to have committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.***

13. In **Manoj v. State of Haryana**, (2022) 6 SCC 187, the Hon'ble Supreme Court held that: -

"41. ... the plea of juvenility has to be raised in a bonafide and truthful manner. If the reliance is on a document to seek juvenility which is not reliable or dubious in nature, the appellant cannot be treated to be juvenile keeping in view that the Act is a beneficial legislation. As also held in Babloo Pasi [Babloo Pasi v. State of Jharkhand, (2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] , the provisions of the statute are to be interpreted liberally but the benefit cannot be granted to the appellant who has approached the Court with untruthful statement."

14. In Manoj (supra) the Hon'ble Supreme Court has referred to an earlier decision in the case of **Jyoti Prakash Rai Vs. State of Bihar: AIR 2008 SC 1696**, wherein it was held that though the Act is a beneficial legislation but principles of beneficial legislation are to be applied only for the purpose of interpretation of the statute and not for arriving at a conclusion as to whether a person is juvenile or not.

15. When this court examines the facts of the case in the light of the law explained by the Hon'ble Supreme Court in the above mentioned cases, it appears that the opposite party no.2 had lodged the F.I.R. on 22.07.2022 stating that her daughter aged about three and half years had gone missing from her home at about 3.30 p.m. on 22.04.2018. After investigation a charge sheet was submitted on 29.04.2018, stating that the dead body of the missing girl child was recovered on 25.04.2018 and thereafter Section 302 I.P.C. was added. The dead body was hidden in a sack tied with a rope. Pests had developed in the dead body. The charge sheet was submitted against the juvenile-delinquent for commission of offences under Sections 363, 302, 201, 376, 511 I.P.C. and Section 7/8 of POCSO Act and three other co-accused persons namely, father, mother and brother of the juvenile-revisionist were charged for commission of offence under Sections 302 and 201 I.P.C.

16. The learned counsel for the revisionist has contended that the certificate issued by the Modern School was not produced in original but a mere photocopy thereof was filed.

17. The contention raised by the learned counsel for the revisionist cannot be examined by this court at this stage as the order dated 18.04.2022 states that the certificate was issued before the Juvenile Justice Board and not its copy and this order has not been assailed by the revisionist and it has attained finality. There is no material before this Court to establish that the original certificate regarding date of birth was not produced before Juvenile Justice Board. When the Juvenile Justice Board in the order dated 18.04.2022 stated that the certificate dated 10.08.2018 issued by Modern School, Poora-1, Faizabad, wherein the date of birth of the juvenile-

delinquent is mentioned to be 10.03.2001, was presented before the Board, in absence of any material to controvert this statement this court cannot presume that the aforesaid narration is incorrect.

18. In furtherance of the aforesaid order dated 18.04.2022 the Juvenile Justice Board passed an order dated 19.04.2022 for transferring the matter to be tried by the Children's Court Section 18 (3) of the Juvenile Justice (Care and Protection of Children) Act, 2015. In the impugned order dated 07.07.2023, passed by the Children's Court it has been held that by means of an order dated 18.04.2022 the Juvenile Justice Board has ascertained the age of the juvenile to be 16 years, 6 months and no appeal was filed against the aforesaid order and it has attained finality. Therefore, the Children's Court had no other option except to treat the age of the juvenile to be 16 years, 6 months as ascertained by the order dated 18.04.2022 passed by the Juvenile Justice Board, which has attained finality. The Juvenile Justice Board has passed the order dated 19.04.2022 after taking into consideration the report of the Psychiatrist and assessing the physical and mental capabilities of the juvenile as also his capacity to understand the consequence of the offence allegedly committed by him. The juvenile is an accused of kidnapping a girl child aged about three and half years and killing her by strangulating her. An attempt to rape was made against the victim and sexual assault was made on her. Her dead body was hidden in a sack and three days after the incident it was thrown away from the rooftop. Pests had developed in the dead body. These facts indicate the physical and mental capacity of the juvenile. The appellate court found that all the facts and circumstances of the case had been duly considered by the Juvenile Justice Board and therefore there was no need for any interference in that order.

19. In view of the aforesaid discussions, the grounds taken in the memo of revision that the impugned order has been passed in an illegal and arbitrary manner and without any application of judicial mind, is absolutely misconceived. It appears that the learned counsel for the revisionist has used such heavy words without taking care to understand its implication and without even going through the appellate order. The lack of challenge to the original order dated 19.04.2022 against which the appeal was filed wherein the impugned order dated 07.07.2023 was passed clearly indicates lack of proper professional care and concern while drafting the revision.

20. While deciding the plea of juvenility the courts have to take a just view after taking into consideration all the relevant facts and circumstances of the case and the material available on record, to ensure justice not only to juvenile-delinquent but to the victim of the offence, who in the present case was a girl aged about three and half years and upon whom an attempt to rape was committed who was subjected to sexual assault and who was killed ultimately. The offence committed falls in the category of the most heinous offences that can be committed by any human being.

21. Therefore, keeping in view the peculiar facts and circumstances of the case no lenient view can be taken favouring the accused - revisionist.

22. The revision lacks merit and the same is accordingly ***dismissed.***

(2024) 3 ILRA 89
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2023
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 1079 of 2023

Smt. Lakshmi Poddar @ Shikha Poddar & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Ravi Yadav, Sri Anil Kumar Srivastav (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498A, 323, 504, 506 & 406 - Dowry Prohibition Act, 1961 - Sections 3/5 - Code of Criminal Procedure, 1973 - Sections 245, 397 & 401 - Revisionists, married sisters-in-law of complainant, challenged dismissal of discharge application in Complaint Case No. 221 of 2004 for alleged dowry harassment and matrimonial cruelty. Court held: (1) General and omnibus allegations against revisionists without specific roles attributed; no evidence they resided with complainant or benefited from dowry demands. (2) Revisionists, living in distant cities (Calcutta, Thane), unlikely to be involved in matrimonial discord. (3) Trial court failed to consider lack of specific allegations and probability of false implication, mechanically dismissing discharge application. (4) Supreme Court precedents emphasize caution against roping in distant relatives in matrimonial disputes without prima facie evidence (Kahkashan Kausar @ Sonam Vs St. of Bihar, AIR 2022 SC 820; Geeta Mehrotra Vs St. of U.P., (2012) 10 SCC 741; Preeti Gupta Vs St. of Jharkhand, (2010) 7 SCC 667; Rajesh Sharma Vs St. of U.P., (2018) 10 SCC 472; Arnesh Kumar Vs St. of Bihar, (2014) 8 SCC 273; K. Subba Rao Vs St. of Telangana, (2018) 14 SCC 452). Revision partly allowed; impugned order set aside regarding revisionists; matter remanded for fresh consideration of discharge application. (Paras 11-21)

Revision Partly Allowed.

Case Law Cited:

1. Kahkashan Kausar @ Sonam Vs St. of Bihar, AIR 2022 SC 820 (Para 11, 17)

2. Geeta Mehrotra Vs St. of U.P., (2012) 10 SCC 741 (Para 12, 16, 17)

3. Preeti Gupta Vs St. of Jharkhand, (2010) 7 SCC 667 (Para 12, 15)

4. Rajesh Sharma Vs St. of U.P., (2018) 10 SCC 472 (Para 12, 13)

5. Arnesh Kumar Vs St. of Bihar, (2014) 8 SCC 273 (Para 12, 14)

6. K. Subba Rao Vs St. of Telangana, (2018) 14 SCC 452 (Para 12, 17)

7. G.VS Rao Vs L.H.VS Prasad, (2000) 3 SCC 693 (Para 12, 16)

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. By means of instant Criminal Revision the revisionist has assailed the judgment and order dated 23.12.2023 passed by learned Additional Chief Judicial Magistrate, Court No.2 Gorakhpur in Complaint Case No.221 of 2004 (Alka Rani Vs. Rajesh Agarwal and others), whereby application for discharge under Section 245 Cr.P.C. moved by accused persons Rajesh Agarwal, Maya Devi, Lakshmi Poddar @ Shikha Poddar and Sunita Tulsyan has been dismissed by the trial court.

2. Heard Sri Anil Kumar Srivastava, Senior Advocate, assisted by Sri Ravi

Yadav, learned counsel for the revisionists, Sri Yogendra Singh Yadav, learned A.G.A. for the State and perused the material on record.

3. The facts leading to filing of present revision are that the complainant/respondent No.2 initially moved an application under Section 156 (3) Cr.P.C. before the Court of Judicial Magistrate Ist Gorakhpur on 09.08.2004 which was registered as Misc. Application No.221 of 2004 with averments that her marriage with opposite party No.1 Rajesh Agarwal was solemnized 14.04.2002 according to hindu rites and rituals in arranged manner. She was send off to her matrimonial home after marriage. However just after her arrival at her matrimonial home her mother-in-law, brother-in-law and sisters-in-law began to tease her for not bringing sufficient dowry and when she objected to this, they gave her beating, she suffered this mall treatment and observed her matrimonial obligations after sometime of marriage she came to know that her husband is suffering from illness. He used to suffer lunatic bouts from time to time and his family members were taking advantage of his situation and did not try to treat him. His family members used to provoke him against her and on their provocation her husband used to beat her. She also came to know that her husband was previously married to one Smt. Meena and she was also subjected to matrimonial cruelty for demand of dowry and ultimately the marriage was broken and FIR was lodged by father of Meena against her husband and family members under Section 323, 504, 506, 498A of IPC. The family members of her husband exerted pressure on her to get her third pregnancy aborted and when she did not agree to this, they abused and harassed her. During that period she knew that these people were trying to kill her and they turned her out from their home after sometime, she reached at her parental place any how. She delivered a male child on 01.11.2003 in private hospital at Gorakhpur. Her in-laws and husband visited her, but did not spend any money. Her sisters-in-law Lakshmi Poddar and Sunita Tulsyan and other family members were also exerting pressure on her to get her pregnancy aborted.

4. Learned court below vide order dated 28.08.2004 directed to register the application under Section 156 (3) Cr.P.C. as complaint and after recording statement of the complainant under Section 200 Cr.P.C. and her witnesses Thakur Prasad Gupta, Ramesh Chandra Sharma under Section 202 Cr.P.C., summoned the accused persons vide order dated 13.05.2005 for charge under Section 498A, 323, 504, 506, 406 of IPC and Section 3/5 of Dowry Prohibition Act. The accused persons challenged the summoning order with prayer to quash the entire proceedings in complaint case No.221 of 2004 by filing petition under Section 482 Cr.P.C. No.4228 of 2006, which was dismissed vide order dated 12.10.2018 passed by this Court.

5. Learned court below recorded the statement of the complainant Alka Rani under Section 244 Cr.P.C., wherein she was also cross examined at length on behalf of the accused persons at precharge stage. Thakur Prasad Gupta, father of the complainant was also examined as PW2 at the stage of Section 244 Cr.P.C., in which they supported complaint version.

6. Accused Rajesh Agarwal and others moved and application under Section 245 Cr.P.C. on 12.10.2022 with a prayer to discharge them with averment that they

have been falsely implicated in the case. Accused Rajesh Agarwal, the elder brother of the husband of the complainant is 80% disabled and bedridden. The complainant and her family members themselves misbehaved with the accused persons. Rajesh Agarwal, the husband of the complainant filed a petition under Section 9 of the hindu marriage act for restitution of conjugal rights on 18.02.2004, in which notice was issued to the complainant and said petition was decided on 07.12.2005 exparte, but the complainant has not complied with the decree of court and did not join the husband instead, she file an application for setting aside the decree. On 17.03.2004 the complainant and her family members assaulted the husband Rajesh Agarwal and declined to send the complainant with him. After which he lodged an FIR vide C-6/4 under Section 406, 506 IPC against the complainant and her parents, in which chargesheet has been filed. The present complaint was filed by the complainant with false allegations against the accused persons and the accused persons are liable to be discharged.

7. Learned court below vide impugned order dated 23.12.2022 considered and facts and evidence of the case. The facts of the case as well as the evidence adduced by the complainant at the stage of Section 244 Cr.P.C. in light of documents available on record and dismissed the application under Section 245 Cr.P.C. with finding that there is ample evidence against accused persons at this stage for framing charge against them and putting demand prior.

8. Feeling aggrieved by the impugned order passed by learned Magistrate the present revisionists who are married sisters-in-law (Nanads) of the complainant have preferred present revision with averments that revisionists were already married at the time of marriage of complainant and their brother Rajesh Agarwal. The Omnibus and general allegations are levelled against them in the complaint only with a view to harass them, as they are sisters of the husband of the complainant. However, revisionist No.1 Smt. Lakshmi Poddar alias Shikha Poddar was residing in Calcutta at the time of incident and Smt. Sunita Tulsyan was residing in district Thane, Maharashtra at that time. They are presently residing in Hyderabad and Maharashtra alongwith their husband and family.

9. Learned counsel for the revisionists submitted that no specific allegation has been made against the revisionists in complaint as well as in evidence of PW1 and 2 recorded by the court below, they are not supposed to be beneficiary of any demand of dowry made by the husband or his immediate family as alleged. They have not been attributed any specific role in the offence, learned court below dismissed the discharge application with respect to present revisionists also in mechanical manner without considering the role attributed to accused persons. They are not concerned with matrimonial discord between the complainant and her husband. They have been implicated as accused in complaint only with a view to harass them due to their relationship with the husband of the complainant.

10. Per contra, learned counsel appearing for respondent No.2 submitted that the revisionists although married sisters-in-law of the complainant have played active role in harassment and torture of the complainant. They were also hand in grove with co-accused persons in demand

of dowry and subjecting the complainant to matrimonial cruelty. The complainant and her witnesses had given ample evidence regarding complicity of the accused persons including the revisionists in their sworn testimony before the court under Section 244 Cr.P.C. The grounds taken in discharge application are misleading and baseless. The revision deserves to be dismissed.

11. Learned counsel for the revisionists placed reliance on judgment of Hon'ble Supreme Court in **Kahkashan Kausar @ Sonam and others Vs. State of Bihar and others; AIR 2022 SC 820**, this was a case under Sections 341, 323, 379, 354, 498A read with Section 34 of Cr.P.C. The accused persons had challenged the summoning order under Section 482 Cr.P.C. before the High Court, but same was dismissed by High Court. By the impugned order Hon'ble Supreme Court allowed Special Leave to Appeal against order of High Court with observations that " therefore, upon consideration of the relevant circumstances and in the absence of any specific role attributed to the Accused Appellants, it would be unjust if the Appellants are forced to go through the tirbulation of a trial, i.e., general and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial. It has been highlighted by this Court in varied instances, that a criminal trial leading to an eventual acquittal also inflicts severe scars upon the Accused, and such an exercise must therefore be discouraged.

12. The Hon'ble Supreme Court also observed in aforesaid case as under:-

"12. Before we delve into greater detail on the nature and content of allegations made, it becomes pertinent to mention that incorporation of Section 498A of Indian Penal Code was aimed at preventing cruelty committed upon a woman by her husband and her in- laws, by facilitating rapid state intervention. However, it is equally true, that in recent times, matrimonial litigation in the country has also increased significantly and there is a greater disaffection and friction surrounding the institution of marriage, now, more than ever. This has resulted in an increased tendency to employ provisions such as 498A Indian Penal Code as instruments to settle personal scores against the husband and his relatives.

13. This Court in its judgment in Rajesh Sharma and Ors. v. State of U.P. and Anr. (2018) 10 SCC 472, has observed:

"1 4 . Section 498-A was inserted in the statute with the laudable object of punishing cruelty at the hands of husband or his relatives against a wife particularly when such cruelty had potential to result in suicide or murder of a woman as mentioned in the statement of Objects and Reasons of the Act 46 of 1983. The expression 'cruelty' in Section 498A covers conduct which may drive the woman to commit suicide or cause grave injury (mental or physical) or danger to life or harassment with a view to coerce her to meet unlawful demand. It is a matter of serious concern that large number of cases continue to be filed under already referred to some of the statistics from the Crime Records Bureau. This Court had earlier noticed the fact that most of such complaints are filed in the heat of the moment over trivial issues. Many of such complaints are not bona fide. At the time of filing of the complaint, implications and consequences are not visualized. At times such complaints lead to uncalled for

harassment not only to the Accused but also to the complainant. Uncalled for arrest may ruin the chances of settlement."

14. Previously, in the landmark judgment of this Court in ***Arnesh Kumar v. State of Bihar and Anr.(2014) 8 SCC 273,*** *it was also observed:*

"4. There is a phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A Indian Penal Code was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A Indian Penal Code is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grandfathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested."

15. Further in Preeti Gupta and Anr. v. State of Jharkhand and Anr. : (2010) 7 SCC 667, it has also been observed:

"32. It is a matter of common experience that most of these complaints Under Section 498A Indian Penal Code are filed in the heat of the moment over trivial issues without proper deliberations. We come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment are also a matter of serious concern.

33. The learned Members of the Bar have enormous social responsibility and obligation to ensure that the social fiber of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned Members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint Under Section 498A as a basic human problem and must make serious endeavour to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fiber, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases.

34. Unfortunately, at the time of filing of the complaint the implications and consequences are not properly visualized by the complainant that such complaint can lead to insurmountable harassment, agony and pain to the complainant, Accused and his close relations.

35. The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to

be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful."

16. In ***Geeta Mehrotra and Anr. v. State of U.P. and Anr. : (2012) 10 SCC 741,*** *it was observed:*

"21. It would be relevant at this stage to take note of an apt observation of this Court recorded in the matter of G.V. Rao v. L.H.V. Prasad and Ors. reported in (2000) 3 SCC 693 wherein also in a matrimonial dispute, this Court had held that the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside. Their Lordships observed therein with which we entirely agree that:

"There has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as Accused in the criminal case. There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different courts." The view taken by the judges in this matter was that the courts would not encourage such disputes."

17. Recently, in K. Subba Rao v. The State of Telangana : (2018) 14 SCC 452, it was also observed that:

"6 . The Courts should be careful in proceeding against the distant relatives in crimes pertaining to matrimonial disputes and dowry deaths. The relatives of the husband should not be roped in on the basis of omnibus allegations unless specific instances of their involvement in the crime are made out."

18. The above-mentioned decisions clearly demonstrate that this Court has at numerous instances expressed concern over the misuse of Section 498A Indian Penal Code and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the Accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this Court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them."

13. Section 245 of Cr.P.C. reads as under:-

245. When accused shall be discharged.

" (1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

14. The revisionists are married sisters-in-law (Nanad) of the complainant. The complainant has admitted in her cross examination under Section 244 Cr.P.C. that present revisionists were already married when she came to know after marriage and they were living with there respective spouse, they have taken specific case that they were implicated in the case wrongly in a sense that matter pertains to inter se dispute between Rajesh Agarwal and the complainant.

15. Omnibus and general allegations are levelled against the accused in the complaint as well as in the evidence of the witnesses recorded under Section 244 Cr.P.C. together with co-accused persons, accused Rajesh Agarwal, the husband of the complainant, Maya Devi mother-in-law, Krishna Mohan Agarwal brother-in-law (Jeth) and Suman Agarwal (Jethani). Discharge application under Section 245 Cr.P.C. was filed by four accused persons barring Jeth and Jethani of the complainant, which was dismissed by impugned order dated 23.12.2022 by learned trial court with observations that there is sufficient grounds to put the accused persons on trial for charges levelled against them. Out of four accused persons, whose discharge application has been dismissed, by impugned order, this revision has been preferred only by two accused Smt. Lakshmi Poddar and Smt. Sunita Tulsyan who are married sisters-in-law of the complainant. They are residing at distant places, there is no allegation in the complaint or in statement of the witnesses that revisionists were living together with the complainant and her husband at their parental place.

16. This is admitted fact that they were married prior to the marriage of Rajesh Agarwal and complainant. The complainant has stated in her evidence that her sisters-in-law are greedy people and used to visit her matrimonial home and gave her beating, and all the accused persons got her pregnancy aborted. But there is no medical evidence in support of this version.

17. The case of the revisionists is squarely covered by judgment of Supreme Court in **Kahkashan @ Sonam and others Vs State of Bihar and others and in Geeta Mehrotra and another Vs. State of U.P.** in which Hon'ble Apex Court has filed the grave situation where all the family members and relatives of husband are roped in complaint under Section 498 of IPC by way of general and omnibus allegation made in course of matrimonial dispute.

18. The court below, while dismissing the discharge application has failed to notice the role of the revisionists and the probability of their false implication, as these are married sisters-in-law of the complainant who are stated to have been living at far away place during the period when offence of matrimonial cruelty and demand of dowry was practised against the

complainant. They are not supposed to be beneficiary of any demand of dowry made by co-accused persons.

19. The application for rejection of discharge application requires reconsideration in respect of the present revisionists in light of foregoing discussions and the judgments of Hon'ble Supreme Court cited above.

20. The revision stands partly **allowed.**

21. The impugned order passed by learned court below is partly set-aside, in so far as it relates to present revisionists and learned Magistrate is directed to consider the prayer for discharge made by present revisionists a fresh in accordance with law after giving opportunity of hearing to both the sides.

(2024) 3 ILRA 96
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2024
BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 1206 of 2023

Bantu & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Kunwar Bhadur Dixit, Sri Anurag Shukla, Sri Anuraj Shukla

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Sections 227, 228, & 397 – Indian Penal Code, 1860 – Sections 376 & 120B – Discharge Application – Scope of Revisional Jurisdiction – Prima Facie Case – Consideration of Evidence at Charge Framing Stage

The revisionists, Bantu and Ramveer Singh, challenged the order dated 13.02.2023 passed by the Additional Sessions Judge, Mainpuri, in Sessions Trial No. 189 of 2022, rejecting their discharge application under Section 227 Cr.P.C. in Case Crime No. 16 of 2022 (Sections 376, 120B IPC). The FIR, lodged by Nema Devi on 23.02.2022, alleged that on 20.02.2022, Bantu lured her to Ramveer Singh's tubewell under the pretext of negotiation, where Ramveer raped her, and co-accused Prem Narayan attempted to outrage her modesty, with Bantu involved in the conspiracy. The revisionists argued that the FIR was false, motivated by a property dispute involving an agreement to sell, and supported by a pen drive allegedly recording the victim's threat to falsely implicate them. They also cited contradictions in the victim's St.ments under Sections 161 and 164 Cr.P.C., lack of medical evidence, and delay in FIR lodging. Held: The court, relying on Amit Kapoor Vs Ramesh Chander ((2012) 9 SCC 460), St. of Orissa Vs Debendra Nath Padhi ((2005) 1 SCC 568), and other precedents, held that at the charge-framing stage, the trial court's role is limited to determining if a prima facie case exists based on prosecution materials, without meticulously weighing evidence or considering defense materials like the pen drive. The victim's consistent St.ments under Sections 161 and 164 Cr.P.C. established a prima facie case for rape and conspiracy. The alleged motive of a property dispute and the pen drive evidence could not be considered at this stage, as per Debendra Nath Padhi. The trial court's order was neither illegal nor arbitrary, as it correctly applied judicial mind to the prosecution's evidence.

Revision was dismissed.

Case Law Cited:

1. Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460

2. St. of Orissa Vs Debendra Nath Padhi, (2005) 1 SCC 568

3. Ghulam Hassan Beigh Vs Mohammad Maqbool Magrey, SLP (Crl.) No. 4599 of 2021

4. Union of India Vs Prafulla Kumar Samal, (1979) 3 SCC 4

5. Dipakbhai Jagdishchandra Patel Vs St. of Guj., (2019) 16 SCC 547

6. Sajjan Kumar Vs C.B.I., (2010) 9 SCC 368

7. St. of Karnataka Vs M.R. Hiremath, (2019) 7 SCC 515

8. Asim Shariff Vs National Investigation Agency, (2019) 7 SCC 148

9. St. of Bihar Vs Ramesh Singh, (1977) 4 SCC 39

10. Madhavrao Jiwajirao Scindia, (1988) 1 SCC 692

11. St. of Bihar Vs P.P. Sharma, 1992 Supp (1) SCC 222

12. M.N. Damani Vs S.K. Sinha, (2001) 5 SCC 156

13. St. of Maharashtra Vs Som Nath Thapa, (1996) 4 SCC 659

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

This criminal revision has been filed against the impugned order dated 13.02.2023 passed by learned Additional Sessions Judge/F.T.C. Court No.1, Mainpuri in Sessions Trial No.189 of 2022 (State vs. Bantu and another) arising out of Case Crime No.16 of 2022, under Sections 376 and 120 B I.P.C., Police Station-Orchha, District-Mainpuri.

2. By the impugned order, the trial Court rejected the application of the revisionists under Section 227 Cr.P.C. for discharging them of the offence, under Sections 376 and 120 B I.P.C.

3. It has been submitted by learned counsel for the revisionists that trial Court without considering the facts as well as evidence on record illegally or arbitrarily rejected the discharge application of the revisionists. While rejecting the application of the revisionists, trial Court has not apply its judicial mind or without considering the facts and evidence given in the application. It has also been submitted by learned counsel for the revisionists that informant/opposite party No.2, namely, Nema Devi had lodged First Information Report against the revisionists-Ramveer Singh, Prem Narayan and Bantu on 23.02.2022 at about 7:04 P.M., while the said occurrence has taken place on 20.02.2022 at about 04:30 P.M to 22.02.2022 at about 5:00 A.M. The informant/opposite party No.2 has not given any reason for delay in lodging the FIR. It has also been submitted that victim, who is aged about 40 years having four children. At the time of lodging of FIR, Station House Officer, Police Station Orchha had called the revisionists where in the presence of revisionists the first informant, namely, Nema Devi had stated before the police that the house/plot be given to her by the revisionists, if not given the same, she will falsely implicate the revisionists in a rape case. This statement has been recorded as video by mobile, which has been submitted in pen drive to the trial Court by the revisionists. It has also been submitted that there is a contradiction in the statement of victim recorded under Sections 161 as well as 164 Cr.P.C. It has also been submitted that victim-Nema Devi, after the death of her husband, residing with one Bangali Babu, who left the victim and went to another village. Bangali Babu had entered into an agreement to sale of his house in favour of revisionist No.2-Ramveer Singh and one

another person, but victim has pressurised the revisionist No.2 to withdraw from the said agreement of the house and when he denied the same, the false criminal case was registered against the revisionists. It has also been submitted that there is no medical evidence of the alleged incident and revisionists only submitted the pen drive before the trial Court, but trial Court did not consider it and arbitrarily passed the impugned order.

4. Per contra, learned A.G.A. for the State has submitted that trial Court has passed the impugned order which is based on the evidence on record and there is no ground to interfere in the same.

5. Heard Sri Anuraj Shukla, learned counsel for the revisionists and Ms. Seema Shukla, learned A.G.A. for the State.

6. The facts relating to the case, in brief, is that victim has lodged FIR on 23.02.2022 alleging that on 20.02.2022 at about 4:30 P.M., accused-Bantu came to her house and told her that revisionist No.2-Ramveer Singh had called for negotiation of the alleged house/plot as she was familiar with Bantu and Ramveer Singh. Thereafter, on the same day at 4:30 p.m. she went with Bantu to the tubewell of Ramveer. On the request of Ramveer, she remained there at night and Ramveer committed rape with her and co-accused Prem Narayan also tried to outrage her modesty. Co-accused-Bantu was also involved in the conspiracy of the alleged occurrence.

7. During the investigation, victim has given following statements recorded under Sections 161 as well as 164 Cr.P.C.:-

"दिनांक 23.02.2022

महोदय थाना कार्यालय पर पीड़िता नेमादेवी उपस्थित है नियमानुसार म०का० 383 रीता वर्मा द्वारा पीड़िता का धारा 161 सीआरपीसी का बयान लेखबद्ध कराया गया जिसकी नकल हस्ब जैल है ---- बयान पीड़िता नेमा देवी पत्नी स्व० सुनील कुमार नि० न० केहरी थाना घिरोर मैनपुरी सम्बन्धित मु०अ०सं० 16/22 धारा 376/504/120B IPC थाना औछा मैनपुरी बयान पिड़िता नेमा देवी पत्नी स्व० सुनील कुमार नि० न० केहरी थाना घिरोर जि० मैनपुरी उम्र 40 जाति यादव पूछने पर बताया कि रामवीर पुत्र सीताराम नि० तिसाह थाना औछा मैनपुरी ने मेरे घर पर वन्टू पुत्र मातादीव भेजा था कि मेरी बात करा दो फिर रामवीर से फोन पर मेरी बात करायी रामवीर ने मुझे समर (खेत) तिसाह पर शाम को 5.00 बजे बुलाया वहॉ पर रामवीर व प्रेमनारायण ने मुझसे बोला कि आज रात यही रूक जाओ समर (खेत) पे तो मैं समर (खेत) पर रात में रूक गयी रामवीर ने मेरे सारे कपड़े उतार दिये और मेरे साथ गलत काम किया और प्रेमनारायण ने मेरे साथ छेड़खानी की और मेरे पूरे शरीर पर हाथ फिराया रामवीर ने सुबह 4.00 बजे प्रेमनारायण के साथ ईको गाड़ी से मेरे गॉव न० केहरी रोड पर छोड़ दिया एसडी नेमादेवी DATE 23.02.2022 L/C रीमा 383 रीमा वर्मा थाना औछा जनपद मैनपुरी लेखबद्ध बयानो को मूल रूप से संलग्न सीडी किया जाता है।

दिनांक 24.02.2022

विवरण पीड़िता बयान 164 सीआरपीसी- ने पूछने पर बताया कि रामवीर सिंह निवासी तिसाह ने मेरे घर पर वन्टू निवासी तिसार को 20 तारीख दिन रविवार को मुझ बुलाने के लिये भेजा था मै वन्टू के साथ 20 तारीख दिन इतवार उस दिन वोट पड़ी थी को रामवीर सिंह के खेत पर लगी समर पर आ गयी वहॉ पर एक खेत में समर के पास पक्का कमरा बना है जिसमें दो चारपाई पड़ी है रामवीर सिंह ने कट्टा दिखाकर मेरे कपड़े उतारे और मेरी छाती पर कट्टा रख दिया सारे कपड़े उतार और रामवीर सिंह मेरे ऊपर लेट गया रामवीर सिंह ने मेरे पुरे शरीर को अपने हाथो से छुआ था और मेरे छाती को कई बार दबाया भी था उसने मेरी पेशाब वाली जगह पर अपनी ऊगली भी डाली थी और रामवीर ने मेरे साथ बलात्कार किया फिर उसने जबरदस्ती मुझे अपने ऊपर बैठा लिया और दो बार मेरे साथ बलात्कार किया वन्टू मुझे रामवीर सिंह के पास खेत पर छोड़कर चला गया था रामवीर ने पूरी रात मुझे अपने पास अपनी समर पर रखा और मेरे साथ बलात्कार किया गया और फिर सूबह 4 बजे रामवीर और वन्टू मुझे मेरे घर छोड़ आये रामवीर के पास मेरा प्लाट गिरवी रखा है मेरे पति का पिछले साल निधन हो गया मेरी दो बेटी दो बेटे है मेरे पति की मौत के बाद से ही मैं बंगाली बाबू के

साथ रह रही हूं अब बंगाली बाबू मुझे छोड़कर अपने गॉव कतरागंज जिला एटा चला गया।"

8. Before examining the merits of the present case, the ambit, scope and power of the Sessions Court as well as the High Court u/s 397 Cr.P.C. should be discussed and ascertained.

9. The Hon'ble Apex Court in **Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460** in paragraph nos. 12 and 13 of its judgement has narrated the ambit and scope of revision by the High Court u/s 397 Cr.P.C. which are as follows :

12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC.

10. In paragraph nos. 17 and 19 of the aforesaid judgement, the Apex Court has narrated that before framing a charge, what documents should be considered by the trial court. It has also provided about the extent of evidence required for framing of a charge. In paragraph no. 20 of the aforesaid judgement, the Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. which is given hereunder :

20. The jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be

done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest i.e. when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The section confers very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused.

11. After comprehensive survey and discussion of the judgement of the Hon'ble Supreme Court and the factors to be considered by the trial court while disposing of application u/s 227 Cr.P.C. and framing charge u/s 228 Cr.P.C., the Apex Court in **Amit Kapoor (supra)** has given following directions :

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

12. The statutory provisions regarding consideration of the case with a view to framing of charge or discharging the accused as given in Sections 226, 227 and 228 Cr.P.C. has been laid down by the Hon'ble Supreme Court in the case of **Ghulam Hassan Beigh Vs. Mohammad Maqbool Magrey & Ors.** in S.L.P. (Crl.) No. 4599 of 2021 :

15. Section 226 of the CrPC corresponds to sub-section (1) of the old Section 286 with verbal changes owing to the abolition of the jury. Section 286 of the 1898 Code reads as under:-

"286.(1) In a case triable by jury, when the jurors have been in chosen or, in any other case, when the Judge is ready to hear the case, the prosecutor shall open his case by reading from the Indian Penal or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused. (2) The prosecutor shall then examine his witnesses."

Section 226 of the 1973 Code reads thus:

"226. Opening case for prosecution.— When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused."

Section 226 of the CrPC permits the prosecution to make the first impression regards a case, one which might be difficult to dispel. In not insisting upon its right under Section 226 of the CrPC, the prosecution would be doing itself a disfavour. If the accused is to contend that the case against him has not been explained owing to the non-compliance with Section 226 of the CrPC, the answer would be that the Section 173(2) of the CrPC report in the case would give a fair idea thereof, and that the stage of framing of charges under Section 228 of the CrPC is reached after crossing the stage of Section 227 of the CrPC, which affords both the prosecution and accused a fair opportunity to put forward their rival contentions.

16. Section 227 of the CrPC reads thus:

"227. Discharge.— If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

17. Section 228 of the CrPC reads thus:

"228. Framing of charge.- (1) If, after such consideration and hearing as aforesaid,the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

13. While framing charge, the Court has to ensure that a *prima facie* case must be made out against the accused. The Hon'ble Apex Court in **Union of India Vs. Prafulla Kumar Samal and another, (1979) 3 SCC 4**, considered the scope of enquiry a judge is required to make while

considering the question of framing of charges. After an exhaustive survey of the case law on the point, in paragraph no. 10 of the judgement, has laid down the following principles :

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

14. The Hon'ble Apex Court in paragraph nos. 15 and 23 of its judgement in **Dipakbhai Jagdishchandra Patel Vs. State of Gujarat, (2019) 16 SCC 547**, has elaborately discussed the law relating to the framing of charge and discharge of the accused which is as under :

15. We may profitably, in this regard, refer to the judgment of this Court in State of Bihar v. Ramesh Singh [State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : AIR 1977 SC 2018] wherein this Court has laid down the principles relating to framing of charge and discharge as follows: (SCC pp. 41-42, para 4)

"4. … Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial

stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. … If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.

15. In Sajjan Kumar Vs. C.B.I, (2010) 9 SCC 368, the Hon'ble Apex Court after elaborately discussing the scope of Sections 227 and 228 Cr.P.C. has laid down principles which emerge therefrom in paragraph no. 21 which is as under :

21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

16. In the case of **State of Karnataka Vs. M.R. Hiremath, (2019) 7 SCC 515,** the Hon'ble Apex Court has laid down principles to be considered by the Magistrate while dealing with discharge application of the accused u/s 239 Cr.P.C. in warrant trial case. The directions given by the Apex Court is equally applicable to the discharge of accused u/s 227 Cr.P.C.

17. In paragraph no. 25 of **Ghulam Hassan Beigh (supra)**, the Apex Court held as under :

25. In the case of Asim Shariff v. National Investigation Agency, (2019) 7 SCC 148, this Court, to which one of us (A.M. Khanwilkar, J.) was a party, in so many words has expressed that the trial court is not expected or supposed to hold a mini trial for the purpose of marshalling the evidence on record. We quote the relevant observations as under:-

"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the Court discloses grave suspicion against the accused which has not been properly

explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, 3 2018(13) SCC 455 4 2019(6) SCALE 794 the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record.

18. In paragraph nos. 28, 29 and 30 of the judgement in **Amit Kapoor (supra)**, the Hon'ble Supreme Court has held as hereunder :

28. At this stage, we may also notice that the principle stated by this Court in Madhavrao Jiwajirao Scindia[(1988) 1 SCC 692 : 1988 SCC (Cri) 234] was reconsidered and explained in two subsequent judgments of this Court in State of Bihar v. P.P. Sharma [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 : AIR 1991 SC 1260] and M.N. Damani v. S.K. Sinha [(2001) 5 SCC 156 : 2001 SCC (Cri) 823 : AIR 2001 SC 2037] . In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent.

29. In the light of the above principles, now if we examine the findings recorded by the High Court, then it is evident that what weighed with the High Court was that firstly it was an abuse of the process of court and, secondly, it was a case of civil nature and that the facts, as stated, would not constitute an offence under Section 306 read with Section 107 IPC. Interestingly and as is evident from the findings recorded by the High Court reproduced supra that "this aspect of the matter will get unravelled only after a full-fledged trial", once the High Court itself was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial, where was the need for the Court to quash the charge under Section 306 at that stage. Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings.

30. We have already noticed that the legislature in its wisdom has used the expression "there is ground for presuming that the accused has committed an offence". This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in State of Maharashtra v. Som Nath Thapa [(1996) 4 SCC 659 : 1996 SCC (Cri) 820] referred to the meaning of the word "presume" while relying upon Black's Law Dictionary. It was defined to mean "to believe or accept upon probable evidence"; "to take as proved until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that

the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence.

19. In light of the statutory provision under Section 227 Cr.P.C. interpreted by the Hon'ble Apex Court, the facts given in the case is to be considered. On the date of alleged incident, revisionists persuaded the victim to visit the field of Ramveer on the pretext that Ramveer has called her for negotiation. When she reached there, revisionist No.2 Ramveer Singh asked her to stay at night near the tubewell, which is installed in the field of Ramveer Singh/revisionist no.2. On the same night, Ramveer Singh committed rape with her. The victim has stated the aforesaid facts given in the written report in her statement recorded under Sections 161 as well as 164 Cr.P.C. The averment of revisionists is that the victim has lodged false FIR due to reason that Bangali Babu had not given his property to her and same has been executed in favour of Gaura Devi wife of Ramveer Singh and others, which has been registered on 13.08.2020 in the office of Sub-Registrar, Mainpuri. The revisionists have submitted a copy of agreement to sale, which was registered about two and half years before lodging the FIR. Apart from this alleged motive for lodging the FIR, the same cannot be considered at the stage of deciding the discharge application. The aforesaid averments that the victim lodged the false FIR due to aforesaid reasons cannot *prima facie* be considered true. The revisionists have not submitted any evidence/documents regarding the agreement to sale to the Investigating Officer during investigation, therefore, this document is not a part of the case diary. The effect of alleged agreement to sale as motive for lodging a false FIR against the revisionists cannot be examined at the stage of considering the discharge application under Section 227 Cr.P.C. The alleged motive for lodging a false FIR can only be considered at the stage of final arguments when evidence of prosecution as well as defence is concluded.

20. In the case of **State of Orissa vs. Debendra Nath Padhi: (2005) 1 SCC 568**, the Hon'ble Apex Court held that at the time of framing of charge, trial Court can consider only the evidence which has been filed with the charge-sheet. At this stage, accused has no right to produce any document or evidence to rebut the framing of charge against him.

21. Thus, contention of the learned counsel for the revisionists is that victim had threatened the revisionist No.1 before Investigating Officer that if he does not transfer the house/plot in her favour, she will lodge false FIR against him. At the stage of framing of charge, the Court has to observe whether there is a *prima facie* evidence against the accused regarding the charge-sheet filed against him. The veracity of sufficiency of evidence cannot be weighed at the stage of framing of charge. In such circumstances, trial Court has rightly refused to consider the evidence allegedly recorded in the pen drive at the stage of framing of charge against the revisionists.

22. From the above discussions regarding evidence produced in the case, I do not find any illegality, irregularity or impropriety in the impugned order passed by the trial court.

23. There is no merit in the criminal revision and the same is liable to be dismissed.

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

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

(2024) 3 ILRA 107
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2024
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 2076 of 2019

Sanju & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Hari Prakash Mishra, Sri Dharmendra Kumar Srivastava

Counsel for the Opposite Party:
G.A., Sri Chandra Prakash Pandey, Sri Dur Vijay Singh

Criminal Law -Code of Criminal Procedure, 1973 – Sections 319, 397, 190 & 193 – Indian Penal Code, 1860 – Sections 147, 148, 149 & 302 – Summoning of Additional Accused – Scope of Revisional Jurisdiction – Evidence under Section 319 Cr.P.C. – Consideration of Investigation Materials

The revisionists, Sanju and others, challenged the order dated 02.05.2019 passed by the Additional District and Session Judge, Farukhabad, in Sessions Trial No. 192 of 2012, summoning them under Section 319 Cr.P.C. to face trial for offences under Sections 147, 148, 149, and 302 IPC, based on the testimony of PW1 (Munni Devi, informant) and PW9 (Dinesh), despite their exclusion from the chargesheet. The FIR, lodged on 03.02.2012, alleged that the revisionists, linked to Dalganjan Singh, killed the informant's husband, Amar Singh, and his friend, Man Singh, due to prior enmity. The Investigating Officer (IO) found no complicity of the revisionists, citing mobile location data and witness St.ments, and instead chargesheeted seven others. During trial, PW1 and PW9 supported the FIR version, leading to the summoning order. The informant later disowned the Section 319 application via an affidavit dated 17.08.2019, claiming it was filed without her instructions. Held: The court, relying on Hardeep Singh Vs St. of Punj. ((2014) 3 SCC 92) and Brijendra Singh Vs St. of Rajasthan, set aside the summoning order, finding that the trial court erred by ignoring the IO's findings, which exonerated the revisionists based on mobile data and witness St.ments, and failed to establish "much stronger evidence" of complicity as required under Section 319 Cr.P.C. The court emphasized that investigation materials can corroborate trial evidence, and the trial court should have considered these to assess the prima facie case. The revision was allowed, and the matter was remitted for fresh consideration of the Section 319 application, ensuring compliance with legal standards.

Case Law Cited:

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

2. Brijendra Singh Vs St. of Rajasthan

3. Dharam Pal Vs St. of Har., (2014) 3 SCC 306

4. Suresh Vs St. of Maharashtra, AIR 2001 SC 1375

5. Niranjan Singh Karam Singh Punj.i Vs Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962

6. St. of Maharashtra Vs Priya Sharan Maharaj, AIR 1997 SC 2041

7. Manjeet Singh (specific citation not provided in text)

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the revisionists, learned counsel for the respondent No.2 as well as Sri Deepak Kapoor learned A.G.A. for the State and perused the record.

2. Learned counsel for the revisionist submitted that report has been filed by trial judge on dated 06.10.2023, pursuant to order dated 19.09.2023 passed by this Court reads as under:-

"Learned counsel for the opposite party referred to the affidavit enclosed in the counter affidavit that on 17.08.2019, an application was moved on behalf of the informant, Munni Devi, before the Court concern in S.T. 192A of 2012 (State of U.P. Vs. Sanju and others) that no such application under Section 319 Cr.P.C., to summon the revisionist to face the trial, was moved by her. This application was supported by the affidavit.

Learned trial court be directed to submit a report with regard to the status of the aforesaid application moved by the informant within three weeks.

List on 11.10.2023.

Interim order, if any, shall continue till the next date of listing".

3. Learned trial judge has reported that informant Smt. Munni Devi has moved an application on 17.08.2019 in S.T. No.192A of 2012 (State of U.P. Vs. Sanju and others), photo copy of which is placed on record. The order is endorsed thereon to the effect that in S.T. No.192 A of 2012 the proceedings remain stayed by the order of Hon'ble High Court. Therefore, the said application cannot be placed on record and same is returned to the applicant.

4. The informant has stated in the said application that she is filing an affidavit with regard to true facts of the case, and said affidavit is placed on record alongwith application. It is stated therein that informant had not instructed her counsel Sri Satyendra Pathak to move this application on 03.04.2019 for summoning Sanju and others, if any application has been moved for summoning Sanju and others, the same is false.

5. Smt. Munni Devi was summoned before the Court in compliance of order dated 19.09.2023 and she has admitted to have filed an application to the effect that application and affidavit filed by her on 17.08.2019 before court below was submitted by her.

6. Instant Criminal Revision has been preferred against the order dated 02.05.2019 passed by Additional District and Session Judge, Court No.7, Farukhabad in Session Trial No.192 of 2012, State Vs. Kashmi Singh, under Section 319 of Cr.P.C. whereby revisionist are summoned to face trial under Sections 147, 148, 149 and 302 of I.P.C. together with the accused who are already facing trial.

7. The facts leading to filing of present revision are that the informant/defacto complainant Munni Devi had lodged an FIR on the basis of a written report at Police Station Mohammadabad, District Farukhabad with averments that on 03.02.2012 her husband Amar Singh had gone to Mohammadabad market by riding a Hero Honda Motorcycle, bearing Registration No.UP76J8360 alongwith his friend Man Singh who was sitting on pillion of the motorcycle. She also went to market sitting on pillion of the motorcycle ridden by Tejram. Her husband was coming back from the market alongwith Man Singh and she was also coming back from the

market on motorcycle ridden by her relative Dinesh. They came near Shekhpur village at around 06:30 PM, suddenly a white four wheeler came from behind of them, in which Sanju, Raju @ Raje, Ramu @ Ahab Pratap, Manjit Singh @ Bablu, Chandra Mohan, Sarvesh @ Pappu, Anil @ Karu were sitting, these persons stepped out from the car having armed with weapons, and stated that they were waiting for them for long period. One Dalganjan Singh had visited at her home one week ago and stated that he would kill her husband to take revenge of the murder of his brother. These persons killed her husband Amar Singh and his friend Man Singh acting under conspiracy on getting opportunity on said date and time in the presence of the informant and said Dinesh. Accused Sanju fired a shot at her husband by country made pistol and Raju alias Raje fired a shot at Man Singh by his fire arm, other persons assaulted the injured by butt of their guns. The injured became unconscious. On hearing the screams, co-villagers Shersingh, son of Ram Krishna, Vipin son of Rameshwar Singh reached there and had seen the incident. The assailants belonged to the same family, they escaped from the place after committing murder towards Mohammadabad . She could not visit the police station in the night, being scared by this incident. FIR was lodged against seven named accused persons under Sections 147, 148, 149 and 302 of IPC. Police investigated the case and recorded the statements of informant Smt. Munni Devi, Shersingh, Vipin Yadav, Dinesh and other witnesses.

8. The informant Munni Devi and Dinesh her said companion/eye witnesses at the time of incident supported the FIR version in their statement under Section 161 Cr.P.C. The Investigating Officer on 15.03.2012 recorded in Case Diary Parcha No.14 that CDR and tower location of Mobile No. 09554166555 of witness Dinesh has been collected, and on its analysis it is found that on 02.02.2012 at 09:34:25 hours its location was at Phakna and thereafter from 13:50:11 to 15:03:53 hours, it was within area of Mohammadabad tower and between 17:47:06 to 03.:02:12 hours from 17.04.2006 to next day up to 09:57:36 hours its location was detected at Pakhina Sirauli tower. Whereas the place of incident is lying within Mohammadabad tower, as probable time of incident is stated to be 18:30 hours on 02.02.2012.

9. According to Investigating Officer, the location of the witness Dinesh was not found at the place of incident at relevant date and time. Another witness Shersingh, who is named in FIR stated to him that he was not present on relevant time and place of incident, and next day he heard that two dead bodies are lying on the corner of railway line and then he visited the place at of occurrence around 08:00 AM and saw that dead body of co-villager Amar Singh, who was his relative was lying alongwith dead body of Man Singh, resident of Malwa Dhani. He and other villagers informed Smt. Munni Devi about the incident telephonically, who was at that time present at her parental place in village Shankarpur and she was called there, he had not seen any such incident. He could not know as to why his name is shown as witness in FIR, Smt. Munni Devi herself was not present at the time of the incident, as she had gone to her parental place, ten to fifteen days prior to the incident. He is not willing to depose falsely, the other witnesses Vipin Yadav has also not supported the FIR version and nor he was present on the spot at the time of incident,

he heard next day on 03.03.2012 that his co-villagers Sanju, Raju @ Raje and others had killed Amar Singh and Man Singh, but he did not see the occurrence. He admitted that he had gone to Mohammadabad market at around 6:30 pm on 02.02.2012 alongwith Shersingh riding a motorcycle; he operates a milk dairy and ice-cream factory at village Nadaura. However, he could not explain as to why Shersingh stated in his statement that he did not visit Mohammadabad on 02.02.2012 and did not hear anything about the occurrence. Witness Vipin Yadav also stated that he neither saw the incident nor firing, he also stated that he visited the place of incident on next day, where the dead body was lying at the corner or railway track. He admitted that there is a old enmity between family members and the witnesses of the accused persons.

10. The Investigating Officer collected further facts during investigation on the basis of evidence of witness Brijesh Yadav, Lekhpal Khateriya, Satyapal Singh Yadav and others. The deceased were shot at the temple by miscreants and informant Munni Devi was present at that time at her parental place village Shankarpur Bishnupur, District Kannauj. There was old family enmity between the deceased Amar Singh and Dalganjan Singh, the head of the family of accused persons. Deceased Amar Singh was accused in murder of Ramchander who was the brother of Dalganjan Singh. Deceased Amar Singh was awarded life imprisonment in said murder case by court and was released on bail during the pendency of appeal five years ago the incident. The mobile phones of deceased were also taken away by the killers; deceased were persons of criminal antecedents.

11. According to the observation of Investigating Officer Dalganjan Singh visited the dead bodies alongwith a nephew after knowing the incident. The FIR was lodged against son and nephews of Dalganjan Singh due to old enmities and litigations. The Investigating Officer came to the conclusion, after investigation that the complicity of named accused persons was not found in double murder case and the informant and her relative Dinesh were not found to have witnessed the incident as their present was found else where on date and time of incident. The informant falsely named the present accused persons in FIR in view of old family dispute with Dalganjan Singh, while the mobile phone of deceased Amar Singh was recovered on 08.04.2012 from possession of one Rajpal @ Manishpal son of Kannaujiapal resident of Khimsepur Police Station Mohammadabad District Farukhabad, robbed by miscreants after committing murder of Amar Singh on 02.02.2012.

12. The complicity of Kashmir Pal, Nagendra Yadav, Kuldeep, Rahis Pal, Shekhar Pal, Rajpal and Sukhveer Yadav was found during investigation in the murder of deceased Man Singh and Amar Singh on account of their mobile phone location, statement of the witnesses and CDR and involvement of present revisionists who were named in the FIR was found false. Nagendra Yadav was inimical to deceased Amar Singh and Sukhvir Singh and wanted to kill Man Singh and all these chargesheeted accused hatched a conspiracy and killed the two to fulfill that.

13. Thus, the Investigating Officer dropped the name of all the seven named accused persons, and instead filed chargesheet against seven other persons

whose complicity was found in the offence during investigation.

14. The court below recorded the evidence of as many as nine witnesses at the stage of trial, and thereafter an application under Section 319 Cr.P.C. was filed by the informant (PW1) in ST No.1927 of 20112 State Vs. Kashmir Pal to summon all the named accused persons in FIR as accused, who faced trial together with the accused persons who are already facing trial. Nine witnesses are examined during trial out of whom PW1 Munni Devi, PW9 Dinesh are witnesses of fact. PW5 Ram Chandra is scriber of written report Ex.Ka.1.

15. Learned trial court after hearing the submissions of both the sides and taking into consideration the evidence on record during trial placed reliance on version of PW1 Munni Devi and PW9 Dinesh summoned the revisionists as accused in exercise of powers under Section 319 Cr.P.C. The newly added accused persons, being aggrieved by the impugned order dated 02.05.2019, preferred present revision before this Court. Two counter affidavits were filed by respondent No.2 one on 26.08.2019 through Advocate Sri Chandra Prakash Pandey and the other through Advocate Sri Durvijay Singh on 13.11.2019. In first affidavit respondent No.2 has countered the affidavit filed in support of the Revision and the other is supportive of the revisionists version. The respondent No.2 appeared before this Court and disowned first counter affidavit as well as application under Section 319 Cr.P.C. purportedly filed by her before the court below.

16. Learned counsel for the revisionists submitted that though it is true that P.W.1 Smt. Munni Devi, PW 9 Dinesh have testified in support of FIR version, they are only two witnesses examined during trial. The other witnesses of chargesheet have not been examined by prosecution during trial and on the basis of whose statement during investigation the complicity of the revisionists was not found in the offence and instead complicity of accused Kashmir Singh and others have been found, who are facing trial before the court below.

17. Learned counsel for revisionists further submitted that in the present case although strong motive as been attributed to revisionists who belonged to family of Dalganjan Singh in whose brother's murder case deceased Amar Pal was tried and convicted by the court and was on bail during appeal. However, this fact is noticeable that causing fire arm injury to deceased persons is specifically attributed in FIR as well as in statement of witnesses namely Munni Devi and Dinesh Singh to accused Sanju and Raju @ Rajey. The other named accused persons are said to have assaulted the deceased persons by kicks, fists and butts of riffle, according to version of these witnesses. However, in postmortem report both the deceased are found to have suffered incised wound also apart from fire arm and other injuries, and these witnesses have no where stated that the named accused persons were armed with any sharp edged weapon. Their presence was not found by the investigating officer on the place of incident, whereas they have stated in their sworn testimony before the court that they had seen the incident.

18. The trial itself has reached at the advance stage of recording of statements of the accused persons under Section 313

Cr.P.C. Therefore, during trial only those witnesses were produced in support of prosecution case who have testified against the revisionists during investigation as well as during trial. Thus, in the entirety, it is submitted that there can be no strong satisfaction recorded by the learned trial court to summon the revisionists as additional accused to face trial in exercise of powers under Section 319 Cr.P.C. alongwith accused persons who are already facing trial. He further submitted that no strong satisfaction has been recorded by the learned court below with regard to prima-facie case against the revisionists as envisaged under Section 319 Cr.P.C. before passing the impugned order. The independent witnesses named in FIR are not examined during trial. PW1 is complainant and PW9 is a partisan and entrusted witnesses and is on inimical terms with accused side long before the incident.

19. Learned counsel for the respondent No.2 made request irrespective of the new stand of the informant Smt. Munni Devi at this stage, the revision may be decided on merits of the case in light of law laid down by Hon'ble Apex Court in various recent judgments.

20. Learned A.G.A. for the State - respondent submitted that the name of actual assailants who are named in the FIR has been dropped by the Investigating Officer in chargesheet due to allurement and political pressure. The investigation was faulty and partial, it was not fair investigation, otherwise there was no reason that family members of the deceased would have named wrong persons in FIR and concealed the name of actual assailants. It is further submitted that strangely, the names of all seven accused persons were dropped in the chargesheet with a view to screen the actual offenders and new set of accused were chargesheeted. The subsequent application and affidavit of the complainant after passing of impugned order is insignificant. It is her "evidence" and not her affidavit which will be read in the matter in hand.

21. On the cumulative strength of above contentions, learned A.G.A. appearing on behalf of respondents vehemently contended that the present criminal revision is liable to be dismissed.

22. In the present case two persons Amar Singh, the husband of the informant and his friend Man Singh were killed on 02.02.2012 at around 06:30 pm, when they were coming from Mohammadabad market riding a motorcycle. In the FIR as many as seven accused persons are named as assailants and specific role of firing a shot at the deceased is attributed to accused Sanju and Raju alias Raje in the FIR as well as in the statements of the informant and her witness Dinesh in the statements under Section 161 Cr.P.C. and in their sworn testimony before the Court of PW 1 and PW9 respectively.

23. In the FIR it is stated that appellant No.1 Sanju had fired a shot at Amar Singh and Raju @ Raje appellant No.2 fired a shot at Man Singh and remaining persons assaulted the injured persons by butt of their guns badly till arrival of the witnesses. In the statement dated 04.02.2012 made under Section 161 Cr.P.C. the informant i.e. the next day of lodging the FIR has stated that after opening of fire on deceased persons by Sanju and Raju @ Raje the remaining accused persons assaulted these two injured persons by kicks, fits and butts of their

guns badly, who died by fatal injuries suffered in their incident. The other two witnesses Sher Singh and Vipin who were named as eyewitness in the FIR have not supported the FIR version in their statement under Section 161 Cr.P.C.. However, the witness Dinesh has corroborated the FIR version and statement of the informant in his statement under Section 161 Cr.P.C. recorded at belated stage on 29.06.2012 by the Investigating Officer as well as in his sworn testimony before the court as PW9. PW1 and PW9 the witnesses of facts have categorically stated in their evidence during the cross examination that accused persons Nagendra and others who are facing trial at present were not assailants and the accused persons named in the FIR are real assailants. The new set seven accused have been introduced by Investigating Officer during investigation and chargesheeted namely Nagendra Yadav, Kuldeep, Rahish Pal, Shekhar Pal, Raja and Kashmir Pal. The witness Dinesh Singh has already stated in his statement under Section 161 Cr.P.C. and before the Court as PW9 that Sanju fired a shot at Amar Singh and Raju @ Raje fired a shot at Man Singh and remaining accused persons named in the FIR assaulted the injured by butts of their guns, kicks and fits. He fled from the place of incident taking Smt. Munni Devi his sister-in-law (bhabi) with him at village Nadaura, the parental place of Munni Devi where they stayed in the night, as stated in his evidence that he identified the accused in the light of their four wheeler and his motorcycle. The witness Dinesh Singh is named as accused in FIR lodged as Crime No.Nil of 2002 under Sections 147, 148, 149, 307 and 504 I.P.C. alongwith his father and other accused for attempting to commit murder of the nephew of Dalganjan Singh on 18.02.2002 the present revisionists include sons, nephew and family members of Dalganjan Singh.

24. The postmortem report of deceased Amar Singh and Man Singh dated 03.02.2012 revealed that deceased Amar Singh received fire arm wound of entry on right temporal region. One incised wound 11cm x2.5 cm x bone deep over right side of mandible under-lying bone fractured, abraded contusion 12 cm x 7cm over right side of face, ligature mark 32 cm x 4 cm around the neck, on cut haematoma was present. Tracheal ring depressed, multiple contusion over front of right shoulder and upper part of chest. Linear abrasion 6 cm over right side of upper part buttuck. Thus six entries were found on his person.

25. In postmortem report of injured Man Singh also one fire arm wound of entry 2 cm x 5 cm on right temporal region and one wound on exit over left side of ear was found. Apart from that one lacerated wound 3 cm x 1 cm bonedeep over left eyebrow, one incised wound 3.5 cm x 0.5 cm over the right shear involving lower eyelid and abraded contusion 11 cm x 1 cm on front of neck, middle part were found.

26. Thus, from the postmortem report of Amar Singh it appears that he received fire arm injuries, lacerated and abraded wounds as well as incised wounds. He also received injuries on his neck and on cut tracheal ring was depressed and haematoma was present beneath the injury, this shows that he was attributed to be strangulated. Some what similar nature of wounds were found in postmortem report of deceased Man Singh.

27. It needs to be highlighted that when a person is named in the FIR by the complainant, but police after investigation

finds no role of that particular person and files a chargesheet without implicating him, the court is not powerless, and may exercise its jurisdiction to summon any person as accused whose complicity has been found in the offence on the basis of material collected during investigation at pre trial stage in exercise of powers under Sections 190 and 193 Cr.P.C. as recognized by the Apex Court in ***Dharam Pal and Others Vs. State of Haryana and Another, (2014) 3 SCC 306 (Constitution Bench)*** and the trial court need not wait for evidence to be recorded so that non chargesheeted accused could be summoned under Section 319 of Cr.P.C. Even on commencement of trial and recording of some evidence the court is empowered to exercise its powers under Section 319 Cr.P.C. to summon any other person who has not been chargesheeted by police officer after investigation, yet his complicity in the offence prima facie established during trial, and as such the newly added accused will be tried together with the accused persons who are already facing trial in the case.

28. **Section 319 Cr.P.C. is quoted hereunder:-**

"319 Cr.P.C. -Power to proceed against other persons appearing to be guilty of offence:-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(5) (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

29. The Hon'ble Supreme Court in Constitutional Bench Judgment in ***Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92*** *held as under:-*

"55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above."

85. In view of the discussion made and the conclusion drawn herein above, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial.

92. Thus, in view of the above, we hold that power under Section 319 Cr.P.C.

can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

95. In Suresh v. State of Maharashtra, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, AIR 1990 SC 1962 and State of Maharashtra v. Priya Sharan Maharaj, AIR 1997 SC 2041, held as under:

"9…….at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

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

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

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

117.2. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

The word evidence used in Section 319 of Cr.P.C. has been used in a comprehensive sense respondent does not include the evidence collected during investigation.

30. Inspite of above noted judgment, issue did not come to rest, but again cropped up for consideration in Brijendra Singh (supra) wherein Court considered the observations made in paragraphs 8, 12, 13, 19, 105 and 106 of Constitution Bench judgment in Hardeep Singh (Supra) and applying the ratio as mentioned in aforesaid paragraphs widened the scope of parameters regarding exercise of jurisdiction under section 319 Cr.P.C. In this case, Court was examining the summoning of a non-charge-sheeted accused in a Sessions Trial under Sections-147, 148, 149, 323, 448, 302/149 I.P.C. and Section- 3 and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Court went a step further. Having done so, Court summed up as follows in paragraphs 13, 14, 15:-

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the I.O. at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima

facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

31. In **Manjeet Singh (Supra)**, Court was considering the correctness of an order passed by High Court dismissing the revision preferred against an order passed by Sessions Judge allowing the application under Section 319 Cr.P.C. filed in a case under Sections 363, 366, 376 IPC and Sections 3/4 Protection of Children From Sexual Offences, (POCSO) Act, 2012 Court again examined the issue relating to parameters for exercise of jurisdiction under section 319 Cr.P.C. Court took notice of the constitution Bench judgement in Hardeep Singh (Supra) and S. Mohammed Ispahani (Supra) and on basis of ratio laid down therein evolved the ambit and scope of powers of Court under section 319

Cr.P.C. in paragraphs 34 of judgement. Having done so, Court examined the testimony of P.W.1 Manjeet who is an injured witness and on basis thereof tested the veracity of orders passed by High Court as well as trial court whereby summoning of non charge sheeted accused was declined. Hon'ble Supreme Court upon evaluation of evidence on record disagreed with the view taken by High Court as well as trial court. Following disagreement was expressed by court in paragraphs 34, 35, 36, 37 and 38 of the judgement:

"34. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:

(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;

(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;

(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;

(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;

(v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;

(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;

(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;

(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;

(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;

(xi) the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;

(xiii) if the Magistrate/court is convinced, even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);

(xiv) If the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;

(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not has to wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.

32. In the present case PW1 Munni Devi who is informant and wife of deceased Amar Singh. PW1 Munni Devi and PW9 Dinesh Singh were produced as a witnesses of fact, during trial of the present case, the other witnesses of facts are not examined, they have supported the FIR version in their sworn testimony before the Court. After recording the evidence of P.W1 and PW9 an application under Section 319 of Cr.P.C. was moved by the complainant Munni Devi before the trial court for summoning the named accused persons as additional accused to face trial in the case together with the accused persons who are already facing trial, and said application has been allowed by the trial court by the impugned order. The application under Section 319 Cr.P.C. was moved at a belated stage after conclusion of prosecution evidence. The leaned trial court by the impugned order has summoned all the named accused persons in FIR, in exercise of powers provided under Section 319 Cr.P.C. The accused persons summoned under Section 319 Cr.P.C. have filed present criminal revision, and this Court has stayed the effect and operation of impugned order dated 02.05.2019, till the next date of listing vide interim order dated 24.05.2019, and said interim order has been extended from time to time.

33. During the pendency of present revision the applicant Munni Devi moved an application on 17.08.2019 before the trial court, wherein she has disowned the application under Section 319 Cr.P.C. dated 03.04.2019 and stated on affidavit that she never instructed her counsel Satyendra Kumar Pathak to move an application under Section 319 Cr.P.C., because she came to know that after her evidence before the court on 03.01.2017, the named accused persons Sanju and others were not involved in murder of her husband Amar Singh and his friend Man Singh and for that reason she stopped prosecuting the case after her evidence against Sanju and others. The opponents of Sanju and others misled her and obtained her thumb impression on a pre-written paper. She is an illiterate lady and she was depressed for longtime due to murder of her husband. This application was returned in original by the court below, as operation of the impugned order was stayed by orders of this Court.

34. The complainant Munni Devi, appeared before this Court and admitted to have filed this application dated 17.08.2019 accompanied with an affidavit before the court below. So far as the other facts of this case are concerned, two sets of accused persons have been introduced in this case for committing double murder of Amar Singh and Man Singh on fateful day time and place. One set of accused are named in the FIR lodged at the instance of PW1 Munni Devi who are present revisionists. However, their name was dropped in chargesheet and a new set of accused persons Kashmir Pal, Nagendra Yadav, Kuldeep, Rahis Pal, Shekhar Pal, Rajpal and Sukhveer Yadav surfaced during investigation and their complicity was found in the offences during investigation and they were ultimately chargesheeted and are facing trial at present. Interestingly the witnesses of facts PW1 Munni Devi and PW9 Dinesh Singh have also not implicated the accused persons Nagendra Yadav and others who are already facing trial in their sworn testimony before the court, and have stated that they have not seen them on the scene of crime when it was committed. The complicity of the present revisionist was not found during investigation, instead a new set of accused persons Nagendra and others were chargesheeted on the basis of their mobile location and CDR of their mobile phone as well as on the basis of statement of independent witnesses. The witnesses named in the FIR namely Sher Singh and Vipin as independent witnesses have not been produced during trial and they have not supported the FIR version in the statement under Section 161 Cr.P.C.

35. The learned court below has not discussed the course of investigations, evidence collected during investigation, reasons behind exoneration of named accused persons and introduction of a new set of accused persons during investigation by the Investigating Officer.

36. Whereas Hon'ble Supreme Court in **Brijendra Singh Meena vs State Of Rajasthan And Ors. (supra)** held in paragraph 13 of the judgment that the 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the I.O. at the stage of inquiry is concerned, it can be utilized for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

37. Hon'ble Supreme Court also held in **Brijendra Singh's** case that powers of the Court to proceed under Section 319 Cr.P.C. even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that real culprit should not get away unpunished. As Section 319 Cr.P.C. springs out of a legal maxim "judge is condemned when guilty is acquitted" and this doctrine must be used as a beacon light while explaining the ambit and sprit underlying the enactment of Section 319 Cr.P.C. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by

manipulating the investigating and/or the prosecuting agency.

38. The Hon'ble Apex Court observed that in a case like the present where plethora of evidence was collected by the Investigating Officer during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prim-facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (appellants), complicity has come on record. There is no satisfaction of this nature. The police on investigation revealed that the statement of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did no inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

39. With foregoing submissions at Bar and discussion, this Court is of the considered opinion that the learned court below has committed legal error while ignoring all together the course of investigation, the reason behind exoneration of the revisionists and filing of chargesheet against a new set of accused persons on the basis of evidence collected during investigation. Although the evidence adduced during inquiry or trial is envisaged as "evidence" under Section 319 Cr.P.C., as settled in constitutional Bench Judgment the Hon'ble Apex Court in **Hardeep Singh Vs. State of Punjab and Others** (supra), but in subsequent judgment in **Brijendra Singh and Others Vs. State of Rajasthan (supra)** the Hon'ble Apex Court held that the evidence collected by IO at the stage of investigation should also be looked into as the same may be utilized for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. The impugned order is not sustainable under law and deserves to be set-aside.

40. The revision stands **allowed**. The impugned order dated 02.05.2019 passed by learned trial court is hereby set-aside and matter is remitted to the court below to hearing the application under Section 319 Cr.P.C. afresh and decide the same in accordance with law in the light of observations made in this order, after giving opportunity of hearing to the complainant and prosecution.

41. However, it is clarified that the observations made herein before are only for the purpose of deciding the present revision and have no bearing on the merits of the case for final adjudication.

(2024) 3 ILRA 121
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2023
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 2419 of 2023

Rajkumar @ Raju & Ors. ...Revisionists
Versus
State of U.P. & Ors ...Opposite Parties

Counsel for the Revisionists:
Sri Thakur Prasad Dubey, Sri Yogesh Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Sections 227, 228 & 397 – Indian Penal Code, 1860 – Sections 147, 148, 323, 504, 506, 452 & 354A –

Protection of Children from Sexual Offences Act, 2012 – Section 8 – Discharge Application – Revisional Jurisdiction – Prima Facie Case – Contradictions in St.ments

The revisionists, Rajkumar @ Raju and others, challenged the order dated 17.05.2023 passed by the Special Judge (POCSO Act)/Additional Sessions Judge, Bareilly, dismissing their discharge application under Section 227 Cr.P.C. in Case Crime No. 368 of 2019, involving charges under Sections 147, 148, 323, 504, 506, 452, 354A IPC, and Section 8 POCSO Act. The FIR, lodged on 27.07.2019 pursuant to a Section 156(3) Cr.P.C. application, alleged that on 02.06.2019, the accused trespassed into the informant's house, molested her minor daughter, and assaulted the informant due to prior enmity. The Investigating Officer submitted a final report favoring the accused, citing a monetary dispute, but the trial court rejected it based on the victim's and informant's St.ments under Sections 161 and 164 Cr.P.C., summoning the accused. The revisionists argued contradictions between the informant's and victim's St.ments, with the victim implicating only Veer Singh and Pappi, not Raju, Guddu, or Darpan. Held: The court, relying on Sheoraj Singh Ahlawat Vs St. of U.P. ((2013) 11 SCC 476), Sajjan Kumar Vs CBI ((2010) 9 SCC 368), and Tarun Jit Tejpal Vs St. of Goa ((2019) SCC OnLine 1053), found that the trial court failed to consider the contradiction in St.ments, where the victim did not implicate Raju, Guddu, or Darpan, rendering their complicity doubtful. The court emphasized that under Section 227 Cr.P.C., the trial court must evaluate material for a prima facie case without conducting a roving inquiry. The revision was allowed, the impugned order was set aside, and the matter was remitted for fresh consideration of the discharge application with reasoned orders.

Case Law Cited:

1. Sheoraj Singh Ahlawat Vs St. of U.P., (2013) 11 SCC 476

2. Onkar Nath Mishra Vs St. (NCT of Delhi), (2008) 2 SCC 561

3. Sajjan Kumar Vs CBI, (2010) 9 SCC 368

4. Dilawar Balu Kurane Vs St. of Maharashtra, (2002) 2 SCC 135

5. R.S. Nayak Vs A.R. Antulay, (1986) 2 SCC 716

6. Tarun Jit Tejpal Vs St. of Goa, (2019) SCC OnLine 1053

7. Union of India Vs Prafulla Kumar Samal, (1979) 3 SCC 4

8. St. of Orissa Vs Debendra Nath Padhi, (2003) 2 SCC 711

9. Niranjan Singh Karam Singh Punj.i Vs Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76

10. Supt. & Remembrancer of Legal Affairs Vs Anil Kumar Bhunja, (1979) 4 SCC 274

11. St. of Bihar Vs Ramesh Singh, (1977) 4 SCC 39

12. S. Selvi (specific citation not provided in text)

13. St. Vs A. Arun Kumar, (2015) 2 SCC 417

14. Sonu Gupta Vs Deepak Gupta, (2015) 3 SCC 424

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Challenge in this revision is to the order dated 17.5.20223 passed by learned Special Judge (POCSO Act)/ Additional Sessions Judge, Bareilly, in Case Crime No.368 of 2019, under Sections 147, 148, 323, 504, 506, 452, 354-Ka IPC and Section 8 of POCSO Act, Police Station Aonla, District Bareilly, wheeby the discharge application moved by the accused-revisionists in said case under Section 227 Cr.P.C. has been dismissed and case was fixed for framing of charge.

2. Heard learned counsel for the revisionists, learned AGA for the State and perused the material placed on record.

3. Factual matrix of the case in brief are that the FIR was lodged at the instance of respondent No.2 at police station concerned on 27.7.2019, at 16:16 hours on the basis of order passed by learned Special Judge, POCSO Act, Bareilly on application under Section 156(3) Cr.P.C. filed by the informant on 16.7.2019, with averment that on 4.9.2019, at around 6:20 AM, accused persons namely Raju, Pappi, Guddu, Darpan and Veer Singh, who are resident of her mohalla had mercilessly beaten and threatened him with life. The son and husband of the informant went somewhere else due to fear of accused persons. As informant had made a complaint at police station concerned regarding that incident, the accused-persons were bearing grudge against her. The accused persons appeared at the door of the house of informant at 2.6.2019, at about 11:30 PM due to previous enmity and knocked at her door. The informant opened door in impression that her son and husband would have come to home. The accused persons barged into her house and accused Veer Singh and Pappi grabbed and molested her minor daughter with bad intention. When the informant objected to this, they engaged in maar-peet with her and threatened her that they would compel her to leave the place like her husband and son and will grab her house and take her daughter with them. When the informant and her children shouted for help, the accused persons left the place after hurling threats of life to them. The informant tried to lodge her report at police station concerned but due to influence of accused persons, her report had not been lodged and ultimately she had to take recourse of the court for lodging her FIR, under Section 156(3) Cr.P.C.

4. The police investigated the case, recorded statements of victim, informant and witnesses, inspected the place of incident and Investigating Officer prepared site plan of the place of occurrence and after investigation submitted a final report in favour of the accused persons with conclusion that matter enquired into by approaching respectable people of locality and daughter-in-law of the informant, who was present on the spot but no such type of incident was found to have occurred. This fact emerged that the informant and her husband had borrowed money from accused persons for marriage of their son but they did not intent to pay back the money and a false case was lodged against accused persons with malafide. The informant appeared before the trial court and filed her protest petition against final report submitted by the Investigating Officer. Learned trial court heard the informant on final report and protest petition and placing reliance on statement of victim recorded under Section 164 Cr.P.C. before the Magistrate as well as the statement of informant recorded under Section 161 Cr.P.C. as well as FIR version rejected the final report and **allowed** the protest petition vide order dated 6.12.2021 and summon the accused Veer Singh and Pappi for said charges and accused Raju, Guddu and Darpan were also summoned for said charges except charge under Section 8 of POCSO Act.

5. The accused persons assailed the summoning order before this Court by moving an Application U/S 482 No.2702 of 2022, wherein they submitted that in fact, no such incident took place as mentioned in the F.I.R. and due to the personal grudges, entire family of the applicants has been roped in the present matter. It is further submitted that no offence against applicants

is disclosed and present prosecution has been instituted with a malafide intention for the purposes of harassment. This Court disposed of the application under Section 482 Cr.P.C., vide order dated 9.2.2022 with observation that the disputed defence of the accused cannot be considered at this stage. The Court did not see any abuse of the court's process either. The summoning court has been vested with sufficient powers to discharge the accused even before the stage to frame the charges comes, if for reasons to be recorded, it considers the charge to be groundless. Moreover, the applicants have got a right of discharge under Section 239 or 227/228 Cr.P.C., as the case may be, through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the Trial Court. The Court below holds the view that the accused has been rightly summoned and the material brought on record does not indicate the charges to be groundless it shall make an order to that effect and proceed further in the matter, in accordance with law.

6. In the light of observations of this Court on Application U/S 482 Cr.P.C. filed by the accused persons, they moved an application under Section 227 Cr.P.C. before the trial court praying for their discharge from alleged charges, wherein, they place reliance on the statements of independent witnesses given through affidavits to S.H.O., concerned, in which they have stated that no such type of incident occurred as alleged in the FIR. The accused persons are respectable people of the locality and they have been falsely implicated in the case with ulterior motive and with a view to grab their money lent to the husband of the informant. They have also stated in the application that they have been released on bail vide order dated 31.3.2022 by the Court. The FIR has been lodged by the informant with a view to blackmail the accused persons and avoid repayment of their money borrowed by him. It was also stated therein that in fact, the informant wanted to get her daughter (victim) married with accused Darpan but her offer was declined by accused persons. Accused Ajay @ Guddu and Rajkumar @ Raju are afflicted with serious ailment and they could not participate in such type of incident. The informant has stated the date of incident as 2.6.2019 whereas the victim, in her statement under Section 164 Cr.P.C., has stated the incident had occurred on 2.8.2019. The victim has implicated only accused Veer Singh and Pappi in the incident. Learned court below rejected the application for discharge moved by the accused persons with observation that the accused persons were summoned on protest petition, vide order dated 6.12.2021. They filed discharge application at belated stage after order of High Court in this respect. No fresh evidence appeared after summoning of the accused persons on the basis of which accused persons can be discharged. The discharge application has been moved on the basis of same evidence which was available at the time of summoning of the accused. No such type of evidence is found on record on basis of which, the accused persons could be discharged.

7. Feeling aggrieved by the impugned order, the accused persons/revisionists preferred present criminal revision.

8. Learned counsel for the revisionists submitted that learned trial court has wrongly observed in the impugned order that no fresh evidence or material has appeared on record after summoning of the accused-persons, which could form basis

for the discharge as this Court while deciding Application U/S 482 Cr.P.C. No. 2702 of 2022, vide order dated 9.2.2022, has clearly observed that "If the concerned Court feels persuaded to have the view that accused ought not to have been summoned and charge is groundless it shall not abstain from discharging the accused only on the ground that the material available at the time of summoning was the same which is available on record at the time of hearing the discharge application."

9. Learned counsel for the revisionists further submitted that where informant has implicated all the five accused persons in the FIR as well as in her statement under Section 161 Cr.P.C., the victim has made allegations only against two accused namely, Pappi and Veer Singh in the incident. Even, daughter-in-law of the informant has not supported FIR version in her statement under Section 161 Cr.P.C. The victim or informant suffered no injury in the incident as no injury report has been brought on record. The affidavits of the witnesses is part of case diary.

10. Per contra, learned AGA submitted that the offence is of serious nature. Learned court below has rightly dismissed the discharge application moved by the applicants/revisionists by impugned order while considering the material on record and submissions of learned counsels appearing for the parties. No case for discharge has been made out in the matter.

11. From perusal of record, it appears that the FIR in the case was lodged on the basis of order of Special Judge, POCSO Act, Bareilly, on 27.7.2019 regarding the incident dated 2.6.2019, time 11:30 PM. It is stated in the FIR that the accused-persons assaulted her and molested her minor daughter on date and time of incident by committing house trespass, due to previous enmity and incident dated 4.5.2019. The informant has supported FIR version against all the accused persons in her statement recorded under Section 161 Cr.P.C., wherein specific allegation of molestation of her minor daughter are attributed to accused namely, Veer Singh and Pappi. The victim in her statement under Section 161 Cr.P.C. recorded on 20.6.2019 has implicated only two accused person namely Pappi and Veer Singh, who knocked at her door in the fateful night, which was opened by her mother and they tried to outrage her modesty. She has also stated that there were no other person at that time except these two people. The victim in her statement under Section 164 Cr.P.C. recorded by the Magistrate on 26.7.2019 has also implicated only two accused namely Pappi and Veer Singh. She has sated nothing about other accused-persons.

12. Reference in this connection can be made to a recent decision of this Court in **Sheoraj Singh Ahlawat v. State of U.P. [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52],** in which, after analysing various decisions on the point, this Court endorsed the following view taken in **Onkar Nath Mishra v. State (NCT of Delhi) [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] : (Sheoraj Singh Ahlawat case [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52] , SCC p. 482, para 15) "15.** '11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not

expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.' (Onkar Nath case [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] , SCC p. 565, para 11)" (emphasis in original)

13. Now reverting to the decisions of this Court in **Sajjan Kumar [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] and Dilawar Balu Kurane [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310]**, relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the court cannot make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused:

1. Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245*(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction".*

2. Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245*, on the other hand, is reached only after the evidence referred in Section 244 has been taken.*

3. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in R.S. Nayak v. A.R. Antulay [(1986) 2 SCC 716 : 1986 SCC (Cri) 256] . The same reads as follows: (SCC pp. 75556, para 43) "43. ... Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245*(1) is a preliminary one and the test of 'prima facie' case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial court is satisfied*

that a prima facie case is made out, charge has to be framed." 9.2 In the subsequent decision in the case of S. Selvi (Supra) this Court has summarised the principles while framing of the charge at the stage of Section 227/228 of the CrPC. This Court has observed and held in paragraph 6 and 7 as under:

"6. It is well settled by this Court in a catena of judgments including Union of India v. Prafulla Kumar Samal [Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4 : 1979 SCC (Cri) 609] , Dilawar Balu Kurane v. State of Maharashtra [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310] , Sajjan Kumar v. CBI[Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] , State v. A. Arun Kumar [State v. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , Sonu Gupta v. Deepak Gupta [Sonu Gupta v. Deepak Gupta, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2003) 2 SCC 711 : 2003 SCC (Cri) 688] , Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya [Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76 : 1991 SCC (Cri) 47] and Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] that the Judge while considering the question of framing charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his rights to discharge the accused. The Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the materials as if he was conducting a trial.

14. Hon'ble Apex Court in **Tarun Jit Tejpal vs. State of Goa, (2019), SCC OnLine 1053,** placed reliance on a previous judgement of Apex Court in Sajjan Kumar [Sajjan Kumar v. CBI, (2010) 9 SCC 368, wherein Apex Court on consideration of various decision about scope of Section 227 and 228 Cr.P.C. laid following principles:-

"(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully

justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."" In the case of Mauvin Godinho (Supra) this Court had an occasion to consider how to determine prima facie case while framing the charge under Section 227/228 of the CrPC. In the same decision this Court observed and held that while considering the prima facie case at the stage of framing of the charge under Section 227 of the CrPC there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. At this stage the decision of this Court in the case of Stree Atyachar Virodhi Parishad (Supra) is also required to be referred to. In that aforesaid decision this Court had an occasion to consider the scope of enquiry at the stage of deciding the matter under Section 227/228 of the CrPC. In paragraphs 11 to 14 observations of this Court in the aforesaid decision are as under:-

"11. Section 227 of the Code of Criminal Procedure having bearing on the contentions urged for the parties, provides:

"227. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

12. Section 228 requires the Judge to frame charge if he considers that there is ground for presuming that the accused has committed the offence. The interaction of these two sections has already been the subjectmatter of consideration by this Court. In State of Biharv. Ramesh Singh [(1977) 4 SCC 39 : 1977 SCC (Cri) 533 : (1978) 1 SCR 257] , Untwalia, J., while explaining the scope of the said sections observed: [SCR p. 259 :

SCC pp. 4142 : SCC (Cri) pp. 53536, para 4] Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously Judged.

Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused.

13. In Union of India v. Prafulla Kumar Samal [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : (1979) 2 SCR 229] , Fazal Ali, J., summarised some of the principles: [SCR pp. 23435 : SCC p. 9 : SCC (Cri) pp. 61314, para 10] "(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused had been made out.

(2) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

14. In present case, the victim, who is minor daughter of the informant/defacto complainant has stated in her statement under Section 161 as well as 164 Cr.P.C. that only accused Veer Singh and Pappi committed house trespass in the fateful night in presence of her mother and molested her. Even she has not attributed any role to other accused persons namely, Raju, Guddu and Darpan. She has not even stated their presence on the spot. Therefore,

there is clear contradiction in stand of the informant and that of victim regarding presence and participation of these three accused namely, Raju, Guddu and Darpan in the incident. There is no reason as to why the victim had not stated anything regarding presence of these three persons on date, time and place of incident. Therefore, the complicity of these three accused persons in the alleged incident appears highly doubtful. Accused persons are said to have belonged to same family and there is allegation of enmity in the FIR itself between informant and accused persons. The offence was not investigated with regard to incident dated 4.5.2019, which allegedly happened with husband and son of the informant and present FIR was lodged only with regard to incident dated 2.6.2019. Therefore, learned court below has rejected the discharge application moved by the accused revisionists without considering the apparent conflict between stand of the victim and the informant in their statements recorded during investigation. The court below while dismissing discharge application has not considered the observations made by this Court while disposing off the Application U/S 482 Cr.P.C. as mentioned above. Seeking discharge on cogent grounds is a valuable right of the accused. Therefore, the revision is liable to be **allowed** and impugned order, whereby the discharge application moved by the revisionists has been dismissed, is liable to be set aside.

15. Accordingly, present criminal revision stands **allowed** and the impugned order dated 17.5.2022, passed by learned trial court is set aside and the matter is remitted to trial court with direction to hear and decide the discharge applicable moved by the revisionists afresh in the light of observation made in present order, after giving opportunity of hearing to both sides and passed a reasoned and speaking order based on material on record, in accordance with law.

(2024) 3 ILRA 130
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.11.2023
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 4752 of 2022

Vishnu Kumar Saini ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri Ankit Agarval

Counsel for the Opposite Parties:
G.A.

Civil Law - Essential Commodities Act, 1955 – Sections 3, 6A, 6B & 7 – Uttar Pradesh Scheduled Commodities Distribution Order, 2004 – Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Confiscation of Food Grains – Revisional Jurisdiction – Absence of Control Order Violation - The revisionist, Vishnu Kumar Saini, challenged the order dated 29.09.2022 by the Special Judge (E.C. Act)/Additional Sessions Judge, Bulandshahr, dismissing his appeal against the confiscation order dated 21.05.2022 by the Additional District Magistrate (ADM), which seized food grains (180 quintals wheat, 8 quintals rice, 2.5 quintals flour, 12.5 quintals chokar, and 3 quintals wheat in government-stitched sacks) from his flour mill under Section 6A of the Essential Commodities Act, alleging black marketing of Public Distribution System (PDS) and Mid Day Meal grains. The revisionist argued no violation of any control order was specified, the seized grains were not linked to PDS or Mid Day Meal shortages, and a final

report favoring him was submitted on 28.04.2023 in the related criminal case (Crime No. 797 of 2021). The District Magistrate's order dated 02.07.2022, pursuant to a prior writ petition, found no control order violation and released the flour mill. Held: The court, relying on the District Magistrate's findings and precedents like *1982 ACC 514* and *1992 (EF)*, held that the confiscation order was unsustainable due to the lack of evidence connecting the seized grains to PDS or Mid Day Meal schemes and the absence of a specified control order violation. The revision was allowed, setting aside the impugned orders, and the seized grains (except the 3 quintals in government-stitched sacks) were ordered to be released to the revisionist, subject to conditions, or their sale proceeds if already auctioned.

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Ankit Agarval, learned counsel for the revisionist, Sri Sameer Shanker, learned AGA-I for the State and perused the material placed on record.

2. Instant criminal revision has been preferred against the impugned judgement and order dated 29.9.2022, passed by Special Judge (E.C.) Act/Additional Session Judge, Court No.14, Bulandshahr in Criminal Appeal No.110 of 2022, Vishnu Kumar Saini vs. State of U.P., whereby the appeal filed against the order dated 21.5.2022, passed by Additional District Magistrate (Administration), Bulandshahr, in Case No.1667 of 2021, State of U.P. vs. M/s Gold Shan Bhog Aata Flour Mill (Proprietor Vishnu Kumar), under Section 6-A of Essential Commodities Act has been dismissed and impugned order passed by A.D.M. (Administration) has been affirmed.

3. The factual matrix of the case in brief are that the action in present case was initiated at the instance of Letter No.1155/Enforcement/2021 dated 23.7.2021 of District Supply Officer, Bulandshahr, in which he informed that on 21.6.2021, he led a raid alongwith Tehsildar (Judicial), Khurja, Sri Rakesh Kumar Sharma, Ashish Srivastava, Supply Inspector and Police Officials on directions of U.P. Zila Adhikhari, Khurja at 4:30 P.M. and found that illegal sell and purchase of food grains of Public Distribution System/Mid Day Meal was being carried out there. The Proprietor of said flour mill, Vishnu Kumar Saini and his brother Narendra Kumar Saini were found there, who produced the license of flour mill and documents relating to G.S.T. As many as 400 sacks were found in disarranged manner on the floor of said flour mill, which included 180 qunital wheat and 3 qunital rice kept in five sacks were also found. These sacks were tied by handmade thread. Apart from that, 6 sacks, the opening thereof was sealed by Government stitches were produced at the flour mill, at that time by Mrs. Neeraj Goswami, a Primary School Teacher, who could not give any plausible explanation for the same and stated that she had come there to return said wheat, as the wheat was allotted by the Government, under Mid Day Meal Scheme in lieu of 'Atta', borrowed by school from said flour mill.

4. Case under Section 3/7 of E.C. Act was registered against proprietor of Goldson Bhog Aata, Flour Mill namely, Vishnu Kumar Saini and his brother, as they failed to give any explanation of storing this huge amount of rice and wheat in the flour mill. As Mid Day Meal does not come within the purview of Public Distribution System, the departmental action was initiated by said school teacher. It was found that the Proprietor of flour

mill was converting the nature of food grains of PDS system to earn unlawful gain and this was black marketing of food grains, which belongs to P.D.S. System. All the food grains which included five qunital of flour, 50 sacks of 12.50 quintal chokar, 180 quintal wheat, 3 quintal rice and Government stitched 6 sacks of wheat (3 quintal) brought by said school teacher found in flour mill were kept by Searching Officer in the flour mill and its doors were closed and sealed and security thereof was intrusted to S.H.O., concerned.

5. A notice under Section 6-B of E.C. Act was issued to proprietor of Floor Mill namely, Vishnu Kumar and his brother Naredhra Kumar Saini by Additional District Magistrate, (Administration), Bulandshahr on 28.7.2021. They appeared and filed their reply on 2.8.2021 before ADM (Administration), in which they have stated that they had not violated any control order or regulation issued under E.C. Act. The Supply Inspector has sealed their flour mill in illegal manner and all the food grains which were brought for grinding were kept inside the mill, which was sealed. Some food grains, supplied to school under Mid Day Meal were brought to the mill for grinding, but same was illegally detained and sealed due to which the opposite parties were facing much loss. They have moved an application for opening of the seal of their flour mill and also filed application for release of the food grains seized by District Supply Officer and his team The statement of Supply Inspector and Neeraj Goswami, the Head Master, Primary School No.15 was recorded before ADM. The opposite party/revisionist produced receipt of Mandi Samiti dated 15.6.2021 and bill of firm Kali Charan Sanjiv Kumar dated 15.6.2021, which was sent for verification of Sachiv, Mandi Samiti. Mandi Samiti, in its report informed that agricultural produce wheat amounting Rs.57.60 quintal was sold to M/s God Sambhog Mill, Khurja, at the rate of Rs.22,00/- per quintal. However, online form No.6 and 9 were not issued to firm M/s Kali Charan Sajiv Kumar for entry of wheat. The seized food grains were inspected in presence of opposite party Vishnu Kumar. A Criminal Case under 3/7 of E.C. Act was lodged against Vishnu Kumar and his brother Narendra Kumar Saini for hoarding food grains. However, learned ADM (Administration) vide impugned order dated 21.5.2022, confiscated the case property, which consisted of 2.5 quintal flour (atta), 12.5 quintal chokar, 180 quintal wheat, 8 quintal rice and 6 sacks consisting of 3 quintal wheat brought by said school teacher in favour of Government and District Supply Officer, Bulandshahr was directed to get the seal of flour mill opened and bring the said food grains recovered therefrom to auction. It is also directed that the sale proceeds were deposited in State Exchequer, which will be subject to final order by the competent Court in Case Crime No.797 of 2021.

6. Feeling aggrieved by the said confiscation order, the revisionist, who is proprietor of said flour mill preferred a Criminal Appeal No.110 of 2022 before the Court of Session, which was dismissed vide order dated 29.9.2022 by learned Special Judge (E.C.) Act/Additional Session Judge, Court No.14, Bulandshahr. Learned appellate court has found no factual or legal error in impugned order and affirmed the impugned order.

7. Learned counsel for the revisionist submitted that the learned courts below have rejected his release application in

illegal manner. This fact is not established that the seized food grains from flour mill operated by the revisionist were part of Public Distribution System. Therefore, no case under Section 3/7 of E.C. Act is made out. The revisionist was made accused in criminal case registered under Section 3/7 of E.C. Act, vide Crime No.797 of 2021, wherein he is enlarged on anticipatory bail by orders of this Court dated 4.1.2022, passed in Criminal Misc. Anticipatory Bail Application U/S 433 Cr.P.C. No.13861 of 2021, till submission of police report. In show cause notice issued under Section 6-B of EC Act, learned ADM failed to specify as to which particular provision of U.P. Scheduled Commodities Distribution Order, 2004 and U.P. Essential Commodities (Regulation of sale and distribution control) Order, 2016 has been violated by the revisionist, hence, the case of the revisionist is covered by the decision laid down in 1982 ACC 514 and 1992 (EF), in which this court held that the show cause noticed issued under Section 6-B of EC Act must state the grounds under which the confiscation is intended to be made. The revisionist used to purchase food grains from shop keepers and sell the same to the customers. A true copy of the bill issued in favour of the revisionist has been filed as Anenxure No.7 of the affidavit. Without specifying the breach of particular control order issued by State or Central Government, no proceeding under Section 3/7 of E.C. Act, can be launched against a person. The opposite party has failed to connect the alleged recovered food grains to any ration dealer or any Government godown as nobody can obtain food grains except the ration dealer or godown owners. No ration dealer has reported any case of theft with regard to said food grains. Even, no report has been lodged at the instance of school regarding shortage of grains allotted under Mid Day Meal. There is no evidence against the revisionist in respect of the allegations of black marketing. In fact the alleged food grains belongs to revisionist and same is liable to be released in his favour. He lastly submitted that a copy of final/closure report filed by the Investigating Officer of concerned criminal case registered vide Crime No.797 of 2021, under Section 3/7 registered against the revisionist in which final report has been filed in favour of the revisionist on 28.4.2023 and no offence has been made out in respect of seized food grains. Therefore, due to subsequent developments also, the impugned orders are not sustainable and the seized food grains are liable to be released in favour of the revisionist.

8. Per contra, learned AGA-I submitted that the detailed objections are filed by way of counter affidavit dated 20.4.2023 by Sub Inspector of Police. A huge quantity of food grains were seized from flour mill of the revisionist and he could not give plausible explanation for restoring the same, in the mill in disarranged manner. The impugned confiscation order passed by ADM is just, proper and in accordance with the provisions of law. However, he did not deny the fact that the revisionist is a proprietor of firm registered in the name of M/s Goldson Bhog Aatta and a license and GST was issued to the firm by the Government. He also could not deny the fact that a final report has been filed in favour of the revisionist by the Investigating Agency with finding that during investigation, sufficient evidence could not be found against the accused persons, namely, Vishnu Kumar Saini and Narendra Kumar Saini.

9. From perusal of record, it appears that the revisionist filed a Writ C No.6421 of 2022 (Vishnu Kumar vs. State of U.P. and 2 others), before this court against sealing order of his flour mill by the Government and officials wherein, this court directed the respondent No.3 to file a copy of control order which has been allegedly violated by the petitioners and also to disclose the evidence as to how goods found lying in the petitioner's flour mill have been linked with the food grains under the Mid Day Meal Scheme. In case the goods reserve for Mid Day Meal has been diverted to the revisionist's flour mill, there has to be some complaint or evidence from relevant quarter that the goods which are supplied under Mid Day Meal were short form or have been stolen. This is specific case of the petitioners that neither any ration dealer or other persons has reported shortage of food grains reserved under the Mid Day Meal Scheme. The respondent No.3 was also directed to re-visit the matter, if he finds the said aspects were not considered earlier. In compliance of above order of this Court, the District Magistrate, Bulandshahr revisited the matter and gave a finding that on perusal of record, no control order issued by the Government consisting the present matter was found. The matter does not come within the purview of Uttar Pradesh Essential Commodities (Sale and Distribution Control Regulation) Order, 2016 because this regulation covers only those food grains and essential commodities, which comes within the purview of PDS System and this is issued to maintain proper distribution of food grains amongst eligible rashan card holders. The Supply Inspector has also accepted that the food grains under Mid Day Meal are not covered within the public distribution system under E.C. Act. No evidence was found on record which could suggest that the food grains found in flour mill were same food grains which are allotted to fair price shops or under Mid Day Meal Scheme. This fact has also not emerged during investigation that the food grains seized from the flour mill of the petitioners were found to be stolen from any person or institution or some shortfall was found in food grains supplied to any such person or institution. The learned District Magistrate observed that as no violation of any control order was found on the part of the petitioners, therefore, there is no action to continue sealing of his flour mill and thus, action of Supply Inspector Ashish Srivastava whereby, the flour mill of the petitioner is seized is set aside and said flour mill is released under occupation of the petitioners.

10. In the light of above findings and order of District Magistrate dated 2.7.2022 as well as other material available on record, this is obvious that no violation of any food control order has been found in the matter. The said food grains, although, in large quantity are found in the premises of the revisionist out of which 6 sacks, each weighing 50 kgs, having 3 quintals wheat were found to be brought by a primary school teacher Mrs. Neeraj Goswami, which was stitched by government seal. Many aspects of the case are already clarified in aforesaid order of District Magistrate dated 2.7.2022 whereby the sealing order of the premises of flour mill, owned and operated by the revisionist was set aside and the premises are released in favour fo the revisionist. The documents filed by the revisionist before the courts below in respect of his claim over seized good grains have not been duly considered.

11. I have gone through the Uttar Pradesh Scheduled Commodities Distribution Order, 2004 as well as Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control), Order 2016, paragraph No.22 of Uttar Pradesh Scheduled Commodities Distribution Order, 2004 give power of entry, search and seizure etc to the Food Officer, competent authority, Senior Supply Inspector or Supply Inspector to enter, inspect or break open and search any place or premises, vehicle or vessel, in which he has reason to belief that any contravention of the provisions of this order has been or is being or is about to be made. He can seize any scheduled commodities, if he is satisfied that there has been contravention of this order. Learned AGA could not point out any contravention of this distribution order, 2004 and learned District Magistrate in order dated 2.7.2022 has categorically stated that the matter does not comes within the purview of this control order, 2016. Therefore, the confiscation and auction of seized food grains has lost its significance in view of subsequent developments as the Investigating Agency has submitted closure report in criminal case lodged against the revisionist in respect of seized food grains under Section 3/7 of E.C. Act. Therefore, the impugned orders passed by the learned courts below are not sustainable in view of foregoing discussion and the same is liable to be set aside.

12. Accordingly, present criminal revision stands allowed.

13. The competent authority/ADM (Administration), Bulandshahr is directed to release the seized food grains in present matter from flour mill of the revisionist **(barring 6 stitched sacks containing 3 quintal wheat allegedly allotted to the Government Primary School and brought by teacher Mrs. Neeraj Goswami at the mill at the time of search and seizure)** after taking a personal bond and one surety from the revisionist of the market value of said seized food grains with undertaking to produce the same or its equivalent price before the court as and when required and in case the auction has been already carried out, the sale proceeds will be released in favour of the revisionist, subject to final judgement/order of the court concerned in the matter.

14. Let copy of this order be forwarded to District Magistrate, Bulandshahr for compliance and necessary action.

(2024) 3 ILRA 135
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.02.2024
BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 4944 of 2022

Smt. Kamlesh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Gireesh Chandra Dwivedi, Sri Puneet Kumar Verma, Sri Sanjay Tiwari

Counsel for the Opposite Parties:
G.A., Sri Puneet Kumar Verma

Criminal Law - Code of Criminal Procedure, 1973 - Section 156(3) - Application for Investigation - Revisionist challenged the order dated 27.09.2022 by Chief Judicial Magistrate, Firozabad, dismissing her application under Section 156(3) Cr.P.C. for investigation into the alleged murder of her daughter, Madhuri, by her husband, Yogendra,

and in-laws, claiming dowry-related harassment and suspicious death on 21.03.2022. Revisionist alleged injuries on Madhuri's body and coercion by accused to avoid postmortem. Trial court, based on Circle Officer's report, found Madhuri died of illness (asthma), no postmortem was insisted upon by revisionist's family, and accused transferred land to Madhuri's son, Manavaya, with revisionist as guardian. Application dismissed due to three-month delay and lack of objection to the report. Court, applying Anjum Vs St. of U.P., 2008 (3) ADJ 417, and Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287, held that Section 156(3) requires judicial discretion, not mandatory investigation, and applications must be supported by affidavit to deter frivolous claims. No cognizable offence disclosed, no supporting documents, and delay unexplained. Impugned order found free of irregularity, illegality, or impropriety. Revision dismissed. (Paras 9-16)

Revision Dismissed.

Case Law Cited:

1. Anjum Vs St. of U.P., 2008 (3) ADJ 417 (Paras 11, 12, 14)

2. Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287 (Paras 13, 14)

3. Lalita Kumari Vs St. of U.P., (2014) 2 SCC 1 (Para 13)

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

Heard Sri Sanjay Kumar Tiwari, Advocate, holding brief of Sri Gireesh Chandra Dwivedi, learned counsel for the revisionist, Sri Puneet Kumar Verma, learned counsel for the opposite party nos. 2 to 6 and learned A.G.A. for the State.

2. By means of this instant criminal revision, the revisionist has assailed the judgement and order dated 27.09.2022 passed by learned Chief Judicial Magistrate, Firozabad in Misc. Case No. 2128 of 2022 (Smt. Kamlesh Vs. Yogendra and Others) u/s 156 (3) Cr.P.C., Police Station- Sirsaganj, District- Firozabad.

3. By the impugned order, the learned Magistrate has dismissed the application u/s 156 (3) Cr.P.C. filed by the revisionist.

4. It has been submitted by learned counsel for the revisionist that the learned Magistrate passed the impugned order dated 27.09.2022 without considering the evidence on record and without application of his mind. Since the impugned order has been passed against the weight of the evidence on record, it should be set-aside and learned Magistrate may be directed to pass order afresh on the application of the revisionist.

5. It has been submitted by learned counsel for the opposite party no. 2 that the revisionist has filed criminal revision on false and frivolous ground. Learned Chief Judicial Magistrate has rightly rejected the revisionist's application vide order dated 27.09.2022.

6. Learned counsel for the revisionist, learned counsel for the opposite party no. 2 and learned A.G.A. for the State have been heard. Perused the entire evidence present on the revision.

7. In the counter affidavit filed on behalf of the opposite party nos. 2 to 6, it has been averred that the revisionist's daughter, Madhuri, was married to opposite party no. 2, Yogendra Singh s/o Phoolan Singh, resident of village- Bhura Bhartara, Police Station- Sirsaganj, District- Firozabad, as per Hindu rites and rituals on 06.05.2017. It has also been averred that after marriage, the deceased and her husband were peacefully living a married

life and one child, namely, Manavaya, was born out of their wedlock. It has also been averred that Madhuri, wife of opposite party no. 2, was suffering from asthma and for that, she was under treatment of doctor. During her treatment in the hospital, she died on 31.03.2022. The opposite party no. 2 and his family members informed about her death to the revisionist and other family members. In the cremation ceremony of Madhuri, revisionist and her family members were present. It has also been averred that after the death of Madhuri, the revisionist pressurized the opposite parties to take his son, Manavaya, but the opposite party no. 2 and his family members agreed to purchase agricultural land in favour of Manavaya for securing his future. It has further been averred that agricultural land was purchased by opposite party no. 3, Phoolan Singh, father of Yogendra.

8. The applicant/revisionist, Smt. Kamlesh, has filed application u/s 156 (3) Cr.P.C. on 20.06.2022 alleging that her daughter, Madhuri, was married on 06.05.2017 to accused, Yogendra according to hindu rites and rituals. The applicant/revisionist has spent about Rs.8,00,000/- in the marriage of her daughter. The husband of revisionist's daughter, Yogendra, her father-in-law, Phoolan Singh, mother-in-law, Smt. Guddi Devi and brother-in-law (devar), Vineet were not satisfied with the dowry and they were asking Madhuri a car from her father. Averment has made in the application u/s 156 (3) Cr.P.C. that after returning from her matrimonial home to her paternal home, applicant/revisionist's daughter used to tell the applicant, her father and her sister, Sonia about her harassment for dowry by her husband and in-laws. She used to tell that they may cause her death in order to get a car. The applicant/revisionist's daughter started doing job as a G.N.M. in Agra where her husband was also working. He used to often taunt her that she did not provide a car from her father while she was staying with her husband at Agra. Her father-in-law, Phoolan Singh, mother-in-law, Smt. Guddi Devi and brother-in-law (devar), Vineet, used to visit her house and secretly prepared plan to kill her but they could not succeed. Fifteen days before her murder, she had visited her paternal home and informed her mother and sister, Sonia that her in-laws could kill her anytime for a car. One Mahima, who was working as G.N.M. at Agra used to visit her daughter's house and she started living with Yogendra and her daughter. On 21.03.2022 at 2:30 o'clock, her son-in-law, Yogendra informed the applicant on phone that Madhuri was not able to speak. Then the applicant with her husband, Pooran Singh and several other villagers reached Krishna Hospital, Agra at 4 p.m. Her daughter, Sonia, informed applicant's husband that Madhuri had died. Yogendra, his parents, his brother Vineet and G.N.M. Mahima was also present there. The applicant/revisionist observed mark of injury on the person of Madhuri and swelling on her neck. The doctor asked for postmortem report and police was summoned but Yogendra and his relatives pressurized the police to get the postmortem of Madhuri done. They threatened the applicant/revisionist that if she tried to complain against them, she will be killed. Since persons on the side of applicant/revisionist were less in number, the accused forcibly carried her deceased daughter's body and her son to their village. The applicant/revisionist submitted written report in the police station about the incident and made several other efforts for 2-4 days but the police did not register the criminal case and took no action. The applicant/revisionist also sent information

to S.S.P., Firozabad, but no action was taken.

9. The trial court has given following reasons for rejecting the application u/s 156 (3) Cr.P.C. filed by the applicant/revisionist :

"न्यायालय द्वारा दिनांक 21-07-22 को क्षेत्राधिकारी सिरसागंज से मामले की जांच करायी गई क्षेत्राधिकारी सिरसागंज की आख्या पत्रावली पर संलग्न है उनके द्वारा यह आख्या दी गई है कि माधुरी की तबियत खराब रहती थी और उसका इलाज चल रहा था मृतका का पोस्टमार्टम वादिनी उसके घरवालों की सहमति से नही कराया गया क्योंकि उसकी मृत्यु बीमारी के चलते हुई मृतका की मृत्यु श्री कृष्ण हॉस्पिटल में उपचार के दौरान हुई थी। मृतका का अन्तिम संस्कार दोनो पक्षों की सहमति से हुआ था एवं बाद में आवेदिका की मांग पर विपक्षी फूलन सिंह द्वारा दिनांक 11-04-22 को 2604 वर्ग फीट का प्लाट मानवय उम्र 03 वर्ष के नाम किया था मांग के अनुसार संरक्षिका कमलेश कुमारी को बनाया गया था।

क्षेत्राधिकारी सिरसागंज द्वारा जो आख्या प्रेषित की गई है उस आख्या पर आवेदिका की ओर से कोई भी आपत्ति दाखिल नही की गई है।"

10. From the perusal of the reasons assigned by the trial court, it transpires that the death of the applicant/revisionist's daughter had taken place on 21.03.2022 at 2.30 o'clock but the applicant/revisionist has submitted application u/s 156 (3) Cr.P.C. after a delay of about 3 months and no sufficient reasons have been assigned for the inordinate delay for submitting the revision petition. In the enquiry done by Circle Officer concerned, it was found that Madhuri, deceased daughter of the applicant/revisionist was suffering from illness and her medical treatment was going on. The family members of the applicant/revisionist did not insist on getting the postmortem of the deceased done, therefore, no postmortem of the deceased's body was conducted. The opposite party no. 3, deceased's father-in-law, Phoolan Singh on 11.04.2022 had transferred 2604 sq. ft. of land in favour of deceased's son, Manavaya, aged about 3 years. In the transfer deed, applicant/revisionist was shown as guardian of Manavaya. The applicant/revisionist did not file any objection against the report of the Circle Officer concerned.

11. A coordinate Bench of this Court in paragraph nos. 4 and 7 of its judgement in **Anjum Vs. State of U.P. and Ors., 2008 (3) ADJ 417** has held as follows :

"4. …..The word 'may' occurring in Section 156(3) Cr.P.C. is of utmost significance. It gives the magistrate a discretionary power to order or not for an investigation into the cognizable offence disclosed in the petition. This discretionary power ought to have been exercised only on reasons and not on arbitrariness. This discretionary power has been given to magistrates to enable them to deal adequately with both types of the petitions (i) the genuine petitions containing truthful allegations about the commission of the cognizable offence and (2) the petitions having baseless or false allegations. The increasing tendency of the people to file petitions on false allegations cannot be ignored.

7. In other cases the magistrate must apply his own mind and reason while dealing with the powers under Section 156(3)Cr.P.C. The magistrate must always keep it in mind that the passing of an order for investigation in frivolous and vexatious petitions containing false allegations is an abuse of the process of the court. Simultaneously declining to pass the order for an investigation in genuine petitions containing truthfulness

allegations, is akin to denial of justice to the needy persons. Both of these situations are dangerous."

12. In the aforesaid judgement of **Anjum (supra)**, this Court has issued following guidelines for passing orders on application u/s 156 (3) Cr.P.C. which are as follows :

i) The investigation under Section 156(3) Cr.P.C. cannot be ordered where the petition does not disclose the commission of a cognizable offence.

ii) Magistrates are not under any obligation to order the investigation invariably in all the petitions, which disclose the commission of the cognizable offences.

iii) Where the allegation of the commission of cognizable offence is supported by any such documents which tends to inspire the confidence of the magistrate regarding the commission of a cognizable offence, the magistrate must pass the order for the investigation. Such documents may include the medical report or some other cogent material of the like nature.

iv) Where the allegation, in itself, is of such a nature which naturally inspire the confidence of a reasonable man in its truthfulness the magistrate must pass the order for an investigation. Such allegations include the allegation of rape, outraging the modesty of a woman, sodomy or the offence under Sections 363 and 366 etc, provided the victim is related to the petitioner. Such allegations involve the reputation of the family of the victim and the petitioner both, hence such allegations are generally, not levelled falsely. Hence in such cases also the magistrates must pass the order for an investigation.

v) Where the name of the accused is not known to the petitioner, the chances of false implication are ruled out. Hence in such cases also, the investigation must be ordered,

vi) Where the recovery of the victim or the victim's corpse is to be made, the investigation must be ordered. Such as in the case of allegations of the offences under Section 363, 366 and 364 IPC. vii) Where the recovery of any valuable movable property is to be made and where there is cognent document to show the ownership of the petitioner over such moveable property, the investigation may be ordered.

viii) Where there is allegation regarding the commission of a heinous offence, the investigation must be ordered. Such as in the case of murder, culpable homicide not amounting to murder etc.

ix) Where the magistrate is of the opinion that some more facts which are in obscurity but are necessary to be investigated for the just decision of the case, the magistrate may order for the investigation provided the petition discloses the commission of a cognizable offence.

x) where there is nothing to convince the magistrate regarding the truthfulness of the allegation and where there is nothing to rule out the possibilities of the allegation being false, the magistrate must avoid to pass an order for investigation.

13. In the case of **Mrs. Priyanka Srivastava and Another Vs. State of U.P. and Others, 2015 (6) SCC 287**, the Hon'ble Apex Court has given following directions to the Magistrate for passing order u/s 156 (3) Cr.P.C. for registration of a first information report to the S.O. of the concerned police station :-

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari [(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

14. Considering the reasons assigned by the trial court in the impugned order for rejecting the application u/s 156 (3) Cr.P.C. in the light of the guidelines issued by the Hon'ble Apex Court in **Mrs. Priyanka Srivastava (supra)** and the High Court in **Anjum (supra)**, I do not find any irregularity, illegality or impropriety in the impugned order.

15. There is no merit in the criminal revision and the same is liable to be dismissed.

16. Accordingly, the criminal revision is **dismissed.**

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

(2024) 3 ILRA 141
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2024
BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 5185 of 2022

Smt. Alka & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Ram Jee Saxena, Sri Raghuvansh Chandra

Counsel for the Opposite Parties:
G.A., Sri Ashok Kumar Pandey

Criminal Law -Code of Criminal Procedure, 1973 - Section 125 - Maintenance - Revisionists (wife and two minor daughters) challenged the order dated 13.09.2022 by Additional Principal Judge, Family Court No.1, Meerut, granting interim maintenance of Rs.3,000/- to revisionist No.1 (wife) and Rs.2,000/- each to revisionist Nos.2 and 3 (minor daughters) under Section 125 Cr.P.C., seeking enhancement. Revisionists alleged dowry harassment and abandonment by opposite party No.2 (husband), a pump operator earning Rs.30,551/- monthly (net Rs.23,528/-). Trial court's order lacked reasoning and failed to consider husband's income and family status. Relying on Rajnesh Vs Neha, (2021) 2 SCC 324, court held that maintenance should prevent destitution, consider husband's financial capacity, and be awarded from the date of application, up to 25% of monthly income. Opposite party No.2's claim of supporting a heart-patient brother insufficient to reduce obligation. Impugned order set aside as erroneous. Maintenance enhanced to Rs.4,000/- for wife and Rs.3,000/- each for daughters, totaling Rs.10,000/- monthly, payable from date of application, with arrears in four installments. Revision allowed. (Paras 13-21)

Revision Allowed.

Case Law Cited:

1. Rajnesh Vs Neha, (2021) 2 SCC 324 (Paras 5, 9, 13, 14, 15, 16, 17)

2. Smt. Kuldeep Kaur Vs St. of U.P., (2012) 3 JIC 522 (All) (Para 5)

3. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316 (Para 13)

4. Bhuwan Mohan Singh Vs Meena, (2015) 6 SCC 353 (Para 13)

5. Chanmuniya Vs Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141 (Para 13)

6. Kamala Vs M.R. Mohan Kumar, (2019) 11 SCC 491 (Para 13)

7. Jasbir Kaur Sehgal Vs District Judge, Dehradun, (1997) 7 SCC 7 (Para 14)

8. Vinny Parmvir Parmar Vs Parmvir Parmar, (2011) 13 SCC 112 (Para 14)

9. Manish Jain Vs Akanksha Jain, (2017) 15 SCC 801 (Para 14)

10. Reema Salkan Vs Sumer Singh Salkan, (2019) 12 SCC 303 (Para 14)

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

By means of the instant criminal revision, revisionists have assailed the judgement and order dated 13.09.2022 passed by Additional Principal Judge, Family Judge Court No.1, Meerut in Case No.07 of 2022 (Smt. Alka vs. Sohanpal @ Sonu), under Section 125 Cr.P.C.

2. By the impugned order, the trial Court has granted interim maintenance of

Rs.3,000/- to the revisionist No.1 and of Rs.2,000/- to the revisionist Nos.2 and 3 per month each under Section 125 Cr.P.C. The revisionists have prayed in the revision for enhancement of maintenance allowance granted by the trial Court in their favour.

3. It has been submitted by the learned counsel for the revisionists that before calculating the quantum of maintenance, the trial court has not taken into consideration the salary of the opposite party No.2 (husband) and the status of family. It has also been submitted that opposite party No.2 is still neglecting to maintain the revisionists, who are his wife and two minor daughters. The revisionists are not capable to maintain themselves. He next submitted that finding of the trial court regarding the income of the opposite party No.2 is not based on the evidence on record. As per the evidence on record, the monthly salary of the opposite party No.2 is of Rs.30551/-, therefore, revisionists shall be entitled to atleast 1/3rd of salary of opposite party No.2 as maintenance allowance.

4. The revisionist No.1 has filed payslip of opposite party No.2, which was issued on 26.09.2022 by the Executive Engineer, Vidyutkhand-III, U.P. Awas Vikas Parishad, Kalyanpur, District Kanpur. The same has been annexed as Annexure No.1 to the revision. In this statement of salary, the gross income of the opposite party No.2 is shown as Rs. 30,551/- and net amount payable as Rs. 23,528/-.

5. Learned counsel for the revisionists has placed reliance on the following judgments of the Hon'ble Apex Court as well as this Court:-

(i) Rajnesh vs. Neha and Another, (2021) 2 SCC 324.

(ii) Smt. Kuldeep Kaur and Another Vs. State of U.P. and Another, (2012) 3 JIC 522 (AII).

6. Per contra, learned counsel for the opposite party No.2 has opposed the prayer of the revisionists and submitted that trial court has passed the impugned order on evidence on record. It has also been submitted that trial court has not given reasons for fixing the amount of maintenance allowance. It has also been submitted that opposite party No.2 having been appointed as pump operator in U.P. Awas Vikas Parishad, Kalyanpur, Kanpur under dying in harness rules and he has liability to maintain 58 years old elder brother, who is suffering from heart disease, therefore, the amount of next salary will be reduced after deducting the amount for maintenance of his brother from his monthly gross salary.

7. Heard Sri Raghuvansh Chandra, learned counsel for the revisionists, learned A.G.A. for the State and Sri Ashok Kumar Pandey, learned counsel for opposite party no.2.

8. Factual matrix of the case, in brief, is that Smt. Alka, who is revisionist No.1 in this revision filed an application under Section 125 Cr.P.C. for herself and two minor daughters alleging that revisionist No.1 was married with opposite party No.2- Sohanpal @ Sonu according to Hindu rites and rituals on 29.04.2015 and her parents spent Rs.10 Lakhs on her marriage. After marriage, she started living in her matrimonial home where her

husband (opposite party No.2) and her in-laws started harassing her for not bringing sufficient dowry. On 15.03.2016, after her giving birth to a girl child, namely Tavisha, her husband and in-laws started taunting her for the same. On 09.05.2017, her husband (opposite party No.3) and in-laws beaten her and also ousted from her matrimonial home. After so many efforts made by her father and brother, they brought her back and dropped her to House No.78, Shergari Meerut on 17.06.2018. In-spite of that, her husband and in-laws continued harassing and taunting her. Meanwhile, on 11.08.2020, she gave birth to second girl child, namely, Lashika Singh. After the birth of second child, the torture and harassment of her husband and in-law also increased. On 18.12.2021, her husband and in-laws beaten her and tried to evict her from matrimonial home, then, revisionist No.1 called the police. After arrival of the police, her husband and in-laws ran away from that place. On 20.12.2021, opposite party No.2 (husband) left the revisionist No.1 and his daughters at her parental house, and thereafter, opposite party No.2 neither provided any maintenance to the revisionists nor have any contact with her. Revisionist No.1 is a domestic woman and having no source of income to maintain herself and her daughters. Opposite party No.2 is a healthy person. He is working as a Tube-well Operator in U.P. Awas Vikas Parishad, District Muzaffarnagar and earning Rs.30,000/- per month as salary. On 19.04.2021, opposite party No.2 in the presence of his brother and father of the revisionist No.1 entered into compromise with the revisionists and opposite party No.2 agreed to pay per month 50% of his salary to his wife as well as two children as maintenance allowance but opposite party No.2 did not comply the aforesaid settlement agreement arrived between them. The revisionist No.1 requires maintenance allowance of Rs.20,000/- to maintain herself and her children.

9. Even after service of notice, opposite party No.2 did not appear in the trial court. The trial court considering the notice having been sufficiently served on 24.06.2022 ordered for ex-parte proceedings against opposite party No.2. The revisionist No.1 recorded her oral evidence and produced the aadhar card as documentary evidence. The revisionist No.1 also produced affidavit of compliance on the direction by the Hon'ble Apex Court in the case of **Rajnesh (supra)**, in which, she deposed that she has not been granted any maintenance allowance at an earlier stage and opposite party No.2 has not provided any maintenance to her.

10. On the basis of evidence on record, trial Court found that revisionist No.1 is unable to maintain herself and her two minor daughters, whereas her husband-opposite party No.2 has sufficient means and is still neglecting to maintain them. By the impugned order, the trial court granted aforesaid monthly maintenance allowance to them.

11. In the counter affidavit, opposite party No.2 has stated that he has obtained employment/job under dying in harness rules and has liability to maintain her elder brother, who is aged about 58 years and is also suffering from heart disease. He also stated that the revisionist No.1 is highly qualified and running coaching at her house.

12. The provision of Section 125 Cr.P.C. provides for maintenance of wives,

children and parents. The Section 125 Cr.P.C. reads as under:-

"125.Order for maintenance of wives, children and parents.—*(1) If any person having sufficient means neglects or refuses to maintain—*

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.—*For the purposes of this Chapter—*

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date

on which it became due : Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

***Explanation.**—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be a just ground for his wife's refusal to live with him.*

(4) No wife shall be entitled to receive an allowance for the maintenance or interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

13. In paragraph Nos.37, 38, 39 and 40 of **Rajnesh vs. Neha and Another: (2021) 2 SCC 324**, the Hon'ble Apex Court has observed as under:-

"37. In Chaturbhuj v. Sita Bai [Chaturbhuj v. Sita Bai, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356] this Court held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife by providing her food, clothing and shelter by a speedy remedy. Section 125 CrPC is a measure of social justice especially enacted to protect women and children, and falls within the constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution.

38. Proceedings under Section 125 CrPC are summary in nature. In Bhuwan Mohan Singh v. Meena [Bhuwan Mohan Singh v. Meena, (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200] this Court held that Section 125 CrPC was conceived to ameliorate the agony, anguish, financial suffering of a woman who had left her matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children. Since it is the sacrosanct duty of the husband to provide financial support to the wife and minor children, the husband was required to earn money even by physical labour, if he is able-bodied, and could not avoid his obligation, except on any legally permissible ground mentioned in the statute.

39. The issue whether presumption of marriage arises when parties are in a live-in relationship for a long period of time, which would give rise to a claim under Section 125 CrPC came up for consideration in Chanmuniya v. Virendra Kumar Singh Kushwaha [Chanmuniya v. Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141 : (2011) 1 SCC (Civ) 53 : (2011) 2 SCC (Cri) 666. This judgment was referred to a larger Bench.] before the Supreme Court. It was held that where a man and a woman have cohabited for a long period of time, in the absence of legal necessities of a valid marriage, such a woman would be entitled to maintenance. A man should not be allowed to benefit from legal loopholes, by enjoying the advantages of a de facto

marriage, without undertaking the duties and obligations of such marriage. A broad and expansive interpretation must be given to the term "wife", to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time. Strict proof of marriage should not be a precondition for grant of maintenance under Section 125 CrPC. The Court relied on the Malimath Committee Report on Reforms of Criminal Justice System published in 2003, which recommended that evidence regarding a man and woman living together for a reasonably long period, should be sufficient to draw the presumption of marriage.

40.The law presumes in favour of marriage, and against concubinage, when a man and woman cohabit continuously for a number of years. Unlike matrimonial proceedings where strict proof of marriage is essential, in proceedings under Section 125 CrPC such strict standard of proof is not necessary. [Kamala v. M.R. Mohan Kumar, (2019) 11 SCC 491 : (2019) 4 SCC (Civ) 732 : (2019) 4 SCC (Cri) 242]."

14. The Hon'ble Apex Court in paragraph Nos.77, 78, 79 and 80 of **Rajnesh vs. Neha and Another (supra)** has provided for criteria for determining quantum of maintenance, which reads as under:-

" 77. The objective of granting interim/permanent alimony is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

78. The factors which would weigh with the court inter alia are the status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife. [Refer to Jasbir Kaur Sehgal v. District Judge, Dehradun, (1997) 7 SCC 7; Refer to Vinny Parmvir Parmar v. Parmvir Parmar, (2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290]"

79. In Manish Jain v. Akanksha Jain [Manish Jain v. Akanksha Jain, (2017) 15 SCC 801 : (2018) 2 SCC (Civ) 712] this Court held that the financial position of the parents of the applicant wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the court should mould the claim for maintenance based on various factors brought before it.

80. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able-bodied and has educational qualifications. [Reema Salkan v. Sumer Singh Salkan, (2019) 12 SCC 303 : (2018) 5 SCC (Civ) 596 : (2019) 4 SCC (Cri) 339]"

15. After thoroughly discussing the numerous judgements of the Hon'ble Apex Court and this Court, the Apex Court in para-109 of **Rajnesh vs. Neha and Another (supra)** held that maintenance should be provided from the date of application not from the date of order. The para-109 of the aforesaid judgement reads as under:-

" 109. The judgments hereinabove reveal the divergent views of different High Courts on the date from which maintenance must be awarded. Even though a judicial discretion is conferred upon the court to grant maintenance either from the date of application or from the date of the order in Section 125(2) CrPC, it would be appropriate to grant maintenance from the date of application in all cases, including Section 125 CrPC. In the practical working of the provisions relating to maintenance, we find that there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that maintenance is awarded from the date of the application."

16. The Hon'ble Apex Court in the decision of **Rajnesh vs. Neha and Another (supra)** has held that the husband is bound to provide maintenance allowance to his wife and children which may be upto 25% of his monthly income.

17. Considering the law propounded by the following decisions and facts and circumstances of the case, there is sufficient ground to allow the present criminal revision and enhance the amount of maintenance allowance to be paid to the revisionist Nos.1, 2 and 3.

18. In view of the aforesaid factual and legal aspect, I am of the view that the order impugned dated 13.09.2022 is erroneous and cannot survive in the eyes of law, therefore, I set aside the impugned order for the aforesaid reasons.

19. The application for enhancement of maintenance allowance filed by revisionist no.1 is allowed and it is observed that she will be entitled for Rs.4,000/- per month as maintenance allowance along with Rs.3000/- per month to revisionist Nos.2 and 3 (minor daughter of the opposite party No.2) each.

20. Thus, opposite party No.2 shall be bound to provide maintenance allowance @ of Rs.4000/- to his wife (revisionist No.1) and Rs.3000/- to his minor daughters each (revisionist Nos.2 and 3) and total Rs.10,000/- per month shall be given to the

revisionists from the date of application. The arrears of maintenance allowance shall be paid by the opposite party No.2 in four equal amounts at the gap of four months. The monthly interim maintenance shall be paid regularly till 7th day of each month.

21. The present criminal revision is **allowed** in terms of above mentioned conditions.

22. The copy of the order be sent to the trial Court concerned for necessary compliance, forthwith.

(2024) 3 ILRA 148
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2022
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 5401 of 2022

Shamshad Ahmad ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Manoj Kumar Singh, Sri S.C. Singh (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri M.J. Akhtar

Criminal Law - Code of Criminal Procedure, 1973 – Sections 156(3), 397, 401 – Forgery and Fraud – Application for Police Investigation – Civil and Criminal Proceedings – Judicial Discretion of Magistrate - The revisionist, Shamshad Ahmad, challenged the order dated 27.06.2022 by the Additional Chief Judicial Magistrate, Muzaffarnagar, dismissing his application under Section 156(3) Cr.P.C. for police investigation into an alleged forged Will deed dated 20.10.2005, purportedly executed by his deceased father, Hazi Anwarul Haq, in favor of the opposite party, Ansar Khan. The revisionist alleged that the Will, notarized by Jamiruddin (who died on 17.01.1998, as per a death certificate), was forged to unlawfully claim his father's share in jointly purchased properties. The Magistrate dismissed the application, deeming the matter civil in nature due to a pending civil suit (No. 503 of 2019) and suggesting the revisionist could pursue a complaint case. Previous revisional orders had set aside similar dismissals, directing fresh consideration. Held: The court, relying on Prem Das Vs St. of U.P. (Matter Under Article 227 No. 1328 of 2021) and other precedents, held that the Magistrate erred in dismissing the application without adequately considering the prima facie evidence of forgery, particularly the death certificate of the notary predating the Will's execution. The court emphasized that civil and criminal proceedings can coexist for the same facts if a cognizable offence is disclosed, and police investigation was necessary due to the complexity of the forgery allegations. The revision was allowed, the impugned order was set aside, and the matter was remitted to the Magistrate for fresh consideration with directions to decide in accordance with law.

Case Law Cited:

1. Sukhwasi Vs St. of U.P., 2007 ACC 739 (DB)

2. Prem Das Vs St. of U.P. & 5 Others, Matter Under Article 227 No. 1328 of 2021

3. Smt. Sadhana Devi Vs St. of U.P., 2007 (1) JIC 523 (All)

4. Ram Gopal Vs St. of U.P., 2011 (2) JIC 314 (All) (LB)

5. Amar Pal Singh Vs St. of U.P., 2002 (I) JCrC (HC) 241

6. Vinod Natesan Vs St. of Kerala, 2019 (1) JCrC 235

7. Prof. R.K. Vijayasarthy Vs Sudha Seetharam, 2019 (1) JCrC 728

8. Rajesh Bhai Muljibhai Patel Vs St. of Guj., 2020 (1) U.C. 609

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri S. C. Singh, learned Senior Advocate assisted by Sri Manoj Kumar Singh, learned counsel for the revisionist, Sri M.J. Akhtar, learned counsel for the respondent No.2 as well as learned A.G.A. for the State.

2. By means of instant criminal revision under Section 397/401 Cr.P.C., the revisionist has assailed the impugned order dated 27.6.2022, passed by learned Additional Chief Judicial Magistrate, Court No.2, Muzaffar Nagar in Misc. Application No.4911/09 of 2020, under Section 156(3) Cr.P.C. By the impugned order, learned Magistrate has dismissed the application filed by the applicant, who is revisionist, before this Court.

3. The factual matrix of the case leading to filing of present revision are that the applicant Samshad Ahmad moved an application under Section 156(3) Cr.P.C. before the court of Chief Judicial Magistrate, Muzaffar Nagar on 3.1.2020, stating therein that her father late Hazi Anwarul Haq had purchased two properties situated at Kasba Khatauli, District Muzaffar Nagar on 9.7.1982 and 13.9.1993, jointly with Ansar Khan, the opposite party and both of them occupied their respective shares in said properties. On 11.7.2007, Anwarul Haq, the father of the applicant died. The applicant became owner in possession of the share of his father in the said prosperties together with brothers namely Subhan Ali and others. Applicant and his brothers executed two separate sale deeds in the name of Salma Beg, wife of Azhar Beg and Azhar Beg, son of Asgar Beg with regard to their respective share in said property inherited from their father. The purchaser came into possession of said property after sale deed dated 19.9.2019. The applicant received a summon from trial court, from which he came to know that some civil suit has been filed by Ansar Khan against the applicant. The applicant visited the place of Ansar Khan on 24.9.2019, at 6:00 PM where he was present alongwith his two companions. The applicant tried to gather information regarding suit whereupon Ansar Khan became enraged and he abused them and showed him a photocopy of a forged Will deed and stated that he had got a forged Will deed prepared in the name of his father and on the strength of that, he would forcefully took possession of the property. The photocopy of Will deed dated 20.10.2005, is apparently false, forged and fictitious, which has been prepared by the opposite party Ansar Khan with the help of his unknown accomplishes, in which signature of Hazi Anwarul Haq and witness Salimuddin are completely forged. The Will has been prepared by opposite party only with intent to grab the said property. The applicant has filed a report of private handwriting and finger print expert, which reveals that admitted signature of the executant is not appended thereon. The Notary Public Jamiruddin, who is shown to have notarized the disputed Will has died around 6 years ago, the date of alleged Will deed. The said Will deed is a result of fraud committed by opposite party with assistance of his companions. There is no blood relation between late father of the applicant and opposite party. The applicant prayed for issuing direction to SHO concerned to register a case and investigate the same in his application under Section 156(3) Cr.P.C.

4. Learned ACJM, Court No.1, Muzaffar Nagar, vide order dated

14.10.2020, directed the registration of the application as a complaint case in the light of pronouncement of a Division Bench of this Court in **Sukhwasi vs. State of U.P., 2007 ACC 739 (DB)** and fixed the case for recording of statement under Section 200 Cr.P.C. Feeling aggrieved by this order, the applicant filed a Criminal Revision before the court of Session, which was decided by learned Additional Session Judge, Court No.1, Muzaffar Nagar on 19.1.2021 and impugned order dated 14.10.2020 was set aside and the lower court was directed to decide the application under Section 156(3) Cr.P.C. within one month in the light of legal position stated in the revisional order. Learned revisional court observed that the case law cited on behalf of the respondent No.2 i.e. **Smt. Sadhana Devi vs. State of UP, 2007 (1) JIC 523 (All), Ram Gopal vs. State of UP, 2011 (2) JIC 314 (All)(LB), Amar Pal Singh vs. State of UP 2002 (I) JcrC (HC) 241, Vinod Natesan vs. State of Kerala, 2019 (1) JcrC 235, Prof. R.K. Vijyasarthy vs. Sudha Seetharam, 2019 (1) J.Cr.C. 728, Rajesh Bhai Muljibhai Patel vs. State of Gujarat, 2020, (1) U.C., 609** are not applicable to the facts of the present case and observed that the disputed facts in the case could only be cleared and verified during investigation and on the facts of the case, the learned lower court has committed jurisdictional error while passing an impugned order and failed to exercise jurisdiction vested in it with regard to prayer made by the applicant.

5. Learned Magistrate, after receiving the certified copy of the order of Revisional Court, heard the applicant's counsel afresh on Original Misc. Application under Section 156(3) Cr.P.C. and by order dated 3.3.2021, observed as under:

"After going through the application, order of revisional court and the documents placed alongwith the application, I do not find any ground to direct the investigation under Section 156(3) Cr.P.C. Facts and circumstances of the present case although disclose commission of cognizable offence but in this case all the information and details are in the possession of the applicant and his witnesses. The applicant may move an application for the registration of FIR after civil court decision on disputed Will. Furthermore, if at any stage, the court thinks that investigation is required, the same may be referred under Section 202 Cr.P.C. and police assistance may be taken. It seems that the applicant wants to put pressure on the other side by registration of the FIR. This is so on account of the fact that once an FIR is registered, the other side namely, accused persons would be on the run because they will face an imminent threat of arrest and secondly, it becomes convenient for the complainant as well because it becomes a State case where the presence of the complainant is not required on each and every date of hearing. That is the modus operandi, which is invariably adopted and aimed at by the every applicant."

6. With above observation, the learned magistrate, has re-written the order set aside in criminal revision and directed the office clerk to register the case as complaint and complainant was directed to be present before the court on the date fixed for recording of his statement under Section 200 Cr.P.C.

7. The applicant again, feeling aggrieved by the impugned order dated 3.3.2021, passed by the learned Magistrate, preferred a criminal revision before the

Court of Session, which was registered as Criminal Revision No.84 of 2021, Samshad Ahmad vs. State of UP and Another, which was decided by the revisional court on 8.3.2022 and the revision was allowed and impugned order 3.3.2021 passed by a subordinate court was quashed. The revisional court directed the court below to hear afresh on application under Section 156(3) Cr.P.C. in the light of observations made in previous criminal revision No.82 of 2020 on 19.1.2021, after giving opportunity of hearing to both parties and pass a lawful order thereon. Learned Revisional Court observed that the impugned order passed by the learned Magistrate dated 3.3.2021 was clear in violation of the observations of Additional Session Judge, in revisional order dated 19.1.2021, passed in Criminal Revision No.82 of 2020.

8. Present respondent No.2 filed a criminal revision before this Court against said order dated 8.3.2022 passed in Criminal Revision No.84 of 2021, which is cited as Criminal Revision No.1183 of 2022, Ansar Khan and others vs. State of UP and Another. In said criminal revison, an apprehension was raised before this court by the revisionist's counsel that in view of observations made by the court of Session in Criminal Revision No.82 of 2020, decided on 19.1.2021, learned magistrate under circumpressure may pass some unjust judicial order to abrogate his misgivings as the reivsional court in second revision, vide order dated 8.3.2022, has directed the Magistrate for revisiting his order denovo in the light of certain guidance/guidelines given in previous criminal Revision No.82 of 2020, decided on 19.1.2021.

9. This Court decided the Criminal Revision No.1183 of 2022, vide order dated 31.3.2022 with observation that "Learned Magistrate, concerned is hereby directed to apply his own independent judicial mind unaffected by any of the observations given by revisional court while deciding the Criminal Revision No.84 of 2021 as well as earlier Revision No.82 of 2020, and pass a suitable and well reasoned order, strictly adhering to his robust judicial sense and the law laid down in this regard within a period of 8 weeks from the production of certified copy of the order after hearing both the parties.

10. Learned Additional Chief Judicial Magistrate, Court No.2, Muzaffar Nagar, revisited the issue afresh in the light of observations made by this Court in said Criminal Revision No.1183 of 2022 and dismissed the application under Section 156(3) Cr.P.C. vide impugned order dated 27.6.2022, with observation that keeping in view the order passed by the Hon’ble High Court and considering the facts and circumstances, he is of conclusion that the matter is not liable to be investigated by the Police and it is essentially of civil nature and Original Suit No.503 of 2019 is already pending in the Civil Court. The applicant is in possession of the relevant documents on the basis of which, the validity of the disputed Will can be decided by the civil court and in case of civil court comes to the conclusion that the disputed notarized Will deed is not a genuine document, due to the fact that according to the Notary Public, who is purported to have attested the Will deed, died six years prior to its execution, the applicant will have again an opportunity to register a criminal case. According to the opinion of learned ACJM, the matter is of not such nature that requires registration of a case and

investigation by police, at this stage. The applicant has not clarified as to how, he is in possession of the said property covered under disputed Will whereas he has himself stated in the application that property in question has been sold to Azhar Beg and Salma Beg and the purchasers have acquired their possession thereof. The purchasers have not moved any complaint before competent officer in this regard and even the applicant has not moved any application for mutation in his name on property in question as a legal heir of the executant of the Will. Learned Magistrate placed reliance on the judgement of Hon'ble High Court in **Prem Das vs. State of UP and 5 Others, Matter Under Article 227 No.1328 of 2021**, wherein this Court observed as under:-

"16. It is therefore seen that upon an application received under Section 156(3) of the Code disclosing a cognizable offence, the Magistrate may direct the police to register the F.I.R. and investigate or alternatively the Magistrate can take cognizance of the complaint, register it as complaint case and follow the procedure under Chapter XV of the Code. While exercising this discretion and taking either of the courses, it would be incumbent upon the Magistrate to apply judicial mind and the exercise of discretion would have to be guided by interest of justice, depending upon the facts of the case. In a situation where the investigation required is of a nature which can only be made by a police officer upon whom the statute has conferred the powers of investigation, the Magistrate may be well within his discretion to direct the registration of an F.I.R. and its investigation by the police officer. In a case where the complainant is in possession of the complete details of the case and also the material evidence, such that 'investigation' by the police may not be required, the Magistrate may follow the procedure of a complaint case."

11. Feeling aggrieved by the impugned order dated 27.6.2022, the applicant had filed present revision before this Court.

12. Learned counsel for the revisionist submitted that the approach of learned Magistrate was contrary to the notion of judicial discipline as learned Magistrate has re-written his over ruled order dated 14.10.2020 in Criminal Revision No.82 of 2020 and ignored the observations made by Court of Session in Criminal Revision No.82 of 2020, decided on 19.202021 and by order dated 3.3.2021, this fact was addressed by the Court of Session in Criminal Revision No.84 of 2021, wherein the Court of Session took strong exception to the approach of the court below while deciding the application afresh contrary to the observations made by revisional court. However, this Court in Criminal Revision No.1183 of 2022, directed the Magistrate to decide the application afresh and pass a suitable, well reasoned order according to his judicial sense applying his own independent judicial mind unaffected by any of the observations given by the revisional court.

13. Learned counsel for the revisionist further submitted that the impugned order passed by learned court below is contrary to law and established judicial authority on the subject as civil and criminal proceeding, both can be maintainable in regard to same set of facts, if cognizable offence is clearly made out on the basis of facts of the case. Respondent No.2, Ansar Khan, is owner of the property, which was jointly purchased by him and late Anwarul

Hasan in the year 2007, till then there was co-ownership and there was no occasion of executing the Will in favour of the respondent No.2, who is not related to him in any manner. The court below has twice passed the order to register the application under section 156(3) Cr.P.C. as a complaint case and finally dismissed the same after disposal of Criminal Appeal No.1183 of 2022, by this Court. The Civil Suit No.503 of 2019 has not been filed by the revisionist. This is filed by the opposite party No.2 to fortify his illegal claim over disputed property on the basis of disputed notarized Will deed propounded by him, which is essentially fake and forged document with intent to engulf the parental property of the revisionist. The Notary Public Advocate, Jamiruddin, died on 17.1.1998, as per his death certificate filed by the revisionist in the lower court record. Whereas, the disputed Will deed bears its date of execution as 20.10.2005 and said death certificate cold not be rebutted by the respondent No.2 as yet. Inasmuch as, the signature of Salimuddin as witness of said Will deed is also forged but this aspect has not been considered by the court below in proper perspective. The impugned order is not sustainable and is liable to be set aside by orders of this Court.

14. Per contra, learned AGA as well as learned counsel for the respondent No.2 submitted that the impugned order is well reasoned order, in which all the attendant facts and circumstances are duly considered in the light of authoritative judicial precedents and even after passing of impugned order, whereby the application under Section 156(3) Cr.P.C. moved by the applicant has been dismissed, the applicant is within his right to file a

criminal complaint in the matter.

15. Learned counsel for the respondent No.2 further submitted that death certificate of Jamiruddin, Notary Public, who has attested the Will dated 20.10.2005 is not a genuine document as the place of death of Jamiruddin mentioned therein is recorded in the name of Smt. Roshan Ara, wife of Amir Ahmad. Present application under Section 156(3) Cr.P.C. was filed by the applicant after filing of said civil suit by respondent No.2.

16. This is admitted fact that property in question was purchased by father of the revisionist and respondent No.2 jointly, on 9.7.1982 and 13.9.1993 by two sale-deeds and the purchasers occupied their respective shares in said property. This is the case of the respondent No.2 Ansar Khan that Hazi Anwarul Haq, father of the revisionist and joint purchaser of the said property executed a Will deed in favour of the respondent No.2 on 20.10.2005, which is unregistered but it was notarized by one Jamiruddin, then Notary Public and the father of the revisionist namely, Hazi Anwarul Haq died on 11.4.2007 and there is no dispute regarding date of death of Hazi Anwarul Haq. According to the revisionist, he accompanied with his brothers became owner in possession of this share of said property. Revisionist and his brothers executed two separate sale deed in the name of Salma Beg, wife of Azhar Beg and Azhar Beg, son of Asgar Beg with regard to their respective share in said property inherited from their father. Respondent No.2 has filed a civil suit for injunction on the basis of Will deed dated 20.10.2005 executed by Hazi Anwarul Haq in favour of Ansar Khan, the respondent No.2. The genuineness of will is liable to be adjudicated by the civil court. However, this fact cannot lost sight that the revisionist has filed death certificate of

Jamiruddin, the Notary Public, who attested the unregistered Will deed propounded by respondent No.2 in his favour and according to the said death certificate, the date of death of Jamiruddin is mentioned as 17.1.1998, at House No.786/1, Khalapar, whereas the date of execution of said Will date is shown as 20.10.2005, thus, according to the death certificate of said Notary Public, the genuineness of Will deed comes under cloud. This fact is also noticeable that no good ground could be shown by respondent No.2 as to why the father of revisionist namely, Hazi Anwarul Haq, chose to bequeath his share of property in favour of co-sharer of property namely, Ansar Khan, excluding his own sons. There is no legal bar with regard to proceeding of civil and criminal case simultaneously on similar set of facts. The main consideration is that as to whether on facts of the case put forth before the court of first instance by the complainant, a cognizable offence is made out or not. The complaint was initally filed in the year 2020 and after lapse of more than 3 years period, the respondent No.2 could not produce any document in rebuttal of death certificate of Notary Public namely, Jamiruddin, placed on record by the complainant/revisionist. The intricate facts of the case need to be investigated by the police as this is not of such nature that the complainant will be able to produce necessary documentary evidence in the case on his own. This court is not inclined to subscribe the view of the learned Magistrate that the matter is essentially of civil nature, where the allegations of fraud and forgery are made and some material is shown in support of the same, this should not be termed as a matter essentially of civil nature. In my considered opinion, learned court below has committed a legal error and impropriety by dismissing the application moved by the revisionist under Section 156(3) Cr.P.C. and impugned order is not sustainable under law. On facts of the case, the stand of the revisionist that matter is of such nature that it requires investigation by police under Section 156(3) Cr.P.C. appears to be forceful and reasonable and learned court below should have considered the case for issuing a direction to police to register the case and investigate the same.

17. In view of foregoing discussion, the revision stands **allowed** and the impugned order passed by learned court below is set aside and the matter is remitted to court below with direction to hear the revisionist/complainant afresh on application under Section 156(3) Cr.P.C. in the light of observation made in this order and decide the same in accordance with law.

(2024) 3 ILRA 154
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.01.2024
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 5477 of 2023

(Juvenile) X ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Atul Kumar Shahi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015 – Sections 9, 94 – Code of Criminal Procedure, 1973 – Section 397 – Indian Penal Code, 1860 – Sections 363, 366 &

376(3) – Protection of Children from Sexual Offences Act, 2012 – Sections 3, 4(2) – Determination of Juvenility – Reliability of Documentary Evidence – Radiological Age Assessment - The revisionist, a juvenile, challenged the order dated 06.09.2023 by the Special Judge (POCSO Act), Mainpuri, which set aside the Juvenile Justice Board's (J.J. Board) order dated 13.01.2023 declaring him a juvenile in Case Crime No. 183 of 2021 under Sections 363, 366, 376(3) IPC and Sections 3/4(2) POCSO Act. The J.J. Board, relying on a medical examination estimating the revisionist's age as 20–21 years on 30.09.2022, calculated his age as approximately 17 years, 6 months, and 9 days on the incident date (09.04.2021) by applying a one-year margin. The revisionist claimed a birth date of 15.05.2006 based on a school certificate, while the prosecution relied on a 05.07.2000 birth date from earlier school records. The appellate court rejected the revisionist's certificate as unreliable, citing inconsistencies and lack of supporting evidence for an alleged deceased elder sibling with the same name. Held: The court, referencing Ram Vijay Singh Vs St. of U.P. ((2021) SCC OnLine SC 175), Mukarrab Vs St. of U.P. ((2017) 2 SCC 2010), Arnit Das Vs St. of Bihar ((2000) 5 SCC 428), Parag Bhati Vs St. of U.P. ((2016) 12 SCC 744), and Rishipal Singh Solanki Vs St. of U.P. ((2021) 11 ADJ 489), upheld the appellate court's decision. It found the revisionist's claim of a 2006 birth date implausible due to lack of credible evidence, inconsistencies in school records, and no proof of the elder sibling's death. The radiological age (20–21 years) aligned with the 2000 birth date, and a mechanical two-year deduction was deemed unwarranted. The court emphasized that juvenility claims must be scrutinized to prevent misuse in heinous offences.

Revision dismissed.

Case Law Cited:

1. Ram Vijay Singh Vs St. of U.P., Criminal Appeal No. 175 of 2021 (SLP (Crl) No. 2898 of 2020)

2. Mukarrab Vs St. of U.P., (2017) 2 SCC 2010

3. Arnit Das Vs St. of Bihar, (2000) 5 SCC 428

4. Parag Bhati Vs St. of U.P., (2016) 12 SCC 744

5. Rishipal Singh Solanki Vs St. of U.P., 2021 (11) ADJ 489

6. Sanjeev Kumar Gupta Vs St. of U.P., (2019) 12 SCC 370

7. Abuzar Hossain Vs St. of West Bengal, (2012) 10 SCC 489

8. Ashwani Kumar Saxena Vs St. of M.P., (2012) 9 SCC 750

9. Babloo Pasi Vs St. of Jharkhand, (2008) 13 SCC 133

10. Jitendra Ram Vs St. of Jharkhand, (2006) 9 SCC 428

11. St. of M.P. Vs Anoop Singh, (2015) 7 SCC 773

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

1. Heard Sri Atul Kumar Shahi, learned counsel for the revisionist and Sri L.D. Rajbhr, learned A.G.A. for the State.

2. This criminal revision has been filed with a prayer to quash the order dated 06.09.2023 passed by Special Judge, POCSO Act in Criminal Appeal No. 8 of 2023 arising out of case crime no. 183 of 2021 under sections 363, 366 and 376(3) I.P.C. and 3/4(2) of POCSO Act, P.S. Bewar, District- Mainpuri, whereby the order passed by J.J. Board dated 13.01.2023, by which accused was declared a juvenile, has been set aside and appeal has been allowed.

3. The relevant facts are as below:

In the enquiry no. 34 of 2021 conducted for determination of age by the J.J. Board in crime no.183 of 2021, under

sections 363, 366 and 376(3) I.P.C. and under section 3/4(2) of POCSO Act, on behalf of the accused, oral and documentary evidence was produced. The J.J. Board did not rely upon the statement given by father of the juvenile and also did not rely on the certificate as regard date of birth showing name of Kuldeep Kumar son of Harish Chandra, issued by Subedar Pandey Inter College, Pandey Nagar Kusumra, District Mainpuri. The J.J. Board instead relied upon the medical examination done by a panel of doctors constituted by C.M.O. Farrukhabad. It may be noted that the accused was medically examined on 30.09.2022 and as per doctors' opinion, he was between 20 to 21 years of age. The learned J.J. Board calculated the age of juvenile, taking him as minimum 20 years on the date of medical examination and therefore, 18 years 6 months and 9 days on the date of incident (i.e on 09.04.2021). The J.J. Board took a view that the age can be considered on the lower side by giving a margin of maximum one year therefore, declared him as 17 years 6 months and 9 days on the date of incident.

4. This may be noted that the said order by the J.J. Board was passed after the matter of age determination was remanded for adjudication afresh, by the appellate court to the J.J. Board. Notably the J.J. Board had passed a fresh order in compliance of earlier direction by the appellate court in Criminal Appeal No. 5 of 2023. The freshly passed order dated 13.01.2023 declaring him about 17 and half years, was challenged in Criminal Appeal No. 8 of 2023 and appeal stood allowed. Now, the revisionist is before this Court, challenging the order dated 06.09.2023, passed in appeal.

5. The contentions of the revisionist in nutshell are that the appellate court did not consider that his date of birth was recorded as 15.05.2006 in the certificate issued by Subedar Pandey Inter College. The appellate court committed gross illegality in not considering the aforesaid document. Further that medical age was found 20-21 years and as per settled law, a variation of two years is possible on both the sides. Therefore the benefit ought to have been given to the accused by lowering the same by a margin of two years and not by margin of one year. Hence, he was about 17 years even by medical standards. The appellate court has ignored provisions of law and has passed an order which is illegal and improper.

6. Learned A.G.A. has vehemently opposed the contentions drawing the attention of this Court towards oral and documentary evidence in which date of birth of the revisionist has been mentioned as 05.07.2000.

7. I heard both the sides and perused the material on record. On behalf of juvenile, a High School certificate has been produced, which showed name of Juvenile ‘X’ son of Harish Chandra and Surajmukhi Devi and date of birth as **15.05.2006**. This paper was admittedly produced before the appellate court for the first time. Another certificate dated 19.05.2021, issued by the Principal, Subedar Pandey Inter College, has been produced which mentioned his date of birth as 15.05.2006. Admittedly this certificate bears a date of issue as 19.052021 and it said that ‘X’ s/o Harish Chandra took admission in that Inter College in class 9th on 2.7.2019. It does not say that he has been studying there from class 6th. However, the Principal of that college, who was examined, says that he

studied from class 6th. At the same time says that no T.C. was given by him at the time of admission. On the other hand the first informant filed a written objection stating therein that in fact, date of birth of juvenile has been shown as **5.7.2000,** when he took admission in Class I in Primary School, Saraichak, Govindepur. The first informant also produced an information obtained under Right to Information Act 2005. In this paper, it is clearly mentioned that 'X', son of Harish Chandra, took admission in the academic year 2006-2007 in Primary School, Saraichak, Govindepur and his name was mentioned at serial no. 1021 in the school records. Very interesting explanation with regard to two different dates of birth has come before the courts below that the elder son of Harish Chandra, who took birth on 5.7.2000, had the same name 'X' and that he died. Another son was born to him on 15.05.2006 and he was again named 'X', therefore, two different dates of birth have come on record. The contention is that the instant accused was born on 15.05.2006, therefore, he should have been treated as juvenile. The thing which cannot be ignored is that the revisionist has no explanation as regard the reasons why no details have been given as to how and when did his elder son actually died. Actually no credible evidence as regard fact of death, when and how did he die, has been given. No documentary evidence like death certificate issued by Gram Pradhan or Gram Panchayat has been produced. No copy of pariwar register showing his death, has been produced. The story is that for some reason, the younger one, who was born in 2006 was also named as 'X'. Very interestingly, paper no. 60, copy of information obtained through office of Block Education Officer proves that 'X' son of Harish Chandra had taken admission in 2006-07 in Primary School Saraichak, Govindepur. If the story set up by the revisionist is believed and presuming that this paper pertained to elder son only then it should also be presumed that elder one was alive at least till 2006-07. If that be so, there appears no logic in naming the second son as 'X' again when elder one was still alive. The story of younger son being named 'X' again is nothing but ill conceived and false. This inference is further fortified by another paper produced on behalf of juvenile which is a certificate issued by Principal, Subedar Pandey Inter College. This paper shows that the juvenile (the younger son) took admission on 02.07.2019 in class 9. There is no documentary evidence to demonstrate where did he actually receive education before taking admission in academic session 2019-20. All these facts are too incohesive to be believed. Only conclusion which can be drawn is that academic papers showing his date of birth as 15.05.2006 are not reliable at all. There appears strong probability that his actual date of birth is 05.07.2000. The appellate court committed no mistake in not relying upon the papers produced on his behalf.

8. Another question is whether the appellate court was wrong in determining the age as below 18 on the basis of medical opinion. Undisputedly, the juvenile was examined by the medical board constituted by CMO, and medical opinion said that he was between 20-21 years on the date of medical examination and with that being counted as the base line, his age may be inferred as 18 years 6 months 9 days on the date of incident. Notably date of birth as asserted by the opposite party i.e. 5.7.2000, gives almost same age, which is found by the doctors.

9. There is no strict law as regard lowering the age by two years from the

medical age. Undoubtedly, the age determined on the basis of medical tests is merely an opinion. **In view of probability of error, a general rule has evolved that there may be error of 2 year on either side. This is not to say that in all the cases, 2 year have to be deducted or added. A mechanical adherence to such law may entail failure of interest of justice**. The courts ought to apply the judicial mind when it decides to lower the age by certain margin. The law on probable error in determining age on the basis of medical evidence has evolved and has a general application **but the question is whether the Court is expected to go mathematically? or is it mandatory to consider the age of accused 2 years less than the medical age?** The answer must be 'No'. Possibility of error cannot be equated with actual error. Definitely in certain cases evidence might be available which may show the margin of error on the higher side rather than on lower side. This is well established that the medical age can act as a guideline only and not as a conclusive proof. This is an accepted fact that radiological age may not give precise or exact age. Other relevant facts and circumstances may assist the Court in arriving at the right conclusion.

10. The Supreme Court in **Criminal Appeal No. 175 of 2021 arising out of S.L.P. Criminal No. 2898 of 2020, Ram Vijay Singh Vs. State of U.P**., considered the question of reliance upon radiological age of a person. The Supreme Court observed in Para 9, 10, 12 and 14 as below:

"9. The judgment in Abuzar Hossain considered Section 7-A of the Act and Rule 12 of the Rules. A perusal of Rule 12(3)(b) of the Rules shows that in the absence of documents as mentioned in clause (i), (ii) or (iii), the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. It was further provided that in case wherein the exact assessment of the age cannot be done, the Court or the Juvenile Justice Board, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. However, it is to be noted that Section 94 of the Act does not have any corresponding provision of giving benefit of margin of age.

10. Admittedly, in the present case, there is no Date of Birth Certificate from the school or matriculation or equivalent certificate or a Birth Certificate given by a Corporation or Municipal Authority or Panchayat. Therefore, clause (iii) of Section 94(2) of the Act to determine the age by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board comes into play.

11……..

12. Mr. Goel, on the contrary, argued that procedure as provided under Rule 12(3)(b) of the Rules is not materially different from that contained in the Statute. In fact, the discretion given to the Court to lower the age by one year in the Rules has been omitted. He further relied upon a judgment of this Court in Mukarrab wherein it has been held that the Courts have observed that the evidence afforded by radiological examination is a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances. It was further held that the

ossification test cannot be regarded as conclusive when the appellants have crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. It was held as under:

"26. Having regard to the circumstances of this case, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At p. 31 of Modi's Textbook of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:

"In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following Table, but it must be remembered that too much reliance should not be placed on this Table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development." ***Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.***

27. In a recent judgment, State of M.P. v. Anoop Singh, (2015) 7 SCC 773 : (2015) 4 SCC (Cri) 208], it was held that the ossification test is not the sole criteria for age determination. Following Babloo Pasi [Babloo Pasi v. State of Jharkhand, (2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] and Anoop Singh cases [State of M.P. v. Anoop Singh, (2015) 7 SCC 773 : (2015) 4 SCC (Cri) 208], we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.

28. At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan", which reads as under:

"There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in younger age group by dentition and ossification along with epiphyseal fusion. [Ref.: Gray H. Gray's Anatomy, 37th Edn., Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];

A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.

[Ref.: Parikh C.K. Parikh's Textbook of Medical Jurisprudence and Toxicology, 5th Edn., Mumbai Medico-Legal Centre Colaba: 1990; 44-45];

**** Variations in the appearance of centre of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of wrist ossification for age estimation in paediatric group in Central Rajasthan " by Dr.*

Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973].

29. In the present case, their physical, dental and radiological examinations were carried out. Radiological examination of skull (AP and lateral view), sternum (AP and lateral view) and sacrum (lateral view) was advised and performed. As per the medical report, there was no indication for dental x-rays since both the accused were much beyond 25 years of age. Therefore, the age determination based on ossification test though may be useful is not conclusive. An x-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and days of a person's life."

13……....

14. We find that the procedure prescribed in Rule 12 is not materially different than the provisions of Section 94 of the Act to determine the age of the person. There are minor variations as the Rule 12(3) (a)(i) and (ii) have been clubbed together with slight change in the language. Section 94 of the Act does not contain the provisions regarding benefit of margin of age to be given to the child or juvenile as was provided in Rule 12(3)(b) of the Rules. The importance of ossification test has not undergone change with the enactment of Section 94 of the Act. The reliability of the ossification test remains vulnerable as was under Rule 12 of the Rules."

11. In **Mukarrab Vs. State of U.P. 2017 2SCC 2010**, the Supreme Court gave an opinion that the radiological age may not be treated as conclusive proof of age. The Supreme Court observed as below:-

"22. It is well-accepted fact that age determination using ossification test does not yield accurate and precise conclusions after the examinee crosses the age of 30 years, which is true in the present case.

After referring to Bhola Bhagat's case and other decisions, in Babloo Pasi's case, this Court held as under:-

"18. Nevertheless, in Jitendra Ram v. State of Jharkhand (2006) 9 SCC 428 the Court sounded a note of caution that the aforestated observations in Bhola Bhagat (1997) 8 SCC 720 would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit and each case has to be considered on the basis of the materials brought on record.

22. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence."

12. In **Arnit Das vs. State of Bihar; (200) 5 SCC 428**, after considering the judicial opinions in many other precedents, the Supreme Court observed as below:-

"while dealing with a question of determination of the age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a

juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. We are also not oblivious of the fact that being a welfare legislation, the courts should be zealous to see that a juvenile derives full benefits of the provisions of the Act but at the same time it is also imperative for the courts to ensure that the protection and privileges under the Act are not misused by unscrupulous persons to escape punishments for having committed serious offences."

13. It may be noted that where two views were possible, the Court, though is permitted to lean in favour of the accused, however this is not to be done, where there are definite indicators that benefit of provisions of the Juvenile Justice Act is being claimed to escape from punishment in cases involving heinous offence. The Supreme Court warned against misuse of law by unscrupulous litigant. In line with the above observations in Arnit Das case (supra), the Supreme Court in ***Parag Bhati vs. State of U.P.; (2016) 12 SCC 744*** observed in para nos. 26 and 27 as below:-

"26. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

27. The benefit of the principle of benevolent legislation attached to the JJ Actwould thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue." [Emphasis added] From the above decision, it is clear that the purpose of Juvenile Justice Act, 2000 is not to give shelter to the accused of grave and heinous offences."

14. The Apex Court in **Rashipal Singh Solanki vs. State of U.P. and Others; 2021 (11) ADJ 489 decided on 18.11.2021**, considered the judgments given in ***Parag Bhati vs. State of U.P.; (2016) 12 SCC 744, Sanjeev Kumar Gupta vs. State of U.P. and Another; (2019) 12 SCC 370 and Abuzar Hossain vs. State of West Bengal; (2012) 10 SCC 489, Ashwani Kumar Saxena vs. State of M.P.; (2012) 9 SCC 750, Babloo Pasi vs. State of Jharkhand; (2008) 13 SCC 133, Arnit Das vs. State of Bihar; (2000) 5 SCC 488, Jitendra Ram vs. State of Jharkhand; (2006) 9 SCC 428*** and several others and in essence held that each case may be dealt with in the light of its own peculiar facts and circumstances while keeping certain principles as guiding factor in mind as described in concluding para of the judgment of Hon'ble Apex Court.

In para no. 29 the Apex Court in **Rishipal Singh Solanki (supra)** held as below:-

"29. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(ii-a) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.

(ii-b) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(ii-c) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised

and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hyper-

technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

15. In **Sanjeev Kumar Gupta vs. State of U.P. and Another; (2019) 12 SCC 370,** the credibility and authenticity of the matriculation certificate was questioned. In the said case, the Juvenile Justice Board had rejected the claim of the juvenility but the High Court reversed the findings of the Juvenile Justice Board, however the Apex Court restored the order of the Juvenile Justice Board. The Apex Court observed that the records maintained by the C.B.S.C. were not dependable because there was no underlying documents to support the date of birth recorded therein. The Apex Court found that there was clear and unimpeachable evidence of date of birth which had been recorded in the records of another school, in which the second respondent therein had attended till Class 4th. The Apex Court held that the date of birth reflected in the matriculation certificate could not be accepted as authentic or credible.

16. In the instant matter, an implausible story has been set by the revisionist, which goes like that the parents gave same name to the younger son, who was born 6 years after the birth of the elder one. Name of the elder son i.e. 'X' was given to younger son as well because elder son had died. The revisionist could not even prima facie satisfy the courts below on this story. As observed earlier, no particular date of death of elder son has been given. No documentary evidence as regard his death has been furnished. On the

other hand, if the story given by the revisionist is believed, the admitted document indicates that he was alive till at least 2006 i.e., the year in which the younger son was born. Coupled with this fact are the circumstances that no credible has been furnished to show where did the juvenile (the younger son) studied before be took admission in Subedar Pandey Inter College directly in Class-9th. The story is too imaginative to be a reality. A strong probability appears that the actual date of birth of the juvenile was 05.07.2000, as is shown by the date of birth registered in a school where he had studied initially. Notably the age calculated on the basis of date of birth being 5.7.2000 matches with the radiological age and therefore a whimsical and mechanical approach to deduct two straight years from radiological opinion is nothing but uncalled for. All the evidence dissuade the Court from considering probable age on lower side. This is definitely not a case where age could be or ought to have been considered by lowering it by a margin of 2 years. **No two views seem possible, therefore no question arises of leaning in favour of accused.** The Juvenile Justice Board clearly committed an error which was corrected by the Appellate Court.

17. On the basis of above discussion, I do not find any good reason to interfere in the order passed by the appellate court. The revision lacks merit and is hereby **dismissed.**

(2024) 3 ILRA 164
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.01.2024
BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Revision No. 5924 of 2023

Arunendra @ Dabbu ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Nipun Singh, Sri Vivek Chaturvedi, Sri V.P. Srivastava (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Kunjesh Kumar Dubey

Criminal Law - Code of Criminal Procedure, 1973 – Sections 319, 379 & 401 – Indian Penal Code, 1860 – Sections 307/419, 436/149 & 323/149 – Application under Section 319 Cr.P.C. – Summoning Additional Accused – Degree of Satisfaction for Summoning – Maintainability of Application - The revisionist, Arunendra @ Dabbu Yadav, challenged the order dated 31.10.2023 by the Additional Sessions Judge/Special Judge (MP/MLA Court), Prayagraj, allowing an application under Section 319 Cr.P.C. to summon him as an additional accused in Complaint Case No. 2390 of 2010 under Sections 307/419, 436/149, and 323/149 IPC. The complainant alleged that on 30.06.2005, the revisionist, along with others, fired rifles, broke into her house, assaulted her family, and set fire to property, following an earlier incident on 29.06.2005. Despite his name appearing in the complaint, the revisionist was not initially summoned. The trial court, based on consistent St.ments of PW-1, PW-2, and PW-3 implicating him, allowed the Section 319 application before judgment delivery. Held: The court, relying on Sukhpal Singh Khaira Vs St. of Punj. ((2023) 1 SCC 289), Hardeep Singh Vs St. of Punj. ((2014) 3 SCC 92), Vikas Vs St. of Rajasthan ((2014) 3 SCC 321), and Brijendra Singh Vs St. of Rajasthan ((2017) 7 SCC 706), upheld the trial court's order. The application was maintainable as it was filed before judgment, and the evidence against the revisionist was sufficient to frame charges, meeting the degree of satisfaction required under Section 319 Cr.P.C.

Revision was dismissed .

Case Law Cited:

1. Sukhpal Singh Khaira Vs St. of Punj., (2023) 1 SCC 289

2. Hardeep Singh Vs St. of Punj., (2014) 3 SCC 92

3. Vikas Vs St. of Rajasthan, (2014) 3 SCC 321

4. Brijendra Singh Vs St. of Rajasthan, (2017) 7 SCC 706

5. Periyasami Vs S. Nallasamy, (2019) 4 SCC 342

6. Sugreev Kumar Vs St. of Punj., AIR 2019 SC 2903

7. Shiv Prakash Mishra Vs St. of Uttar Pradesh, (2019) 7 SCC 806

8. Mani Pushpak Joshi Vs St. of Uttarakhand, AIR 2019 SC 5263

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

1-The instant Criminal Revision under Section 379/401 of the Code of Criminal Procedure, hereinafter referred as "Cr.P.C" has been preferred by the revisionist-Arunendra alias Daddu Yadav with a prayer to set aside the impugned order dated 31.10.2023 passed by learned Additional Sessions Judge/Special Judge MP/MLA Court, Prayagraj in Complaint Case No. 2390 of 2010 (UPAD01-007721-2010), under Sections 307/419, 436/149, 323/149 I.P.C., Police Station Jhunsi, District Prayagraj, whereby application No. 171 kha dated 17.10.2023 moved by the complainant under Section 319 Cr.P.C. was allowed and revisionist-Arunendra alias Daddu Yadav was summoned to face the trial for the offence punishable under Sections 307/419, 436/149, and 323/149 I.P.C.

2-Heard Mr. V.P. Srivastava, learned Senior Advocate, assisted by Mr. Nipun Singh, learned counsel for the revisionist, Mr. J.K. Upadhyay, learned Additional Government Advocate assisted by Ms. Pratiksha Rai, learned Brief Holder for the State of U.P./opposite party No. 1, Mr. Kunjesh Kumar Dubey, learned counsel for opposite party no. 2 and perused the materials on record.

3-Brief facts of the case which are required to be stated are as follow:-

3.1-The complainant/opposite party no. 2-Shashi Devi moved an application under Section 156(3) Cr.P.C. dated 08.07.2005 in respect of incidents dated 29.06.2005 and 30.06.2005 against eleven accused persons, namely, Moolchandra Yadav, Smt. Vijma Yadav (MLA), Raju Yadav, Ashok Nishad, Loha Singh, Amar Singh, Gyan Chandra, Lal Chandra, Jabar Singh, Padmakar Rai-Sub-Inspector, Police Station Jhunsi, Allahabad and Raju seeking direction to lodge F.I.R. in the matter for the offence under Sections 395, 397, 436, 323, 504, 506, 364 I.P.C. alleging inter alia that Mohan Lal Yadav of her village was murdered by some unknown persons on 29.06.2005 in the morning. Angered by this murder, deceased's brother Moolchandra Yadav, Smt. Vijma Yadav (MLA), Raju Yadav, Gyan Chandra Yadav, Amar Singh Yadav, Ashok Nishad, Loha Singh, Jabar Singh, Raju, Lal Chand and 10-20 unknown persons barged into her house and started beating women, children and her brother-in-laws Raj Kumar and Awadhesh. Raj Kumar and Awadhesh got scared and ran away from the village. Then on the exhortation of Smt. Vijma Yadav, MLA, Moolchandra and other accused persons looted the ornaments, clothes and licensed

rifles and cartridges of her brother-in-law Raj Kumar Yadav and her husband Ashok Kumar Yadav kept in house and set the house on fire, as a result thereof about 140 bags of grains and household items kept in the house were burnt to ashes. The accused persons also burnt the tractor parked in front of her house. It is further alleged in paragraph no. 4 of the application that on the next day, on 30.06.2005 under the leadership of Smt. Vijma Yadav, MLA, again Moolchandra Yadav, **Arunendra @ Daddu Yadav (revisionist)**, Gyan Chandra Yadav, Jabar Singh, Amar Singh, Raju Yadav, Raju son of Tulsiram, Ashok Nishad, Lalchand and 15-20 persons came and opened fire with the rifles which they had looted from her house and weapons they had brought with them and barged into her house by breaking the doors and started beating her and her children. When she protested, then Vijma Yadav, MLA exhorted the persons who had come with her to set the house on fire and she herself by pouring kerosene set the bed on fire and started pushing the children towards fire. When she protested, then Padmakar Rai-Sub-Inspector, Police Station Jhunsi, Allahabad, who was present at the spot after beating and abusing her directed the constables to put her on police vehicle. Thereafter constables took her to the police station. In the police station also she was beaten. Her tent house and home were set on fire. In the application, it is also stated that police of concerned police station is not taking any action against the accused persons under the pressure and in collusion with Smt. Vijma Yadav (local MLA).

3.2-Learned Magistrate, vide order dated 03.08.2005 instead of directing to lodge F.I.R. in the matter treated the said application dated 08.07.2005 as a complaint and after recording statement under Section 200 Cr.P.C. of complainant on 12.08.2005 and statements under Section 202 Cr.P.C. of prosecution witnesses namely, Shiv Narayan (PW-1) on 27.09.2005, Awadhesh Yadav (PW-2) on 27.09.2005, Ram Bachcha (PW-3) on 12.04.2006, Shivmurat alias Rajjan (PW-4) on 12.04.2006, Ayodhya Prasad (PW-5) on 21.04.2006, Prakash Giri (PW-6) on 21.04.2006, Pramod Kumar (PW-7) on 21.04.2006 and Ajeet Kumar (PW-8) on 21.04.2006, summoned all the aforesaid accused persons vide order dated 29.06.2006 to face trial except the revisionist-Arunendra @ Daddu Yadav, who is presently "Block Pramukh" from block Bahadurpur, Prayagraj.

3.3-Accused persons had preferred the Criminal Misc. Applications under Section 482 Cr.P.C. Nos. 7761 of 2007, 2469 of 2007, 2667 of 2007 and 38646 of 2017 which were decided by common judgement and order dated 23.02.2018 by the coordinate Bench of this Court, whereby prayer for quashing the criminal proceeding, summoning order and issuance of bailable and non-bailable warrants against the accused persons were refused and trial court was directed to conclude the trial expeditiously, preferably within the period of eight months.

3.4-Thereafter, charges were framed against the accused persons on 13.10.2019 and statement of complainant and witnesses, namely, Shashi Devi, Awadesh Yadav and Shiv Narayan were recorded before the trial court as PW1, PW-2 and PW-3 on 09.12.2019, 29.09.2022 and 29.05.2023 respectively, in which, they have supported the prosecution case and made allegations against the present revisionist-Arunenedra @ Daddu Yadav also along with other accused persons. Relevant part of their statements in respect of role of the revisionist-Arunenedra @

Daddu Yadav regarding the incident dated 30.06.2005 are as under:-

(i) Statement of complainant-Shashi Devi, PW-1.

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"दूसरे दिन सुबह हम लोग अपने महमूदाबाद वाले घर पर आये। फिर मुल्जिमान को जब पता चला तो वे लोग वहाँ पर भी आयें। मृतक मुनीम का लड़का अरुणेन्द्र उर्फ डब्बू तथा मूलचन्द्र मृतक मुनीम के भाई हमारे आदमी की राइफल लिये थे। तथा अरूणेन्द्र उर्फ डब्बू मेरे देवर की राइफल लिये थे। विजमा यादव के कहने पर फायर किया। मुल्जिमान मेरे घऱ का दरवाजा तोड़ दिये। हम लोगों को मुल्जिमान पुनः पीटे। घर अन्दर तख्ता रखा था। उसे विजमा यादव ने जला दिया। मेरे बेटे मंगल यादव के सिर का बाल पकड़ कर आग में झोकने की कोशिश किया। मैने हाथ पकड़ कर बेटे को अपने तरफ खींचने की कोशिश किया फिर पोलिस आ गयी। दूसरे दिन मुल्जिमान हमारी कार, ट्रैक्टर, टेण्ट हाउस में भी विजमा के ललकारने पर लगाया पुलिस के आने पर विजमा ने कहा कि इसे मारो। इस पर दरोगा ने हाथ ऐठ कर मुझे डण्डे से मारा। पुलिस को देखकर बाकी लोग भागने लगे। दरोगा जी के मारने के बाद विजमा ने भी मुझे मारा। मुझे तथा मेरे बच्चों को पुलिस वाले पकड़ कर थाने ले गये। थाने का नाम नहीं बता सकती। शहर के थाने में ले गया था। इस आगजनी व तोड़फोड़ में मेरा करीब 20-25 लाख का नुसकान हुआ आज तक मेरे पति व देवर की राइफल नहीं मिली। विजमा तथा अन्य मुल्जिमान मारते पीटते समय गाली भी दे रहे थे। हाजिर अदालत मुल्जिमान को देखकर साक्षी ने कहा कि ये मेरे गांव के है इन्हें मैं जानती पहचानती हूँ। अभियुक्ता विजमा यादव हाजिर अदालत नहीं है। वह किसी अन्य गांव की है।"

(ii) Statement of witness Shiv Narayan, PW-2

बयान शिव नारायण यादव पी०डब्लू-2

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"दूसरे दिन दिनांक 30.06.2005 को हमारे ग्राम सभा उस्तपुर वामदबाद के मकान पर सुबह मूलचन्द्र विजमा यादव क्षेत्रीय विधायक डब्बू उर्फ अरूणेन्द्र यादव एक हाथ में मूलचन्द्र एक हाथ में डब्बू उर्फ अरूणेन्द्र लेकर आए और मेरे घर पर फायर करने लगे।

यहाँ खड़ा ट्रैक्टर को मेरे दरवाजे पर था खड़े ट्रैक्टर को विजमा यादव के कहने पर उसमें आग लगा दिये घर में खड़ी गाड़ी स्टीम (कार) को दरवाजा तोड़कर के अंदर मोबिल डालकर आग लगा दिया घर में मेरी बड़ी भाभी माया देवी व उनके बच्चे को मारना पीटना चालू कर दिया विजमा यादव जबरजस्ती टांग पकड़कर खींचने लगी बोली आग लगा दो मिट्टी का तेल छिड़ककर आग लगा दी और मेरे भाभी के बच्चों को आग में ढकलने लगी उनको भी आग में ढकेलकर इनको जला दो।

यहाँ पर मौजूद थानेदार पदमाकर राय से बोली मेरे भाभी शशी को पकड़कर जबरजस्ती जीप में ढकेल दिया जीप में बैठा लिया थानेदार पदमाकर राय मेरी भाभी को थाने में भद्दी भद्दी गालियां जाति सूचक देते हुए उनके साथ दुर्वव्यवाहार किया गया और थाने में लाकर मारा पीटा गया और उनको थाने पर तीन-चार दिन तक बैठाए रहे क्षेत्रीय विधायक विजमा यादव के दबाव में। कोई कार्यवाही न होने पर मेरी भाभी शशी देवी मुल्जिमानों को दण्डित कराने हेतु प्रा० पत्र दिया था।"

(iii) Statement of witness Awadhesh Kumar Yadav, P.W. 3

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"दि०30/06/05 को उपरोक्त सभी अभि०गण, व लूटी हुई रायफल अरूणेन्द्र उर्फ डब्बू यादव और मूलचन्द्र यादव लेकर आये और उस्तापुर वाले घर में ट्रैक्टर, इस्टीम कार, टेन्ट हाउस के सामान रजाई, गद्दा, कुर्सी आदि, पर अपने साथ लायें मिट्टी के तेल छिड़ककर आग लगा दियें, मेरी भाभी ने जब विरोध किया तो विजमा यादव बाल पकड़कर उनकों मारने-पीटने लगी। विजमा यादव ने कहा कि सब लोगों को बच्चों सहित आग में डालकर जला दों। मैने जब बचाने को प्रयास किया तो मूलचन्द्र, अरूणेन्द्र उर्फ डब्बू यादव द्वारा बाहर से फायर किया गया। दि०30/06/2005 को विजमा यादव के साथ पदमाकर एस०ओ० झूंसी भी साथ में थे, जब विजय यादव मार-पीट ली, तो भाभी शशि देवी को पदमाकर राय ने अपनी सरकारी जीप में बैठा लिया और 30/06/05 से 06/07/2005 तक भाभी को थाने पर रखे थे, जब हम लोग थाने पर जाते थे तो पदमाकर राय दौड़ाकर मारते थे और गाली-गुप्ता देते थे।

जब मेरी भाभी छूटकर दि०06/07/2005 को आई तो उन्होंने बताया कि पदमाकर मारते-पीटते और प्रताड़ित करते थे। विजमा यादव के कहने पर पदमाकर राय थाने पर भाभी को गाली देता था व प्रताड़ित करता था।"

3.5-On 01.09.2023 statements under Section 313 Cr.P.C. of the accused persons were recorded and after completion of defence evidence and final argument, date was fixed for delivery of judgement on 18.10.2023. In the meantime before delivery of judgement, the complainant /opposite party no. 2 moved an application under Section 319 Cr.P.C. dated 17.10.2023 for summoning the revisionist-Arunenedra @ Daddu Yadav to face trial. The said application of the complainant has been

allowed by the trial court vide order dated 31.10.2023 and summoned the revisionist Arunendra @ Daddu Yadav as an additional accused to face trial under Section 307/149, 436/149 and 323/149 I.P.C., which is the subject matter of challenge in the present Criminal Revision.

4-The main substratum of argument of learned counsel for the revisionist is that on 29.06.2005 revisionist's father was murdered, regarding which Moolchandra Yadav (uncle of the revisionist) lodged F.I.R. against Ashok Yadav (husband of complainant), Raju Yadav, Chottan Giri and Ramesh Chandra Yadav, therefore a false complaint has been filed by the complainant. Much emphasis has been given by contending that though in paragraph No. 4 of the complaint, allegation against the revisionist Arunendra @ Daddu Yadav has been levelled with regard to the incident dated 30.06.2005, but he was not included as an accused in array of the parties and he was not summoned under Section 204 Cr.P.C. The complainant at that time did not file any petition regarding non summoning of the revisionist along with other accused persons. It is next argued that complainant with ulterior motive has moved an application under Section 319 Cr.P.C. at the fag end of the trial on 17.10.203, a day before the delivery of judgement, which was not maintainable. It is also argued that on the basis of statements of PW-1, PW-2 and PW-3 given before the trial court, revisionist cannot be convicted, hence the same is not sufficient to summon the revisionist under Section 319 of Cr.P.C. The learned Additional Sessions Judge/Special Judge wrongly and illegally entertained the said application under Section 319 Cr.P.C. of the complainant and without applying judicial mind and without giving finding as to whether revisionist can be convicted on the material evidence (statements of PW-1, PW-2 and PW-3) or not, allowed the said application and summoned the revisionist in exercise of powers under Section 319 Cr.P.C. to face trial vide impugned order dated vide order dated 31.10.2023, which is liable to be set aside.

5-On the other hand, learned A.G.A. for the State and learned counsel appearing on behalf of complainant/opposite party no. 2 vehemently opposed the prayer made on behalf of the revisionist by contending that name of the revisionist Arunendra @ Daddu Yadav and allegation against him with regard to the incident dated 30.06.2005 are mentioned in paragraph no. 4 of the complaint itself, but due to omission, his name was not mentioned at first page of the complaint in the list of accused. The complainant and witnesses in their statements under Section 200 and 202 Cr.P.C. have also made allegation against the revisionist. Much emphasis has been given by contending that before the trial court also the complainant and witnesses who have been examined as PW-1, PW-2 and PW3 have made allegation against the revisionist by stating inter-alia that on the next day on 30.06.2005, in morning, they came to their house in Mahmudabad. When accused persons came to know it, they also came there. Arunendra @ Daddu Yadav was armed with rifle of complainant's brother-in-law and Moolchandra was armed with rifle of complainant's husband which were looted by the accused persons on 29.06.2005 and fired on the exhortation of accused Vijama Yadav (the then M.L.A.). Learned A.G.A. for the State referring the statements of PW1, PW2 and PW3, also argued that from their statements active involvement of revisionist in the incident dated 30.6.2005 is apparent on record and

as such much more than prima facie case is made out against the revisionist, which is sufficient to frame charge against him.

6-Before adverting to the claim of the parties, it would be useful to quote Section 319 Cr.P.C.

"319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

7-From the perusal of Section 319 Cr.P.C., it is clear that it is the duty of the Court to see that no accused is left unpunished.

8-The moot question involved in the present case is as to whether application under Section 319 Cr.P.C. of the complainant which was filed before delivery of judgement was maintainable or not and what would be degree of satisfaction for invoking the provisions of Section 319 Cr.P.C.

9-So far as the first issue regarding the maintainability of application dated 17.10.2023 under Section 319 Cr.P.C. is concerned, it would be appropriate to refer the Constitutional Bench judgement of Hon'ble Apex Court in the case of **Sukhpal Singh Khaira Versus State of Punjab, (2023) 1 SCC 289,** in which the Hon'ble Apex Court after wholesome treatment interpreting the word and phrases "Trial", "Conclusion of trial'' and "Trial when concluded" has settled the issue about the stage(s) of the proceeding at which power under Section 319 Cr.P.C. may be invoked. The relevant paragraphs of the said judgement are as follows:-

"Para no. 23- A close perusal of Section 319 of CrPC indicates that the power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing the offence. Therefore, it would be open for the Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion

of trial. The connotation 'conclusion of trial' in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment as already held in Hardeep Singh (supra) since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court.

Para no. 33- In that view of the matter, if the Court finds from the evidence recorded in the process of trial that any other person is involved, such power to summon the accused under Section 319 of CrPC can be exercised by passing an order to that effect before the sentence is imposed and the judgment is complete in all respects bringing the trial to a conclusion. While arriving at such conclusion what is also to be kept in view is the requirement of sub-section (4) to Section 319 of CrPC. From the said provision it is clear that if the learned Sessions Judge exercises the power to summon the additional accused, the proceedings in respect of such person shall be commenced afresh and the witnesses will have to be re-examined in the presence of the additional accused. In a case where the learned Sessions Judge exercises the power under Section 319 of CrPC after recording the evidence of the witnesses or after pronouncing the judgement of conviction but before sentence being imposed, the very same evidence which is available on record cannot be used against the newly added accused in view of Section 273 of CrPC. As against the accused who has been summoned subsequently a fresh trial is to be held. However while considering the application under Section 319 of CrPC, if the decision by the learned Sessions Judge is to summon the additional accused before passing the judgement of conviction or passing an order on sentence, the conclusion of the trial by pronouncing the judgement is required to be withheld and the application under Section 319 of CrPC is required to be disposed of and only then the conclusion of the judgement, either to convict the other accused who were before the Court and to sentence them can be proceeded with. This is so since the power under Section 319 of CrPC can be exercised only before the conclusion of the trial by passing the judgement of conviction and sentence.

Para no. 34- Though Section 319 of CrPC provides that such person summoned as per sub-section (1) thereto could be jointly tried together with the other accused, keeping in view the power available to the Court under Section 223 of CrPC to hold a joint trial, it would also be open to the learned Sessions Judge at the point of considering the application under Section 319 of CrPC and deciding to summon the additional accused, to also take a decision as to whether a joint trial is to be held after summoning such accused by deferring the judgement being passed against the tried accused. If a conclusion is reached that the fresh trial to be conducted against the newly added accused could be separately tried, in such event it would be open for the learned Sessions Judge to order so and proceed to pass the judgment and conclude the trial insofar as the accused against whom it had originally proceeded and thereafter proceed in the case of the newly added accused. However, what is important is that the decision to summon an additional accused either suo-moto by the Court or on an application under Section 319 of CrPC shall in all eventuality be considered and disposed of before the judgement of conviction and sentence is pronounced, as otherwise, the trial would get concluded and the Court will get divested of the power under Section

319 of CrPC. Since a power is available to the Court to decide as to whether a joint trial is required to be held or not, this Court was justified in holding the phrase, "could be tried together with the accused" as contained in Section 319(1) of CrPC, to be directory as held in ***Shashikant Singh (supra)*** *which in our opinion is the correct view.*

Para no. 38- For all the reasons stated above, we answer the questions referred as hereunder.

Para no. 39.(I)- Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

The power under Section 319 of CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

Para no. 40 (II)- Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

The trial court has the power to summon additional accused when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split up (bifurcated) trial pointing to the involvement of the accused sought to be summoned. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

Para no. 41.(III)- What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?"

Para no. 41.1- If the competent court finds evidence or if application under Section 319 of CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

Para no. 41.2- The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

Para no. 41.3- If the decision of the court is to exercise the power under Section 319 of CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.

Para no. 41.4- If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

Para no. 41.5- If the decision is for joint trial, the fresh trial shall be

commenced only after securing the presence of the summoned accused.

Para no. 41.6- If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.

Para no. 41.7- If the proceeding paused as in (i) above is in a case where the accused who were tried are to be acquitted and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

Para no. 41.8- If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 of Cr.P.C can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split up (bifurcated) trial.

Para no. 41.9- If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319 of CrPC, the appropriate course for the court is to set it down for re-hearing.

Para no. 41.10- On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

Para no. 41.11- Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

Para no. 41.12- If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier;

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused."

10-In the case in hand, admittedly the application under Section 319 Cr.P.C. was moved before the judgement was delivered/pronounced by the trial Court, hence in the light of principles laid down by the Hon'ble Apex Court in the case of **Sukhpal Singh Khaira (Supra)**, this Court is of the view that application dated 17.10.2023 under Section 319 Cr.P.C. of the complainant was maintainable and same has been rightly entertained and considered by the trial Court.

11-So far as second issue regarding parameters / degree of satisfaction for invoking the provisions of Section 319 Cr.P.C. is concerned, it would be useful to refer following judgements of the Hon'ble Apex Court, wherein this issue has specifically dealt with.

11.1-The Constitutional Bench of Hon'ble Apex Court in the case of **Hardeep Singh Versus State of Punjab,(2014) 3 SCC 92**, has framed five questions, out of which question no. IV which is relevant for the purpose of this case is as under:-

Question (iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused?

Whether the power under Section 319 (1) Cr.P.C. can be exercised

only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Aforesaid questions have been answered in the following terms:-

Para No. 117.5. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial, therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different."

11.2-The Division Bench of Hon'ble Supreme Court in **Vikas Vs. State of Rajasthan,** (2014) 3 SCC 321, has held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

11.3-While dealing with the duty and power of the Court under Section 319 Cr.P.C., Hon'ble Supreme Court in **Brijendra Singh and others Vs. State of Rajasthan,** 2017(7) SCC 706, has held as under:

"It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C."

xx xx xx

"The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence." It also goes without saying that Section 319 Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Section 207/208 Cr.P.C., the committal etc., which is only a pre- trial stage intended to put the process into motion."

11.4-The aforesaid principles have further been followed by Hon'ble the Supreme Court in the cases of **Periyasami and others Vs. S. Nallasamy; 2019 (4) SCC 342, Sugreev Kumar vs. State of Punjab and others; AIR 2019 SC 2903, Shiv Prakash Mishra vs. State of Uttar Pradesh; 2019 (7) SCC 806 and Mani Pushpak Joshi vs. State of Uttrakhand and another; AIR 2019 SC 5263.**

12-Here it would also be relevant to mention that each case must be decided on its own facts and merit. Even one additional or different fact may make big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

13-So far as F.I.R. dated 29.06.2005 lodged by Moolchandra (uncle of the revisionist) regarding murder of revisionist's father against Ashok Yadav (husband of complainant), Raju Yadav, Chottan Giri and Ramesh Chandra Yadav is concerned, I find that they have been acquitted by the judgement and order dated 23.09.2010 of the trial court passed in Sessions Trial No. 338/2006, 489/2006 and 340/2006, but Moolchandra who was informant/complainant in that case did not prefer any appeal against the aforesaid judgement of acquittal and order dated 23.09.2010. Smt. Padmavati Devi, who is mother of the revisionist had preferred Criminal Appeal u/s 372 Cr.P.C. along with Criminal Misc. Application Defective U/s 372 Cr.P.C. (Leave to Appeal) No. 58 of 2017 **after 2354 days** on 27.05.2017, which has been dismissed as time barred by the Division Bench of this Court vide order dated 23.01.2019.

14-Having heard the submissions of learned counsel for the parties and examined the record in its entirety, I find that:-

14.1- The complainant in her application under section 156 (3) Cr.P.C. made allegation that since one of the accused-Vijma Yadav was sitting MLA at the time of incident and co-accused Padmakar Rai, Sub-Inspector at that time was posted in Police Station-Jhunsi, Allahabad, therefore, on the influence of Vijma Yadav, the then local sitting MLA, who is one of the accused in the present case, her FIR was not lodged with regard to incident dated 29.06.2005 and 30.6.2005. Under the circumstances, she filed application under Section 156(3) Cr.P.C. dated 08.07.2005 seeking direction to lodge F.I.R. in the matter for the offence under Sections 395, 397, 436, 323, 504, 506, 364 I.P.C., but the said application was treated as complaint, as such no police investigation was done in the matter.

14.2-Regarding the second incident dated 30.06.2005, allegation has been levelled against the revisionist-Arunendra @ Daddu Yadav in paragraph no. 4 of the complaint, statement under Section 200 Cr.P.C. of the complainant and statements of witnesses under Section 202 Cr.P.C. alleging inter-alia that on the next day, i.e. 30.06.2005 under the leadership of Smt. Vijma Yadav MLA, again Moolchandra Yadav, Arunendra @ Daddu Yadav (revisionist), Gyan Chandra Yadav, Jabar Singh, Amar Singh, Raju Yadav, Raju son of Tulsiram, Ashok Nishad, Lalchand and 15-20 persons came and opened fire with the rifles which they had looted from her house and the weapons, which they had brought with them and barged into her house by breaking the doors and started beating her as well as her children.

14.3-When statement of complainant (Shashi Devi) and witnesses namely, Shiv Narayan and Awadesh Yadav were recorded before the trial court as PW1, PW-2 and PW-3 they have made same allegation against the revisionist, as noted above in preceding paragraph no. 3.4.

14.4-Considering the facts, materials on record as well as statements of PW-1, PW-2 and PW-3, as mentioned above in paragraph no. 3.4, with regard to second incident dated 30.06.2005, I find that the role attributed to the revisionist-

Arunendra @ Daddu Yadav is similar to role of accused Moolchandra Yadav who is already facing trial. Hence, this Court is of the view that the evidence which has come on record against the revisionist are much more than prima facie and are sufficient to proceed against the revisionist in exercise of power under Section 319 Cr.P.C. and for framing of charge.

15-In view of above, it can safely be held that the learned Additional Sessions Judge while passing the impugned order dated 31.10.2023 was fully satisfied that there are strong and cogent evidence against the revisionist which is sufficient for framing of charge and has not passed the order in a casual manner.

16-The order passed by the learned Additional Sessions Judge is in consonance with the law laid down by Hon'ble Supreme Court in **Sukhpal Singh Khaira and Hardeep Singh (Supra)** and it cannot be said that the order of the learned Additional Sessions Judge is in the teeth of the order of Hon'ble Supreme Court referred to above.

17-In view of what has been indicated herein above, I do not find any illegality or irregularity in the order date 31.10.2023 passed by learned Additional Sessions Judge/Special Judge MP/MLA Court, Prayagraj summoning the revisionist under Section 319 Cr.P.C. to face the trial under Sections 147, 148, 302/149, 323/149, 504 and 506 IPC along with other accused.

18-The Criminal Revision is bereft of merit. It is accordingly rejected.

(2024) 3 ILRA 175
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 28.02.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Civil Misc. Arbitration Application No. 91 of 2023

Gedpec Infratech Ltd. ...Applicant
Versus
U.P. Power Transmission Corporation Ltd., Lucknow ...Opposite Party

Counsel for the Applicant:
Vishnu Pratap Singh, Awaneesh Yadav

Counsel for the Opposite Party:
Puneet Chandra

Arbitration Law – Arbitration and Conciliation Act, 1996 – Sections 11(6), 11(8) & 12 – Fifth Schedule - Item 24 – Appointment of Arbitrator – Applicant sought appointment of arbitrator under Section 11(6) for disputes arising from three agreements dated 30.06.2017 with respondent – Held, respondent's objection to proposed arbitrator (Hon'ble Mr. Justice VSC. Gupta) based on Item 24 of Fifth Schedule (arbitrator serving in another arbitration involving respondent within past three years) untenable – Item 24 requires the other arbitration to involve a related issue or arbitrator's affiliation with a party, neither established by respondent – *HRD Corporation Vs GAIL (India) Limited* followed, clarifying that Item 24 disqualification is not absolute and requires specific relationship or involvement, absent here – No evidence of arbitrator's lack of independence or impartiality – Hon'ble Mr. Justice VSC. Gupta appointed as arbitrator, respondent granted liberty to raise objections before arbitrator if legally permissible – Application disposed of. (Para 11-18)

Application disposed of.

List of Cases Cited:

1. HRD Corporation (Marcus Oil and Chemical Division) Vs GAIL (India) Limited; (2018) 12 SCC 471

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

1. Heard Sri Syed Tamjeed Ahmad, learned counsel for the applicant and Sri Puneet Chandra, learned counsel for the respondent.

2. This Court, by means of the order dated 07.02.2023, proposed the name of Hon'ble Mr. Justice V.C.Gupta(Former Judge of this Court) as Arbitrator to settle the dispute between the parties. The order dated 07.02.2023, on reproduction, reads as under:-

"Heard Sri Awaneesh Yadav learned counsel for the applicant and Sri Puneet Chandra learned counsel for the respondent.

This Court has passed following order on 12.12.2023:-

"Heard Shri Syed Tamjeet Ahmad, learned counsel for the petitioner. Shri Puneet Chandra, learned counsel has accepted notice on behalf of the respondent.

The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 for seeking appointment of a sole Arbitrator.

The submission of the learned counsel for the petitioner is that three separate agreements were entered between the parties. All the three agreements between the parties are dated 30.06.2017. Each of the agreement has an identical arbitration clause.

It is further urged that the first agreement relates to supply of equipment and material for construction of 400kV Sub Station at Jaunpur. The second agreement of the same date relates to the erection, testing, commissioning, operation and maintenance for two years of 400kV Sub Station at Jaunpur whereas the third agreement relates to civil works for construction of 400kV Sub Station at Jaunpur. Accordingly, it is submitted that all the three contracts are part of one composite project which was to be completed by the petitioner under the three separate heads.

It is further urged that during the course of subsistence of the agreements, certain disputes arose between the parties and the petitioner by means of its notice dated 27.09.2023 by making a reference to all the three contracts invoked the arbitration clause.

It is further submitted that as per Clause 38 of the agreement which contained an arbitration clause it provided that any dispute arose between the parties was to be referred to the Chairman of the respondent Corporation, however, in light of the provisions contained in Section 12(5) of the Act of 1996 duly amended in the year 2015 it is now not open for the respondent to either arbitrate or nominate an arbitrator.

In the given circumstances, the petitioner had requested the respondent to cooperate in an early constitution of Arbitral Tribunal, however, despite the notice dated 27.09.2023 having been served on the respondent, there was no response, hence, the petition.

Shri Puneet Chandra, learned counsel for the respondent on the other hand submitted that though he requires time to file his response as he wishes to raise a preliminary objection to the effect that since there are three separate agreements which have given rise to three separate cause of action, hence, one single petition raising the disputes as well as one composite notice dated 27.09.2023 both are not valid, apart from the fact that the

agreements also provide for the jurisdiction at Allahabad.

Let the response be filed by the respondent within two weeks from today with an advance copy to the learned counsel for the petitioner, who if may so choose, may file his response within one week thereafter.

Since, the respondent Corporation is represented through its counsel, hence, no fresh notice is required.

List this matter on 12.01.2024. "

Learned counsel for the respondent, on the basis of instructions submits that respondent does not want to file any objection and since there is dispute, therefore, Arbitrator may be appointed.

Having considered the submissions of the learned counsel for the parties there appears to be some arbitral dispute between the parties and if the same is resolved through Arbitrator appointed by this Court in terms of Clause 25 of Section 8 of the agreement none of the parties are going to be prejudiced.

Accordingly the Court proposes to appoint Hon'ble Mr.Justice V.C.Gupta, House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897 as Arbitrator to settle the dispute between the parties.

Let a copy of the pleadings on record alongwith the relevant provisions of the amending Act 2015 be sent to Hon'ble Mr.Justice V.C.Gupta, House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897 for eliciting his disclosure in terms of Section 11(8) read with Section 12(1) of the Act, 1996 and Schedule VI and VII as amended by Act 2015, appended thereto, as also his consent for appointment as an Arbitrator for resolving the dispute.

Learned counsel for the applicant shall supply an additional copy of the application to the office for the said purpose within a week.

List after receipt of reply/consent."

3. In deference to the aforesaid order, Hon'ble Mr. Justice V.C.Gupta(Former Judge of this Court) has sent his consent through letter dated 19.02.2024 in accordance with law.

4. Learned counsel for the respondent submits that since Hon'ble Mr. Justice V.C. Gupta(Former Judge of this Court) is conducting an arbitration between the respondent-U.P. Power Transmission Corporation Ltd. and SEW Infrastructure Ltd. after being appointed as an arbitrator by means of the order dated 27.09.2023 by this Court in Civil Misc. Arbitration Application No.40 of 2023 and he has also issued notices on 11.10.2023,therefore, as per Item 24 of the Fifth Schedule of the Arbitration and Conciliation Act,1996(here-in-after referred to as the Act of 1996), he may not be appointed as an arbitrator as it gives rise to justifiable doubts as to his independence or impartiality. He relies on **HRD Corporation (Marcus Oil and Chemical Division) Versus GAIL(India) Limited; (2018)12 SCC 471.**

5. Per contra, learned counsel for the applicant submits that contention of learned counsel for the respondent is mis-conceived and not tenable for the reason that he has failed to indicate that the proposed arbitrator was or is related in any manner with one of the parties on the issue involved in this case in the other arbitration or he is affiliate of one of the parties. He further submits that he has no objection in appointment of the proposed arbitrator.

6. I considered the submissions of learned counsel for the parties and gone through the records.

7. Section 11 of the Act of 1996 provides the appointment of arbitrators. Sub-section (6) of Section 11 of the Act of 1996 provides the appointment of the arbitrator by the High Court, in case the parties fails to act as required under the procedure of appointment agreed upon by the parties. Sub-section (8) of Section 11 provides that the arbitral institution referred to in sub-sections (4), (5) and (6) before appointing the arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12. Sub-section (8) of Section 11 is extracted hereinbelow:-

(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]"

8. Section 12 of the Act of 1996 provides that the proposed arbitrator shall disclose in writing any circumstances as disclosed therein with reference to Fifth Schedule of the Act of 1996 in regard to his independence and impartiality etc. Section 12 is extracted herein-below:-

12. Grounds for challenge.

[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality;

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

9. The Fifth Schedule of the Act of 1996 provides the grounds which give rise to justifiable doubts as to the independence or impartiality of arbitrators.

10. Item No.24 of the Fifth Schedule of the Act of 1996, on the basis of which, objection has been raised by learned counsel for the respondent for appointment of the proposed arbitrator is extracted herein-below;

"24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."

11. In view of the aforesaid Item 24 of Fifth Schedule, doubt in regard to the independence or impartiality of an arbitrator can be raised if an arbitrator currently serves or has served within the past three years, as arbitrator in another arbitration on a related issued involving one of the parties or he is an affiliate of one of the parties. Therefore if an arbitrator is currently serving or has served in the past three years as an arbitrator on the related issue involving one of the parties, on which the arbitration is to be held in the present case or if he is affiliate to one of the parties, it may be a ground to give rise to his independence or impartiality. Thus it cannot be conclusive ground of doubt of his independence or impartiality.

12. Item No.1 to14 and 30 and 31 of the Fifth Schedule of the Act of 1996 provides the grounds which may give rise to justifiable doubts of independence or impartiality of arbitrator on the ground of his relationship with the parties or counsel. Item No.15 and 16 of the Fifth Schedule provides that the arbitrator can be said to be related to the dispute if he has given legal advise or provided an expert opinion on the dispute to a party or an affiliate of one of the parties or he has previous involvement in the case. The circumstances have been given in Item No.1 to 14 and 30 and 31 of the Fifth Schedule in which the arbitrator can be said to be affiliate to one of the parties, such as, if he is an employee, consultant, advisor or has any other past or present business relationship with a party or currently he represents or advises one of the parties or an affiliate of one of the parties etc.

13. Learned counsel for the respondent has failed to indicate any such circumstance, in terms of the aforesaid provisions, on account of which it may be said that the proposed arbitrator is serving as an arbitrator on a related issue with one of the parties i.e. the respondent Corporation in the other arbitration or he is his affiliate. It is also very strange that objection has been raised by learned counsel for the respondent on the basis of Item No.24 without disclosing relationship of respondent corporation with the proposed arbitrator except that he is arbitrator in the other arbitration, which may be a disqualification for appointment of the proposed arbitrator in the present matter.

14. In view of above, without disclosing as to how he can say that the arbitrator is related to the issue with one of the parties in the other arbitration, in which the respondent corporation itself is a party,

when he fairly admits, on a query being put to him, that the other arbitration is on separate issue or as to how the proposed arbitrator is an affiliate of the respondent-corporation, without disclosing the relationship, in terms of the Fifth Schedule of the Act of 1996, the contention of learned counsel for the respondent is misconceived and not tenable.

15. The Hon'ble Supreme Court, in the case of **HRD Corporation (Marcus Oil and Chemical Division) versus GAIL(India)** Limited(supra), has held that the disqualification contained in Items 22 and 24 is not absolute The relevant paragraph 24 is extracted hereinbelow:-

"24. On reading the aforesaid guideline and reading the heading which appears with Item 16, namely "Relationship of the arbitrator to the dispute", it is obvious that the arbitrator has to have a previous involvement in the very dispute contained in the present arbitration. Admittedly, Justice Doabia has no such involvement. Further, Item 16 must be read along with Items 22 and 24 of the Fifth Schedule. The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions. Also, if he currently serves or has served within the past three years as arbitrator in another arbitration on a related issue, he may be disqualified under Item 24, which must then be contrasted with Item 16. Item 16 cannot be read as including previous involvements in another arbitration on a related issue involving one of the parties as otherwise Item 24 will be rendered largely ineffective. It must not be forgotten that Item 16 also appears in the Fifth Schedule and has, therefore, to be harmoniously read with Item 24. It has also been argued by learned counsel appearing on behalf of the respondent that the expression "the arbitrator" in Item 16 cannot possibly mean "the arbitrator" acting as an arbitrator, but must mean that the proposed arbitrator is a person who has had previous involvement in the case in some other avatar. According to us, this is a sound argument as "the arbitrator" refers to the proposed arbitrator. This becomes clear, when contrasted with Items 22 and 24, where the arbitrator must have served "as arbitrator" before he can be disqualified. Obviously, Item 16 refers to previous involvement in an advisory or other capacity in the very dispute, but not as arbitrator. It 32 was also faintly argued that Justice Doabia was ineligible under Items 1 and 15. Appointment as an arbitrator is not a "business relationship" with the respondent under Item 1. Nor is the delivery of an award providing an expert "opinion" i.e. advice to a party covered by Item 15".

16. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the objection raised by learned counsel for the respondent is totally misconceived and not tenable and liable to be repelled, which is accordingly repelled.

17. At this stage, learned counsel for the respondent submits that he may be granted liberty to raise the issue before the arbitrator, for which no liberty is required and if he is entitled to raise objection in accordance with law and advised so, he may raise and the same may be considered by the arbitrator in accordance with law.

18. In view of above, Hon'ble Mr.Justice V.C.Gupta(Former Judge of this Court), House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897, is hereby appointed as an Arbitrator to decide the dispute between the parties herein.

19. The application is, accordingly, **disposed of.**

20. Let a copy of this order be communicated forthwith to Hon'ble Mr.Justice V.C.Gupta, House No.D-862, Omex City, Raebareli Road, Lucknow (U.P.) Mobile No.8004928897.

(2024) 3 ILRA 181
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.03.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Civil Misc. Arbitration Application No. 100 of 2023

M/S Deep Distributors Pvt. Ltd.
...Applicant
Versus
Tigers Brewery Industries Pvt. Ltd.
...Opposite Party

Counsel for the Applicant:
Pritish Kumar, Amal Rastogi

Counsel for the Opposite Party:
Amrenra Nath Tripathi, Ajay Kumar Mishra

Arbitration Law – Arbitration and Conciliation Act, 1996 – Sections 9, 2(1)(e), 2(1)(f) – Commercial Courts Act, 2015 – Sections 4 & 10 – Jurisdiction of Commercial Division – Applicant sought interim relief under Section 9 to restrain respondent from breaching a marketing agreement dated 25.07.2018 – Respondent raised preliminary objection on jurisdiction, arguing Allahabad High Court, lacking ordinary original civil jurisdiction, cannot constitute a Commercial Division – Held, dispute qualifies as international commercial arbitration under Section 2(1)(f) as respondent is a Nepal-based company – Section 10(1) of Commercial Courts Act mandates that applications in international commercial arbitration be heard by Commercial Division of High Court, irrespective of ordinary original civil jurisdiction – Section 4's restriction on Commercial Division to High Courts with ordinary original civil jurisdiction does not limit Section 10's mandate for international commercial arbitration – *ITI Limited Vs Alphion Corporation* followed, affirming Commercial Division's jurisdiction for such matters – Allahabad High Court's Commercial Division, constituted by Chief Justice, has jurisdiction to hear the application – Preliminary objection rejected, case listed for hearing. (Para 9-27)

Application maintainable, listed for hearing.

List of Cases Cited:

1. ITI Ltd. Vs Alphion Corporation; Commercial Appeal No. 22 of 2022, decided on 25.02.2022 (Karnataka High Court)

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

1. Heard Sri Pritish Kumar, Advocate assisted by Sri Amal Rastogi for the petitioner and Sri Amrendra Nath Tripathi assisted by Sri Akash Mishra for the respondents.

2. The petitioner has invoked the jurisdiction of this court by filing an application under section 9 of the arbitration and conciliation act, 1996 seeking to restrain the respondents from importing, exporting marketing and selling the Beer manufactured by the respondents in violation of the agreement dated 25/07/2018.

3. On notices being issued, the respondents have put in appearance, and raised preliminary objection with regard to the jurisdiction of this Court to entertain the instant application. It is submitted that a Commercial Division can be constituted only in a High Court having ordinary civil jurisdiction and not otherwise, and the Allahabad High Court which does not have original civil jurisdiction, the Commercial Division could not be constituted, and application therefore can be entertained only by a Bench having jurisdiction to hear appeal from degrees of subordinate courts.

4. Counsel the petitioner, on the other hand, has opposed the preliminary objection raised by the respondents and submitted that the present petition pertains to "International Commercial Arbitration" and the same has to be filed in the High Court as per the provisions contained in section 10 (1) of the Commercial Courts Act, 2015. It has further been submitted that the value of the present dispute is about to ₹ 10 crores which is above the threshold limit of ₹ 3 lakhs as per the provisions contained in section 2(1)(i) of the Commercial Courts Act, 2015 it is a "commercial dispute" as per section 12 of the act of 2015. It was further submitted that Commercial Division of the High Court has been duly constituted by the Chief Justice and consequently this Court, exercising jurisdiction of Commercial Division of the High Court would have jurisdiction to consider an application under section 9 of the Arbitration and Conciliation act, 1996.

5. It was further submitted that this aspect of the matter was duly considered by a bench of the Karnataka High Court in the case **of ITI Limited vs Alphion Corporation** in Commercial Appeal No. 22 of 2022 which was decided on 25/02/2022 and it was held that in terms of section 10 (1) of the Commercial Courts Act challenge to an international commercial arbitral award would have to be considered by the Commercial Division establishing High Court consisting of a Single Judge, and therefore the present dispute similar provisions will apply, and the application would be cognizible before the Commercial Division of this Court.

6. I heard the counsel the parties and perused the record. Learned counsel for the parties have jointly requested that the preliminary issue be decided at the outset before considering the application on merits.

7. The present dispute has his roots in the memorandum of understanding dated 25/07/2018 entered between the petitioner and the respondent whereby the petitioner company was given exclusive rights of marketing, distribution and sale of beer of certain brands as stated therein. According to the petitioners despite grant of exclusive rights for marketing and distribution of beer, the respondent in violation of the aforesaid agreement have entered into new marketing agreement with different companies. It is in the aforesaid circumstances that application under Section 9 of the Arbitration & Conciliation Act, 1996 has been filed by the petitioner seeking to restrain the respondent.

8. The value of the dispute is more than the specified value of ₹ 3 lakhs, and as per the rejoinder affidavit filed by the petitioner is Rs. 10 crores and therefore it will fall within the definition of 'commercial dispute' as per section 2(1) and 2(ix), (xviii) of the Act of 2015.

9. The matter pertains to International Commercial Arbitration in terms of section 2(1)(f) of the arbitration and conciliation act, 1996 which is reproduced hereinunder: -

*(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is— (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) 2*** an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country;"*

10. The respondent company has registered office at Sukhanagar-10 Butwal, Nepal i.e outside the territory of Republic of India and, therefore, would come within the purview of section 2 (1) (f) (ii) since one of the parties is a body corporate incorporated in the country other than India.

11. According to clause 8 of the memorandum of understanding dated 28/02/2018 it has been provided that in the event of any dispute between both the parties the matter shall be referred for arbitration as per the Arbitration & Conciliation Act, 1996 and the proceedings shall be carried at Lucknow. The seat of arbitration is in Lucknow and therefore in terms of section 2(2) of the Arbitration & Conciliation Act, 1996 the arbitration proceedings between the parties would fall within the scope of part I of the Arbitration & Conciliation Act of 1996, and any application under section 9 would be heard and decided by the "Court" as per section 2(f) of the Act of 1996 which as is as follows:-

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

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

12. A perusal of the aforesaid provision would indicate that in case of international commercial arbitration, the High Court having jurisdiction to hear appeals from degrees of courts subordinate to that court would have jurisdiction to decide the matter, and as per section 10 (1) of the Commercial Courts Act in an international commercial arbitration all applications arising out of such arbitration shall be heard and decided by the commercial division having been constituted in such High Court.

13. The controversy in the present case has arisen on account of the fact that this Court does not exercise of original civil jurisdiction like the presidency Courts of

Bombay, Calcutta, Madras and the High Court of Delhi where the application would be cognizible before a Bench having been assigned the jurisdiction to decide the question forming subject matter of the arbitration if the same had been subject matter of a suit, while in all other cases, the Bench of the High Court having jurisdiction to hear appeals from degrees of court subordinate to the High Court.

14. Chapter 2 of the commercial Courts act deals with the Constitution of the Commercial Court, Commercial Appellate courts, Commercial Divisions and Commercial Appellate Divisions.

15. With regard to the jurisdiction in respect of arbitration matters particularly international commercial arbitration Section 10 of the Commercial Courts Act provides:-

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

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

16. Accordingly, in respect of international commercial arbitration all applications that have been filed in the High Court shall be disposed of by Commercial Division of the High Court, and, therefore, the present case has been listed before this Court. There is no dispute that applications pertaining to International Commercial Arbitration shall be cognizible before the High Court, and more particularly before the Commercial Division which has been constituted by the Chief Justice.

17. Section 4 deals with the Constitution of the Commercial Division of the High Court. Section 4 of Commercial Court Act, 2015 is as under:-

"4. Constitution of Commercial Division of High Court.—(1) In all High Courts, having [ordinary original civil jurisdiction], the Chief Justice of the High Court may, by order, constitute Commercial Division having one or more Benches consisting of a single Judge for the purpose of exercising the jurisdiction and powers conferred on it under this Act.

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Division."

18. Therefore, considering the aforesaid provisions, it is borne out that under the Commercial Courts Act Commercial Courts can be constituted at the District Judge level or court below the District Judge level as per provisions of Section 3 of the Commercial Courts Act by the State Government in consultation with the High Court. Section 3A provides for designation of Commercial Appellate Courts in those States which do not have ordinary original civil jurisdiction at the level of the District Judge.

19. According to section 4 of the Commercial Courts Act, all High Courts having ordinary original civil jurisdiction may constitute Commercial Division

Courts consisting of a Single Judge. From a bare reading of the aforesaid provision it is clear that a Commercial Division is sought to be constituted only in those High Courts exercising ordinary original civil jurisdiction.

20. Section 5 of the Commercial Courts Act makes provision for constitution of the commercial appellate division which is as follows:-

"5. Constitution of Commercial Appellate Division.—
(1) After issuing notification under subsection (1) of section 3 or order under sub-section (1) of section 4, the Chief Justice of the concerned High Court shall, by order, constitute Commercial Appellate Division having one or more Division Benches for the purpose of exercising the jurisdiction and powers conferred on it by the Act.

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Appellate Division."

21. According to Section 5 of the Commercial Courts Act the Chief Justice has been empowered to constitute the Commercial Appellate Division. A bare perusal of section 5 would indicate that Commercial Appellate Division has been sought to be constituted in all the High Courts irrespective of whether they exercise ordinary original civil jurisdiction or not.

22. The provision for appeal has been made in chapter IV of the Act of 2015, and it provides for appeal against a judgement or order of Commercial Court below the level of District Judge, to the Commercial Appellate Court, and against the judgement of a Commercial Court at the level of District Judge exercising original jurisdiction or by Commercial Division of the High Court the appeal would lie to the Commercial Appellate Division of the High Court. Proviso 2 of Section 13(1A) of the Commercial Courts Act restricts intra Court appeals from the Commercial Division of a High Court to its Commercial Appellate Division, only to those orders of the Commercial Division, which are specifically enumerated under Order 43 of the Code of Civil Procedure 1908 as amended by the Commercial Courts Act and Section 37 of the Arbitration and Conciliation Act 1996.

23. The aforesaid provisions when read with Section 10 of the Commercial Courts Act makes it clear that the special provision has been made with regard to the arbitration matters. According to section 10 (1) if the arbitration is an international commercial arbitration all applications or appeals arising out of such arbitration, that have been filed in the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted, as per section 10 (2) in the case of domestic arbitration then the application or appeals would have to be filed on the original site of the High Court and shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted by the High Court, and, lastly, in all cases other than international commercial arbitration, which would lie be before any principal civil court of original jurisdiction, would be heard and disposed of by the Commercial Division bench has Commercial Court where it has been constituted.

24. Even though as per section 4 of the Commercial Courts Act, a provision has

been made for constitution of Commercial Division only for the High Courts having ordinary original and civil jurisdiction, but the special provision has been carved in Section 10 with regard to matters pertaining to international commercial arbitration, where all applications and appeals have to be disposed of by the Commercial Division of the High Court. Section 10 does not distinguish between High Courts having ordinary original civil jurisdiction and High Courts which do not have ordinary civil jurisdiction. Therefore, a Commercial Division would have to be created in all the High Courts for disposal of applications pertaining to international commercial arbitrations.

25. The Karnataka High Court in the case of **Karnataka High Court in the case of ITI Limited vs Alphion Corporation** in commercial appeal No. 22 of 2022 which was decided on 25/02/2022 has also taken a similar view, and the observations are contained in 51 which is quoted as under:-

"51.1 Hence, we answer the questions raised as under:

51.1 A challenge to an award passed in an International Commercial Arbitration can be made before the High Court of Kamataka in view of Section 2 (e)(ii) of the A & C Act, 1996.

51.2 In terms of Section 10 (1) if the CC Act, a challenge to an International Commercial Arbitral Award would have to be considered by a Commercial Division established in the High Court consisting of a Single Judge.

51.3 The Commercial Divisions were constituted as a special Division, the ordinary limitation of the pecuniary Jurisdiction for the exercise of powers of the Single Judge would not apply and the pecuniary jurisdiction would be unlimited.

"51.4 Section 37 of the A & C Act mandates the provision of an Appellate remedy, the Commercial Appellate Division which exercises Jurisdiction under Section 37 of the A & C Act, 1996 would also be the forum for challenging a decision of the Commercial Division of the High Court.

51.5 The classification of cases now existing is not sufficient to cater to the Challenge made to an award in any International Commercial Arbitration. A fresh Classification would have to be made as regards such proceedings. One relating to proceedings under Section 34 as regards the Challenge to an International Commercial Arbitral Award and another relating to the orders of the Commercial Divisions challenging the Order passed under Section 9 of the A& C Act as regards International Commercial Contracts or Arbitral Proceedings.

51.6 Any Proceedings seeking for the execution of an International Commercial Arbitral Award or seeking for interim relief in respect of International Commercial Arbitration would also have to be dealt with by the Commercial Division comprising of a Single Judge.

51.7 All pending proceedings which meet the above criteria pending before the Commercial Appellate Division are directed to be reclassified and transferred to the Single Judge exercising jurisdiction over the Commercial Division."

26. The objects and reasons of Commercial Courts Act, 2015 is to provide for speedy disposal of the commercial disputes to create a positive image to the investor worldwide about the independence and responsive Indian legal system. Applications and appeals in case of international commercial arbitration lies under jurisdictional ambit of commercial

division and constitution of such commercial division only in High Courts having ordinary original civil jurisdiction will narrow down commercial divisions only to five States which in turn will defeat the object of Commercial Courts Act, 2015.

27. Therefore, from the above, it is clear that an application in the matters pertaining to international commercial arbitration would lie to the Commercial Division of the High Court where it has been constituted. In the Allahabad High Court, the Chief Justice has constituted a Commercial Division, and the present application having been filed before the Commercial Division is accordingly maintainable before this Court.

28. Accordingly, list this case on 3.4.2024 for hearing.

(2024) 3 ILRA 187
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 22 of 1992

Devendra ...Appellant
Versus
The State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ram Babu, Sri Amit Kumar Srivastava, Sri Ram Babu Sharma, Sri Ravi Kant, Sri Sanjay Agarwal, Sri Vijit Saxena

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 - Sections 364 - kidnapping or abducting in order to murder, Section 302 - murder, The Code of criminal procedure, 1973 - Section 374(2) - Circumstantial Evidence - Last Seen Theory - Extra-Judicial Confession - enmity - unexplained delay in FIR - benefit of doubt - Conviction cannot rest solely on weak circumstantial evidence like last seen theory and extra-judicial confessions - For a finding of guilt, all circumstances must form a complete and unbroken chain - If inconsistencies or doubts arise in witness statements and other circumstantial evidence, benefit of doubt should be extended to the accused - more serious the offence, the stricter the degree of proof or in other words the graver the offence, the stricter is the standard of proof. (Para - 32,33)

(B) Indian Evidence Act, 1872 - Circumstantial evidence - where a case rests squarely on circumstantial evidence - the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person - Circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.(Para - 9)

Appellant was accused of carrying away victim - on pretext of watching Ramleela - later allegedly killing him due to longstanding enmity - Witnesses testified seeing them together and later heard gunshots - deceased's body was found the following morning with gunshot wounds - Trial court convicted appellant based on circumstantial evidence - including last seen theory and extra-judicial confession. (Para 3-5, 15)

HELD: - Evidence of witnesses of last seen as well as PW-10, the witness of extra-judicial confession, are not of such quality that on the basis of their evidence, the conviction of the accused can be recorded for a charge under Section 364 and 302 IPC. Court set aside

conviction and acquitted appellant of all charges due to insufficient evidence and inconsistencies in testimonies, granting him benefit of doubt. (Para -32 to 35)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Kanhaiya Lal Vs St. of Raj., (2014) 4 SCC 715

2. Nizam & anr. Vs St. of Raj., 2015 (91) ACC 243

3. Sahdevan Vs St. of T.N., 2012 (78) ACC 228

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Amit Kumar Srivastava, learned amicus curiae for the appellant and learned AGA for the State and perused the material placed on record.

2. By means of instant criminal appeal, the convict-appellant has assailed the correctness of the judgement and order dated 19.12.1991, passed by learned IV Additional Sessions Judge, Bulandshahar, in S.T. No.121 of 1990, arising out of Case Crime No.122 of 1989, Police Station Khurja Dehat, District Bulandshahar, whereby, the appellant has been convicted for charges under Sections 364, 302 IPC and sentenced to undergo ten years rigorous imprisonment for offence under Section 364 IPC and imprisonment for life for offence under Section 302 IPC.

3. The prosecution case in brief is that on 24.10.1989, at about 6:00 P.M., accused Devendra carried away Rajkumar, son of Budhha, who was nephew of the informant, Pooran Singh (PW-1), on pretext of making him watch Ramleela, from home of the victim, in presence of Devi Singh and Satyaveer Singh. After two hours, at about 8:00 P.M., Chandrapal and Prakash, the co-villagers of the informant told him that they had seen Rajkumar going towards Village Jhumka, in company of Devendra on 'Patri of Bamba', from the plot of Sardar Singh, lying at a distance of 500 paces. They also heard sound of firing. These witnesses apprehended occurrence of some untoward happening. On this information, the informant together with several persons of the village, went in search of his nephew, Rajkumar, but could not get his whereabouts in the night. On next date i.e. 25.10.1989, they again proceeded in search of Rajkumar in the early morning and when they reached near plot of Sardar Singh, the dead body of Rajkumar was found in the water of 'bamba'. The dead body was taken out of the water and placed on patari, firearm injuries were visible on person of the deceased. The accused Devendra had long-standing enmity with Rajkumar but prior to 15 days of the incident, he developed friendship with the victim Rajkumar and made him to accompany him on pretext of watching 'Ram-leela', in a planned manner with intention to kill him. The informant got a written report scribed by Rajpal Singh and went to police station where he lodged the FIR. The FIR was registered vide Case Crime No.122 of 1989, at police station Khurja Dehat, on 25.10.1989, at 8:00 A.M., against named accused Devendra. The S.H.O. concerned took over the investigation of the case herself. She collected plain earth and blood stained earth from the place of recovery of the dead body of the deceased on 25.10.1989, in presence of Gram Pradhan, Jaipal Singh, son of Meva Ram and one Jaipal Singh, sone of Sadhu Singh. She had also taken into possession one pair of socks and shoes from the place of recovery of the dead body and got it sealed. The inquest on dead body of the deceased was conducted

by the Investigating Officer, S.I. S.K. Singh (PW-6), between 9:00 AM to 10:00 AM on 25.10.1989, in presence of Panch witnesses, near track of Bamba, at Jungle Village Bagrai, where dead body was found. The postmortem examination on the dead body of the deceased was conducted by Doctor R.K. Lal (PW-5) on 25.10.1989, at about 4:10 PM. The Doctor received the dead body in a sealed cover, brought by two police personnel. He examined the injuries found on person of the deceased and prepared his postmortem examination report in his signature and handwriting, which was proved as Ex.Ka-2 by evidence of Doctor. Following injuries were found on the person of the deceased Rajkumar, according to his postmortem examination report:-

(1) Entry wound of gunshot on middle of chest on inter apple line; margins were inverted, size 1 inch in diameter and there was blackening and tattooing in the area of 1 ½ inches, around the injury. The direction was backwards.

(2) Gunshot wound of exit on the right side back, just by the side of vertebral column at level of thoracic vertebra, size 3/4 inch diameter; margins averted. The direction of the edges were towards forwards.

Age of the deceased as about 18 years. Time of death was about 3/4 days. Rigor mortis was present all over the body. The doctor found that 5th rib was broken in the internal examination of the dead body. The membranes of heart were badly damaged. Blood veins were lacerated near heart. Pericardium was badly lacerated. Internal injuries were caused as a result of injury No.1. In the opinion of Doctor, the cause of death was shock and haemorrhage, as a result of antemortem injuries.

4. The Investigating Officer submitted chargesheet before the Court of Magistrate having jurisdiction, as offence was exclusively triable by Court of Session, the case was committed to Court of Session for trial by learned Chief Judicial Magistrate. The trial judge i.e. IVth Additional Sessions Judge, Bulandshahar framed charges under Sections 302, 364 IPC against accused-appellant Devendra on 5.6.1990, on commencement of trial.

5. The prosecution examined PW-1 Pooran Singh; PW-2 Chandrapal; PW-3 Premvati; PW-4 Satyaveer Singh, as witnesses of fact and PW-10, Rajjan; Dr. R.K. Lal, the author of postmortem report of the deceased as PW-5; PW-6 S.I. S.K. Singh, the author of inquest report; PW-7 Constable of Police Omveer Sharma, who was entrusted dead body of the deceased Rajkumar for postmortem after inquest proceedings; PW-8 Head Constable Yogendra Singh, the scribe of chik FIR and PW-9 S.O. Kumari Mala Rani, the Investigating Officer. The statement of accused Devendra was recorded by the trial court after conclusion of prosecution evidence, in which he has stated that the witnesses have deposed against him due to village *partibandi* and enmity. He has not committed any offence. The accused Devendra did not adduce any defence evidence. His defence is that of denial. Learned trial judge after appreciating the evidence on record and considering the submissions of both sides, found the accused as guilty of charge under Sections 364 and 302 IPC and convicted him for said charges and sentenced him, as aforesaid, by impugned judgment and order dated 19.12.1991. The accused appellant feeling aggrieved by the impugned judgement and order, preferred present appeal under Section 374(2) Cr.P.C., before

this Court. The appellant was enlarged on bail by orders of this Court dated 3.1.1992, during pendency of appeal.

6. Learned counsel for the appellant filed written submissions on behalf of the appellant, which is placed on record. The main plank of the arguments advanced by learned counsel for the appellant are as follows:-

(1) unexplained delay in lodging of First Information Report. The deceased was said to be taken by the appellant on 24.10.1989, at 6:00 PM but the First Information Report was lodged on next day i.e. 25.10.89 at 8.00 p.m., after the recovery of dead body.

(2) P.W.-1 and PW-3 have stated that there was previous enmity with the appellant despite that deceased was permitted to go with the appellant. This does not sound natural.

(3) P.W. 1 does not appear to be witness of last seen as initially he has stated that he was told by Premwati and Satyaveer that the appellant took the deceased with him, but subsequently he himself assumed the role of the witness of aforesaid fact, during trial.

(4) As per the statements of prosecution witnesses of fact they went to place of incident/ recovery of dead body in the night itself but nothing was found, however in the morning the dead body was found at the same place, where they visited in the night of 24.10.89. Thus, the manner and place of incident is highly doubtful.

(5) Conduct of P.W. 2 is highly unnatural as he heard the noise of fire of firearm but he did not even try to enquire about the said fact rather he returned back to home.

(6) P.W. 3, Smt. Premwati, is neither cited as witness in the First Information Report nor in the charge- sheet despite that she was examined during the trial as a witness of last seen.

(7) The time gap between the last seen and recovery of dead body is too long i.e. almost 12 hours and therefore the evidence of last seen is of no consequence.

(8) P.W. 10, before whom the appellant is said to have made extra judicial confession, himself admitted enmity between him and the appellant. Moreover he does not appear to be an influential persons hence there was no occasion for the appellant to make extra judicial confession before him.

(9) Prosecution story is not consistent with the medical evidence available on the record as no bullet or pellet was found in the dead body. No symptom has been found that the body was lying in the water.

(10) Prosecution failed to prove motive for committing the alleged offence, which is most important in cases based on circumstantial evidence.

(11) Links of chain of circumstances are not proved in the manner so as to form a complete chain from which an inference of the guilt of the accused could be drawn, unerringly.

7. Learned counsel for the appellant placed reliance on the judgements of Apex Court in **Kanhaiya Lal vs. State of Rajasthan, (2014) 4 SCC 715 and Nizam and Another vs. State of Rajasthan, 2015 (91) ACC 243, Sahdevan vs. State of Tamil Nadu, 2012 (78) ACC 228.**

8. On the basis of aforesaid submissions and in the light of case law, cited as above, learned counsel for the appellant prayed that the appeal is liable to be allowed and the appellant may kindly be acquitted of the charges, for which he has

been convicted and sentenced by learned trial Judge in impugned judgement and order.

9. In **Kanhaiya Lal vs. State of Rajasthan, (supra)**, Hon'ble Apex Court has observed that "The appellant was convicted by trial court for charge under Sections 302/201 IPC and sentenced to 3 years rigorous imprisonment with fine for charge under Section 201 IPC and imprisonment for life with fine for charge under Section 302 IPC. Co-accused were acquitted of all the charges. Judgement and order of trial court was affirmed by High Court in criminal appeal. The conviction was mainly based on evidence of last seen. The prosecution case was that the accused appellant committed murder of victim by strangulating him and threw the dead body in the well. No body witnessed the occurrence and case was registered on the basis of circumstantial evidence. Hon'ble Apex Court held that **It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn, have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.**

10. Learned Apex Court in **Kanhaiya Lal vs. State of Rajasthan, (supra)** further observed as under:-

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant. ……..

15. The theory of last seen – the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh vs. State of Rajasthan (2010) 15 SCC 588."

11. In **Nizam and Another vs. State of Rajasthan (supra),** Hon'ble Apex Court while deciding appeal against judgement of conviction and sentence of appeal for charge under Section 302/201 IPC, observed as under:-

8. Case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his evidence.

9. The principle of circumstantial evidence has been reiterated by this Court in a plethora of cases. In Bodhraj @ Bodha And Ors. vs. State of Jammu & Kashmir,(2002) 8 SCC 45, wherein this court quoted number of judgments and held as under:-

"10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan (1977) 2 SCC 99, Eradu v. State of Hyderabad AIR 1956 SC 316, Earabhadrappa v. State of Karnataka (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Suppl. SCC 79, Balwinder Singh v. State of Punjab (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P., 1989 Suppl. (1) SCC 560) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab AIR 1954 SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus: (SCC pp. 206-07, para 21) "21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

10. In Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681, this court held as under:

"12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence." The same principles were reiterated in Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205, Sampath Kumar vs. Inspector of Police, Krishnagiri (2012) 4 SCC 124 and Mohd. Arif @ Ashfaq vs. State (NCT of Delhi), (2011) 13 SCC 621 and a number of other decisions.

14. Courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23.01.2001. Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some

certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of "last seen alive" in State of Rajasthan vs. Kashi Ram, (2006) 12 SCC 254, this Court held as under:-

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. (AIR 1960 Mad 218)" The above judgment was relied upon and reiterated in Kiriti Pal vs. State of West Bengal, (2015) 5 Scale 319."

12. Learned counsel for the appellant also cited a judgement of Hon'ble Apex Court in **Sahdevan vs. State of Tamil Nadu, 2012 (78) ACC 228**, wherein Hon'ble Apex Court considered and laid down the law relating to evidentiary value of extra judicial confession and its effect on recording the verdict of guilt of an accused and observed as under:-

12. There is no doubt that in the present case, there is no eye-witness. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution. ***It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra- judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per***

the prosecution version, it may be difficult for the court to base a conviction on such a confession. *In such circumstances, the court would be fully justified in ruling such evidence out of consideration.*

13. Now, we may examine some judgments of this Court dealing with this aspect.

14. In Balwinder Singh v. State of Punjab [1995 Supp. (4) SCC 259], this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15. In Pakkirisamy v. State of T.N. [(1997) 8 SCC 158], the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

16. Again in Kavita v. State of T.N. [(1998) 6 SCC 108], the Court stated the dictum that there is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

17. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Court, further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

18. In the case of Aloke Nath Dutta v. State of W.B. [(2007) 12 SCC 230], the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

19. Accepting the admissibility of the extra-judicial confession, the Court in the case of Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B.]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

22. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

The Principles:-

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law.

13. On issue of evidence of 'last seen' Hon'ble Supreme Court in **Sahdevan vs. State of Tamil Nadu, (supra)**, observed as follows:-

31. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt. In Arjun Marik v. State of Bihar [1994 Supp.(2) SCC 372], this Court took the view that the where the appellant was alleged to have gone to the house of one Sitaram in the evening of 19th July, 1985 and had stayed in the night at the house of deceased Sitaram, the evidence was very shaky and inconclusive. Even if it was accepted that they were there, it would, at best, amount to be the evidence of the appellants having been last seen together with the deceased. The Court further observed that it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of guilt of the accused and,

therefore, no conviction, on that basis alone, can be founded.

32. Even in the case of State of Karnataka v. M.V. Mahesh [(2003) 3 SCC 353], this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.

33. In the case of State of U.P. v. Satish [(2005) 3SCC 114], this Court had stated that the principle of last seen comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

34. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

14. Per contra, learned AGA appearing for the State submitted that there is no infirmity or any factual or legal error in the impugned judgment and order passed by learned court below, whereby the appellant has been convicted and sentenced for charge under Sections 302, 364 IPC. The case is based on circumstantial evidence but all the links of chain of circumstances are complete in the case and are proved by the prosecution evidence in present case. The complicity of accused is based on evidence of witnesses of last seen as well as extra-judicial confession made by the accused to PW-10, Rajjan. The mode and manner of commission of offence is corroborated by medical evidence also. Motive is also proved by the evidence of witnesses of fact. The delay in lodging of FIR is explained in FIR itself. The appeal deserves to be **dismissed.**

15. A perusal of evidence and material on record reveals that according to the FIR version and evidence of PW-1, informant, his nephew namely, Rajkumar, son of Buddha, was carried away by accused Devendra Singh on 24.10.1989, at around 6:00 P.M., from his home on pretext of watching Ram-leela, which was organized in Village Jhumka. In FIR, it is stated that the accused carried away the victim from the home. The witness Chandrapal and Prakash (PW-2) told the informant at around 8:00 PM, on same day, that they had seen Rajkumar walking alongwith Devendra towards village Jhumka, at the track of Bamba, near the field of Sardar Singh and just after they walked about 200 paces from the place where they had seen the victim and the accused, they heard sound of firing, due to which they suspected that some untoward happened to the victim Rajkumar. The informant moved to the probable place, placing reliance on the statement of the said witnesses namely, Chandrapal and Prakash, taking alongwith him some co-villagers in search of his nephew, Rajkumar, but could not find him in the night. The accused and victim could not be traced till following morning and, therefore, the informant, Pooran Singh

(PW-1) again moved in search of his nephew, at around 6:00 AM, accompanied by 10 to 20 persons including Jaipal, Buddha (father of deceased), Kartar, Prakash, Sardar Singh and others. When he reached near agricultural field of Sardar Singh, at the track of Bamba, he found that wooden bandha was installed in the Bamba and dead body of Rajkumar was stuck therein. There was water also in the vicinity of the dead body. He took out the corpse from Bamba and placed the same on track of Bamba. He went back to his home where he got the report scribed by Suraj Pal, as per his dictation and after going through the contents of the written report, he filed the same at police station. PW-1, proved the written report as Ext. Ka-2 during his evidence before the Court, which is signed by him and scribed by Suraj Pal.

16. PW-1, Pooran Singh, has stated in cross-examination that prior to this incident, accused Devendra had committed mischief by fire in the grove of Rajkumar, due to which some mango trees got burnt. A claim was filed by him in this regard as the grove belong to deceased Rajkumar as well as witness Pooran Singh. He admitted that there was enmity between himself and deceased and on that of the accused Devendra on the other hand. In the case which pertains to mischief by fire, Satyaveer, Jaipal, Devi and Buddha were witnesses but Chandrapal was not witness therein. His brother, Buddha, the father of the deceased, was also present in the village on the fateful day. His sister-in-law *(bhabhi)*, Premwati and Satyaveer had told him at around 7:00 PM, on the date of incident that the accused Devendra had carried away Rajkumar with him. The witness and his brother, Buddha, were residing separately.

17. Learned counsel for the defence pointed out that in cross-examination, PW-1, has taken a new case in contradiction to his prevision statement that his *bhabhi*, Premwati and Satyaveer had told him that Devendra had carried away the deceased, Rajkumar, with him and prior to this, he himself saw Rajkumar, walking in the company of Devendra, at 6:00 PM and he asked them to stop but they did not stop thereupon, he thought that it would be better if they unite. The witness admitted that he did not get this fact scribed in his statement under Section 161 Cr.P.C. that he had stopped Rajkumar and Devendra but stated that he had seen accused and deceased walking together on fateful day. He also told the Court during cross-examination that on being told by Chandrapal, he went towards Bamba but could not find anything due to darkness and they came back empty hand. The dead body was retrieved at 6:30 AM on the next morning. He remained there up to 7:30 AM and thereafter got the report scribed by his son, Surajpal, which took half an hour and place the same at police station. The witness denied the defence suggestion that Chandrapal had stated nothing to him regarding version of last seen together of deceased and accused.

18. PW-2, Chandrapal, is examined as an independent witness as no enmity with the accused has been suggested by defence with regard to him. He in his evidence stated that he had seen victim and accused Devendra walking together towards village Jhumka, at the track of Bamba. His companion Prakash was also with him at that time. He was returning after discharging some agricultural work in his field, they saw the deceased and accused near the field of Sardar. He asked them about their movement whereupon, Devendra stated that they were going to watch Ram-leela. Devendra was having a

'katta' (countrymade pistol) in his hand. They walked towards village Jhumka. He turned to his village alongwith Prakash and when they reached on pitched road, they heard the sound of firing of countrymade pistol, which came from village Jhumka. He went to his home. The witness Buddha and his wife (Premwati) met him and asked him that whether he saw Rajkumar, he stated that Rajkumar and Devendra met him near the field of Sardar. These old persons met him at the threshold of their home. No any other met him and he went straight to his home. He had not met Pooran Singh in that evening.

19. The witness Chandrapal has stated in his statement before Investigating Officer that he had told the fact that he met Rajkumar and accused when they were walking towards village Jhumka, in the evening of fateful day and had told this fact to PW-1 (Pooran Singh), however, he deviated from this fact in his evidence before the Court wherein he stated that he had not met Pooran Singh (PW-1) at that time and was declared hostile at the instance of prosecution and was permitted to be cross-examined by the prosecution, wherein, he has stated that it would be wrong to say that when he went to his home, he saw Pooran sitting in front of his house on a cot and he told him about the factum of seeing Rajkumar and Devendra together. He stated that the Investigating Officer asked about this matter on next day, he had only stated to Investigating Officer that he heard sound of firing. When he interrogated him about the incident and also told him that he had seen the victim and accused moving towards Bamba together but he had not told him that he and Prakash apprised Pooran of this fact on reaching the village when he was found sitting on his cot in front of his home. He had also not told him that mother of Rajkumar was moaning and asking about Rajkumar and thereupon, he stated to her about Rajkumar and Devendra. It is possible that Pooran might have been sitting in his house as the doors of houses of Rajkumar and Pooran are nearby each other. He further stated that on next date, he had seen the dead body of Rajkumar on track of Bamba but it was not retrieved in his presence. He had seen the dead body at 6:00 AM on the track of Bamba. On being cross-examined by defence, this witness stated that when he had seen Rajkumar and Devendra on fateful day, there was darkness and the place from where he saw them was 100 to 150 yards away from pitch road. His field fromwhere he was returning after work was lying eastwards to the track of Bamba. Ram-leeta would begin in day hours and lasted till mid night but he had not went to see Ram-leela. He failed to recollect as to whether at the time of incident, Ram-leela was being organized at village Jhumka or not. This statement of witness was recorded after one year of the incident. He admitted that he had not moved towards the place from where sound of firing came. He had seen the victim and accused around 7:00 PM.

20. PW-3, Smt. Premwati, the mother of the deceased, has stated in her evidence that the accused took her son, Rajkumar, away with him on the fateful day around 6:00 PM by giving him an offer to watch Ram-leela. She stated that she initially objected to this but accused assured her that there is nothing to worry and he would take care of everything. She has also stated that she told about this fact to his brother-in-law (devar), Pooran Singh, who also stated that he had seen them going together. After some time, her co-villagers Chandrapal and Prakash came to her place and told that

they had seen Rajkumar and Devendra at the track of Bamba while walking towards village Jhumka and heard the sound of firing. Rajkumar did not turn back and the people went in search of him but failed to find him. The dead body of Rajkumar was found at the track of Bamba just on rising of sun on the next date. In cross-examination, the witness stated that she was not interrogated by Investigating Officer and she was deposing before the Court for the first time. Ram-leela would be closed at 12:00 hours in the night. She waited for her son till 8-9 PM. Ram-leela would start from 9:00 PM. She is unable to state that how Sub-Inspector recorded her statement. There was enmity between her son and accused Devendra as the accused had burnt her mango trees, which jointly belong to her and the informant Pooran. There was litigation between Devendra and Buddha (her husband). The accuse started visiting her place prior to 15 to 15 days of the incident but failed to elaborate as to how her son Rajkumar and accused got associated. When the accused took her son away with him, her husband was not present in her house. The houses of the witness and Pooran are not seprate but one. Chandrapal told her about above victim and accused on his own and without her asking. When Chandrapal told her about the incident, her husband was present in the house and just after getting the information, her family members and others went in search of Rajkumar taking lantern and torch in their hand. Chandrapal had not accompanied the witnesses in the morning.

21. PW-4, Satyaveer is also a witness of last seen, who stated that on fateful day, at around 6:00 PM, he visited the place of Buddha but could not find him. He saw Rajkumar and Devendra at the door of his house and asked about Buddha, Rakumar told him about his father Buddha and stated that he was going to Village Jhumka. He came back after making call to Buddha. A commotion occurred at around 8:00 PM in the village that Rajkumar has become untraceable. Thereafter, he visited the track of Bamba in the company of Pooran and others but could not find Rajkumar there. They again visited the place together with Surajpal and others and found the dead body, which they retrieved from Bamba and kept on track. In cross-examination, the witness stated that he met Buddha on the date of incident at about 8:00 PM, he is his uncle in relation but not real uncle. He re-visited the place of Buddha at 8:00 PM, where villagers had assembled and there he stated that Rajkumar went with Devendra. They made a search for Rajkumar in the night in the nearby places of Bamba but came back. When, he visited the place of recovery of dead body on the next day, the dead body was already taken out from the water and kept on track by Buddha and Devi. They placed dead body on other track of Bamba. The houses of Buddha and Pooran are situated at nearby. He is not having any enmity with Devendra. He is not a witness in the case of mischief by fire against accused Devendra.

22. PW-10, Rajjan Singh, is co-villager of the informant and accused, who has given evidence of extra judicial confession against accused. He has stated before the Court that after three days of the incident of murder of Rajkumar, accused Devendra, who was present before the Court, came and met him outside the home and touched his feet and expressed his regret regarding death of Rajkumar and prayed him to reconcile the matter with Buddha Ram, the father of the deceased. He also made monetary offer in the matter for compromise. He anyhow got rid off

Devendra on that day. The witness stated in his cross-examination that a case under Section 307 IPC was registered at the instance of accused Devendra against him, after this incident and the fact that Devendra had confessed to him of having committed this offence, was only disclosed by him to the Investigating Officer and none else, who recorded his statement on 29.10.1989, at the police station. He had not spoken about the offer of accused Devendra to Buddha. Devendra confided to him about this matter separately at this place.

23. So far as the exhibits are concerned, PW-1, Pooran Singh has proved written report dated 25.10.1989 as Ext.Ka-1; PW-5 Dr. R.K. Lal, has proved postmortem examination report of the deceased as Ext.Ka-2; PW-6, S.I. S.K. Singh, has proved inquest report of the deceased as Ext.Ka-3 and papes relating to postmortem of the deceased as Ext.Ka-4 to Ext. Ka-8; PW-8, Head Constable Yogendra Singh, has proved chik FIR as Ext.Ka-9 and extracts of GD of registration of case dated 25.10.1989 as Ext.Ka-10 and PW-9, S.I. Kumari Mala Rani, the Investigating Officer has proved recovery memo of socks and shoe of deceased as Ext.Ka-13, site plan as Ext.Ka-11, recovery memo of plain and blood stained earth as Ext.Ka-12, statement of witness Chandrapal as Ex.-14 and chargesheet as Ext.Ka-15 by her evidence.

24. Learned trial court after appreciating the evidence on record concluded that prosecution has successfully proved its case beyond any doubt. The only conclusion from circumstantial evidence in the case can be drawn regarding guilt of the accused. The chain and link of the circumstantial evidence is very complete, which gives only one conclusion. It is proved by evidence that accused Devendra had abducted the deceased with knowledge to commit murder who succeeded in his plan and carried away Rajkumar with him, thus, the evidence under Section 364 IPC is well proved against accused. In this case, it is well proved by the circumstantial evidence that it was only Devendra and none else who committed murder of Rajkumar. Devendra was having countrymade pistol, thus, the offence of committing murder is also proved against accused Devendra. With these evidence, learned trial court has convicted and sentenced the appellant as aforesaid.

25. The prosecution case is based on circumstantial evidence as this is admitted position that there is no eye-witness of the incident. The prosecution case stands on mainly two sort of evidence:- (1) evidence of last seen of deceased together with the accused given by PW-1, Pooran Singh, PW-2 Chandrapal, PW-3 Premwati and PW-4 Satyaveer Singh; (2) extra judicial confession allegedly made by the appellant to PW-10 Rajjan. However, if we meticulously scrutinize the evidence of these witnesses, we find that there are inherent infirmities in their evidence. The prosecution case is that the accused appellant carried the deceased away from his home on pretext of watching Ram-leela with intention to kill him and killed the deceased by firing a shot at him in quick succession, at around 6/7:00 PM, on fateful day. The dead body was found stuck in the bridge lying on water of Bamba on the next day at around 6:00 AM and dead body was retrieved from water by the informant and his co-villagers. Doctor, who conducted postmortem on the dead body of the deceased opined that cause of death was shock and haemorrhage due to antemortem

firearm injury. The injuries were sufficient to cause death in ordinary course of nature. In the opinion of Doctor, the death was possible in the evening of 24.10.1989, which is estimated time of death as stated in statement of witnesses of fact. The deceased suffered one wound of entry in his chest and one exit wound on his back, which reveals that deceased suffered one firearm injury. According to the opinion of Doctor, the internal injuries detected on person of the deceased were fall out of injury No.1. In view of wound of exit corresponding to the wound of entry, this is natural that no pieces of bullet or pellets were found inside the dead body.

26. The informant, Pooran Singh, who has been examined as PW-1, stated in FIR itself that there was previous enmity between the deceased and accused and in his evidence as PW-1, he has elaborated that this enmity was due to the fact that the accused caused mischief by fire in mango grove, which was jointly shared by the informant and the deceased, who was his nephew and the informant got a case registered against accused for that misdeed. The informant has also stated in FIR as well as in his evidence that the accused tried to come into close contact with the deceased 15 days prior to the incident and he has nowhere stated in the FIR as well as in his examination-in-chief that the deceased left his home in company of the accused in his presence and he has stated in FIR as well as in his examination-in-chief that at around 6:00 PM, on the date of occurrence, the accused carried away deceased on pretext of watching Ram-leela towards village Jhumka and he had received this information from witness Chandrapal, who had stated that Devendra and Rajkumar were on inimical terms; he had seen them walking towards Jhumka and he heard sound of firing and then he apprehended that something untoward had happened to him. He had clarified in examination-in-chief that prior to this nobody told him about these facts and he immediately rushed to the place alongwith 4 persons to search out Rajkumar but he failed to find him in the night. However, he has stated in cross-examination that in the case filed by him against accused for committing mischief by fire, Satyaveer, Jaipal, Devi and Buddha- his brother, were witnesses. He took a new fact in cross-examination that Premwati (PW-3), the mother of the deceased and Satyaveer (PW-4), had told him that accused Devendra carried away Rajkumar at around 7:00 PM on the date of incident. He took an entirely new case during cross-examination that prior to getting the information about Rajkumar, he had himself seen the deceased going in company of the accused, at around 6:00 PM. However, this fact is neither written in FIR nor in statement of the witness under Section 161 Cr.P.C. recorded by the Investigating Officer. His statement under Section 161 Cr.P.C. is wrongly exhibited during evidence of PW-9, S.O. Mala Rani, in violation of proviso to Section 162(1) Cr.P.C.

27. This fact is also not credible that PW-4, Chandrapal, had seen the deceased and accused together in the evening of fateful day and accused was having a countrymade pistol in his hand and even after hearing the sound of firearm, he had not tried to further enquire the fact and came back his home. PW-1 has stated that Chandrapal has stated that he had seen the accused and deceased on the track of Bamba when he was returning home from his field, near the field of Sardar Singh. He has stated that he apprised the parents of the deceased of this fact on way to his

home, when they met him and made a query about Rajkumar. These persons were standing at the threshold of their home and thereafter, he went to his home. He did not meet Pooran Singh on that date. For this reason, the witness was declared hostile and cross-examined by the prosecution but even in cross-examination, he did not admit that he had communicated with PW-1, in the fateful evening. He has also admitted that he had not gone in search of Rajkumar, when PW-1 went in search of Rajkumar alongwith co-villagers. He has clarified that he had seen the dead body in the next morning, which was kept on the track of Bamba. The witness failed to state that whether any Ram-leela was organized at Jhumka in the night of said date or not. Even the Investigating Officer (PW-9) has admitted that she did not enquire the fact that whether Ram-leela was organized in village Jhumka or not on the date of incident. Thus, there is material contradiction in the statement of PW-2, who is star witness of the case, from his previous statement recorded by the Investigating Officer that he has told the fact of last seen of deceased and accused together to PW-1, the informant.

28. Another witness of last seen namely, Prakash, who is said to have accompanying PW-2, Chandrapal, when he had seen the accused and deceased together, has not been produced during trial and he was discharged from evidence on application of prosecution on ground that he had been influenced by the accused.

29. PW-3, Premwati, is mother of the deceased, who has stated in her evidence that the accused took away her son Rajkumar from her home on pretext of watching Ram-leela. The deceased had demanded some money from her but she had no money with her and she had informed her brother-in-law (devar), Pooran Singh, in this regard, who had stated that he had also seen them going together. She has taken a new case that Chandrapal and Prakash told her about seeing the accused and deceased together when she was standing with Pooran Singh on her door. This is admitted fact that even after much efforts and getting the location of the place of incident from PW-2, PW-1 and his co-villagers could not trace out the deceased in the night. PW-3 has disowned her statement under Section 161 Cr.P.C. recorded by the Investigating Officer. She has also stated that deceased and accused were on inimical terms due to litigation, which was still pending. She has stated that her husband, brother-in-law Pooran and others went in search of her son in the night and came back after one and half hours empty handed, thus, on perusal of evidence of PW-3, we find a material improvement in her testimony before the Court from her previous statement recorded under Section 161 Cr.P.C., on 29.11.1989 i.e. after more than a month of the occurence and this gave ample time for after thought.

30. PW-4, Satyaveer, has also been examined as witness of last seen but his name does not find mention in FIR whereas he has stated in his evidence that the accused took away the deceased alongwith him from the home of the deceased in his presence as he had come to the place of deceased in search of his father, Buddha. He has stated that he also

accompanied PW-1 in the night in search of Rajkumar and again visited the place of incident in the morning, when dead body was found. This witness is collateral of the deceased. His statement under Section 161 Cr.P.C. was recorded long after the incident on 29.11.1989 and does not inspire confidence for these reasons.

31. PW-10, Rajjan, is witness of extra-judicial confession allegedly made by the accused to him after three days of the incident, in which the accused pleaded with him for extending his support in attaining a compromise with the family of the deceased. However, there is no whisper of the evidence that this witness is an influential person of the locality and was having influence on the family of the deceased. This is also strange that this witness had not told this fact to PW-1, the uncle of the deceased or parents of the deceased prior to his statement under Section 161 Cr.P.C. recorded by the Investigating Officer on 4.11.1989, i.e. after 10 days of the incident. He has also stated in cross-examination that he had not told this fact of accused making confession to him regarding murder of the deceased to any person prior to he narrated this fact to 'Darogaji'. The defence has given suggestion to this witness that he has deposed this fact on instruction of 'Darogaji' but he denied the same.

32. On perusal of aforesaid judicial authorities, a settled position of law emerges that evidence of last seen as well as extra judicial confession are weak piece of circumstantial evidence and reliance thereon can be placed only when they are of sterling quality and free from doubt. In present case, the evidence of witnesses of last seen as well as PW-10, the witness of extra-judicial confession, are not of such quality that on the basis of their evidence, the conviction of the accused can be recorded for a charge under Section 364 and 302 IPC. This is a principle of jurisprudence that the more serious the offence, the stricter the degree of proof or in other words the graver the offence, the stricter is the standard of proof. The star witness of the case namely PW-2, Chandrapal, resiled from his previous statement on a vital aspect. There is material inconsistencies in statement of witnesses of fact, as enumerated above, which give rise to reasonable doubt in veracity and credibility of their evidence.

33. In view of foregoing discussion, were are of the considered opinion that prosecution has miserable failed to prove its case beyond reasonable doubt and learned trial court has committed legal and factual error in recording the conviction of the deceased, placing reliance on circumstantial evidence given by the witnesses of fact in present case, which do not inspire confidence. The evidence of witnesses of last seen as well as that of PW-10, the witness of extra-judicial confession, are not free from doubt. Consequently, the appeal is liable to be allowed and the accused deserves to be acquitted of all charges by giving him benefit of doubt.

34. According, present appeal stands and the impugned judgement and order dated 19.12.1991, passed by learned IV Additional Sessions Judge,

Bulandshahar, in S.T. No.121 of 1990, arising out of Case Crime No.122 of 1989, Police Station Khurja Dehat, District Bulandshahar, whereby, the appellant has been convicted for charges under Sections 364, 302 IPC and sentenced him to undergo ten years rigorous imprisonment for offence under Section 364 IPC and imprisonment for life for offence under Section 302 IPC, is hereby set aside and the accused is acquitted from all charges. He is on bail and he need not to surrender.

35. The appellant is directed to file his bail and surety bonds in compliance of Section 437-A of Cr.P.C., within a period of 10 days from today.

36. Office is directed to return the lower court record alongwith certified copy of this Judgement for necessary information/compliance, to court concerned, within a period of two weeks.

37. Learned Amicus Curiae is entitled to get his professional fee of Rs.15,000/- (Fifteen Thousands), within a period of one month.

(2024) 3 ILRA 204
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Appeal No. 91 of 2023

Hargovind Ahirwar ...Appellant

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Devendra Kumar Shukla

Counsel for the Respondents:
G.A., Sri Ramesh Kumar

(A) Criminal Law - Rejection of Application under Section 156(3) Cr.P.C. - Code of Criminal Procedure, 1973 - Section 156(3) - Discretionary power of court - Court may treat application under Section 156(3) as a complaint.(Para - 6)

Appellant filed an application under Section 156(3) Cr.P.C. - against 11 named persons and 2 unknown - Application alleged that their family members were assaulted, property was stolen - they were threatened with caste-based abuse - Trial court rejected application, treating it as complaint instead of directing FIR registration. (Para 3-4)

HELD: - Court upheld the trial court's decision to treat the application as a complaint rather than directing the registration of an FIR. Trial court's discretion to treat application as complaint was valid. Court found no illegality, impropriety or irregularity in the order impugned. (Para -6)

Appeal dismissed. (E-7)

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

1. Heard Sri Devendra Kumar Shukla, learned counsel for the appellant, Sri Ramesh Kumar, learned counsel for opposite party nos. 2 to 12 and Sri O.P. Mishra, learned AGA for the State.

2. This criminal appeal has been filed on behalf of the appellant challenging the impugned order dated 17.11.2022 passed by learned Special Judge, SC/ST (Prevention of Atrocities) Act/Additional District and Sessions Judge, Lalitpur in Criminal Misc. Case No. 725/2022 rejecting the application under Section 156(3) Cr.P.C.

3. The undisputed facts are as below:-

The revisionist/appellant moved an application against 11 named including the incharge S.O. , Police Station Mahrauni and two unknown under Section 156(3) Cr.P.C. alleging that they came on a Safari to his house when they had gone to sleep after celebrating the birthday of his son Ankur; they surrounded the house and before the complainant could understand anything, he saw that his daughter in-law Seema has been trying to strangulate her husband Ankur; she snatched golden chain and diamond ring from his person and physically assaulted him causing injuries; when the complainant's wife Meera Devi and daughter Bharti protested to her, she called the police from Police Station Mahrauni; the police of the local police station took away his son; next day at about 11 am in the morning all the accused persons again intruded in his house, broke open the lock of his almirah and removed valuable and cash; they physically assaulted his family members; it is specifically stated in the application that 2 days thereafter on 20.09.2022, when he was sitting on his shop as usual, the incharge of Police Station-Rajesh Kumar Dubey threatened him and abused him using caste driven words.

4. The only contention of the appellant is that there were 2 unknown person who cannot be identified unless the matter is investigated by the police, therefore the order passed by the learned trial court directing the registration of complaint case is not sustainable.

5. The contention is opposed by the other side arguing that the appellant cannot insist upon a particular relief from the court; if the allegations as contained in the application moved under Section 156(3) Cr.P.C. are gone through, there are enough of indicators to demonstrate that whole story is false and concocted; it was not even worth grant of relief of registration as complaint, it should have been out-rightly dismissed.

6. I went through all the material on record. The learned trial Judge found it fit to treat the application under Section 156(3) Cr.P.C. as complaint. In my view it was perfectly under his discretionary power to treat it as complaint instead of directing for registration of FIR. I do not find any illegality, impropriety or irregularity in the order impugned. Therefore, this criminal appeal is **dismissed.**

(2024) 3 ILRA 206
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 4593 of 2019

Saleem ...Appellant
Versus
State of U.P. ...Respondents

Counsel for the Appellant:
Sri Prem Sagar Verma, Sri Madan Mohan, Sri Ajay Kumar Pandey, Sri Amod Tripathi, Sri Santosh Kumar Mishra

Counsel for the Respondents:
G.A.

(A) Criminal Law - Acquittal in Murder Case Based on Circumstantial Evidence - Indian Penal Code, 1860 - Sections 302, 201 ,120B - Circumstantial Evidence - motive - illicit relationship - last seen - chain of evidence - acquittal - reasonable doubt - Conviction based solely on circumstantial evidence is not sustainable unless the prosecution establishes a complete chain of evidence proving the guilt beyond reasonable doubt and excludes every other hypothesis. (Para 41-49)

Appellant was convicted of murder and conspiracy – allegation of an illicit relationship with wife of deceased -conspired with her to murder her husband - prosecution's case relied on circumstantial evidence, including motive and last seen evidence - No direct evidence was presented to establish the accused's involvement - Trial court acquitted wife of deceased due to lack of evidence for conspiracy. (Para 1-3, 10, 32-34, 39-40)

HELD: - Appellant cannot be convicted without proof of motive or conspiracy with co-accused (Sanjoo), who was acquitted by trial court. Conviction and sentence under Sections 302 and 201 IPC were set aside due to the prosecution's failure to establish a complete chain of circumstantial evidence. Appellant was acquitted. (Para - 49 to 52)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Laxman Prasad Vs St. of M.P., (2023) 6 SCC 399

2. Pritinder Singh Vs St. of Punj., (2023) 7 SCC 727

3. Sharad Birdhichand Sarda Vs St. of Maha., (1984) 4 SCC 116

4. Pradeep Kumar Vs St. of Har., (2024) SCC OnLine SC 21

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Heard Sri Ajay Kumar Pandey, learned counsel for the appellant and learned AGA for the State.

2. This appeal is preferred against the judgment of conviction and order of sentence dated 04.06.2019 passed by the learned Additional District & Sessions Judge/ Fast Track Court No. 1, Hapur in Sessions Trial No. 145 of 2017(State of U.P. vs. Saleem and another), arising out of Case Crime No. 498 of 2016, Police Station- Garh Mukhteshwar, District- Hapur whereby the appellant was held guilty of offence punishable under Section 302 and 201 of IPC and was sentenced to undergo life imprisonment under Section 302 with a fine of Rs. 5,000/- and in default of non-deposit of fine to further undergo simple imprisonment of one year and

further three years simple imprisonment under Section 201 IPC along with a fine of Rs. 2,000/-, in default of payment of fine to further undergo simple imprisonment of six months.

3. The co-accused of the appellant Smt. Sanjoo was acquitted of the charge. The case as set up by the prosecution, based on the statement of informant- P.W.-1 Seoraj Singh is that he had a son namely Kuldeep (since deceased) who was married with Sanjoo daughter of Vijay Pal in the year 2002. Out of this wedlock, four children were born. Appellant Saleem is resident of Narangpur and used to visit the house of his son. Saleem had developed illicit relationship with Smt. Sanjoo. The informant and his son Kuldeep used to protest in this regard. On 21/22.11.2016, Kuldeep and his wife Sanjoo had exchanged hot words and even had a scuffle with each other. On 25.11.2016, at about 11 AM Kuldeep told the informant that his wife is not mending her ways and therefore, he is going to police station to lodge complaint. On this, Smt. Sanjo and appellant Saleem felt sorry and promised that nothing of such type will happen in future. On next date, i.e. 26.11.2016 at about 2.00 PM, when informant and one Tilakram, Municipal Councillor, who is also resident of the vicinity of appellant were standing near Ambedkar Gate, he saw that his son Kuldeep was going along with appellant Saleem. Informant asked him where he is going along with Saleem, upon this his son told him that they are going for some important work and he will return by the evening. When his son did not return in the evening, he visited house of his daughter-in-law Sanjoo and asked about the whereabouts of Kuldeep. Sanjoo said that he will return back, but thereafter, son of the informant did not return back. He along with other family members started searching for him. When he along with his family members put pressure on Sanjoo, she informed that she is going to police station for lodging a missing report of Kuldeep. In the meantime, informant was searching his son Kuldeep. Thereafter, he came to know through a newspaper that in the intervening night of 26/27.11.2016 body of an unknown man was found by the police on the back side of Rahi Hotel along with the railway line. In this regard, the police of police station Brij Ghat had initiated the proceedings. Informant along with his other son Vijay Pal, Tilakram (Municipal Councillor) and son-in-law Ajeet and some other family members and resident of his area went to Police Station-Brij Ghat. The police informed that a dead body was found on the intervening night of 26/27.11.2016 near the railway line. They opened a parcel and asked them to identify the clothes upon which they identified that these were the clothes of his son Kuldeep. They were also shown the photographs of the deceased and some pamphlets. They had every reason to believe that the deceased was his son Kuldeep. The informant told the police that he has every reason to believe that murder of his son Kuldeep is committed by Saleem and his daughter-in-law Sanjoo and in order to mislead, his dead body was thrown near the railway line. On the basis of the aforesaid complaint, FIR under Section 302, 201, 120 B IPC was registered on 02.12.2016 and the same was entered in the general diary. Thereafter, the investigation was carried out and both Saleem and Sanjoo were arrested and charge-sheet was filed against them. The case was then committed to the court of Sessions where charges under Section 302, 201 IPC were framed against the appellant Saleem and charges under Section 302 read with Section 201 and 120

B were framed against Sanjoo. Both the accused denied the charges and claimed trial.

4. The prosecution examined eight witnesses. P.W.-1- informant Seoraj Singh deposed on the line of facts as per the FIR. He proved the complaint Ex. A4/3 on the basis of which FIR was registered as Ex.Ka-1. This witness also proved the recovery memo of the blood stained stones and earth which is Ex. Ka-2. In cross-examination, this witness stated that he is not an eye-witness. He further stated that Kuldeep and Sanjoo were residing separately for the last ten years. This witness, however, stated that he used to visit the house of Sanjoo and Kuldeep, frequently and in further cross-examination, this witness stated that when he had gone to the police station for recording the FIR, he was accompanied by 15-20 persons and FIR was recorded after due consideration.

5. P.W.-2 Tilakram stated that on 26.11.2016, at about 2.00 p.m., he was standing with Seoraj Singh at Ambedkar Gate for purchasing some articles. In the meantime, Seoraj Singh saw his son Kuldeep and asked him where he is going along with Saleem. Upon this, Kuldeep stated that he is going for some urgent work and will come back by evening. P.W.-2 asked Seroaj Singh who is Saleem, then he informed that Saleem is a man from the side of in-laws of Kuldeep and visits Kuldeep's house. Seoraj Singh also informed that Saleem and his daughter-in-law are having illicit relationship, but they have felt sorry about the same. This witness stated that he has no knowledge whether Kuldeep had taken money from Saleem. Thereafter, Seoraj Singh met him one or two times and told that his son is not traceable. On reading a new item that unclaimed dead body was found near the railway line, many persons along with Seoraj Singh and his family went to Police Station- Brij Ghat where SHO had asked them to identify clothes and photographs. After identifying the same to be of Kuldeep, Seoraj Singh asked him to write a complaint. The complaint was written in his handwriting.

6. In cross-examination, this witness stated that he had no knowledge about the relationship between Sanjoo and Kuldeep. They used to reside in the rented house of one Sunil Kumar Rastogi and he used to visit the house of Sunil Kumar Rastogi. PW-1 told him that Saleem and Sanjoo have illicit relationship. This witness further stated that he has gone to Police Station along with 10-12 persons and after due consideration that the FIR is to be registered in a particular manner it was recorded. He went to police station on 02.12.2016. The script was dictated by Seoraj Singh and written by him thereafter it was signed by Seoraj. This witness pleaded ignorance about the manner in which murder of Kuldeep was committed.

7. PW-3 Ravindra is a witness of Panchayatnama of the dead body dated 27.11.2016.

8. PW-4- Dr. Praveen Kumar Gupta, conducted the post mortem of Kuldeep and has reported the following injuries:

1. Lacerated wound 13cm x 6cm x cavity deep on left side of skull obliquely placed just above left ear cavity empty underlying bone are fractured.

2. Lacerated wound on left side of skull posteriorly 8cm x 4.5 cm x cavity

deep 4cm away from left ear underlying bones are fractured cavity is empty.

3. Lacerated wound 15cm x 7cm x bone deep on left forearm posteriorly just below elbow underlying bone fractured.

4. Lacerated wound 5cm x 3cm x muscle deep 9cm below injury no. 3.

5. Abrasion on right arm 3cm x 2cm laterally 6cm below right shoulder.

9. This witness further stated that during the internal investigation both parietal bones of skull towards left side were fractured, there was no brain tissue in the cavity and both the lungs were congested. The cause of death was due to coma on account of sustaining injuries within half of the day.

10. PW-5- Pravesh Kumar, Constable stated that he was posted in the Police Station- Garh Mukhteshwar, where upon receiving a complaint from Seoraj Singh against the accused person, the same was recorded on a computer and he had signed it. Thereafter, Samarjeet Singh, SHO had also signed and vide G.D. No. 22 dated 10:30 PM on 02.12.2016, which is A4/1 and was exhibited as Ka-5. The G.D. was exhibited as Ex-Ka6. In cross-examination, this witness stated that name of the computer operator is not mentioned in the FIR.

11. PW-6- Rajendra Singh, Sub-Inspector, stated that he was posted as Sub-Inspector in Brij Ghat, Police Station- Garh Mukhteshwar and on receiving information about a dead body, at about 01:30 in night, he along with other co-officials went to the spot and with the help of a torch he inspected the dead body which was lying along the side of the railway line towards up down line. He has also broadly given the nature of injuries and as the dead body could not be identified by calling some persons, the Panchayatnama was prepared which was signed by five persons. The Panchayatnama is Ex-Ka-3. The photograph of the dead body is Ex-Ka-7 and the sample seal is Ex-Ka-8. In cross-examination, this witness stated that at the first instance it was opined that the deceased could have died by falling from the train as such type of accidents occur at the place of incident because there is a curve on the railway track. In the personal search of the deceased, nothing was recovered and as the deceased could not be identified the Panchayatnama was done and the blood stained stones and clothes were recovered.

12. PW-7- Harinandan Sharma, S.I. stated that he was posted in Police Station- Garh Mukhteshwar. On receiving the information regarding the FIR, on 10.12.2016 on direction of Samarjeet Singh, S.H.O. on pointing out of Saleem, he had recovered the bamboo stick and the green coloured slipper along with blood stained earth which was exhibited as Ka-9 and prepared the memo which is Ex-Ka-10. During cross-examination this witness stated that he did not arrest the accused person and on the asking of Saleem, the recovery was effected.

13. PW-8- Samarjeet Singh, Inspector, stated that he has verified the statement of witnesses and on 06.12.2016 the statements of witnesses, Vijay Pal Singh, Ajit Singh and Smt. Mayadin were recorded, thereafter, efforts were made to arrest the accused-Saleem on 10.12.2016 and thereafter along with the police force he was taken to the place of occurrence from where he got recovered one slipper of the deceased along with blood stains earth and one Danda was also recovered which was

taken in possession vide recovery memo. Thereafter, he arrested co-accused, Sanjoo on 11.12.2016 and recorded confession statement of Saleem. This witness has also stated about recording of statement of the other witnesses including Dr. Praveen Gupta who conducted the post-mortem report. The report under Section 173 Cr.P.C. was submitted before the Ilaka Magistrate which is Ex-Ka-11. This witness stated that Saleem was arrested near the Central Bank, Athsaini. This witness also stated that Saleem was not there in the village and had gone to his native place in Agra and he was arrested on 10.12.2016. The report of the FSL was exhibited as Ka-12 and the report submitted before the Court as Ka-13. During his examination, the parcel made by the police was opened and the slipper of deceased was marked as Ex-2.

14. In cross-examination, this witness stated that he had visited the place of incident after 8-9 days of recovery of the dead body and at that time the Sub-Inspector who prepared the Panchayatnama was not along with him. The statement of the accused was recorded in police station and not at the spot. The witness stated that the blood stains which was found near the dead body, was not sent to the Fingerprint Expert.

15. In further cross-examination, this witness stated that during investigation, in the final report no evidence regarding the illicit relationship of Sanjoo and Saleem had come on record.

16. Thereafter, the trial court recorded the statement of both the accused under Section 313 of Cr.P.C. and put the incriminating evidence against them. Both the accused stated that they are not in illicit relationship with each other. A plea was taken that on the date of incident Saleem was not present at the spot and he was at his house in Agra. Thereafter, the accused were given opportunity to lead their defence evidence.

17. DW-1- Pawan Kumar resident of Dayalbagh, Agra stated that he has done the job of electrician on the house of Saleem from 19.11.2016 to 28.11.2016. On 10.12.2016, when he had gone to take money from Saleem, he found that police from Amar Vihar Police Station has arrested Saleem.

18. DW-2- Zakir Hussain also stated that he was also doing the labour work and had accompanied Saleem from 14.11.2016 to 18.11.2016 to Village- Nithavali to attend the marriage of his cousin and thereafter he returned back to Agra from where the police arrested Saleem.

19. DW-3- Basu, about 14 years' old son of deceased Kuldeep and co-accused Sanjoo, stated that he is the eldest among four brothers and sisters. His father Kuldeep was doing business of finance and has lent loan to many persons. He had exchanged hot words with the borrowers and thereafter on 26.11.2021, he left home. He along with his mother and his grand father Seoraj Singh searched for him and thereafter they got the information about his death. This witness stated that he has never seen Saleem with his mother Sanjoo and Saleem never stayed in his house during night time. His mother has sent a complaint against the borrowers but no action was taken by police.

20. In cross-examination by public prosecutor, this witness stated that he has studied up to Class VII and had not

accompanied his grand father when FIR was registered. Saleem is from the side of his maternal grand parents i.e. Village- Narang, Police Station- Parikshitgarh. Saleem has never visited his house. He did not remember the name of persons to whom his father has lent money. This witness denied the suggestion that after he used to go to school, Saleem used to come to his house. He further stated that his father was not murdered by Saleem.

21. The trial court, thereafter, vide impugned judgment of conviction and order of sentence acquitted co-accused Sanjoo, wife of deceased- Kuldeep, whereas convicted the appellant.

22. Learned counsel for the appellant has submitted that the appellant is in continuous custody since the date of his arrest and as on today his custody is 7 years 1 month and 8 days.

23. The trial court record is requisitioned and the paper book is ready and therefore, the arguments in the main appeal is heard and the entire evidence is re-appreciated.

24. Learned counsel for the appellant has argued that as per the informant, the marriage of the deceased Kuldeep was performed with co-accused Sanjoo in the year 2002 and four children were born out of this wedlock. Learned counsel argues that though it is stated in the FIR that Saleem and Sanjoo had developed illicit relationship, however, from 2002 till 26.11.2016 when the dead body of Kuldeep was found, no complaint was ever given to police or any Panchayat or any respectable person in this regard.

25. The counsel has further argued that the statement of PW-2 is wholly not trust-worthy and therefore no reliance can be placed. The counsel submits that PW-2 has stated that on 26.11.2016, he along with informant PW-1- Seoraj Singh has seen Kuldeep Singh in company of Saleem and on his asking, Seoraj told him that Saleem has developed illicit relationship with his daughter-in-law. It is submitted that in cross-examination, this witness stated that he knew one Sunil Kumar Rastogi, who is landlord of Kuldeep and where couple was residing for the last 10 years and he used to visit the house of Sunil Kumar Rastogi but this witness has nowhere deposed that ever Sunil Kumar Rastogi told him about any matrimonial discord between Kuldeep and Sanjoo on account of the extra-marital relationship of Sanjoo with appellant Saleem.

26. Counsel next argued that a totally unbelievable version is set up in the FIR where it is stated that on 25.11.2016 i.e. a date prior to the recovery of the dead body of Kuldeep, he had informed his father-PW1 that on account of illicit relationship of Sanjoo and Saleem, he is just fed up and he is going to register a complaint with the police. However, both Sanjoo and Saleem felt sorry and promised not to do any such thing in future and therefore, no action was taken. Counsel submits that on the very next day i.e. 26.11.2016, as per the informant both Kuldeep and Saleem were going together which is a totally unbelievable version that in such a strained relationship they will be going together for some work.

27. Counsel has argued that this version itself shows that Saleem has been falsely implicated as Kuldeep has either committed suicide or has fallen from the train resulting into his death.

28. Learned counsel has also referred to the recovery memo of blood stained

stones and earth to submit that on 02.12.2016, the recovery was effected after the five days of the date of incident i.e. only after a complaint was lodged with the police by PW-1. Counsel has also assailed the recovery memo of a three feet long bamboo stick and the blood stained earth at the instance of the appellant Saleem on 10.12.2016 i.e. after about 15 days of the incident by submitting that the same has been framed on the appellant.

29. Counsel has also referred to the inquest report/Pachayatnama, Ex-Ka-3 dated 27.11.2016 prepared by the police in which it is stated that it is a case of train accident.

30. Learned counsel, having referred to the statement of PW-4- Dr. Praveen Kumar Gupta along with post-mortem report while describing the injuries received by the deceased, he submitted that all the injuries are sustained by deceased on the left side of the body which suggests that it is a case of accident.

31. Counsel has also referred to the cross-examination of PW-8 who has admitted that there is a curve on the railway track at the place of occurrence where similar accident usually takes place. It is argued by the counsel for the appellant that the case of accident or suicide has been converted to a case of murder and the appellant has been falsely implicated in the case.

32. Learned counsel has argued that there is absolutely no motive proved on record. The motive attributed in the FIR is that both the accused, Sanjoo and appellant-Saleem, after developing extra-marital physical relationship, committed murder of Kuldeep. A reference is made to cross-examination of the Investigating Officer who has clearly stated that during investigation no evidence has come on record in this regard. Learned counsel further submitted that even no evidence is produced by PW-1- informant that in a 14 year old marriage between deceased-Kuldeep and Sanjoo from which four children were born, any complaint was given to any authority or Panchayat regarding the illicit relationship and therefore, the motive is not proved.

33. The counsel has further submitted that the appellant did not record the statement of the landlord where the couple was residing for the last ten years to the fact that they had any fight or difference of opinion on account of the extra-marital affair of Sanjoo with Saleem. Lastly, heavy reliance is placed on the statement of DW-3 who is 14 years old son of deceased Kuldeep and co-accused Sanjoo wherein he has clearly denied that his mother was having any relationship with appellant Saleem. This witness has stated that Saleem was a friend of his maternal uncle and he has never visited his house in Garh Mukhteshwar and never stayed at night. In cross-examination by the public prosecutor, the testimony of the defence witness could not be shattered. No cross-examination was offered to this witness regarding any strained relationship of his parents, on account of the intimacy of his mother with Saleem or that they used to fight with each other in this regard. Rather this witness has denied the suggestion that after he used to go to school, Saleem used to visit his house or stayed in house at night.

34. This witness has categorically stated that his father had a dispute with the persons to whom he has given money on interest, he further denied that his father was murdered by Saleem.

35. Counsel submits that on the basis of the statement of DW-3.,co-accused Sanjoo was acquitted as the element of conspiracy was not proved and was missing, however, on same set of evidence, the appellant is wrongly convicted.

36. The counsel submits that no State appeal has been filed by the prosecution challenging the acquittal of Sanjoo and on the same set of evidence, the appellant had been convicted, despite there being no evidence of conspiracy.

37. The counsel has lastly argued that trial court has wrongly believed an unbelievable version that despite extra-marital relationship between Sanjoo and Saleem and his strained relationship with them, he was still going with him for some work on date of incident.

38. The counsel has also argued that in the entire investigation, in the recovery memo, except PW-1 and PW-2, who are the informant and witness of fact as stated in the FIR, no other independent witness was there to prove authenticity of recovery. The counsel submits that it has come in the statement of both PW-1 and PW-2 that the FIR was got registered after due deliberation and consideration, therefore, there is every possibility of false implication of the appellant.

39. Counsel has also argued that the appellant Saleem was not present at the spot on the date of incident as it is proved from the statement of DW-1 and DW-2 that he was at his house in Agra and therefore, the plea of *Alibi* was not appreciated by the trial court.

40. The counsel has lastly argued that the entire case is based on circumstantial evidence or the last seen evidence and the chain is missing.

41. Learned counsel has referred to ***Laxman Prasad vs. State of Madhya Pradesh (2023) 6 SCC 399*** wherein the Supreme Court has held in case of circumstantial evidence, prosecution is to establish the motive, last seen and recovery of weapon on the pointing of accused and if the chain is not complete, conviction has to be set aside.

42. The counsel has also relied upon ***Pritinder Singh vs. State of Punjab (2023) 7 SCC 727*** wherein the Supreme Case has relied upon earlier judgment in ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*** and has held as under:

"15. Undisputedly, the present case is a case which rests on circumstantial evidence. The law with regard to conviction in the case of circumstantial evidence is very well crystallised in Sharad Birdhichand Sarda v. State of Maharashtra.

16. We may gainfully refer to the following observations of this Court in Sharad Birdhichand Sarda; (SCC p. 185, paras 153-54)

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or

should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra *where the following observations were made: [SCC para 19, p. 807]*

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

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

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

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

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

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

(emphasis in original)

17. It can thus be seen that this Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has been held that the circumstances concerned "must or should" and not "may be" established. It has been held that there is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". It has been held that the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has been held that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

18. It is a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt. In the light of these guiding principles, we will have to consider the present case."

43. Reliance is also placed on a recent judgment of Supreme Court ***Pradeep Kumar vs. State of Haryana (2024) SCC OnLine SC 21*** in which similar view has been taken while relying upon ***'Pritinder Singh's'*** case (supra), it is held that when there is a yawning gap between the charge against the appellant and prosecution evidence and the circumstances do not establish the guilt of appellant and the evidence adduced gives rise to improbabilities and inconsistencies, the conviction is not sustainable.

44. Learned A.G.A. for the State, in reply, has however submitted that motive in this case is proved as it has come in the statement of PW-1- informant that both accused, Sanjoo-wife of deceased Kuldeep and appellant-Saleem, have developed extra-marital affair and due to that reason, they in conspiracy with which other have murdered Kuldeep. It is also argued that the dead body was recovered from near the railway line and on the pointing out of

appellant, a bamboo stick, slipper as well as blood stained earth was recovered from the spot.

45. Learned State Counsel has submitted that it has also come in evidence that Kuldeep has complained to his father about the extra-marital relationship of accused person, a day prior to the date of incident and therefore, the motive is proved.

46. On a Court query, learned A.G.A. for the State could not dispute that the co-accused-Sanjoo stands acquitted and State has not filed any appeal challenging the judgment of acquittal of Sanjoo.

47. Needless to accord that a period of four years has already lapsed when the judgment of acquittal was passed.

48. After hearing counsel for the parties and on re-appreciation of the entire evidence, with the help of both the learned counsels, and going through the paper-book, we find merits in this appeal for the following reasons:

A. The motive in this case is not proved. As per PW-1- informant, his son and co-accused Sanjoo were residing in a rented accommodation for the last 10 years. This witness has also stated that their marriage was performed in the year 2002 and four children were born who were residing with deceased Kuldeep and his wife Sanjoo.

There is absolutely no evidence on record to suggest in an intervening period of 14 years at any point of time a complaint was given by Kuldeep or PW-1 to police, in this regard. There is no evidence that ever any Panchayat was convened within the family of Sanjoo about the extra-marital affairs of Sanjoo and Saleem or that any respected person was called in this regard.

PW-2 has stated that he knew the landlord of the deceased namely Sunil Kumar Rastogi and he used to visit him at his house. This witness further stated that only a day prior to the incident, PW-1 informed him about the illicit relationship between Sanjoo and Saleem. The police has never recorded the statement of landlord of the couple to find out whether there was any such illicit relationship between the two.

Even PW-8, Investigation Officer has categorically stated that during investigation no evidence has come on record about the illicit relationship between Sanjoo and Saleem. The most important witness i.e. DW-3, Basu, aged about 14 years who is son of deceased Kuldeep and Sanjoo, in clear and unequivocal terms denied that Saleem used to visit his house or he had any intimacy with his mother. In cross-examination by the public prosecutor, this witness clearly stated that Saleem neither visited their house nor stayed at night. This witness has even denied that Saleem has committed murder of his father.

Therefore, the motive attributed to appellant is not proved.

B. Another important aspect is that though the charge of conspiracy under Section 120B was framed against co-accused Sanjoo and Section 302 I.P.C. for committing murder of her husband-Kuldeep on account of her extra-marital affair with appellant Saleem, however, the trial court believing the statement of DW-3, Basu, son of deceased-Kuldeep and Sanjoo, acquitted her of charge under Section 302 and 120B I.P.C. holding that the element of conspiracy is missing. The judgment of

acquittal of Sanjoo has attained finality as no State appeal is filed.

Therefore, on the same set of evidence where DW-3 has clearly stated that appellant has not committed murder of her father, even the conspiracy against the appellant is not proved.

C. The complete chain of circumstantial evidence is also not proved in this case. PW-1 has stated that a day prior to the incident on 25.11.2016, his son Kuldeep informed him that he is going to lodge a complaint to police regarding extra-marital affair between Sanjoo and Saleem. However, they felt sorry and promised not to repeat such thing. On the very next day i.e. 26.11.2016, PW-1 has seen both Kuldeep and Saleem going together for some work, which is again an unbelievable version that despite strained relationship between deceased Kuldeep and Saleem who is alleged to having extra-marital affair with his wife Sanjoo, immediately on the next date of some dispute, he would accompany him for some work.

D. At the cost of repetition, PW-2 for the first time came to know about such relationship on 26.11.2016 only when PW-1 informed him, though he stated that he was regularly visiting the house of landlord, Sunil Kumar Rastogi where Kuldeep and Sanjoo were living for the last ten years. The Panchayatnama is Ex-Ka3 in which the police at the first instance reported it a case of accident and similarly in the inquest report, it is recorded to be a train accident. It has come in the statement of PW-8 that the place of occurrence is on the railway line where there is a curve and many accidents used to occur at that place. Moreover, the deceased suffered majority of the injuries on his left side of body which also suggest it to be a case of accident. Therefore, the possibility that the deceased had either fallen from the train or had committed suicide cannot be ruled out.

E. It has come in the cross-examination of the prosecution witness as well as in the statement of DW-3, son of the deceased that his father Kuldeep was doing business of finance and used to lend money to people. This witness has also stated that his father used to have dispute with the person to whom he has lent money. PW-1 has stated that financial condition of his son was not good at time of incident and there was money dealing between Kuldeep and Saleem which is another circumstance against prosecution.

F. There is a delay of about five days in reporting the matter to the police. As per PW-1, Kuldeep did not return back on 26.11.2016 and the FIR was registered on 02.12.2016.

G. It has come in the statement of both PW-1- informant and PW-2 Tilakram that they had gone to police station along with some other persons and after due consideration and discussion about the manner in which the FIR should be registered, the complaint was written by PW-2 on the direction of PW-1. The possibility of false implication of appellant cannot be ruled out specially in the view of fact that co-accused Sanjoo already stand acquitted by the trial court.

H. Another aspect is that marriage of Sanjoo and Kuldeep was performed in the year 2002, as per PW-1 and four children were born out of this wedlock. DW-3, Basu is the eldest son who has categorically stated that there was no illicit relationship between his mother Sanjoo and appellant Saleem. The very fact that in a 14 year old marriage there was no matrimonial litigation or complaint to any authority on account of any matrimonial discord would show that prosecution has failed to prove this aspect of illicit relationship.

I. It has come in the statement of PW-8, Investigation Officer that during investigation he has recorded the statements of one Vishwajeet Singh, the other son of informant, his wife Mayadin and son-in-law Ajeet but none of these witnesses were examined by the prosecution to prove the fact of extra-marital affair of Sanjoo and Saleem, specially when PW-8 has stated that no evidence has come on record in this regard.

49. Therefore, in the absence of prosecution having been able to prove any motive towards the appellant, conspiracy between him and Sanjoo who stands acquitted by the trial court holding that the conspiracy is not proved between them, the conviction of appellant is not sustainable in view of the judgements in ***Laxman Prasad vs. State of Madhya Pradesh (supra), Pritinder Singh vs. State of Punjab (supra) and Pradeep Kumar vs. State of Haryana (supra)*** and the fact that prosecution has failed to prove a complete chain of evidence against the appellant.

50. Accordingly, this appeal is allowed. Judgment of conviction and order of sentence dated 04.06.2019 are set aside.

51. The appellant is acquitted of the charge. He be released from the judicial custody forthwith, if not required in any other case.

52. The bail and surety bonds, if any, are discharged. Any pending application is also disposed of as infructuous. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 3 ILRA 217
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 4677 of 2002

Amar Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri V.S. Singh, Sri Amrendra Pratap Singh, Sri Lavesh Sharma, Sri Narendra Kumar Singh, Sri Rabindra Bahadur Singh, Sri Ravindra Sharma

Counsel for the Respondent:
G.A., Sri Anand Pratap Singh, Sri Aryan Srivastava, Sri Prakash Chandra Srivastava

(A) Criminal Law - Acquittal from Murder Charges - Indian Penal Code, 1860 - Section 302 – murder, Section 149 – unlawful assembly - Common object - Unlawful assembly - Constructive liability - Vicarious liability - Exhortation - The Code of criminal procedure, 1973 - Section 216 – Court may alter charge , Section 217 - Recall of witnesses when charge altered - Mere presence in an assembly without proof of common object cannot be stretched to such an extent so as to implicate the innocent person - Common object and knowledge of that object by the accused must be proven - witness whose evidence is essential for unfolding the narrative must be produced in evidence. (Para - 18, 19, 23,25)

(B) Criminal Law - Indian Penal Code, 1860 - Section 149 - To convict someone under Section 149, the prosecution must establish (i) There was an unlawful assembly (ii) An offense was committed by a member of the assembly (iii) The offense was committed in prosecution of the common object of the assembly, or the

members knew it was likely to be committed.(Para - 20)

(C) Interpretation of Statute - Section 149 I.P.C allows constructive liability to all members of an unlawful assembly, if an offense is committed in the prosecution of the common object or if the assembly knew it was likely to be committed - Prosecution must prove the formation and knowledge of the assembly beyond reasonable doubt, using cogent evidence. (Para - 18,19)

Murder case involving six accused - Allegation of unlawful assembly with common object - Discrepancies in witness statements and evidence - trial court convicted accused under Section 302 read with Section 149 IPC - leading to present appeal. (Para – 4 to 8 ,18,19)

HELD: - Delay in lodging FIR, discrepancies in witness testimonies, non-examination of a crucial witness (wife of the deceased), and lack of direct evidence weakened the prosecution's case. Court finds insufficient evidence to convict all six accused under Section 149. Judgment and order of trial court set aside. Appellants acquitted of charges under Section 302/149 IPC. Bail bonds cancelled and sureties discharged. (Para – 18,24,25,26)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. V.R. Patel Vs R.D. Patel, AIR, 2018 SC. 2472

2. Subal Ghorai & ors. Vs St. of W.B., 2013(4) SCC 607

3. Roy Fernandes Vs St. of Goa, 2012(3) SCC 221

4. Chikkarange Gowda & Ors. Vs St. of Mysore, AIR 1956 SC 731

5. Gajanand & Ors. Vs St. of U.P., AIR 1954 SC 695

6. Ram Charan Rai Vs Emperor, AIR 1946 Pat 242

7. Mizaji & Anr. Vs St. of U.P., AIR 1959 SC 572

8. Shambhu Nath Singh & ors. Vs St. of Bihar, AIR 1960 SC 725

9. Gangadhar - Behera & ors. Vs St. of Orissa ,2002 (8) SCC 381

10. Bishna @ Bhiswadeb Mahato & ors. Vs St. of W.B. ,2005 (12) SCC 657

11. Haramant Laxmappa Kukkadi Vs St. of Karn., 1994(1) SCC 736

12. Balwantbhai B. Patel Vs St. of Guj. & ors., 2009-0-Supreme Court (SC)1557

13. The St. of U.P. & anr. Vs Jaggo @ Jagdish & ors., AIR 1971, SC 1586

(Delivered by Hon'ble Siddharth, J.)

1. Heard Shri Ravindra Sharma, Shri N.K. Singh and Shri R.B. Singh, learned counsel for the surviving appellant nos.3,5,and 6; Shri Rishab Srivastava, learned counsel for the informant and Shri Sushil Kumar Pandey, learned A.G.A.-Ist.

2. This criminal appeal has been preferred against the judgement and order dated 17.10.2002, passed by Additional Sessions Judge(Fast Track Court No.3), Agra in Sessions Trial No. 471 of 1996, convicting and sentencing the appellants under section 302 read with section 149 I.P.C. to undergo life imprisonment and a fine of Rs. 5,000/- against each accused-appellant and in case of non-payment of fine, to undergo one year's R.I.

3. This appeal has already been dismissed as abated against appellant no.1, Amar Singh, appellant no.2, Raghuraj Singh and appellant no.4, Ram Saran by the order of this court dated 12.1.2024.The appeal has been pressed only regarding surviving appellant nos. 3,5 and 6,namely, Devendra Singh, Kehari Singh and Rakesh Kumar.

4. The prosecution case as per First Information Report is that in the night of about 19/20.12.1995, uncle of the informant, Gyan Singh and his aunt, Smt. Urmila were sleeping in their *baithak (drawing room)* when at about 2.30-3.00 A.M., Gyan Singh heard some noise regarding presence of some persons outside his *Baithak*. He called from inside, who is there? On this his wife, Urmila, also awoked. An earthen lamp was burning inside the *Baithak*. Gyan Singh, opened the door to see who is outside when co-villagers, Amar Singh, Raghuraj Singh, Devendra Singh, sons of Ajab Singh; Ram Saran son of Mukut Singh; Kehri Singh son of Mantoo Singh and Rakesh Kumar son of Ramesh Singh Thakur, forced their way inside the *Baithak* and caught hold of Gyan Singh with common object and started assaulting him. On alarm being raised by the first informant and Gyan Singh, the villagers, Hari Om son of Vishambhar, Rajendra Singh son of Sobha Ram and many others came running,who saw the incident. In the meantime accused persons, after causing murder of Gyan Singh, ran towards the northern side. Informant and other witnesses saw the accused persons well in the light of earthen lamp and torches. Yesterday on 19.12.1995, the Bahu (daughter-in-law) of accused, Raghuraj Singh, was making cow dung cakes, when the deceased, Gyan Singh, was coming from his agricultural field. Daughter-in-law of Raghuraj Singh made complaint at her house that Gyan Singh was abusing her. On account of aforesaid incident all the accused persons caused the murder of Gyan Singh.

5. The case was committed by the C.J.M., Agra to the Sessions Court on 17.6.1996 for trial. The trial court charged the accused persons for committing the offence under section 302 I.P.C. They denied the charges and prayed for trial.

6. Before the trial court informant, Raj Kumar, was examined as P.W.1; eyewitness of the incident, Rajendra Singh was examined as P.W.2; Dr. Anoop Kumar, who conducted the postmortem of the deceased was examined as P.W.3,Head constable Harish Chandra, who proved the Chik First Information Report and entries in General Diary(G.D.) was examined as P.W.4; investigating officer of the case, M.P. Singh, was examined as P.W.5, Inspector Incharge, Hari Nath Sharma, who filed the charge sheet against accused and proved the same was examined as P.W.6.

7. P.W.1, Rajkumar deposed before the court that in the night of 19/20-12.1995 his uncle Gyan Singh and aunt, Urmila Devi, were lying in their *baithak* and an earthen lamp was burning on the window in the side of the *baithak*. At about 2:30-3:00 A.M. in the night presence of some persons outside the door was felt by his uncle, Gyan Singh, who waked up and called who is there?On his call his aunt, Urmila, also awoke. His uncle opened the latches of door of the *baithak* to see the persons outside and he found co-villagers, Raghuraj, Devendra Singh sons of Ajab Singh ; Ram Sharan son of Mukut, Rakesh son of Rajesh Singh standing near the door. All of them with surrounded his uncle Gyan Singh with common object and started beating him. Raghuraj had *Ballam* ; Ram Saran caught hold of Gyan Singh; Amar Singh and Devendra Singh caught hold of his right and left hands, respectively. Raghuraj attacked Gyan Singh by *Ballam* and Rakesh was exhorting him to kill Gyan Singh.Kehari was also exhorting alongwith Rakesh. He raised alarm and then neighbours, Hari Om Singh

and Rajendra Singh, etc., came. Except accused, Rakesh, other accused belong to his village and he knows them. After causing murder of his uncle, Gyan Singh, they ran away towards northern side. He saw the accused persons in the light of earthen lamp and torch. He knew them well and identified them. Torches were in possession of P.W.1, Hariom and P.W.2, Rajendra Singh. On the same day at about 4 P.M. when Gyan Singh was returning to his house from agricultural field, bahu (daughter-in-law) of accused Raghuraj was making cakes of cow dung. She went to her house and icomplained that Gyan Singh was abusing her, resultantly accused persons developed enmity against Gyan Singh. Due to fear he did not went to the police station in the night to lodge First Information Report, when villagers were willing to accompany him to the police station.

8. In his cross examination, P.W.1 admitted that earthen lamp was burning on the window. In the *baithak* wherein they were sleeping ,there were two windows and inside main door earthen lamp was burning in the room on window of northern side.He reached the police station at 5-6 A.M. but inspector was not there and had given report at 8 A.M. in the police station when inspector came. He admitted that windows in the *baithak* were open and there was no door in the windows. In his cross examination, P.W.1 further admitted that his house is situated at about 100 meters from the house of deceased Gyan Singh. His wife had gone to her parents house at the time of alleged incident. At that time Gyan Singh was aged about 35 years and his wife,Urmila was aged 32-33 years. In the room where there was also a 1/1/2 years old child of his aunt , Urmila who was also sleeping. Gyan Singh was occasional drinker but at the time of incident he had not consumed liquor. In the suggestion he stated that he used to sleep in the same room with his uncle and aunt. He used to ply tractor of Gyan Singh and his cultivation. He denied his illicit relationship with his aunt, Urmila and causing murder of his uncle, Gyan Singh, because of such relationship with Urmila. P.W.2, Rajendra, was stated to be grandfather of Gyan Singh, who used to reside in different room. Before the incident accused persons had never abused or beaten Gyan Singh.He could not mention *ballam* in the First Information Report due to nervousness. He admitted that his aunt, Urmila and P.W2 raised alarm but he could not mention the same in First Information Report. Apart from Rajendra and Hariom number of other villagers came at the time of incident. As soon as his uncle opened the latches of the door accused persons caught hold him and had beaten him. Then he raised alarm and witnesses came within 1-2 minutes and saw the incident. He admitted that he has not mentioned this fact in the First Information Report that witnesses had come inside the room. His uncle was wearing *Kurta* and *Payjama* wherein blood stains was there. The accused person had made him naked after beating. Prior to the incident Gyan Singh was implicated in a case but what was that case he could not state before the court.He admitted that there was no enmity with accused person earlier but after incident enmity has cropped up.He finally stated that he gave his torch to the inspector.

9. P.W.2, Rajendra Singh,deposed before the court that at the of incident he was in his house .After hearing the noise his wife who was sleeping with him, said that there noise is coming. He took his

torch and went to house of Gyan Singh, where he saw Amar Singh catching hold of one hand of Gyan Singh and other hand of Gyan Singh was caught hold by Devendra. Ram Saran was catching hold of Gyan Singh. He was asking Raghuraj to assault Gyan Singh by *ballam*. Kehari was standing. Raghuraj caused injury to Gyan Singh by *Ballam* on his head which hit his neck.This incident took place inside the house of Gyan Singh and Hariom also came at the scene of occurrence. Both raised alarm and then accused persons ran away. Gyan Singh died on the spot. Accused persons belong to his village. He knows them well since before the time of incident. He had seen accused persons in the light of earthen lamp and torch. He had provided torch to the inspector. After preparing memo historch was returned but his signature was not taken on the memo prepared by the investigating officer.

10. In his cross examination P.W.2 admitted that he is residing with Raj Kumar, P.W.1, in the same house. Gyan Singh used to reside in different house. Gyan Singh was his nephew. There are two windows on eastern and southern side of the house of the Gyan Singh. There is no door in the eastern wall in the house of Gyan Singh. There are no doors and windows of his house.The door shown in the eastern wall by the investigating officer in the site plan is wrong.He reached the place of incident first and thereafter Hariom reached there. His wife got him awake after hearing the noise. He recognized voice of wife of the deceased , Urmila and P.W.1, Raj Kumar and hence he went there .There is no wall between the room of Gyan Singh and *Khadanja* road in front of his house. At the time of alleged incident Gyan Singh was wearing *Kurta* and *underwear*. He denied suggestion that he was not there at the time of incident.

11. P.W.3, Dr. Anoop Kumar, stated that deceased suffered one incised wound 3 cm x 1 cm x Cavity deep front of middle neck and two abrasions of 2cmx 2 cm and 4 cm. X 3cm on back of neck and left shoulder respectively. Mud was found on the dead body of the deceased. In internal examination windpipe of the deceased was found ruptured and left artery of the deceased was also found ruptured. Cause of death of deceased was found to be shock and haemorrhage as a result of antemortem injuries.

12. P.W.4, H.C., Harish Chandra, proved the lodging of First Information Report by the informant at 8.10 A.M. on 20.12.1995 and making entry in the general diary.

13. P.W.5, , investigating officer, proved record of his investigation and evidence collected by him during investigation. He denied that at the time of inquest, First Information Report was not lodged. During cross examination he admitted that he had shown the door in the house of the deceased and two windows without doors. He admitted that statement of the wife of the deceased, Urmila, was recorded by subsequent investigating officer after his transfer.He admitted making memo of recovery of torch but not taking the same in possession. He further stated that P.W.2 informed him that when he raised alarm Rajendra and Hariom came there.Rajendra was not eye witness of the incident.

14. P.W.6, Hari Nath Sharma, proved recording of the statement of the wife of

deceased, Urmila and statements of other accused persons.

15. Learned counsel for the appellants has advanced following arguments:

(i) That there is unexplained delay in lodging the First Information Report. The incident is alleged to have taken place in the intervening night of 19/20.12.1995 between 2.30-3.00 A.M. but the First Information Report was registered on 20.12.1995 at 8.10 A.M. when the distance of the police station from the place of incident was only six kilometres. He has submitted that the delay in lodging the First Information Report assumed significance when P.W.1 explained that on account of fear, he did not lodged the First Information Report earlier but he admitted in his statement that villagers were ready to accompany him to the police station but on account of fear he did not went to police station at night;

(ii) that in the chik report the distance of police station is 6 kilometres, when according to the inquest report it is 8 kilometres. There is no mention of names of the accused in the inquest report nor there is mention of crime number on the photograph of dead body. P.W.5, investigating officer was cross examined on these points but he could not give satisfactorily reply to the questions put up before him in this regard. All the discrepancies in the police papers indicate that the First Information Report was ante-timed and was not in existence at the time of preparation of these papers. Nobody has seen the incident and First Information Report was lodged only on guess work;

(iii) that as per allegations in the First Information Report deceased heard some noise regarding presence of some people outside and when he opened the door, accused persons forced their way inside and caused his murder;

(iv) that the site plan prepared by the investigating officer, shows that deceased was sleeping in room situated in eastern side of his house which did not had any doors nor windows. P.W.1, Raj Kumar and P.W.2, Rajendra Singh , have admitted this fact in their cross examination that there was no wall between the *Khadanja* road and the room of deceased, Gyan Singh. Prosecution story is belied by the fact that there was no wall, not to say doors and windows, in the room where the deceased was sleeping with his wife in the night. Therefore prosecution case regarding opening of door by the deceased which allowed the entry of the accused inside the house was absolutely false;

(v) that there is single injury on the neck of the deceased as per doctor, P.W.3. The trachea of the deceased was found lacerated and carotid artery was found ruptured;

(vi) that First Information Report version and eyewitness account of the incident that the incident took place inside the room is doubtful. The autopsy doctor, P.W.3, has stated in his evidence that the dead body of the deceased was stained in mud but this fact was not disclosed in the inquest report. Deceased may have gone out in the field to urinate in the night and was murdered there by some one and thereafter his dead body was brought inside and the case with eyewitness account was set up. The urinary bladder of the deceased was found to be empty by the doctor, which proves that he had gone out to urinate;

(vii) that trial court charged the accused persons under section 302 I.P.C. simpliciter but has convicted them with aid of section 149 I.P.C. without altering or amending the charge under section 216 Cr.P.C. and recalling and re-examining the

witnesses as per section 217 Cr.P.c., hence conviction of the appellants under section 302/149 I.P.C. cannot be sustained. The common object of six accused was not proved before the trial court;

(viii) that conviction of the appellant under section 302/149 I.P.C. is erroneous on another count also. None of them were assigned any specific role or overt act and were not alleged to be carrying any weapon. Subsequently P.W. 1, improved the prosecution case in his examination in-chief and stated that it was accused Raghuraj, who pierced *Ballam* in the neck of the deceased. Co-accused, Rakesh and Kehari Singh, were exhorting him. Co-accused, Amar Singh and Devendra Singh, were assigned the role of catching hold of hands of the deceased. The role of exhortation assigned to Khehari Singh and Rakesh is not convincing since if they had gone in the night to commit alleged offence with common object in planned manner, there was no need of exhortation of other co-accused which was sufficient for enabling the witnesses to wake up and see the incident;

(ix) that P.W.1, Raj Kumar, who was nephew of the deceased, Gyan Singh, has his own *Pakka* house at the distance of 100 meters from the house of deceased which he admitted in his statement before the trial court. The deceased, Gyan Singh, was 35 years of age and his wife, Urmila, was aged 32 years at the time of incident and why P.W.1, who was nephew of Gyan Singh, was sleeping in their house has not been explained. It has been submitted that presence of P.W.1, in the house of the deceased is not explained;

(x) that wife of the deceased, Urmila, who was admittedly present with the deceased and as per First Information Report version got awake at the time of incident, was not produced as witness before the trial court. P.W.1, Raj Kumar is real nephew of the deceased and P.W.2, Rajendra Singh is grand father of the deceased. P.W.5, M.P. Singh, has stated in his statement that P.W.2, Rajendra Singh, was not an eyewitness of the case. The conviction of the appellants on the basis of testimony of P.W.1, who was an interested and partisan witness, is highly unsafe and not sustainable. Wife of the deceased, Smt. Urmila was examined by the P.W.6, Inspector,Hari Nath Sharma during the investigation and her statement under section 161 Cr.P.C. was recorded but her non-examination before the trial court creates doubt about the prosecution case. Smt. Urmila was the best witness of the case, whose testimony was never got recorded before the trial court;

(xi) that the prosecution has failed to prove that there was sufficient light in night to identify the accused persons in the light of earthen lamp. Prosecution story does not inspires confidence. The earthen lamp was stated to be kept on window *(Jangala)* when it was proved that there is no window or door in the room. The story of seeing the accused persons in the torch light was subsequently cooked up but no torch was recovered by the investigating officer;

(xii) that the time of incident alleged in the First Information Report makes the case doubtful. The autopsy doctor, P.W.3, found watery fluid with small food particles in the stomach of the deceased and his bladder was empty, which proved that incident had taken place at about 11-12 P.M.. In villages people take dinner by 6-7 P.M. The doctor admitted that food takes six hours time to get fully digested but food was not found fully digested in the stomach of the deceased since his stomach was not empty between 2.30-3.00 A.M. ;

(xiii) that accused, Raghuraj, had allegedly pierced *Ballam* in the neck of the deceased, but the injury found was incised in nature which the doctor admitted cannot be caused by *Ballam* which causes punctured wound.

(xiv) that P.W.1 stated that deceased was wearing *Kurta* and *Pajama* at the time of alleged incident, when as per inquest report, he was found to be wearing only shirt and *underwear*. P.W. 3, doctor, found that the deceased was found wearing *Kurta* and *Underwear*. P.W. 1 stated in his statement that the accused persons disrobed the deceased after beating him but he did not explained why dead body of deceased was not found to be naked and found wearing *Kurta* and *underwear*. He has submitted that prosecution story is doubtful;

(xv) that motive of the crime alleged that the daughter-in-law (Bahu) of the co-accused, Raghuraj, had complained that while she was making cakes of cow dung, deceased had abused her and therefore six persons committed murder of the deceased does not sounds credible. There is no evidence that any altercation took place after deceased abused the alleged women. Directly murder of the deceased was caused by six persons. He has further submitted that P.W.1 was aged about 24 years and admitted that his wife had gone to her parental house on the night of the incident, therefore, he was sleeping in the house of deceased and his wife Urmila;

(xvi) that there was illicit relationship of P.W.1, aged about 29 years, with wife of the deceased, who was only aged about 32 years and P.W.1 with the help of wife of deceased may have caused murder of the deceased in the night. This was the reason why the wife of deceased never appeared in the witness box. This was also the reason why First Information Report was not promptly lodged. Number of co-villagers were alleged to have seen the incident but none of them were named and examined before the trial court. Prosecution case has not been proved beyond reasonable doubt. The defence has pointed out sufficient discrepancies in the prosecution case, which is sufficient for acquitting the surviving appellants of all the charges.

16. Learned counsel for the informant and learned A.G.A have vehemently opposed the submissions made by the learned counsel for the appellants. They have submitted that hyper-technical arguments have been made. The torch was recovered and exhibited by the investigating officer as exhibit-12. It has further been submitted that all the accused persons had formed unlawful assembly and committed alleged offence with common object.

17. They have further been submitted that non framing of charge under section 149 I.P.C. by the trial court will not be fatal for the prosecution case since section 149 I.P.C. does creates a separate offence but only declares vicarious liability of all the members of unlawful assembly who acted done with common object. Reliance has been placed in the judgement of Apex court in **Vinubhai Ranchhodbhai Patel vs Rajivbhai Dudabhai Patel,AIR, 2018 SC. 2472.**They have submitted that allegation of illicit relationship of the P.W.1 with wife of deceased, Smt. Urmila, is figment of imagination and no evidence was led to prove the same. P.W.1 has explained why he was present in the house of his uncle and aunt on the fateful night by deposing that his wife had gone to her parental house and therefore he was present in the house of the

deceased. They have submitted that deceased was drunkard and has misbehaved with daughter-in-law of the appellant, Raghuraj, hence he was done to death. It has finally been submitted that prosecution has proved the case against the appellants beyond doubt and hence the judgement and order of conviction and sentence deserves to be upheld by this court.

18. After hearing rival contentions this court finds that six persons have been implicated in this case for committing the offence under section 302/149 I.P.C. Even if it is accepted that section 149 I.P.C. does not creates separate offence but only declares vicarious liability of all the accused of unlawful assembly for the act done with common object, implication would not be justified unless the ingredients for constituting the offence under section 149 I.P.C. are established before the court.

19. Section 149 I.P.C provides for constructive liability to every person of an unlawful assembly. If an offence is committed by any member thereof in prosecution of common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. Formation of unlawful assembly having its common object and knowledge of common object are matters of fact which are required to be proved by the prosecution beyond all reasonable doubt for securing conviction of an accused under Section 149 I.P.C. There cannot be any straight jacket formula to arrive at a finding as to who was the member of unlawful assembly and for which object the same was formed. It can be inferred and proved by the cogent evidence only.

20. Section 149 I.P.C has following three essentials (i) there must be unlawful assembly; (ii) commission of offence may be by any member of unlawful assembly; (iii) such offence must have been committed in prosecution of the common object of the assembly, or must be such as member of the assembly knew to be likely to be committed.

21. The concept of constructive liability must not be so stretched as to lead to false implication of innocent person or if general allegations are made against large number of accused, the Court has to be cautious unless reasonable direct and indirect circumstances lend assurance to the prosecution case that all the accused shared common object of unlawful assembly and hence their implication / conviction not be justified, as held by the Apex Court in the case of **Subal Ghorai and others Vs. State of West Bengal, 2013(4) SCC 607**. Ready reference to paragraph 53 would be relevant :-

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the

crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution."

(13) Apex Court has also cautioned that when there is sudden action by one member in the assembly, all are not liable. In the case of **Roy Fernandes Vs. State of Goa, 2012(3) SCC 221,** it was held that a group attack on the victim is not the only decisive factor to infer common object of the unlawful assembly. It would be useful to refer to paragraph 27 to 33 in this context :-

27. This Court has in a long line of decisions examined the scope of Section 149 of the Indian Penal Code. We remain content by referring to some only of those decisions to support our conclusion that the appellant could not in the facts and circumstances of the case at hand be convicted under Section 302 read with Section 149 of the IPC.

*28. In **Chikkarange Gowda & Ors. Vs. State of Mysore [AIR 1956 SC 731]** this Court was dealing with a case where the common object of the unlawful assembly simply was to chastise the deceased. The deceased was, however, killed by a fatal injury caused by certain member of the unlawful assembly. The court below convicted the other member of the unlawful assembly under Section 302 read with Section 149 IPC. Reversing the conviction, this Court held:*

"9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149 Indian Penal Code cannot be sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149 Indian Penal Code was not justified in law."

*29. In **Gajanand & Ors. Vs. State of Uttar Pradesh [AIR 1954 SC 695],** this Court approved the following passage from the decision of the Patna High Court in **Ram Charan Rai Vs. Emperor [AIR 1946 Pat 242]:***

"Under Section 149 the liability of the other members for the offence committed during the continuance of the

occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise".

30. This Court then reiterated the legal position as under:

"9.....The question is whether such knowledge can be attributed to the appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 IPC. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants, much less that they would be used in order to cause death."

31. In ***Mizaji and Anr. Vs. State of U.P. [AIR 1959 SC 572]*** *this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of IPC was, therefore, attracted and the conviction of the members of the assembly for murder legally justified.*

32. This Court analysed Section 149 in the following words:

"6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the

circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all."

33. In ***Shambhu Nath Singh and Ors. Vs. State of Bihar [AIR 1960 SC 725]***, *this Court held that members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object.*

As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court ***Gangadhar - Behera and Others Vs. State of Orissa [2002 (8) SCC 381] and Bishna Alias Bhiswadeb Mahato and Others Vs. State of West Bengal [2005 (12) SCC 657]*** *similarly explain and reiterate the legal position on the subject.*

22. Common object has to be ascertained from the member-ship, weapon used and the nature of injuries as well as other circumstances as held by the Apex Court in the case of **Haramant Laxmappa Kukkadi Vs. State of Karnataka, 1994(1) SCC 736..**

23. This court finds from the above discussion that there is allegation that deceased misbehaved with wife/daughter-in-law of Raghuraj Singh, appellant no.2. No evidence was led to prove that other five appellants constituted unlawful assembly with Raghuraj Singh and they also shared common object with Raghuraj Singh.It was required to be proved by the prosecution that the alleged offence was committed by all the members of unlawful assembly in prosecution of common object. Mere presence in an assembly without proof of common object cannot be stretched to such an extent so as to implicate the innocent person as held by the Apex Court in the case of **Subal Ghorai and others** (Supra).Trial court has not recorded any such finding that all the accused having shared common object with co-accused Raghuraj Singh and had formed unlawful assembly for executing the same.The Apex Court has also held in the case of **Haramant Laxmappa Kukkadi (Supra) that** common object has to be ascertained from the membership, weapon used and the nature of injuries as well as other circumstances. In the present case only weapon allegedly used was *Ballam* but injuries on the person of the deceased did not corroborated the use of the aforesaid weapon. The injury on neck of the deceased which proved fatal for his life was incised in nature, when the *Ballam* can only cause piercing injury. Hence implication of all the appellants for committing offence of murder with aid of section 149 I.P.C. cannot be sustained. The role of catching hold of the deceased was assigned to appellants, Amar Singh and Devendra Singh; role of exhortation was assigned to appellant Rakesh Kumar and Kehari and Raghuraj Singh was assigned the role of causing fatal injury on the neck of the deceased by *Ballam* by P.W.2. P.W.1 has also assigned them similar roles which may have found favour with the trial court to convict them under section 302/149 I.P.C.Apex court in the case of **Balwantbhai B. Patel Vs. State of Gujrat and others reported in 2009-0-Supreme Court (SC)1557**, has held that allegation of catching hold or exhortation are invariably made when number of injuries on injured

party do not co-relate with number of co-accused or in the alternative in an attempt to rope in as many persons as possible from other side. Apex court acquitted, the accused who was implicated for committing offence under section 302 I.P.C. with the help of section 34 I.P.C.

24. This court further finds that most of the arguments raised by the learned counsel for the appellants have not been replied by the other side such as the weakness of motive, delay in lodging of First Information Report, falacity of arguments regarding the opening of door, when no door was found in the house of the deceased, semi -digested food in the stomach of the deceased , his bladder being empty, non production of wife of the deceased as witness by the trial court; discrepancy in the injury and weapon allegedly used in the crime;difference of cloths founds on the body of the deceased.

25. The Apex court in the case of ***The State of U.P. and another Vs. Jaggo alias Jagdish and others, AIR 1971, SC 1586*** has held that witness whose evidence is essential for unfolding the narrative must be produced in evidence. Non-production of Urmila, the wife of deceased, before the court proves that prosecution case was doubtful. She was the best witness to have proved the manner of incident and the roles of accused therein.

26. In view of the above consideration, the judgement and order of the trial court cannot be sustained and is hereby set aside. The surviving appellant nos. 3, 5, and 6, namely, Devendra Singh, Kehri Singh and Rakesh Kumar, are acquitted of charges under section 302/149 I.P.C. They are on bail. Their bail bonds are cancelled and sureties are discharged. The amount of fine, if deposited by the surviving appellants, shall be refunded to them.

27. Certify the judgement to the lower court within a week for compliance and making entry of decision in the register. The record of the case be also transmitted to the court below immediately. Compliance of section 437-A shall be ensured by the court below The compliance shall be reported by the court below to this court within four weeks from the date of receipt the copy of this judgement.

28. Criminal Appeal is allowed.

(2024) 3 ILRA 229
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.01.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 8560 of 2022

Pradeep Kumar Pandey & Ors.
...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Dhirendra Kumar Srivastava, Sri Sandeep Maniji Bakshi, Sri Utsav

Counsel for the Respondent:
G.A.

(A) Criminal Law - Reversal of Conviction under IPC Section 272 - U.P. Excise Act - Indian Penal Code, 1860 - Sections 272 - Adulteration of food or drink intended for sale, Section 120 - offense of concealing a design to commit an offense, The Uttar Pradesh Excise Act, 1910 - Sections 60/63

- Code of Criminal Procedure, 1973 - Sections 207 – Supply to the accused of copy of police report and other documents - Noxious - Mens Rea - Conviction under Section 272 IPC and the U.P. Excise Act cannot be sustained without clear evidence of intent to sell noxious food or drink, as well as specific percentages in F.S.L. reports.(Para - 17-18, 26-27, 30-31, 39-40)

Appellants were accused of transporting adulterated liquor - vehicle crash led to discovery of 40 liters of allegedly adulterated liquor - prosecution relied on testimony of two witnesses, P.W.-1 and P.W.-4 - FSL report indicated presence of 87.2% alcohol in recovered sample - accused were not arrested at the spot - no test identification parade was conducted - seized car was not produced before court - recovery memos were questionable - FSL report was not supplied to accused in time - expert who prepared it was not examined. (Para - 1-6, 9-13, 19-28)

HELD: - Prosecution failed to establish its case beyond reasonable doubt due to unreliable eyewitness testimony and non-compliance with Section 207 Cr.P.C. Accused-appellants were entitled to benefit of doubt and acquitted of charges under IPC and UP Excise Act. Judgment and order of trial court set aside. Accused-appellants acquitted of charges & released from judicial custody. (Para – 39,40,42,43)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Ashok Vs St. of U.P., 2021 (2) ALJ 259/AIRONLINE 2021 All 13

2. Tarun Tyagi Vs C.B.I., (2017) 4 SCC 490

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. This criminal appeal has been preferred by the accused-appellants, Pradeep Kumar Pandey, Kartikey Pandey, and Amrendra Kumar Pandey against the judgment and order dated 16th September, 2022 passed by the Special Judge (SC/ST)/Additional Sessions Judge, Court No.2, Bhadohi in Sessions Trial No. 108 of 2016 (State Vs. Pradeep Kumar Pandey & Others) arising out of Case Crime No. 282 of 2015, under Sections 272, 120 of I.P.C. read with Sections 60/63 Of U.P. Excise Act, Police Station-Aurai, District-Bhadohi, whereby all three accused-appellants have been convicted and sentenced to life imprisonment each under Section 272 of I.P.C. with a fine of Rs. 5,000/- each and in default thereof, they have to further undergo one year additional imprisonment; and one year rigorous imprisonment each under Section 60 of the Excise Act with fine of Rs. 500/- each and in default thereof, they have to further undergo one month additional imprisonment each, with an observation that all the sentences are to run concurrently.

2. We have heard Mr. Dhirendra Kumar Srivastava, learned counsel for the accused-appellants and learned A.G.A. for the State and also perused the entire materials available on trial court record.

3. The prosecution story is that on 11th July, 2015, the Sub-Inspector Suresh Singh (informant) and other police personnels were on patrol duty for searching the miscreants on the way of Maharajganj and when they reached near the tractor workshop of one Bhola Singh, they found that Anand Kumar Singh, Village Pradhan of Village Tewri along with two persons were chasing two young boys, who were aged around 19 to 20 years and were wearing dark coloured pants and shirt, and were running towards the western side of the tractor workshop. Seeing them, all the police personnels including the

informant and other villagers tried to chase both the young boys and made all possible efforts to nab them but they took the advantage of rain and escaped.

4. As per the informant, the Village Pradhan, Anand Kumar told him that at about 09.00 p.m. one vehicle bearing No. U.P. 70 AL-0312 came from the side of Varanasi in a high speed and after losing its balance went down the road and collided with the old thresher kept at the vacant place before the workshop and it got damaged. At that time he was on his way to the tractor workshop for his work. The Village Pradhan further stated that two person quickly came out of the aforesaid vehicle and swiftly started running towards the west side on the road. On suspicion that they might be criminals, he along with other villagers tried to chase them. In the meantime, Police personnels came and information was given that some illicit substance may be kept in the vehicle. Following this, the damaged vehicle bearing No. UP 70 AL-0312 was checked by the Police personnels along with Village Pradhan and from the back side of the vehicle i.e. dicky, two Jerrican (can) in black colour were recovered, out of which, one was broken and empty and the other contained about 40 liters liquor (adulterated). When the cap of the said Jerrican was opened, it emitted strong smell of mixed liquor. Out of the aforesaid 40 litres of liquor (adulterated), one litre was taken out as a sample in a plastic bottle and the same was sealed. The recovered Jerrican containing remaining 39 litres adulterated liquor was also sealed. Recovery memos were prepared. The recovered vehicle was also seized as per Section 207 of the Motor Vehicles Act for carrying/transporting illicit liquors. After that, case under Sections 60/63 of Excise Act and Section 272 of I.P.C. against two unknown persons was registered.

5. Later on, during investigation, the accused-appellant, Pradeep Kumar Pandey was arrested upon obtaining a report from the concerned Regional Transport Officer in which it was stated that the recovered vehicle bearing No. UP 70 AL-0312 belongs to the accused-appellant Pradeep Kumar Pandey.

6. Investigation proceeded and after conducting statutory investigation in terms of Chapter XII of the Cr.P.C. the Investigating Officer submitted the Charge Sheet Nos. 11/2016 and 11A/2016 against the accused-appellants, namely, Pradeep Kumar Pandey, Kartik Kumar Pandey and Amarendra Kumar Pandey under Sections 272, 120B of I.P.C. and Sections 60/63 of Excise Act for trial before the Court concerned. Upon submission of the charge-sheets, cognizance was taken by the Additional Chief Judicial Magistrate on 12.02.2016 and the case was committed to the Court of Sessions. The concerned Sessions Court i.e. trial court framed the charges against the accused-appellants, namely, Pradeep Kumar Pandey, Kartik Kumar Pandey and Amarendra Kumar Pandey under Sections 272, 120B of I.P.C. and Sections 60/63 of Excise Act. The accused-appellants denied the charges and requested for trial.

7. The prosecution examined total four witnesses in the following manner:-

i) P.W.-1/Informant, namely, Sub-Inspector Suresh Singh;

ii) P.W.-2, namely, Anil Kumar Gupta, retired Sub-Inspector;

iii) P.W.-3, namely, Hemant Kumar Jaiswal, Head Constable; and

iv) P.W.-4, namely, Anand Kumar Singh, Village Pradhan, who is said to be an eye-witness.

8. In order to prove its case, the prosecution relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

i) Recovery memos/written report have been marked as Exhibit-Ka-1;

ii) Charge-sheets submitted by the Investigating Officer against the accused-appellants have been marked as Exhibits Ka-2 & 3;

iii) Site plan has been marked as Exhibit-Ka-4;

iv) Letter written to the Regional Transport Officer has been marked as Exhibit-Ka-5;

v). Carbon copy of G.D. entry has been marked as Exhibit-Ka-6; and

vi). The first information report has been marked as Exhibit-Ka-7.

9. P.W.-1/informant, namely, Sub-Inspector Suresh Singh, in his statement, has reiterated the same version as unfolded in the first information report. It is stated that the damaged car, which was used for transporting the illicit liquor was seized under Section 207 of the Motor Vehicles Act and the same has been made case property. The recovery memos of the seized car and Jerrican were marked as Exhibit Ka-1 and the same were proved by P.W.1. The recovered car bearing No. UP 70 AL-0312 is lying in the Police Station in a damaged condition and therefore, it could not be produced before the trial court.

10. P.W.-2, Anil Kumar Gupta, retired Sub-Inspector, in his statement has supported the prosecution version as unfolded in the first information report. He has submitted that after the verifying the fact that the owner of the recovered Indica Car No. UP 70 AL-0312 was the accused-appellant Pradeep Kumar Pandey, he was arrested. Later on, other two accused-appellants, namely, Kartik Kumar Pandey and Amarendra Kumar Pandey were also nominated from the disclosure made by the accused-appellant Pradeep Kumar Pandey in his confessional statement before the Police. This witness has also proved the memos of arrest of accused-appellants, namely, Kartik Kumar Pandey and Amarendra Kumar Pandey, which were marked as Exhibits Ka-3A/1 and 3A/2 and also the site plan which was marked as Exhibit-Ka-4. The letter written to the Regional Transport Officer along with report of P.W.2, which were marked as Exhibit-ka-5 has also been proved by this witness.

11. P.W.-3 Head Constable Hemant Kumar Jaiswal has also supported the prosecution version as enumerated in the first information report. He has also stated that he has prepared the recovery memos of seized car, Jerrican containing 39 litres adulterated liquor and the plastic bottles containing one litre adulterated liquor as sample. He has also prepared the report of seizure of the car under Section 207 of the Motor Vehicles Act. He has prepared the chik first information report. He has further stated that his statement has also been recorded by the Investigating Officer under Section 161 Cr.P.C. He has proved the document no. 8A/5, which was prepared by him and was marked as Exhibit-Ka-6. He has also proved the computerized copy bearing no. 4A/1, which was prepared by Sita Ram Yadav and marked as Exhibit-Ka-7.

12. P.W.-4, Anand Kumar Singh, who is said to be an eye-witness has deposed in his statement that at the time of incident, he

was village Pradhan of village Tewri and he was present at his house, when at about 09:00 a.m. (in the morning) a car, which was in high speed collided with the thresher parked next to Shambhu Singh's tractor workshop on the east side. On hearing the loud noise, he and some other villagers from the neighbourhood came to the spot. It was seen that a car bearing No. UP 70 AL 0312 had collided with a thresher due to which the rear seat of the car was broken and the front bumper was also broken. Two boys of around 19 to 20 years of age were sitting inside the car. The smell of alcohol was coming from the car. After opening the gate, both the boys were hauled out and after some time, they both began to walk and moved a short distance apart. They thought that they were going for natures' call, but after reaching some distance both of them started running away. This witness and two-three boys tried chasing them. In the meantime, P.W.-1/informant and Assistant Sub-Inspector Vijay Yadav came on the spot and asked why were both boys running, P.W.-4 informed them everything and showed the two boys running. P.W.-1 and Vijay Yadav also started chasing them. But taking advantage of the rain, both boys succeeded in escaping from the spot. Thereafter, the damaged car was checked, two Jerricans of about 40 liters each were found, one of which was filled with adulterated liquor and the other was broken and its thick liquor had flown away. After that one litre liquor was taken out from the jerrican containing 40 litres of adulterated liquor as a sample. This witness has further stated that the Police personnels prepared the recovery memos on which he appended his signatures and proved the same before the trial court. Thereafter the Police took away the damaged car to the Police Station with the help of Crane, He has further stated that he was asked by the Police whether he could identify the said boys at the police station in front of them. Statement of P.W.-4 was also recorded by the Investigating Officer under Section 161 Cr.P.C. He has proved the recovery memos prepared by the Police and were marked as Exhibit-Ka-1.

13. After recording of the prosecution evidence by the trial court, the incriminating evidence were put to the accused-appellants, namely, Pradeep Kumar Pandey, Kartik Kumar Pandey and Amarendra Kumar Pandey for confronting with the same under Section 313 Cr.PC. In their statements recorded under Section 313 Cr.P.C. the accused appellants, denied their involvement in the commissioning of the offence punishable under Sections 272 and 120-B of I.P.C. and Sections 60/63 of Excise Act. The accused-appellants have also not adduced any evidence in support of their case.

14. On the basis of evidence so lead during the course of trial, the court below has come to the conclusion that the prosecution has established its case beyond reasonable doubt against accused-appellants and has convicted them for the offence punishable under Section 272 of I.P.C. and Section 60 of Excise Act and sentenced them to life imprisonment with fine, referred to above.

15. At the very outset, learned counsel for the accused-appellants has submitted that the accused-appellants have undergone more than one and half years of actual sentence as on date.

16. Assailing the impugned judgment of conviction, it is argued by the learned counsel for the accused-appellants that the charge under Section 272 of I.P.C. is not

made out against the accused-appellants. In support of his submission, he has referred to Section 272 of I.P.C., which is extracted herein-below:

"272. Adulteration of food or drink intended for sale

Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

STATE AMENDMENTS

……..

Uttar Pradesh:

In its application to the State of Uttar Pradesh, in S. 272, for the words "shall be punished with imprisonment of either description, for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both" substitute the following words. "shall be punished with imprisonment for life and shall also be liable to fine":

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment which is less than imprisonment for life."- U.P. Act 47 of 1975, S. 3 (1) (15-9-1975)."

17. Learned counsel for the accused-appellant submits that from the perusal of the aforesaid Section, it is apparent that in order to prove the charge under Section 272 of I.P.C. the prosecution is required to prove that the recovered article from a person is an adulterated article of food or drink, so as to make such article noxious as food or drink and the intention to sell such article as food or drink.

18. Learned counsel for the accused-appellants submits that there is no evidence on record that the accused-appellants intended to sell the recovered material as an article of food or drink. Learned counsel for the accused-appellants submits that another requirement under Section 272 of I.P.C. is that the accused/persons must have knowledge that it is likely to be sold as noxious drink or food. The intention and mens rea on the part of the accused-appellants is to be proved by the prosecution, which is completely missing in the present case.

19. Then, learned counsel for the accused-appellant has referred to the first information report, which was marked as Exhibit-Ka-7, G.D. entry dated 11th July, 2015 and the recovery memo marked as Exhibit-Ka-1, wherein it is mentioned that at the spot, car make of Alto bearing No. UP 70 AL 0312 was found, whereas in the letter addressed to the Regional Transport Officer by the Investigating Officer dated 15th July, 2015, which was marked as Exhibit Ka-5 for verification of the recovered and seized car, it is mentioned that the said car is of make Indica bearing Registration No. UP 70 AL 0312, Engine No. BTZP 17671, Chassis No. 600136 BTZP 4930.

20. The learned counsel for the accused-appellants has also drawn the attention of the Court to the report submitted by the Regional Transport Officer in response to the letter of the Investigating Officer, which was also marked as Exhibit Ka-5, wherein it has been stated that vehicle No. UP 70 AL 0312

of make "Indica" belongs to accused-appellant Pradeep Kumar son of Panna Lal.

21. Thus, it has been argued by the learned counsel for the accused-appellants that it is the candid case of the prosecution as well as P.W.-4 that from the spot the car of make Alto was recovered and later on during the investigation, it was converted/changed into a car of make "Indica", without there being any explanation in this regard. It is a major inconsistency in the prosecution evidence.

22. Next argument of the learned counsel for the accused-appellant is that there is no evidence on record that after the arrest of the accused-appellants when they were produced before the Magistrate along with the case property, any endorsement was made by the concerned Magistrate as required under Section 457 Cr.P.C. ,when as a matter of fact that it is the specific case of the Investigating Officer and P.W.-1 that the recovered car was never produced, before the trial court, as it was in damaged condition for verifying/establishing the fact that the recovered car from the spot was a car of make "Alto" or "Indica".

23. It is next argued that even the identity of the accused-appellants were not proved by the prosecution. It has come in the statement of P.W.-4 that two boys of around 19 to 20 year of age were seen in the car and that they ran away from the spot.

24. Learned counsel for the accused-appellant has next argued that as per the prosecution case, even the seizure of the sample i.e. 1 litre of adulterated liquor taken from the Jerrican containing 40 litres adulterated liquor, was not proved, as no sample slip or recovery memo was prepared at the spot which was sent for chemical examination to Forensic Science Laboratory. Even the remainder of 39 litres was not produced before the trial court, as admitted by P.W.-1/informant.

25. Learned counsel for the accused-appellant has referred to the statement of P.W.-4, who is said to be an eye-witness. In the cross-examination, P.W.-4 has stated that he has not signed on the written recovery memos, whereas the Police obtained his signatures on a blank paper, which also creates a doubt in the prosecution case.

26. Learned counsel for the accused-appellants next argued that in order to establish its case under Section 272 of I.P.C. against the accused-appellants beyond reasonable doubt, the prosecution has to prove that the recovered article/material is in fact noxious drink meant for sale. Learned counsel for the accused-appellants has drawn the attention of the Court to the report of the Joint Director, Forensic Science Laboratory, U.P., Ramnagar, Varanasi dated 22nd December, 2015, wherein the result reads as under:

"बोतल का दूरा विश्लेषण द्वारा अवमिश्रित स्प्रिंट पायी गयी। नमूने में एल्कोहल की प्रतिशत मात्रा 87.2 आयतन / आयतन पायी गयी। नमूने में अमोनियम क्लोराईड (नौसादर) के परीक्षण परिणाम सकारात्मक पाये गये तथा डिनेचरेन्ट्स मिथाइल एल्कोहल एवं क्लोरलहाइड्रेट' के परीक्षण परिणाम नकारात्मक पाये गये। भौतिक एवं रासायनिक विधियाँ प्रयोग की गयी।"

27. On perusal of the said report, learned counsel for the accused-appellants submits that on analysis of the bottle, sprint was found in the sample. The percentage of alcohol in the sample was found to be 87.2 %. In the sample, the test results of ammonium chloride salt were found

positive, whereas the test results of denatured methyl alcohol and chloro hydrate were found negative. There is no opinion formed that recovered alcohol was unfit for human consumption.

28. Learned counsel for the accused-appellant has referred to Section 3 of the U.P. Excise Act, wherein the word "denatured" is defined under Section 3 (9) of the Excise Act. For ready reference the same is quoted hereunder:

"3. Definitions.---

..

[(9) "denatured" means rendered unfit for human consumption in such manner as may be prescribed by the [State Government] by notification in this behalf. When it is proved that any spirit contains any quantity of any substance prescribed by the '[State Government] for the purpose of denaturation the Court may presume that such spirit is or contains or has been derived from denatured spirit;]"

29. Learned counsel for the accused-appellants submits that even as per the report of the Forensic Science Laboratory, wherein no percentage of ammonium chloride is defined or mentioned and only it is stated that same is found in positive, therefore, is not sufficient to hold that the recovered article in fact is noxious drink.

30. Learned counsel for the accused-appellants has relied upon the judgment of this Court in the case of **Ashok Vs. State of Uttar Pradesh** reported in *2021 (2) ALJ 259/AIRONLINE 2021 All 13*, wherein this Court has held that where the report of the Forensic Science Laboratory does not specify the percentage of the Ammonium Chloride (Nausadar) and only speaks of presence of urea, Ammonium Chloride, it cannot be said to be a legal report in eye of law for bringing a person guilty for offence punishable under Section 272 I.P.C.

31. Learned counsel for the accused-appellants submits that in the report submitted by the Joint Director, Forensic Science Laboratory, U.P., Ramnagar, Varanasi dated 22nd December, 2015, only presence of Ammonium Chloride (Nausadar) is found but there is no percentage of Ammonium Chloride (Nausadar) mentioned in such report and therefore the conviction of the accused-appellants under Section 272 I.P.C. is liable to be set aside.

32. In the case of **Ashok (Supra)**, it has also been observed that the Food Act as per Chapter IX deals with the offences and penalties which provide for punishments for contravention of the provisions of the Act. However, the comparative study of Section 272 of I.P.C. and the relevant provisions of Food Act, which has repealed the Prevention of Food Adulteration Act, 1954 do not provide the definition of terms with regard to commission of offence, as in the present case.

33. Perusal of the judgment of this Court in the case of Ashok (Supra) shows that in the said case also recovered article was illicit liquor containing Ammonium Chloride (Nausadar) without specifying any percentage and on the basis of same the Court has come to the conclusion that the prosecution has failed to establish its case beyond reasonable doubt against the accused-appellant and therefore, the conviction of the accused under Section 272 of I.P.C. was set aside. Learned counsel for the accused-appellant, therefore, submits that the conviction of the present accused-appellants is also liable to be set aside.

34. However, the learned Additional Government Advocate for the State has opposed the above submission advanced on

behalf of the accused-appellants on the ground that it is the accused-appellants to prove that the liquor which was carrying was not meant for human consumption.

35. Learned Additional Government Advocate for the State has further argued that in the report submitted by the Regional Transport Officer, it was mentioned that the recovered car belongs to one of the accused-appellant i.e. Pradeep Kumar Pandey and therefore, wrong mentioning of make of car in the first information report, which was marked as Exhibit-Ka-7, G.D. entry dated 11th July, 2015 and the recovery memo marked as Exhibit-Ka-1, will not demolish the prosecution case to hold that no case is made out against the accused-appellants. He has also argued that P.W.-4, who is an eye-witness has supported the prosecution case in all respect and has proved the recovery memo.

36. Learned Additional Government Advocate could not dispute the fact that no test identification parade which has evidentiary value under Section 9 of the Indian Evidence Act, was done in the present case and even in the statements of the prosecution witnesses, it has not come that two of the accused-appellants were in fact the same persons, who were sitting in the car collided with the thresher as per the prosecution case.

37. On a query made by Court about the criminal antecedents to the credit of the accused-appellants, learned counsel for the accused-appellants has submitted that they were not involved in any criminal case before institution of the present criminal case nor they have been convicted in any other case. One of the accused-appellant i.e. appellant no.1 is said to be 60 years of age. This fact is not denied by the learned A.G.A.

38. After considering the submissions made by the learned counsel for the parties and after appreciation of the evidence on record with regard to the credibility of and reliability of P.W.-1 and P.W.-4, we do not find the same trustworthy or reliable nor can they be treated as eye witnesses so as to rely upon their testimony. P.W.-1 has neither given make of car nor produced the case property i.e. car and remaining sealed 39 litres of alcohol.

39. In view of the deliberation and discussions, we find that prosecution has not been able to establish its case beyond reasonable doubt, inasmuch as the witnesses of fact produced by the prosecution are also not found reliable. The F.S.L. report does not support the prosecution case. There is no other evidence on the basis of which the conviction and sentence of the accused-appellant could be sustained.

40. In such view of the matter, we find that judgement and order passed by the Court below convicting the accused-appellants cannot be sustained for following reasons:

a). The Court below has not examined the testimony of witnesses and other evidence on record nor have they been carefully scrutinized. There are inherent contradictions in their versions, which have been clearly overlooked by the trial court. The basic and important evidence which is lacking in this case is that nothing has come on record to prove that the recovered article was meant for sale as human consumption. It is also not proved that the recovered item falls within the definition of noxious food, which is harmful for human consumption. In absence of any specific report regarding

percentage of Ammonium Chloride (Nausadar), though it is specified in the report of Forensic Science Laboratory that in the sample 87.2 % alcohol was found, the prosecution has even failed to prove that the recovered illicit liquors from the car was meant for sale and for human consumption.

b). Another aspect which makes the prosecution case doubtful is that no accused-appellant/person was arrested on the spot and after their arrest, the prosecution has failed to conduct the test identification parade and therefore, the accused-appellants are entitled to benefit of doubt. Even otherwise, the case property i.e. the seized car has also not been produced before the trial court, so that it may find out as to whether the seized car is make of "Alto" or "Indica" and the same belongs to one of the accused-appellant i.e. Pradeep Kumar Pandey. The FIR reflects make of the car as "Alto", which met with accident from which recovery was made. Moreover, even in the statement of P.W.-1/informant make of the car is not mentioned.

c). The recovery memos of Jerrican containing 40 litres of adulterated liquor as per the case of prosecution and broken Jerrican, prepared by the Police also make the recovery doubtful, as P.W.-4 himself in his cross-examination has stated that he has not signed on the written recovery memos and his signatures were obtained by the Police on a blank paper.

d). In examination-in-chief, P.W.-4 Anand Kumar, who is the sole eye-witness, failed to identify any of the accused-persons and in cross-examination, he admitted that no accused was arrested at spot. This witness stated that his signatures were taken on a blank paper by the Police. Therefore, the identity of none of the accused is proved.

e). The report of the F.S.L. was put to accused persons for the first time during statement recorded under Section 313 Cr.P.C. There is nothing on record to prove that it was part of report under Section 173 Cr.P.C. and was provided to accused persons at the time of framing of charge. Both the Investigating Officers i.e. P.W.-1 and P.W.-2 have failed to prove and exhibit the report under Section 173 (2) Cr.P.C. along with the list of documents. Therefore, the F.S.L. report was never supplied to the accused persons.

It is held by the Supreme Court of India in the case of **Tarun Tyagi Vs. Central Bureau of Investigation** reported in (2017) 4 SCC 490 that Section 207 Cr.P.C. puts an obligation on prosecution to furnish to the accused copies of documents, free of cost, which are forwarded by the Police to the Magistrate report under Section 173 (5) Cr.P.C.

f) Though the expert, who prepared F.S.L. report, is not examined as witness, yet the trial court in view of Section 293 Cr.P.C. has relied upon and taken into consideration. But once the F.S.L. report is not supplied till the stage of recording statement of accused under Section 313 Cr.P.C., the right of accused to cross-examine the Investigating Officers on this point was denied.

g). Even the charge made under Sections 60/63 of U.P. Excise Act is not sustainable. Section 60 provides penalty for unlawful import, export, transport, manufacture, possession or sale of intoxicants. The punishment for possession and transportation of intoxicant, as per Section 60 (b) of U.P. Excise Act, which is not covered under Section 63 of the Act, is upto two years and fine, as defined and punishment for transport and possession of unlawfully imported intoxicant is six months to five years with fine.

In the instant case, neither the possession nor transportation is proved as already held that none of the accused was arrested at spot; make of car is different i.e. recovered car was "Alto" and later on changed as "Indica"; neither the case property nor car was produced before the trial court; the sole eye-witness i.e. P.W.4 failed to identify any of the accused; the F.S.L. report was never supplied to the accused in terms of provision of Section 207 Cr.P.C. and F.S.L. report does not specify contents/percentage of Ammonium Chloride and ever does not disclose the sample as unfit for human consumption. Therefore, on all counts prosecution case false flat.

41. In view of the above, the findings returned in the judgement and order passed by the Court below dated 16th September, 2022 passed by the Special Judge (SC/ST)/Additional Sessions Judge, Court No.2, Bhadohi in Sessions Trial No. 108 of 2016 (State Vs. Pradeep Kumar Pandey & Others) arising out of Case Crime No. 282 of 20105, under Sections 272, 120 of I.P.C. read with Sections 60/63 Of U.P. Excise Act, Police Station-Aurai, District-Bhadohi, convicting and sentencing the accused-appellants are reversed.

42. The present criminal appeal consequently succeeds and is allowed. Judgement and order dated 16th September, 2022 passed by the Special Judge (SC/ST)/Additional Sessions Judge, Court No.2, Bhadohi in Sessions Trial No. 108 of 2016 (State Vs. Pradeep Kumar Pandey & Others) stands set aside.

43. The accused appellants, who are in judicial custody for more than one year and six months, are acquitted of the charges and they shall be released forthwith, unless are wanted in any other case on compliance of Section 437-A Cr.P.C.

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

(2024) 3 ILRA 239
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2024

BEFORE

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

Criminal Appeal No. 9185 of 2022
And
Criminal Appeal No. 9644 of 2022
And
Criminal Appeal No. 9885 of 2022

Hariom ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajrshi Gupta, Sri Mukesh Singh, Sri Devendra Kumar Tiwari, Sri Rizwan Ahmad, Sri Dileep Kumar (Sr. Advocate)

Counsel for the Respondent:
G.A., Sri Vikas Tripathi, Sri Sagir Ahmad (Sr. Advocate)

(A) Criminal Law - Suspension of sentence pending appeal - Indian Penal Code, 1860 - Sections 147, 148, 149, 307, 302, The Code of criminal procedure, 1973 - Section 389(1) - Suspension of sentence pending the appeal; release of appellant on bail - Arms Act, 1959 - Section 3/25 - Prima Facie Satisfaction - Ocular Testimony - Appellate court should avoid microscopic analysis of evidence while deciding suspension of sentence under Section

389(1) CrPC; consideration limited to prima facie satisfaction without reappreciating evidence - Ocular testimony must be given a preference or edge over the opinion of the expert. (Para - 11,13, 28)

(B) Criminal Law - Criminal Jurisprudence - Cardinal principles - accused is presumed to be innocent till he has guilty by the court of competent jurisdiction - Once the accused is held guilty the presumption of innocence gets evaporated - In the same manner, if the accused is acquitted then the presumption of innocence gets further fortified. (Para - 22)

Prosecution's case - a deceased employee of Nagar Nigam - attacked by a group of assailants - who opposed his appointment - incident occurred at a wedding - where deceased, his brother, and their father were injured - An FIR was registered, and the accused was charged with various offenses, including murder, attempt to murder, rioting, and arms act violations - Sessions Court convicted the accused. (Para - 15,16)

HELD: - Applications for sentence suspension under Section 389(1) CrPC for appellants were rejected due to their active roles in the commission of the crime. Appellants, who had a lesser role, were granted bail on the condition of depositing the imposed fines. (Para - 30 to 34)

Case for final hearing in the month of May 2024. (E-7)

LIST OF CASES CITED: -

1. O. P. Sahni Vs J.S. Chaudhary & anr. etc. in Crl. Appeal No. 1331-1332 of 2023, 2023(6) SCC 123

2. Aas Mohd. Vs Shiv Raj Singh @ Lalla Babu & anr., (2012) 9 SCC 446

3. Siddharth Vashisht @ Manu Shamra Vs St., (NCT of Delhi), (2008) 5 SCC 230

4. Atul Tripathi Vs St. of U.P., 2014 (9) SCC 177

5. Kishori Lal Vs Rupa & ors., 2004(7) SCC 638

6. Vijay Kumar Vs Narendra & ors., (2002) 9 SCC 364

7. Vijay Kumar Vs Narendra & ors., (2002) 9 SCC 364

8. Ramji Prasad Vs Rattan Kumar Jaiswal & anr., (2002) 9 SCC 366

(Delivered by Hon'ble Rahul Chaturvedi, J.)

(Order on Sentence Suspension Application)

[1] The aforementioned are the three connected appeals. The respective accused-appellants have filed the three different appeals, invoking the powers of this Court under Section 374(2) Cr.P.C., assailing the legality and validity of the judgment and order dated 31.10.2022/03.11.2022 passed by Additional Sessions Judge, Court No.2, Bareilly while deciding the S.T. Nos. 599 of 2016 (State of U.P. Vs. Sanjeev and 6 others) arising out of case crime no. 210 of 2016 under Section 147, 148, 149, 307, 302 IPC, P.S. Kotwali, District Bareilly, S.T. No. 600 of 2016 (State Vs. Ranjeet) arising out of case crime no. 220 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly, S.T. No. 601 of 2016 (State Vs. Manoj) arising out of case crime no. 321 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareiily, S.T. No. 602 of 2016 (State Vs. Sanjeev) arising out of case crime no. 222 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly and S.T. No. 603 of 2016 (State Vs. Anshu Arya) arising out of case crime no. P.S. Kotwali, District Bareilly, by the common impugned judgement. The said judgement is before us for the judicial scrutiny.

In addition to this, learned counsel for the appellants submits that

during the pendency of the appeal in exercise of power under Section 389(1) Cr.P.C., the sentence awarded to the respective appellants may be suspended in the interest of justice.

[2] From the judgment it is clear that one of the accused Kapil son of Manoj died during trial and as such the trial against him stood abated.

Today, when the case was called out, Sri Rajiv Lochan Shukla, learned counsel for the appellant in Crl. Appeal No. 9644 of 2022 informs the Court, that one of the accused-appellant- Manoj son of Shyam Swaroop, resident of Nekpur, Gautiya, P.S. Subhash Nagar, District Bareilly in the aforesaid appeal died on 13.01.2023, when he was facing incarceration pursuant to the judgment dated 03.11.2023. We are at loss to accept the contention on its face value as the same is not authenticated, unless we receive a report of confirmation from the responsible authority. As such we direct the C.J.M., Bareilly to enquire about the aforesaid fact and furnish a proper detailed report to this Court **within next six weeks.**

[3] Registrar (Compliance) is directed to send the copy of this order to concerned C.J.M. to verify the aforesaid fact.

[4] Heard Sri Dileep Kumar, learned Senior Counsel assisted by Sri Rizwan Ahmad, Advocate, Sri Rajiv Lochan Shukla, Advocate, Sri Manish Tewary, learned Senior Counsel assisted by Sri Atharv Dixit, learned counsel for the appellants named above in three criminal appeals, Sri Sagir Ahmad, learned Senior Counsel assisted by Sri Vikas Tripathi, learned counsel for the informant and Sri Ghanshyam Kumar, learned AGA for the State and perused the records.

[5] Pleadings have been exchanged between the parties and the matter is ripe for disposal of Section 389(1) applications of the respective appeals. Since all the appeals are targetted against the judgement and order dated 31.10.2022/03.11.2022 for the sake of brevity we are proposing to decide all the three applications for suspending the sentence by a common order.

The respective counsel for the appellants have argued the case to extensive length and in its rebuttal by Sri Sagir Ahmad, learned Senior Counsel for the informant as well as learned AGA for the State, have argued the matter upto their satisfaction.

AMBIT & SCOPE OF SEC. 389(1) CR.P.C. :-

[6] Before coming to the merit of the case, it is imperative to spell out the Section 389(1) Cr.P.C. so as to understand its true import/ambit and its reach so that the Court may appreciate the submission advanced by the counsel for the appellants.

"389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

[7] Hon'ble Apex Court recently got an opportunity to elucidate and explain the scope & reach of Section 389(1) Cr.P.C. in the judgement of ***Om Prakash Sahni Vs. Jai Shankar Chaudhary and another etc. in Criminal Appeal No. 1331-1332 of 2023 decided on 02.05.2023 reported in 2023(6) SCC 123*** . The relevant extract of the judgment, which is useful for adjudication of the aforesaid application under Section 389(1) Cr.P.C. are as under:-

"22. Thus, when we speak of suspension of sentence after conviction, the idea is to defer or postpone the execution of the sentence. The purpose of postponement of sentence cannot be achieved by detaining the convict in jail; hence, as a natural consequence of postponement of execution, the convict may be enlarged on bail till further orders.

23. The principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified."

[8] In continuation of the aforesaid in the judgement of ***Aas Mohammad Vs. Shiv Raj Singh alias Lalla Babu and another reported in (2012) 9 SCC 446*** has observed in para 30, which is as follows :-

"30. We may usefully state that when the citizens are scared to lead a peaceful life and this kind of offences usher in an impediment in establishment of orderly society, the duty of the court becomes more pronounced and the burden is heavy. There should have been proper analysis of the criminal antecedents. Needless to say, imposition of conditions is subsequent to the order admitting an accused to bail. The question should be posed whether the accused deserves to be enlarged on bail or not and only thereafter issue of imposing conditions would arise. We do not deny for a moment that period of custody is a relevant factor but simultaneously the totality of circumstances and the criminal antecedents are also to be weighed. They are to be weighed in the scale of collective cry and desire. The societal concern has to be kept in view in juxtaposition of individual liberty. Regard being had to the said parameter we are inclined to think that the social concern in the case at hand deserves to be given priority over lifting the restriction on liberty of the accused."

[9] In yet another judgement Hon'ble Apex Court in the case of ***Siddharth Vashisht alias Manu Shamra Vs. State (NCT of Delhi)*** reported in ***(2008) 5 SCC 230,*** (properly known as ***Jessica Lal murder case***), after hearing the common submission with regard to the bail prayer of the appellant, it has been held that :-

"19. We are conscious and mindful that the main matter (appeal) is admitted and is pending for final hearing. Observations on merits, one way or the other, therefore, are likely to prejudice one or the other party to the appeal. We are hence not entering into the correctness or otherwise of the evidence on record. It, however, cannot be overlooked that as on today, the applicant has been found guilty and convicted by a competent criminal court. Initial presumption of innocence in favour of the accused, therefore, is no more available to the applicant.

XXXX

30. ....In the above cases, it has been observed that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar [(2002) 9 SCC 364 : 2003 SCC (Cri) 1195 : JT 2002 Supp (1) SC 60] that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302IPC, the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted."

[10] In this regard Hon'ble Apex Court after thrashing number of the decisions in ***Atul Tripathi Vs. State of U.P.*** reported in ***2014 (9) SCC 177, Kishori Lal Vs. Rupa and others*** reported in ***2004(7) SCC 638, Vijay Kumar Vs. Narendra and others*** reported in ***(2002) 9 SCC 364.*** In Vijay Kumar v. Narendra and Others reported in ***(2002) 9 SCC 364*** and Ramji Prasad v. Rattan Kumar Jaiswal and Another reported in ***(2002) 9 SCC 366,*** it was held by this Court that in cases involving conviction under Section 302 of the IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. In ***Vijay Kumar (supra)***, it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 of the IPC, the court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.

[11] After thrashing & analysing the aforementioned judgements, the essence arrived at by Hon'ble Apex Court has come to the conclusion by providing a guidelines and the true import of Section 389 (1) Cr.P.C., that, pending appeal while deciding the application for suspending the sentence to ascertain whether the convict has fair chance of acquittal, what is to be looked into is something palpable. To put in a other words, something which is very

apparent or gross on the face of the records, on the basis of which, the court can arrive at prima facie satisfaction that conviction may not be sustainable. The appellate court should not re-appreciate the evidence at the stage of Section 389(1) Cr.P.C. and try to pick few lacunas or loopholes here or there in the case of prosecution such would not be a correct approach.

[12] In the aforesaid judgement of ***Om Prakash Sahani (supra)*** learned Apex Court in so many words have mentioned that High Court has gone the issue like the polital rivalry, delay in lodging the FIR some overwriting in the FIR etc. etc., all these aspect of the issue will have to be looked into at the time of final hearing of the appeals filed by the convict appellants. Upon cursory scanning on the evidence on record, we are unable to agree with the contention of the learned Senior Counsel for the convicts that either there is absolutely no case against the convicts or that the evidence against them are so weak and feeble in nature, that ultimately in all probabilities the proceedings would terminate in their favour.

[13] Thus from taking the help of the aforesaid judgement of Hon'ble Apex Court, it is crystal clear that while deciding the application under Section 389(1) Cr.P.C., the Court is not required to have a meticulous and keen appreciation of the evidence on record. All these aspect of the issue would be well considered only at the time of final hearing of the appeal. At this stage, the microscopic analysis and appreciation would lead to a disastrous results so far as it may affect the final outcome of the appeal.

LEGAL DISCUSSION OF PRESENT APPEALS :-

[14] Now taking the aforesaid analysis as a beacon light, we are proposing to decide all the three applications under Section 389(1) Cr.P.C. in their respective appeal.

FACTS OF CASE :-

[15] As per the prosecution case contained in paragraph 3 of the impugned judgement, which could be formulated as under :-

(a) The informant of this case is Raj Kiran son of Kishan Lal, P.S. Qila, Bareilly lodged an FIR at Kotwali Bareilly that his brother Rajiv @ Raju was employed in Nagar Nigam, Bareilly as *"Safai Karamchari"*. As his appointment has become eyesore to his opponent Sanjeev and Hariom, who were opposing his appointment and in this regard in September 2014 near Nagar Nigam, Bareilly, accused-appellants Sanjeev and others have committed *maar-peet* with him for which the FIR was registered on Kotwali Bareilly on 10.09.2014.

(b) Since then accused-appellants- Sanjeev and others started nurturing an ill feeling towards him and try to eliminate him many times in past but on account of providence he was saved himself.

(c) On 22.04.2016, informant with his brother Rajiv @ Raju (hence deceased) and his father Kishan Lal went to attend the marriage at *'Shehnai Baratghar'*. After taking meals at 10.30 in the night, they came out and suddenly hey were surrounded by appellants, namely, (i) Sanjeev son of Ram Prakash, (ii) Ranjit son of Ram Prakash (iii) Hariom son of Om Prakash, (iv) Manoj son of Shyam Swarup, (v) Kapil son of Manoj (vi) Anhsu Arya son of Naresh Arya, all of them were armed,

Hariom was saying that Rajiv @ Raju and his family members are after his service, today we have to eliminate him. Soon thereafter, Hariom fired upon Rajiv alias Raju with intention to kill. After sustaining the gunshot injury over is leg his brother rushed back to 'Baratghar', however, he was overpowered by Manoj son of Shyam Swarup, Kapil son of Manoj, Anshu Arya, Ranjit @ Ram Prakash who fallen down the deceased and caught hold of him. Thereafter Sanjeev, fired upon his brother Rajiv @ Raju. When the informant and his father rushed to save his brother then the assailants fired upon indiscriminately upon them. One Kamal son of unknown also sustained gunshot injury. After this incident there was a turmoil and upheaval among the guests and everybody was started running in order to save their lives. Thereafter the body of the Rajiv @ Raju was taken to the Mission Hospital, where he was declared dead. All the assailants are hard core criminals and while running away they have extended threats that all of them would face same treatment if anyone opens his mouth. The informant after leaving their Polo and Safari Car left on the spot and also the motorcycle. Since the 'Baratghar' was well lit and therefore the informant clearly identified the individual assailants and their respective activities in the light of 'Baratghar'.

[16] The incident is said to have been taken place on 22.04.2016 at 10.30 in the night of which the FIR was registered on 12.30 in the midnight in between 22/23.04.2016 at P.S. Kotwali, District Bareilly. The police after concluding the investigation has submitted a charge sheet under Sections 147, 148, 149, 307 and 302 IPC against appellants Sanjeev, Ranjit, Manoj, Hariom, Kapil and Anshu Arya. However, against appellant Ranjit the charge sheet was also submitted under Section 3/25 Arms Act, against appellant Manoj under Section 3/25 Arms Act and against appellant Sanjeev under Section 3/25 Arms Act and against appellant Anshu Arya under Section 3/25 Arms Act. Being the cognizable offence the case was referred to the court of Sessions whereby the appellants were convicted for the offence under Sections 147, 148, 307/149, 302/149 IPC and Section 7 Crl. Law Amendment Act, besides the charges under Section 3/25 Arms Act against appellants, namely, Ranjit, Manoj, Sanjeev and Anshu Arya.

ARGUMENTS ADVANCE BY COUNSEL OF APPELLANT :-

[17] Sri Rajiv Lochan Shukla, learned counsel for the appellants primarily have spear headed the arguments on behalf of all the appellants, supported by Sri Dilip Kumar as well as Manish Tewari, learned Senior Counsel for their respective appellants by adding & elaborating their own submissions. Broadly speaking, the argument advanced by learned counsel for the appellants Sri Shukla, Advocate could be formulated as follows :-

(I) There is inter-se difference among the depositions of 'witnesses of fact' with regard to the individual's role of the assailants which considerably erodes the authenticity of the prosecution case.

(II) Manipulation made by the police with regard to the bullets and weapon of assault used by the assailants.

(III) The alleged injured Kamal was never produced as witness nor his injuries were every exhibited or proved.

(IV) Eye witnesses presence is doubtful, besides they being they are interse in relationship and as such their

deposition should be taken with pinch of salt.

(V) Ambulance Driver, who have taken the deceased to the hospital in a precarious condition and he got the injured Rajiv @ Raju admitted to the hospital. The Driver of the Ambulance was never produced as prosecution witnesses.

It is further argued by the counsel, that the informant and his father and the deceased went in their own private car but instead of using their own car for carrying the injured to the hospital, they have summoned the Ambulance for the said purpose, is clearly against the normal human behaviour.

(VI) After visualizing that the deceased have sustained four gunshot wound of injury over his person and more than one weapon have been used, the prosecution witnesses tried to shift their stand just to cover up and made their deposition in such a fashion which would in the consonance with the post mortem report.

(VII) Lastly, the history sheet of appellant-Ranjit H.S. No. 63A and appellant- Sanjeev H.S. No. 61A was brought on record by a written argument and were never exhibited. The criminal antecedents of the accused appellants of eight cases each which have been duly explained in rejoinder affidavits.

[18] Now the arguments advanced by Sri Dilip Kumar, learned Senior Counsel on behalf of appellant Hariom in Criminal Appeal No. 9185 of 2022 are as follows:-

(A) Out of six assailants and the deceased as well as informant on the other hand are belong to same caste, they know each other and probably distinctly related. It is contended that even assailants themselves are interse in the inimical relationship since recent past, they have lodged the various FIRs of *maar-peet* and kidnapping in which the charge sheet have been submitted against the accused-persons. On this factual narration, it is contended, that where the assailants themselves are in inimical relationship and as such this is highly unlikely that they would join their hands to eliminate Rajiv @ Raju.

(B) The scribe of the FIR was Khursheed Khan, though Raj Karan, the informant himself is a well educated person (M.A. pass) but instead of lodging the FIR, he asked Khursheed Khan to become scribe of the FIR. Khursheed Khan, who was never produced as a prosecution witness.

(C) After reading the FIR, the only role attributed to accused appellant Hariom that he has given a first shot to the deceased over leg. And after sustaining he ran inside about eighty to ninety paces from the original place of sustaining injury. Except this, accused appellant Hariom has not attributed any role in commission of the offence.

(D) There is no criminal history to the credit of accused appellant Hariom. He was on bail during trial. The bail order passed by the coordinate Bench of this Court when challenged before Apex Court by filing the S.L.P. of the informant, but the said S.L.P. was dismissed by the Hon'ble Apex Court after exchange of pleading.

(E) The 161 Cr.P.C. statement of one Kishan Lal, P.W.-2 the father of the deceased was recorded by the police after inordinate delay of 10-12 days on 05.05.2016. No justification coming forward for this delay, in which he has stated that 40-50 rounds were fired during this period, but the police has recovered only five used cartridges from the place of occurrence. After perusing the post mortem

report, there is embellishment in the testimony of witnesses of fact.

(F) No recovery of any weapon from the possession of the accused appellant Hariom. The recovery of weapon is shown from Manoj, Ranjit, Sanjeev and Anshu Arya, however, only three weapons were sent for F.S.L. examination. The five cartridges recovered were not matched with three so called weapons recovered.

[19] The argument advanced by Sri Manish Tewari, learned counsel appellant, appellant Anshu Arya in Crl. Appeal No. 9885 of 2022 are formulated herein below:-

(A) Out of six accused person, the role of actual firing were attributed to appellants-Hariom and Sanjeev. However, accused-appellant Kapil died during the trial and accused appellant-Manoj too has taken his last breath on 13.01.2023 during the pendency of the appeal, though, the said fact is yet to be verified by the concerned C.J.M.. The role attributed to appellants Anshu Arya and Ranjit along with two other accused persons/appellants, namely, Manoj and Kapil are of catching hold the deceased and thus it is impossible for him to suggest that he may cause any firearm injury to the deceased.

(B) Presence of P.W.-1 and P.W.-2 is extremely doubtful as the deceased was brought to the hospital and admitted by the driver of the Ambulance and the other injured Kamal was brought to the hospital by his brother Ravi.

(C) There was a fearced animosity in between appellants-Hariom and Sanjeev. The deceased and appellants Sanjeev & Hariom have got a strong motive to eliminate the deceased.

(D) The said injured Kamal was never produced as prosecution witness.

(E) No direct or indirect motive was assigned to appellant- Anshu Arya.

(F) All the criminal history instituted by either the first informant Raj Karan or his relative.

(G) The scribe of the FIR was never produced as prosecution witnesses.

[20] Per contra, Sri Sagir Ahmad, learned senior counsel assisted by Sri Vikas Tripathi, learned counsel for the informant as well as Sri Ghanshyam Kumar, learned AGA submitted that the opinion of the doctor is only suggestive based on his skill and experience which comes within the category of “may be” and the corroborative in nature and it is not a substantive peace of evidence. It is only a suggestive and cannot be replaced the ocular testimony of the eye witnesses.

[21] The bail order granted to appellant Hariom by the coordinate Bench of this Court in the year 2018, which was lateron confirmed by Hon’ble Apex Court while dismissing the S.L.P. would not come into the way.

[22] The finding recorded in the bail order would not going to replace the finding of the trial judge, who after having the wholistic approach, thrashing all the testimonies of different witnesses and the material on record come to a particular conclusion and condemning the accused-appellants.

There is a vast difference in the import of Section 439 Cr.P.C. and Section 389(1) Cr.P.C.. The cardinal principles of Criminal Jurisprudence persisting in our country that the accused is presumed to be innocent till he has guilty by the court of competent jurisdiction. Once the accused is held guilty the presumption of innocence

gets evaporated. In the same manner, if the accused is acquitted then the presumption of innocence gets further fortified.

It is further contended, that the argument advanced by the learned counsel for the appellants that they have venture into the threadbare analysis of the every evidence, tried to magnify the smallest and irrelevant discrepancies in the testimony and material to establish that the judgement and order is per-se bogus and palpably wrong. It is not expected from the appellant court to have microscopic analysis of smallest discrepancies in the testimonies of various PWs and appreciate the same while dealing and deciding the respective 389(1) Cr.P.C. applications. All the submission advanced by the learned counsel may hold good at the final stage of the appeal, but when we are focusing only upon sentence suspension application, all these fine arguments cannot be looked into. It would be rather dangerous to the interest of the appellants to venture in that arena, else it may counter productive.

[23] After the rival submissions advanced by the parties and appreciating the marathon arguments advanced by the counsel, the Court has perused the judgement impugned.

The offence is said to have been committed in three parts, though in the same transaction;

Firstly, appellants Sanjeev and Hariom were nurturing a bad breath and inimical relationship with the deceased Rajiv @ Raju on account of some service/appointment. Appellant Hariom was suspecting that the deceased Rajiv @ Raju was after his service and as such appellants Sanjeev and Hariom were nurturing inimical relation with him. They have got a strong motive to eliminate the deceased. More over, it is the appellant Hariom in order to kill the deceased fired upon him outside the road in front of marriage home for which the deceased has sustained serious injuries over his leg/thigh.

Secondly, after receiving the initial gunshot injury, Rajiv @ Raju (hence deceased) ran away towards marriage home, however, he was over powered by appellants, namey, Manoj, Kapil, Anshu Arya and Ranjit and thereafter appellant Sanjeev has open the fire upon the Rajiv @ Raju, deceased.

Thirdly, after visualizing the gunshot upon the Rajiv @ Raju, deceased, the first informant and his father ran towards the assailants but appellants, namely, Manoj and Kapil open indiscriminate fire upon them and in this transaction Kamal has sustained firearm injury.

[24] It is argued by the counsel that ante mortem injuries of the deceased Rajiv @ Raju, the seat of injury, the nature of injury, size of injury and the surrounding circumstance for committing the offence is most dare devil, ghastly and cold blooded way by the accused-appellants. Broadly speaking, the testimony of P.W.-1 and P.W.-2 supports the prosecution case, as they were eye witnesses of the incident. The surroundings were well lit and the witnesses of facts have got ample opportunity to identify them and the individual's role. There is no question of false implication or case of mistaken identity of the assailants. The FIR was lodged within two hours of the incident, ruling out any possibility of tutoring or embellishments. They know that the animosity with regard to the service is subsisting between them. In this charged moment, one cannot expect sane and cool and calculated behaviour by the informant

or the dependant/close relative of the deceased. It is rather impossible to chalk out the exact human behaviour in that a charged situation.

So far as, motive is concerned, it is clear from the very beginning that Sanjeev and Hariom were dead against the appointment of Rajiv @ Raju, deceased as *"Safai Karamchari"* in the Nagar Nigam, Bareilly and since then, the deceased has become, their eyesore. This was the cause of genesis of the present offence. More over, where there is eye witness account of the incident, whereby the witnesses of fact have identified the assailants in the light of marriage home and this is not a case of mistaken identity as mentioned above, then in that situation the factor of motive occupies the front seat have of considerable importance.

There is no extra ordinary or exceptional delay in lodging of the FIR as the same was lodged within two hours of the incident, the FIR was got registered by the scribe Khursheed Khan.

[25] After having the panoramic view of the issue and the testimonies of the prosecution witnesses, two persons, namely, Hariom and Sanjeev have actively participated in the process of eliminating the deceased, however, rest of the four accused persons/appellants, namely, Ranjit, Kapil, Manoj and Anshu Arya were active partners of the incident but they have been attributed the role of catching hold only; as they over powered the deceased & facilitated the assailant Sanjeev to give lethal blows over his person.

[26] Learned counsel for the appellants have laid much emphasis upon the post mortem report of the deceased and its dimension of the injuries and the testimonies of Dr. Vijay Pal Singh, P.W.-5. No doubt that out of six injuries, five injuries were of gunshot wound of entry ad-measuring 4 cm x 2 cm right side of the head, wound of entry; 4 cm x 1 cm on the right side below above the pelvic bone, a wound of entry 3 cm x 1 cm containing tattooing inside the injury no.3 and lastly a wound of entry 3 cm x 4 cm inside above the thigh. Interestingly, all the injuries contains a bullet inside it. On this, it has been sharply contended by learned counsel for the appellants that the prosecution story and the individual's role in commission of the offence, do not tally with each other. The Court is consciously deferring to adjudicate these fine arguments advanced by learned counsel for the appellants, else it would amount to deciding the appeal at admission stage itself, which is neither desirable nor it is in the interest of justice, rather it would be detrimental to the interest of the appellants, if any finding recorded against them. We are leaving these arguments wide open, to be argued at the time of final stage of the appeals.

[27] In paragraph 37.5 of the judgement, the learned trial judge after taking the aid of Section 149 IPC have clearly recorded his finding that after hearing the fire from appellant Hariom upon the deceased to kill him, the rest of accused persons/appellants, namely, Manoj, Ranjit, Kapil and Anshu Arya, who were present over the site and have actively participated, so as to achieved the target and appellants, Sanjeev and Hariom have accomplished their mission by giving fire upon the deceased in two different innings.

In paragraph 37.16 of the judgement have negated the submissions that the number of injuries sustained by the deceased is not in consonance with the

prosecution story. Even otherwise, if we start appreciating fineries and niceties of the arguments advanced by the learned counsel qua, number of injuries sustained by the deceased; seat & measurement of the injuries, weapon recovered from the appellants, report from the ballistic expert etc. etc.. In this regard it would amount to decide the appeal itself at the stage of Section 389(1) Cr.P.C., which is not desireable.

[28] Even otherwise, it is contended by the counsel for the informant that one cannot give a graphic description of the incident after giving its minutest detail of the incident, namely, number of injuries, weapon used by the individual assailants, recovery of weapons and the cartridges used or empty shell recovered from the site. Under these circumstances, it is not expected from the witnesses that they would count the number of fires, the empty cartridges recovered, the seat of injuries over the deceased. It is settled principles of law, that ocular testimony must be given a preference or edge over the opinion of the expert. There is a consistent stand that these two persons, namely, Hariom and Sanjeev have given a deadly blow over the deceased. It is also true that Hariom fired upon the deceased for making him virtually immobile. Somehow and other, he tried and managed himself to go inside the marriage home just to save himself, but in the midst he was over powered by the rest of the accused persons, paving the path for Sanjeev convenient, so that he may eliminate the deceased Rajiv @ Raju. The argument made by learned counsel for the appellant that initially it was the appellant Sanjeev alone, who are attributed the role of firing, lateron in the testimony of P.W.-1 and P.W.-2, the number of assailants were swelled from Sanjeev and another and lateron it was Sanjeev and Hariom. Fact remains, that the appellant Sanjeev was a common thread in all the three permutation and combination and thus, his name is common from the day one. So far as appellant-Hariom is concerned, he has been attributed the role of firing upon the deceased at first stage. But as mentioned above after, churning the deposition and other materials on record, the appellant Hariom was hold guilty by the trial judge. We are at loss to replace our finding, after negating the conclusion of learned trial judge at Section 389(1) Cr.P.C. stage.

[29] So far as criminal antecedent is concerned that the appellants have got a long criminal history and appellant Sanjeev is enjoying HS No. 61 A whereas the appellant Ranjeet is having HS No. 63A, appellant-Anshu Arya is having a criminal history of 10 cases. All these facts were brought to the knowledge in the form of written submission which were never confronted to the defence. It is further submitted that in most of criminal history, the author the FIR is either Raj Karan, the present informant or his relative. Under these circumstance, learned counsel for the appellants submits, that the false implication cannot be ruled out. We cannot take the judicial note of the fact that the accused-appellants were having a long criminal history to their credit, which were never confronted by the counsel for the defense so as to check its authenticity.

[30] Assessing the entirety of the circumstances mentioned above keeping in view the individual's role let the **appellant-Anshu Arya** and **appellant -Ranjit** be released on bail as the role attributed to them are of catching hold.

[31] Let **applicant/appellants-Anshu Arya & Ranjit** be released on bail in S.T.

Nos. 599 of 2016 (State of U.P. Vs. Sanjeev and 6 others) arising out of case crime no. 210 of 2016 under Section 147, 148, 149, 307, 302 IPC, P.S. Kotwali, District Bareilly, S.T. NO. 600 of 2016 (State Vs. Ranjeet) arising out of case crime no. 220 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly and in S.T. No. 603 of 2016 (State Vs. Anshu Arya) arising out of case crime no. P.S. Kotwali, District Bareilly, on their furnishing a personal bond and two sureties each (one of which of their close relatives) in the like amount to the satisfaction of the court concerned.

[32] On acceptance of bail bonds, the lower court shall transmit photostat copies thereof to this Court for being kept on record of this appeal.

[33] 100% of the fine awarded by the Court below under the impugned judgment shall be deposited by the applicant/appellant within a month from their release on bail.

[34] So far as the accused **appellants, Sanjeev S/o Prakash and Hariom S/o Late Om Prakash** and keeping in view, their active role in the commission of offence as they are main author of the offence, we are not inclined to suspend the sentence under Section 389(1) Cr.P.C., accordingly, their application under Section 389(1)Cr.P.C. stand **REJECTED.**

(Order on Memo of Appeal)

[1] Office is directed to prepare the paper book on priority basis.

[2] List this case for final hearing in the month of May 2024 before appropriate Court.

(2024) 3 ILRA 251
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.02.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

First Appeal From Order No. 699 of 2013

Smt. Uma Shashi Verma Memorial Charitable Trust Faizabad ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.K. Srivastava, Vinod Pandey

Counsel for the Respondent:
Pankaj Kumar Tiwari, Pradeep Kumar Shukla, Ravi Kishore Joshi

Civil Law - Indian Succession Act, 1925 – Sections 63, 68, 222, 248, 276 & 295 – Appeal against order dated 22.05.2013 rejecting probate application for Will dated 01.01.1996 – Held, trial court erred in rejecting probate due to minor contradictions in one attesting witness's St.ment – Two attesting witnesses duly proved execution and attestation of holographic Will as per Sections 63 and 68 – No requirement for all witnesses to sign simultaneously – Holographic Will, undisputed in writing and signature, carries strong presumption of validity – No suspicious circumstances established – Impugned order set aside, probate granted to appellant trust for purposes specified in Will. (Para 7-17)

Appeal allowed.

List of Cases Cited:

1. Joyce Primrose Prestor Vs Vera Marie Vas, (1996) 9 SCC 324

2. Janki Narayan Bhoir Vs Narayan Namdeo Kadam, AIR 2003 SC 761

3. Yumnam Ongbi Tampha Ibema Devi Vs Yumnam Joykumar Singh, (2009) 4 SCC 780

4. Ajit Chandra Majumdar Vs Akhil Chandra Majumdar, AIR 1960 Cal 551

5. H. Venkatachala Iyengar Vs B.N. Thimmajamma, AIR 1959 SC 443

6. Sridevi Vs Jayaraja Shetty, (2005) 2 SCC 784

7. Niranjan Umeshchandra Joshi Vs Mrudula Jyoti Rao, (2006) 13 SCC 433

8. Pentakota Satyanarayana Vs Pentakota Seetharatnam, (2005) 8 SCC 67

9. B. Venkataram Vs B. Venkatesh, (2015) 16 SCC 432

10. Adivekka Vs Hanamavva Kom Venkatesh, (2007) 7 SCC 91

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

1. Heard Sri Rakesh Kr. Srivastava, learned counsel for the appellant and Sri Pradeep Kumar Shukla, learned counsel for respondent No.7. No one has appeared on behalf of the other respondents, despite service of notice.

2. The present appeal was filed against the order dated 22.5.2013 passed by Additional District Judge-I, Court No. 1, Faizabad in Misc. Non Related Case No. 17 of 2000.

3. The crux of the matter is that one Dr. Ram Nath Verma, after death of his wife Smt. Uma Shashi Verma, executed a trust deed dated 19.12.1995, creating a trust in the name of his wife viz. Smt. Uma Shashi Verma Memorial Charitable Trust, Faizabad. In the said trust deed, it was also mentioned that he would execute a Will for the administration regarding the trust. The above Dr. Ram Nath Verma died on 18.10.1999. Thereafter, an application u/s 276 of Indian Succession Act, 1925 was filed by the appellant-trust through its Chairman, Dr. Brijendra Kumar Saxena @ Basantji for grant of probate of Will dated 9.9.1999 claimed to be executed by Dr. Ram Nath Verma. That application was contested by respondents No. 2, 3, 4 and 5, who filed objections regarding the Will dated 9.9.1999. Therefore, that being a contentious case, the proceeding was continued u/s 295 of Indian Succession Act, in the form of regular suit in accordance with the provisions of the C.P.C. During that proceeding, respondent No.6, being the nephew of Dr. Ram Nath, also filed an application, mentioning therein that the Will dated 9.9.1999 was forged and the correct Will is already lying in the locker of Late Dr. Ram Nath Verma. Therefore, learned District Judge by order dated 9.8.2002 directed the bank to open the locker of Late Dr. Ram Nath Verma and produce the Will, lying therein. In pursuance of the order dated 9.8.2002, the Will dated 1.1.1996 was produced before the court. As the Will dated 1.1.1996 was not disputed by any of the parties, therefore, an amendment was made in the probate application, by the appellant and in place of Will dated 9.9.1999, the probate was sought regarding the Will dated 1.1.1996.

4. Except respondent No.1, no one filed any objection to the Will dated 1.1.1996. However, respondent No.2 filed an application (Paper No. 38-Ga) wherein though he did not dispute the Will dated 1.1.1996, he contended that the Will dated 9.9.1999, giving certain benefit to him, is subsequent to the Will dated 1.1.1996. Therefore, the probate of the Will dated 9.9.1999 should be granted. In support of his case, the appellant had produced three witnesses of the Will dated 1.1.1996, namely, Ram Kishore Jaiswal (PW-2), Khushi Ram Verma (PW-3) and R.K. Shukla (PW-4). One Indrasen, who was

power of attorney holder of the Chairman of the appellant trust, was examined as PW-1 and Ram Ratan Verma, who was a family member of Late Dr. Ram Nath Verma was also produced as PW-5. None of the contesting parties have produced any witness in support of their respective Wills. After considering the evidence on record, the learned District Judge, by order dated 22.5.2013, rejected the probate petition of the appellant. Feeling aggrieved by the said order, the present appeal has been filed.

5. Contention of learned counsel for the appellant is that the court below rejected his probate application merely on the ground that there is minor contradiction in the statement of attesting witness Ram Kishore Jaiswal (one of the attesting witnesses) who initially filed the probate petition on behalf of appellant as his counsel. It is further submitted that other witnesses, namely, Khushi Ram Verma and R.K. Shukla, duly proved the Will dated 1.1.1996 as per Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. It is also submitted that the Will dated 1.1.1996, being a hand written Will of Late Dr. Ram Nath Verma, which is termed as Holographic Will, has more evidentiary value if there is no dispute about the signature and writing of the executor. In the present case, none of the parties has disputed the aforesaid facts. In support of his contention, learned counsel for the appellant has also relied upon the judgement of the Apex Court in the case of ***Joyce Primrose Prestor (Mrs.) (Nee Vas) vs. Vera Marie Vas (Ms) and others; (1996) 9 SCC 324.*** In that judgement the Apex Court observed that the Holograph Will presumption is of more value than the ordinary Will, if the writing of the Will and the signature of the testator are admitted. It is further submitted that the Will dated 1.1.1996 was produced before the court in pursuance of the order of the District Judge from the locker of Late Dr. Ram Nath Verma and that Will was also having reference in the trust deed itself, therefore, that Will cannot be disputed and there is apparent error in the impugned order.

6. Per contra, though the learned counsel for respondent No.7 has not opposed the Will and actually admitted the Will dated 1.1.1996, but submitted that as per the trust deed as well as the Will dated 1.1.1996, there is specific condition that the present Chairman of the appellant trust Will induct any of the family members of Late Dr. Ram Nath Verma as trustee, therefore, even if a probate is granted that should be for the limited purpose as required u/s 248 of Indian Succession Act; for the purpose specified in the Will itself.

7. After hearing the parties and on perusal of record, this fact is clear that none of the parties has disputed the writing and signature of Late Dr. Ram Nath Verma over the Will dated 1.1.1996. However, during the proceeding before the District Judge, Faizabad, the statement of one of the attesting witnesses of the Will, namely, Ram Kishore Jaiswal, has some minor contradictions. So far as other witnesses of the Will, namely, Khushi Ram Verma and R.K. Shukla, are concerned, they clearly stated that the above Will was written and signed by Late Dr. Ram Nath Verma and this fact was acknowledged by Late Dr. Ram Nath Verma in their presence and also in presence of Late Dr. Ram Nath Verma they also witnessed the Will. In the impugned judgement, learned District Judge also observed that the witness of the Will dated 1.1.1996 Sri Ram Kishore Jaiswal had admitted that other witnesses had not signed before him. The main thrust

of the District Judge while rejecting the probate application of the appellant, is the contradiction in the statement of Ram Kishore Jaiswal, one of the witnesses of the Will. From the perusal of the statement of attesting witness Ram Kishore Jaiswal, it appears that contradictions are not such which could create suspicious circumstances which are required to be removed by the propounder.

8. Section 63 of the Indian Succession Act provides the execution of unprivileged Wills requires that the testator shall sign or shall affix his mark on the Will so as to give effect to the writing in the Will, and the Will shall be attested by two or more witnesses. However, it is also provided in Section 63(c) of the Indian Succession Act that it shall not be necessary that more than one witness Will be present at the same time. For reference, Section 63 of the Indian Succession Act, 1925 is being quoted below:-

"63. Execution of unprivileged Wills.- *Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:?*

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

9. Therefore, from the perusal of Section 63 of the Indian Succession Act, it is clear that for the signing of the Will by the witnesses, it is not necessary that all the witnesses should be present at the same time. Therefore, view of the District Judge that one of the witnesses Ram Kishore Jaiswal admitted that the other persons had not signed before him, is not a legal requirement of Section 63 of Indian Succession Act. Even Section 68 of the Evidence Act provides that even if the Will is attested by two or more witnesses, it is not necessary for all the attesting witnesses to prove the execution of the Will and same can be proved by calling only one attesting witness. For reference Section 68 of Evidence Act is quoted as under:-

"68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of

1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

10. From the reading of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, it is clear that requirement of the law is that at least one attesting witness to come before the court to prove due execution and attestation of Will. It is also clear from Section 63 of the Indian Succession Act that even if the attesting witness has not seen the testator signing the Will, but if he received the personal acknowledgement from the testator about his signature on the Will, then it Will be sufficient for attesting witness to sign the Will in the presence of the testator.

11. Hon'ble Apex Court in the case of ***Janki Narayan Bhoir vs. Narayan Namdeo Kadam; AIR 2003 SC 761***, while laying down guidelines for proof of execution of the Will, in paragraphs No. 10 and 11, observed as underp:-

"10. *Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness*

examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by ?other evidence? as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the

jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will."

12. Similarly, in the case of ***Yumnam Ongbi Tampha Ibema Devi vs. Uumnam Joykumar Singh and others; (2009) 4 SCC 780***, Hon'ble Apex Court observed that attesting witness should speak not only about testator's signature to the Will but also that each of the witnesses had signed the Will in presence of testator. Paragraphs No. 12 and 13 of the aforesaid judgement are being quoted as under:-

"12. The attestation of the will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested (sic attesting) witness should put his signature on the will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator."

13. In the present case out of four attesting witnesses of the Will dated 1.1.1996, two witnesses, namely, R.K. Shukla and Khushi Ram Verma, clearly stated that the Will had been signed by the testator Late Dr. Ram Nath Verma in their presence and the Will was read over to them and thereafter they have also signed. Therefore, execution of the Will dated 1.1.1996 was duly proved by the witnesses and issuance of probate cannot be denied only on the ground that the third witness, namely, Ram Kishore Jaiswal, had some contradiction in his statement.

14. Once, it is undisputed that the Will was written and signed by the testator Late Dr. Ram Nath Verma and two attesting witnesses very clearly proved that the Will dated 1.1.1996 was signed in their presence and subsequently, they had also signed the same as attesting witnesses, is sufficient to prove the execution of the Will dated 1.1.1996. Hon'ble Apex Court in ***Joyce Primrose Prestor (supra)*** has observed that once writing and signature of testator in holograph Will is admitted then it Will be deemed to be properly executed. Paragraphs No. 15 & 16 of the judgement is quoted as underp:-

"15. While the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more ? a greater presumption. Ex. P-1 is a "holograph Will". It is one which is wholly in the handwriting of the testator. The Calcutta High Court in Ajit Chandra Majumdar v. Akhil Chandra Majumdar [AIR 1960 Cal 551 : 64 CWN 576] (AIR Cal at p. 552) stated about such a Will, thus:

"The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and

firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone appears to either a typed script or to a script written by somebody else."

(emphasis supplied)

The writing of the Will and signature of the testator are admitted. There is also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstance appears on the face of the document, Ex. P-1. The Will appears to be moderate and rational. Viewed from the above angle, there is a great presumption ? even bordering on actual proof of the due execution and attestation of the Will.

16. Defendants have urged a few suspicious circumstances and have alleged that the Will was executed by the undue influence exercised by the plaintiff. Notwithstanding the high degree of presumption available in the case of a holograph Will, which on the face of it, appears to be properly and duly executed and attested, have the defendants let in cogent evidence to offset the said presumption and/or have succeeded in proving the special plea set up by them, falls for our consideration. In our considered view, the answer can be only in the negative."

15. So far as the right to receive probate of the Will dated 1.1.1996 is concerned, it is not disputed that in the trust deed dated 19.12.1995, Basantji was appointed as Chairman/Caretaker Trustee and even in the Will dated 1.1.1996, it was clearly mentioned that Basantji, being the Caretaker Trustee would enforce the Will by appointing the trustee from the family of Late Dr. Ram Nath Verma. Therefore, Basantji being Caretaker Trustee as well as Chairman of the trust, has right to seek probate of the Will dated 1.1.1996 for the purpose, specified in the Will dated 1.1.1996 as per Section 248 read with Section 222 of the Indian Succession Act.

16. In view of the above, this Court is of the view that the order dated 22.5.2013 passed by Additional District Judge-I, Court No. 1, Faizabad in Misc. Non-related Case No. 17 of 2000 is erroneous and, therefore, deserves to be set aside.

17. Accordingly, the impugned order dated 22.5.2013 is set aside with further direction to Additional District Judge-I, Court No. 1, Faizabad to issue probate in favour of the appellant as per Sections 248 read with Section 222 of the Indian Succession Act for the purpose specified in the Will dated 1.1.1996.

18. With the aforesaid observation, the appeal is **allowed.**

19. The office is directed to remit the record of the court below.

(2024) 3 ILRA 258
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARRAF J.

First Appeal No. 30 of 2024

Pankaj Rastogi ...Appellant
Versus
Mohd. Sazid & Anr. ...Respondent

Counsel for the Appellant:
Sri Mohd. Arif

Counsel for the Respondent:

A. Civil Law – Civil Procedure Code, 1908 – Section 151 & O. VII R. 11 – Commercial Courts Act, 2015 – S. 12-A – Commercial dispute – Settlement through Pre-litigation mediation – Significance – Trial Court rejected the application for urgent interim relief holding it imaginary and further on the ground that mandatory provision of pre-litigation mediation could not have been bypassed – Validity challenged – Earlier also the plaintiff filed a suit without seeking any urgent interim reliefs and subsequently withdrew it – Effect – Held, mandatory nature of Section 12-A of the Act underscores the legislative intent to promote alternative dispute resolution mechanisms, particularly mediation, as a preferred method for resolving commercial disputes – The trial court has correctly examined the position and held that mandatory provision of Section 12-A of the Act should have been complied with by the appellant. (Para 9 and 15)

Appeal disposed of. (E-1)

List of cases cited :-

1. M/s Odisha Slurry Pipeline Infrastructure Ltd. & anr. Vs IDBI Bank Ltd. & ors.; 2022 SCC OnLine Cal 3951

2. Yamini Manohar Vs T K D Keerthi; 2022 SCC OnLine Del 2653

3. Yamini Manohar Vs T K D Keerthi; 2023 SCC OnLine SC 1382

4. Patil Automation Pvt. Ltd. & ors.Vs Rakheja Engineers Pvt. Ltd.; (2022) 10 SCC 1

(Delivered by Hon'ble Shekhar B. Sarraf, J.)

1. This is a first appeal against an order dated October 31, 2023, wherein the application filed by the respondents/defendants under Order VII Rule 11 read with Section 151 of the Civil Procedure Code, 1908 in Original Suit No.15 of 2023 was allowed and the plaint filed by the appellant/plaintiff was rejected.

2. Upon perusal of the impugned order, it appears that the trial court enquired into the earlier factual matrix of the case and indicated that earlier a suit being Original Suit No.4 of 2022 was filed by the appellant without any application made for any urgent interim relief. Subsequently, the applicant sought to withdraw the said suit by way of making an application. The applicant also sought liberty to file a fresh suit. The said suit was allowed to be withdrawn vide order dated January 3, 2023.

3. Thereafter, second suit being Suit No.15 of 2023 was filed by the appellant along with an application seeking urgent interim relief. It was noted by the trial court that in the first suit, no prayer for grant of urgent interim relief was made by the appellant. Therefore, the trial court concluded that the prayer made for urgent interim relief is "imaginary" and Section 12A of the Commercial Courts Act, 2015 (hereinafter referred to as the 'Act'), which mandates pre-litigation mediation, could not have been bypassed.

4. Sri Ashish Kumar Srivastava, learned counsel appearing on behalf of the appellant has placed reliance on the judgment of the Calcutta High Court in **M/s Odisha Slurry Pipeline Infrastructure Ltd. and Another v. IDBI Bank Ltd. and Others**, reported in, **2022 SCC OnLine Cal 3951,** the Delhi High Court in **Yamini Manohar v. T K D Keerthi,** reported in **2022 SCC OnLine Del 2653 which was affirmed by the Supreme Court in Yamini Manohar v. T K D Keerthi,** reported in, **2023 SCC OnLine SC 1382** to buttress his argument that in a trademark

suit, there is always an urgency. Accordingly, the provision of Section 12A of the Act was not needed to be complied with by the appellant.

5. Per contra, Sri Mohd. Arif, learned counsel appearing on behalf of the respondents has submitted that the aforesaid judgments relied upon by the learned counsel appearing on behalf of the appellant would not apply to the instant case, as the factual matrix in the instant case is different from those cases insofar is it clear that there was no urgency demonstrated by the appellant in the instant case. This is further evident from the fact that the appellant filed the first suit without any application seeking urgent interim relief. He further submitted that the trial court has, in detail, examined the facts and only thereafter concluded that the urgency contemplated in the present plaint is imaginary in nature.

Analysis and Conclusion

6. I have heard the learned counsel appearing on behalf of the parties.

7. Before delving into the controversy in the instant case, I feel it pertinent to extract Section 12A of the Act herein as under:

"12A. Pre-litigation Mediation and Settlement.—*(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-litigation mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.*

(2) For the purposes of pre-litigation mediation, the Central Government may, by notification, authorise—

(i) the Authority, constituted under the Legal Services Authorities Act, 1987 (39 of 1987); or

(ii) a mediation service provider as defined under clause (m) of Section 3 of the Mediation Act, 2023.

(3) Notwithstanding anything contained in the Legal Services Authorities Act, 1987 (39 of 1987), the Authority or mediation service provider authorised by the Central Government under sub-section (2) shall complete the process of mediation within a period of one hundred and twenty days from the date of application made by the plaintiff under sub-section (1):

Provided that the period of mediation may be extended for a further period of sixty days with the consent of the parties:

Provided further that, the period during which the parties spent for pre-litigation mediation shall not be computed for the purposes of limitation under the Limitation Act, 1963 (36 of 1963).

(4) If the parties to the commercial dispute arrive at a settlement, the same shall be reduced into writing and shall be signed by the parties and the mediator.

(5) The mediated settlement agreement arrived at under this section shall be dealt with in accordance with the provisions of Sections 27 and 28 of the Mediation Act, 2023.]"

8. In the landscape of the Indian commercial laws, Section 12A of the Act stands as a pivotal provision, delineating a framework for pre-institution mediation and settlement of commercial disputes. This provisions places emphasis on mediation as a preferred method to resolve commercial disputes before they escalate

into protracted legal battles. The significance of Section 12A of the Act lies not only in its attempt to decongest the overburdened judicial system but also in its promotion of efficiency, cost-effectiveness, and party autonomy in dispute resolution. India's courts are inundated with a staggering backlog of cases, including commercial disputes, which often leads to significant delays in the dispensation of justice. By mandating pre-litigation mechanism, Section 12A of the Act acts as a gatekeeper, diverting disputes away from the already congested court dockets and towards a more expeditious resolution process. This not only relieves pressure on the judiciary but also ensures timely redressal for the parties involved, thereby enhancing the overall efficiency of the legal system.

9. Moreover, the mandatory nature of Section 12A of the Act underscores the legislative intent to promote alternative dispute resolution mechanisms, particularly mediation, as a preferred method for resolving commercial disputes. In doing so, it reflects a broader global trend towards embracing consensual and collaborative approaches to conflict resolution, as opposed to the adversarial nature of traditional litigation. By making pre-litigation mediation compulsory, Section 12A of the Act institutionalizes the shift towards a more mediation-friendly legal framework, thereby fostering a culture of dispute resolution that prioritizes amicable settlement over prolonged courtroom battles.

10. In **Patil Automation Pvt. Ltd. and Others v. Rakheja Engineers Pvt. Ltd.,** reported in**, (2022) 10 SCC 1**, the Supreme Court expounded on the significance of Section 12A of the Act, and its mandatory nature. Relevant paragraph of the aforesaid judgment is delineated below:

"99.1.The Act did not originally contain Section 12-A. It is by amendment in the year 2018 that Section 12-A was inserted. The Statement of Objects and Reasons are explicit that Section 12-A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear.

99.2. It is an undeniable reality that courts in India are reeling under an extraordinary docket explosion. Mediation, as an alternative dispute mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which amply illustrate this principle, are Section 80CPC and Section 69 of the Partnership Act.

99.3. The language used in Section 12-A, which includes the word "shall", certainly, goes a long way to assist the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage counsel during mediation. The expenses, as far as the fee payable to the

mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained mediator can work wonders.

99.4. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12-A, a mandatory interpretation, would result in defeating the object and intention of Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgment of the lawgiver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the court, must, necessarily, resort to it. Section 12-A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties."

11. The Supreme Court in **Patil Automation (supra)**, further reiterated that non-compliance with Section 12A of the Act would lead to rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908. Relevant paragraphs are extracted herein below:

"92. Order 7 Rule 11 declares that the plaint can be rejected on 6 grounds. They include failure to disclose the cause of action, and where the suit appears from the statement in the plaint to be barred. We are concerned in these cases with the latter. Order 7 Rule 12 provides that when a plaint is rejected, an order to that effect with reasons must be recorded. Order 7 Rule 13 provides that rejection of the plaint mentioned in Order 7 Rule 11 does not by itself preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Order 7 deals with various aspects about what is to be pleaded in a plaint, the documents that should accompany and other details. Order 4 Rule 1 provides that a suit is instituted by presentation of the plaint to the court or such officer as the court appoints. By virtue of Order 4 Rule 1(3), a plaint is to be deemed as duly instituted only when it complies with the requirements under Order 6 and Order 7. Order 5 Rule 1 declares that when a suit has been duly instituted, a summon may be issued to the defendant to answer the claim on a date specified therein. There are other details in the order with which we are not to be detained. We have referred to these rules to prepare the stage for considering the question as to whether the power under Order 7 Rule 11 is to be exercised only on an application by the defendant and the stage at which it can be exercised.

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94.3. Order 7 Rule 11 does not provide that the court is to discharge its duty of rejecting the plaint only on an application. Order 7 Rule 11 is, in fact, silent about any such requirement. Since summon is to be issued in a duly instituted suit, in a case where the plaint is barred under Order 7 Rule 11(d), the stage begins at that time when the court can reject the plaint under Order 7 Rule 11. No doubt it would take a clear case where the court is satisfied. The Court has to hear the plaintiff before it invokes its power besides giving reasons under Order 7 Rule 12. In a clear case, where on allegations in the suit, it is found that the suit is barred by any law, as would be the case, where the plaintiff in a

suit under the Act does not plead circumstances to take his case out of the requirement of Section 12-A, the plaint should be rejected without issuing summons. Undoubtedly, on issuing summons it will be always open to the defendant to make an application as well under Order 7 Rule 11. In other words, the power under Order 7 Rule 11 is available to the court to be exercised suo motu. (See in this regard, the judgment of this Court in Madiraju Venkata Ramana Raju [Madiraju Venkata Ramana Raju v. Peddireddigari Ramachandra Reddy, (2018) 14 SCC 1] .)"

12. One may also make reference to the judgment of the Calcutta High Court in ***Odisha Slurry Pipeline (supra)***, wherein the Court had outlined that in absence of a prayer for urgent interim reliefs, a suit cannot be instituted without mandatory compliance of Section 12A of the Act. The Calcutta High Court further stated that merely an application for urgent interim reliefs would not be sufficient, and if the court comes to a finding that the urgent interim reliefs contemplated are not justified, it may reject the plaint. Relevant paragraphs have been extracted below:

"The law as it stands today is that the suit which does not contemplate any urgent interim reliefs cannot be instituted unless the plaintiff exhausts the mandatory remedy provided under Section 12A of the Act; however the position would be different when the suit contemplates an urgent interim relief. The language employed in Section 12A of the Act does not conceive the situation that even if the urgent interim reliefs are prayed in the suit instituted by the plaintiff, the leave under Order 12A of the said Act is required from the Court. What can be reasonably deciphered from the said provision that if the suit contemplates any urgent interim relief it served the purposes and cannot be said to be bad defective and/or invalid as the pre- institution mediation has not been exhausted. Does it mean that mere seeking an urgent interim relief suffice the purpose or the Court may apply its mind to find out whether their exits a circumstances for such urgent interim relief? The aforesaid section is silent in this regard simply because one of the reliefs claimed in the plaint uses the expression 'urgent interim reliefs' is sufficient enough to confirm the legislative mandate even if such urgent interim reliefs appears to be farcical and intended to avoid the rigour of Section 12A of the Act. The urgent interim relief is an expression of wide import and difficult to give exhaustive meaning. It varies from a case to a case and, therefore, there is no impediment on the part of the Court at the time of presentation the plaint to apply to its mind to find out whether it involves any urgent interim reliefs. Any other Course adopted by the Court would give a free handle to an unscrupulous plaintiff to override the mandatory provision of Section 12A by incorporating a relief which cannot be said to be an urgent interim reliefs nor the facts and circumstances or the cause of action pleaded in the plaint entitles the plaintiff to such relief on a bare reading of the averments made in the plaint. Often an application for urgent interim reliefs are filed in the suit and ultimately if the Court may not find any justification in passing such interim relief yet it would sub-serve the motive and the purpose of avoiding the pre-institution mediation as mandated under Section 12A of the Code. We do not find any restriction or a fetter in the language employed in the aforesaid section that the Court at the time of presentation of the plaint or even thereafter finds that it does not involve an

urgent interim relief to reject the plaint and direct the plaintiff to exhaust the remedy under Section 12A of the Act.

However, the Division Bench of the Delhi High Court in case of Chandra Kishore Chaurasia Vs. R. A. Perfumery Works Pvt. reported in FAO (COMM) 128 of 2021 decided on 27.10.2022 interpreted the expression "contemplated any urgent interim reliefs" used in Section 12A of the Act is relatable to a qualification of the category of the suit and determinant upon the frame of the plaint and the reliefs sought therein."

13. The Delhi High Court in the case of ***Yamini Manohar (supra)***, which arose from a suit seeking permanent injunction restraining infringement of trademark and passing off, had come to a finding that the plaint contained averments with regard to urgency and upheld the order of the commercial court with regard to the conclusion that the suit filed by the plaintiff contemplated grant of urgent relief. This matter went up to the Supreme Court in ***T K D Keerthi's case (supra)***, wherein the Supreme Court laid down the following ratio:

"7. We are of the opinion that when a plaint is filed under the CC Act, with a prayer for an urgent interim relief, the commercial court should examine the nature and the subject matter of the suit, the cause of action, and the prayer for interim relief. The prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12A of the CC Act. The facts and circumstances of the case have to be considered holistically from the standpoint of the plaintiff. Non-grant of interim relief at the ad-interim stage, when the plaint is taken up for registration/admission and examination, will not justify dismissal of the commercial suit under Order VII, Rule 11 of the Code; at times, interim relief is granted after issuance of notice. Nor can the suit be dismissed under Order VII, Rule 11 of the Code, because the interim relief, post the arguments, is denied on merits and on examination of the three principles, namely, (i) prima facie case, (ii) irreparable harm and injury, and (iii) balance of convenience. The fact that the court issued notice and/or granted interim stay may indicate that the court is inclined to entertain the plaint.

8. Having stated so, it is difficult to agree with the proposition that the plaintiff has the absolute choice and right to paralyze Section 12A of the CC Act by making a prayer for urgent interim relief. Camouflage and guise to bypass the statutory mandate of pre-litigation mediation should be checked when deception and falsity is apparent or established. The proposition that the commercial courts do have a role, albeit a limited one, should be accepted, otherwise it would be up to the plaintiff alone to decide whether to resort to the procedure under Section 12A of the CC Act. An 'absolute and unfettered right' approach is not justified if the pre-institution mediation under Section 12A of the CC Act is mandatory, as held by this Court in Patil Automation Private Limited (supra). The words 'contemplate any urgent interim relief' in Section 12A(1) of the CC Act, with reference to the suit, should be read as conferring power on the court to be satisfied. They suggest that the suit must "contemplate", which means the plaint, documents and facts should show and indicate the need for an urgent interim relief. This is the precise and limited exercise that the commercial courts will undertake, the contours of which have been

explained in the earlier paragraph(s). This will be sufficient to keep in check and ensure that the legislative object/intent behind the enactment of section 12A of the CC Act is not defeated."

14. Based on the aforementioned judicial pronouncements, it can be conclusively inferred that the invocation of urgent relief should not serve as a pretext to circumvent or evade Section 12A of the Act. It is imperative that the factual matrix and contextual intricacies of each case are comprehensively assessed from the plaintiff's perspective. The Supreme Court, in its wisdom, has expounded that any attempt to cloak or disguise the true intent behind seeking such relief, with the intention of sidestepping the statutory obligation of pre-litigation mediation, warrants scrutiny, particularly in instances where duplicity and falsehood are manifest or substantiated.

15. In the instant case, it is clear that the plaintiff did not show any urgency as he had earlier filed a suit without seeking any urgent interim reliefs and then withdrew the same. Subsequently, he filed a suit along with an application for seeking ex parte urgent interim relief. Under these circumstances, I am of the view that the trial court has correctly examined the position and held that mandatory provision of Section 12(A) of the Act should have been complied with by the appellant.

16. Having considered the facts and circumstances, I am, however, of the view that for the ends of justice the order passed by the trial court rejecting the plaint may be set aside and modified with a direction upon the appellant to approach the mediation centre as per Section 12(A) of the Act.

17. Accordingly, the impugned order dated October 31, 2023, rejecting the plaint of the appellant is set aside and the appellant/plaintiff is directed to approach the mediation centre within a period of seven days from date. After completion of the above mediation process, the plaint should be presented in accordance with law.

18. With the aforesaid directions, the instant appeal is disposed of.

(2024) 3 ILRA 265
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 54 of 2024

Fagoo Ram & Ors. ...Appellants
Versus
Ram Laut (Died) & Ors. ...Respondents

Counsel for the Appellant:
Prabhat Kumar, Rajendra Prasad Verma

Counsel for the Respondent:
Mohan Singh

A. Civil Law – Civil Procedure Code, 1908 – Section 100 – Substantial question of law – UP Zamindari Abolition and Land Reforms Act, 1950 – Ss. 122-C and 123 – Settlement of land – Condition to be fulfilled for claiming right u/s 123 – Consequence of failure – Held, first a person would have to assert that he comes under the categories provided under sub-section (3) of Section 122-C and the land in question is of categories as provided under sub-section (2) of Section 122-C and he has built a house on the same – Further held, the plea taken by the appellants is not sufficient for claiming the

benefit of Section 123 (1) of the Act of 1950 – The appellants had not constructed any house on land in dispute, prior to 30th June, 1985 or even thereafter, therefore he is not entitled to hold the land in dispute as owner under Section 123 (1) of the Act of 1950 – No substantial question of law arises in this case to be adjudicated between the parties. (Para 12, 13 and 19)

B. Civil Law – Civil Procedure Code, 1908 – Section 100 – Substantial question of law – Meaning – Any question of law which may affect the final decision in a case is substantial question of law between the parties – S. N. Goyal's case relied upon – 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties – A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this court. (Para 16 and 17)

Appeal dismissed. (E-1)

List of cases cited :-

1. Satya Veer & anr.Vs St. of U.P. & ors.; 2015 (4) ADJ 676

2. St. Bank of India & ors.Vs S.N. Goyal; 2008 (8) SCC 92

3. Suresh Lataruji Ramteke Vs Sau. Sumanbai Pandurang Petkar; JT 2003 (9) SC 481

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

1. Heard Shri Prabhat Kumar, learned counsel for the appellants and Shri Mohan Singh, learned counsel for the respondent no.3.

2. This second appeal has been filed for setting aside the judgment and decree dated 25.01.2024 passed by the First Appellate Court i.e.Additional District Judge, Court No.1, Sultanpur in Civil Appeal No.182 of 2001 (Fagoo Ram And Others vs. Ram Laut and Others) and the judgement and decree dated 22.10.2011 passed by Trial Court i.e. Civil Judge (J.D.), Kadipur, Sultanpur in Original Suit No.337 of 1989 (Fagoo Ram and Others Vs. Ram Laut and Others).

3. Learned counsel for the appellants submits that the father of the appellants had filed a suit for permanent injunction and declaration of right on some part of Gata No.105 as an appurtenant land to his house, which is situated on Gata No.106, on the ground that the appellants are in possession of the land in dispute since prior to the promulgation of the U.P. Zamindari Abolition and Land Reforms Act- 1950 (here-in-after referred as the Act of 1950), therefore it stands settled with them under Section 9 of the said Act. He further submits that an alternative plea was also taken that even if the possession of the appellants is not found since prior to promulgation of the Act of 1950, since the appellants are in possession on the land in dispute, since before 1985, therefore the same stands settled with the appellants under Section 123(1) of the Act of 1950. But the learned Trial Court as well as the Appellate Court have dismissed the claim of the appellants on insufficient ground and without considering the evidence adduced before the Trial Court rightly and appropriately. Learned counsel for the appellants also submits that the Appellate Court has failed to record any finding in

regard to the possession of the appellants on the land in dispute and the finding recorded in regard to Section 123 (1) of the Act of 1950 is not tenable, therefore the appellants are before this Court.

4. On the other hand, learned counsel for the Gaon Sabha submits that judgment and order passed by the Trial Court as well as Appellate Court have rightly been passed in accordance with law after considering the pleadings of the parties and the evidence adduced before the Trial Court as they have failed to prove their possession on the land in dispute. He further submits that the benefit of Section 123 (1) of the Act of 1950 is also not available to the appellants because the house of the appellants has not been found on the land in dispute and the benefit of the same is available only in case the house has been built on any such land. Thus the submission is that the appeal is misconceived and liable to be dismissed.

5. Having considered the submissions of learned counsel for the parties, I have perused the documents placed on record of this second appeal.

6. The Original Suit No.337 of 1989 was filed by the predecessor-in-interest of the appellants for permanent injunction and declaration on the ground that the land in dispute, which is the part of Gata No.105 and which is on the eastern side of the house of the appellants which is on Gata No.106, is in possession of the appellants and they are using it since prior to the promulgation of the Act of 1950, therefore it stands settled with him under Section 9 of the Said Act. The alternative plea of Settlement of land in dispute with the appellants under Section 123 (1) of the Act of 1950 was also taken.

7. The learned Trial Court after affording opportunity of evidence and considering the pleadings and evidence adduced before it, has recorded a categorical finding that the appellants have failed to prove the construction of the house of the appellants prior to promulgation of Act of 1950. Thus, they have failed to prove the possession on the land in dispute. Even otherwise on the western and northern side of the house of the appellants, there is sufficient land for his use. Accordingly dismissed the suit. The Appellate court also, considering the pleadings, evidence and material on record, found that the appellants have failed to prove their case and dismissed the appeal holding that the learned trial court was right and justified in his view and approach and his findings/ order is perfectly valid/ legal and does not call for any interference, therefore the submission of learned counsel for the appellants in regard to possession is misconceived and not tenable.

8. The alternative plea of settlement of land in dispute under Section 123 (1) of the Act 1950, taken by the appellants, was also rejected by trial court on the ground that house of the appellants is not existing on the land in dispute, which is the precondition for settlement under Section 123 (1). The plea of the appellants has also been considered by the Appellate Court and dismissed on the ground that Section 123 (1) lays down the provision as to settlement of certain house sites with existing owner thereof and order of preference for allotment of such land for housing site for members of schedules castes, agricultural labourer etc. shall be observed in the light of Section 122-C (3) of the Act of 1950, but plaintiff did not file any paper pertaining to the allotment of the disputed land by the competent authority. The submission of

learned counsel for the appellants in this regard is that there is no requirement of allotment of the site for settlement under Section 123 (1) of the Act of 1950, therefore the question arises as to whether it was a precondition or not and if it was not precondition as to whether any substantial question of law arises in this case for adjudication in view of pleadings and material on record.

9. Section 123 (1) as renumbered by U.P. Act No.34 of 1974 is extracted here-in-below:-

"[(1)] Without prejudice to the provisions of Section 9, where any person referred to in sub-section (3) of Section 122-C has built a house on any land referred to in subsection (2) of that section, not being land reserved for any public purpose, and such house exists on [May 13, 2007] the site of such house shall be held by the owner of the house on terms and conditions as may be prescribed."

10. The aforesaid section 123 (1) provides that where any person referred to in sub-section (3) of Section 122-C has built a house on any land referred to in sub-section (2) of that section, not being land reserved for any public purpose, and such house exists on the site of such house shall be held by the owner of the house on terms and conditions as may be prescribed. The date of existence of house was 30th June, 1985 at the time of filing of suit in 1989, which is changing time to time. Thus, if a person referred in Section 122-C (3) of the Act of 1950 has built a house on any land referred in sub-section (2) of Section 122-C, then the site of such house shall be held by the owner of the house on terms and conditions, which may be prescribed.

11. Section 122-C of the Act of 1950 is extracted here-in-below:-

"122C. Allotment of land for housing site for members of Scheduled Castes, agricultural labourers, etc. *- (1) The Assistant Collector in charge of the sub-division on his own motion or on the resolution, of the Land Management Committee, may earmark any of the following classes of land for the provision of abadi sites for the members of the Scheduled Castes and [the Scheduled Tribes and the Other Backward Classes and the persons of General Category living below poverty line] and agricultural labourers and village artisans-*

(a) lands referred to in clause (i) of sub-section (1) of Section 117 and vested in the Gaon Sabha under that section;

(b) lands coming into possession of the Land Management Committee under Section 194 or under any other provisions of this Act;

(c) any other land which is deemed to be or becomes vacant under Section 13, Section 14, Section 163, Section 186, or Section 211;

(d) where the land earmarked for the extension of abadi and reserved as abadi site for Harijans under the U.P. Consolidation of Holdings Act, 1953, is considered by him to be insufficient, and land earmarked for other public purposes under that Act is available, then any part of the land so available.

(2) Notwithstanding anything in Sections 122-A, 195, 196, 197 and 198 of this Act, or in Sections 4, 15, 16, 28-B and 34 of the United Provinces Panchayat Raj Act, 1947, the Land Management Committee may with the previous approval of the Assistant Collector in charge of the sub-division allot for purposes of building

of houses, to persons referred to in sub-section (3)-

(a) any land earmarked under sub-section (1);

(b) any land earmarked for the extension of abadi sites for Harijans under the provisions of the U.P. Consolidation of Holdings Act, 1953;

(c) any abadi site referred to in clause (iv) of sub-section (1) of Section 117 and vested in the Gaon Sabha;

(d) any land acquired for the said purposes under the Land Acquisition Act, 1894.

(3) The following order of preference shall be observed in making allotments under sub-section (2)- [(i) an agricultural labourer or a village artisan residing in Gram Sabha and belonging to any of the following categories in the order of preference:-

(a) persons belonging to the Scheduled Castes and the Scheduled Tribes;

(b) persons belonging to Other Backward Classes;

(c) persons belonging to the general category living below poverty line.];

(ii) any other agricultural labourer or village artisan residing in the village;

[(iii) any other person residing in the Gram Sabha and belonging to any of the following categories in the order of preference:-

(a) persons belonging to the Scheduled Castes or the Scheduled Tribes;

(b) persons belonging to Other Backward Classes;

(c) persons belonging to the general category living below poverty line.];

[(iv) a person with disability residing in the village.]

Provided that no person shall be deemed to be a village artisan whose total income (including income of his or her spouse and minor children) exceeds two thousand four hundred rupees in a year.]

(4) If the Assistant Collector-in-charge of the sub-division is satisfied that the Land Management Committee has failed to discharge its duties or to perform its functions under sub-section (2) or it is otherwise necessary or expedient so to do, he may himself allot such land in accordance with the provisions of subsection (3).

(5) Any land allotted under this section shall be held by the allottee on such terms and conditions as may be prescribed.

(6) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land under this section inquire in the manner prescribed into such allotment, and if he is satisfied that the allotment is irregular, he may cancel the allotment, and thereupon the right, title and interest of the allottee and of every other person claiming through him in the land allotted shall cease.

(7) Every order passed by the Assistant Collector under sub-section (4) shall, subject to the provisions of sub-section (6) and every order passed by the Collector under sub-section (6) shall be final, and the provisions of [Section 333 and Section 333-A] shall not apply in relation thereto.

*(8) [* * *]*

[(9) In Rule 115-L of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, sub-rule (2) shall be deemed always to have been omitted.]"

12. In view of above, for claiming a right under Section 123 (1) of the Act of 1950, first a person would have to assert that he comes under the categories

provided under sub-section (3) of Section 122-C and the land in question is of categories as provided under sub-section (2) of Section 122-C and he has built a house on the same, then only may be held by him on the terms and conditions, which may be prescribed, but in the present case the appellants have not taken such plea and failed to show the terms and conditions, which may have been prescribed for holding the same by the appellants. He has only taken plea in paragraph-2(अ) of the plaint that if the possession of the plaintiff is not found prior to abolition of zamindari on the land in dispute, even then his possession is coming on the land in dispute since prior to 1985, therefore he is entitled to benefit of Section 123 (1) of the Act of 1950 and under said provision he has become owner of the land in dispute. Paragraph-2(अ) is extracted here-in-below:-

*"**धारा 2 (अ)** - यह कि वादी राम निहोर विवादित भूमि पर अपने पिता के सिलसिले से काबिज है वादी राम निहोर एक गरीब कृषक मजदूर एवं पिछड़ी जाति के अन्तर्गत कुर्मी उपजाति का व्यक्ति है उसका मुख्य पेशा कृषि व कृषि सम्बन्धी मजदूरी ही रहा है। विवादित भूमि पर यदि वादी का कब्जा जमीन्दारी विनाश के पूर्व का न पाया जाय तो भी विवादित भूमि पर वादी का कब्जा सन 1985 ई. के पूर्व से ही बराबर चला आ रहा है। जिससे वादी राम निहोर धारा 123 (1) ज०वि० अधिनियम का लाभ पाने का अधिकारी है और उसके तहत विवादित भूमि का स्वामी हो चुका है।"*

13. In view of above, firstly no plea has been taken that the appellants comes in preference as per sub-section (3) of Section 122-C and the land in dispute is among one of the categories as provided under sub-section (2) of Section 122-C and he/they have constructed a house on the said land, therefore this Court is of the view that the plea taken by the appellants is not sufficient for claiming the benefit of Section 123 (1) of the Act of 1950. Even otherwise, the appellants had not constructed any house on land in dispute, prior to 30th June, 1985 or even thereafter, therefore he is not entitled to hold the land in dispute as owner under Section 123 (1) of the Act of 1950. A co-ordinate bench of this Court, in the case of **Satya Veer and Another Vs. State of U.P. an Others; 2015 (4) ADJ 676**, has held that this apart they are also not entitled for benefit of Section 123 (1) as it is clearly emerged that they have not built their house prior to 01.05.2002, which was a date amended subsequently.

14. The learned Trial Court has considered the alternative plea of the appellants also and rejected recording a specific finding that DW-1 has given the evidence that the appellants has failed to prove that if he is entitled to benefit of Section 123 (1) and the benefit of Section 123 (1) is available to the housing site, therefore the appellants is not entitled for any benefit of the same on the basis of evidence adduced before this Court.

15. The Appellate Court has also recorded a finding that the appellants are claiming benefit of Section 123 (1), but the plaintiffs did not file any paper pertaining to allotment of disputed land by the competent authority. The contention of learned counsel for the appellants is that there is no such requirement. Section 123 (1) of Act of 1950 makes provision of holding of such housing site on which the house was built and existing on 30th June, 1985 by a person referred to in sub-Section (3) of Section 122-C on any land referred in sub-section (2) of that section, by owner of the house on terms and conditions as may be prescribed, therefore the appellants were required to assert and prove his/ their category, category of land and that the house has been built on the land in dispute and the terms and conditions, which have

been prescribed for holding that housing site. Thus, this Court is of the view that even if it may not be a precondition for holding the housing site under Section 123 (1) of the Act of 1950, the house must have been built by the claimant on the land in dispute was required to be proved and the terms and conditions of holding the said site were required to show, which the appellants have failed to do and there is no plea that house has been built on the land in dispute, therefore it can not affect the final outcome of this appeal in view of the pleadings made by the appellants in the plaint and unchallenged findings of the Trial Court in this regard with any cogent evidence, therefore no substantial question of law arises in this case.

16. In the context of Section 100 C.P.C., any question of law which may affect the final decision in a case is substantial question of law between the parties, therefore, even if it may be a question of law, it can not be said to be a substantial question of law to be decided in the present case between the parties.

17. The Hon'ble Supreme Court, in the case of **State Bank of India & others Vs. S.N. Goyal; 2008 (8) SCC 92**, has considered as to what would be the substantial question of law and difference between the question of law and the substantial question of law. Paragraph 13 is extracted here-in-below:-

"13. Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this court (or by the concerned High Court so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this Court (or by the concerned High Court), but the lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by this Court (or the concerned High Court) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this court (or the concerned High Court) and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the

enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two view points, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a strait-jacket definition as to when a substantial question of law arises in a case. Be that as it may."

18. The Hon'ble Supreme Court, in the case of **Suresh Lataruji Ramteke Vs. Sau. Sumanbai Pandurang Petkar; JT 2003 (9) SC 481**, while retreating the principles for considering a second appeal under Section 100 C.P.C. and its jurisprudence considered the judgment of a three judge Bench of Hon'ble Supreme Court in the case of Santosh Hazari Vs. Purshottam Tiwari; 2001 (3) SCC 179 in regard to what constitutes a substantial question of law and one of them is material bearing on the decision of case. The relevant paragraph 13 containing paragraph 13.03 is extracted here-in-below:-

"13. The jurisprudence on Section 100, CPC is rich and varied. Time and again this Court in numerous judgments has laid down, distilled and further clarified the requirements that must necessarily be met in order for a Second Appeal as laid down therein, to be maintainable, and thereafter be adjudicated upon. Considering the fact that numerous cases are filed before this Court which hinge on the application of this provision, we find it necessary to reiterate the principles.

13.1 The requirement, most fundamental under this section is the presence and framing of a "substantial question of law". In other words, the existence of such a question is sine qua non for exercise of this jurisdiction.9 13.2 The jurisdiction under this section has been described by this Court in Gurdev Kaur v. Kaki10 (TwoJudge Bench) stating that post 1976 amendment, the scope of Section 100 CPC stands drastically curtailed and narrowed down to be 9 Panchugopal Barua v. Umesh Chandra Goswami and Ors. (1997) 4 SCC 713 Two Judge Bench 10 (2007) 1 SCC 546 Two Judge Bench restrictive in nature. The High Court's jurisdiction of interfering under Section 100 CPC is only in a case where substantial questions of law are involved, also clearly formulated/set out in the memorandum of appeal. It has been observed that:

"At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the section is that the appeal shall be heard only on that question."

Gurdev Kaur *(supra) was referred to and relied upon in* ***Randhir Kaur v. Prithvi Pal Singh & Ors.*** *(2019) 17 SCC 71; Two Judge Bench*

13.3 In Santosh Hazari v. Purushottam Tiwari12 a Bench of three Judges, held as under in regard to what constitutes a substantial question of law:

a) Not previously settled by law of land or a binding precedent.

b) Material bearing on the decision of case; and (c) New point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. Therefore, it will depend on facts of each case.

Such principles stand followed in ***Government of Kerala v. Joseph [2023 SCC OnLine SC 961]*** *(Two Judge Benh) and Chanddrabhan Vs. Saraswati [2022 SCC OnLine SC1273] (Two Judge Bench).*

13.4 Nonformulation of substantial question(s) of law renders proceedings "patently illegal". This Court's decisions in Umerkhan v. Bimillabi15 and Shiv Cotex v. Tirgun Auto Plast Pvt Ltd. & Ors.16 indicate this position. ."

19. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that this second appeal has been filed on misconceived and baseless grounds and no substantial question of law arises in this case to be adjudicated between the parties here-in. Thus, the appeal lacks merit.

20. The second appeal is, accordingly, **dismissed.**

(2024) 3 ILRA 273
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.02.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Second Appeal No. 428 of 2016

Smt. Raeesa Bano ...Appellants
Versus
Smt. Tabassum Jahan & Ors. ...Respondents

Counsel for the Appellants:
Alok Mishra, Adnan Ahmad, Dr. Manoj Kumar Dubey, Roopani Mishra

Counsel for the Respondents:
C.S.C., Mohd. Wajid Irfan, Narendra Kumar Pandey, Vidhu Bhushan Kalia

A. Civil Law – Civil Procedure Code, 1908 – Sections 9 & 100 – Substantial question of law – Specific Relief Act, 1963 – Section 34 – Bar of civil suit – Suit of civil nature – Relief to declare the death of a person on the ground that he is missing for more than 7 years was sought from civil court – Maintainability – Held, the suit at the instance of the legal heir for declaration of death of a person is maintainable – There is no bar u/s 34 of the Act, 1963, for filing a suit for declaration of a civil death of another person, if the plaintiff is a legal heir and such legal character of civil death is for his benefit and the same is attributed to such legal character – S. 9 of CPC permits all suits of a civil nature except the suits which are expressly or impliedly barred – The suit for declaration of any legal character (civil death of a person) is not specially barred by Section 34 of the Act, 1963 – Suit for mere declaration of civil death is very well maintainable and is not barred by Section 34 of the Act, 1963 merely because further relief was not claimed. (Para 9, 11, 12, 13 and 14)

Appeal allowed. (E-1)

List of cases cited :-

1. Sou. Swati & ors. Vs Shri Abhay & Anr.; 2016 Legal Eagle (BOM) 10130

2. L.I.C. of India Vs Anuradha; 2004 (10) SCC 131

3. Saroj Gupta Vs Sanjay Kumar Gupta; 2023 AIR CC 1214

4. Gokul Pandey & ors.Vs Gram Pradhan Gram Sabha Vill. Bhabnauli Pandey & ors.; 2022 (6) ADJ 375

5. Anathula Sudhakar Vs P. Buchi Reddy; 2008 (4) SCC 594

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

1. Heard Sri Adnan Ahmad, learned counsel for the appellant, Sri Sabul Khan, learned counsel holding brief of Sri Mohd. Wajid Irfan, learned counsel for respondent nos.1 to 5 and Sri Amar Nath Mishra, learned Additional Chief Standing Counsel for respondent no.6.

2. Present appeal has been filed against the judgment and decree dated 18.1.2016 passed by Additional District Judge, Court No. 15, Lucknow in Regular Civil Appeal No. 142 of 2015 (Smt. Raeesa Bano Vs. Smt. Tabassum Jahan & Others) confirming the judgment and decree dated 31.8.2015 passed by Civil Judge (Senior Division), Mohanlalganj, Lucknow in Regular Suit No. 128 of 2015 (Smt. Raeesa Bano Vs. Smt. Tabassum Jahan & others).

3. This appeal was admitted on 27.02.204 on the following substantial question of law "whether a suit for declaration of civil death of a person on the ground that he is missing for more than 7 years, is barred under Section 34 of the Specific Relief Act".

4. The crux of the matter is that the appellant had filed a suit bearing Suit No.128 of 2015 for the relief that her husband is missing for more than 13 years; therefore, he may be declared dead in view of presumption under Section 108 of the Evidence Act. In her plaint, she specifically stated that she had lodged an FIR dated 31.05.2009, the publication in the newspaper and required format as well as notice u/s 80 CPC to the District Magistrate, Lucknow regarding missing her husband (Akhtar Ali) for more than 13 years. It was also pleaded in the complaint that her husband was working in the Electricity Department, but he did not attend his duty for more than 13 years, and unless he is declared dead, she will not be able to get his service benefit. Though none of the respondents contested the above suit, even the State has supported the claim of the plaintiff appellant.

5. After hearing the parties and on perusal of the record, the learned Civil Judge (Senior Division) Mohanlalganj, Lucknow, vide judgement and order dated 31.08.2015, dismissed the suit on the ground that the suit for mere declaration of civil death without further relief is barred by Section 34 of Specific Relief Act, 1963 (hereinafter referred to as 'the Act, 1963'). Against the order of the learned Civil Judge, the plaintiff-appellant had also preferred an appeal before the District Judge, Lucknow, which was registered as Civil Appeal No.142 of 2015, and the same was heard by learned Additional District Judge, Court No.15, Lucknow, who, after hearing the parties, rejected the appeal of the appellant on the same reasoning as of the learned Civil Judge.

6. Contention of learned counsel for the appellant is that under Section 34 of the 'Act, 1963' the legal heirs of the person who is missing for more than seven years

can file a suit for declaration of his civil death, as this legal character will make him entitled to receive benefits in the missing person's property. In support of his contention, learned counsel for the appellant has relied upon the judgement of the Bombay High Court in **Sou. Swati & Ors. Vs. Shri Abhay & Anr** reported in **2016 Legal Eagle (BOM) 10130;** judgement of the Apex Court in **L.I.C. of India Vs. Anuradha reported in 2004 (10) SCC 131**; judgement of Calcutta High Court in **Saroj Gupta Vs. Sanjay Kumar Gupta** reported in **2023 AIR CC 1214**; judgement of this Court in **Gokul Pandey and Others Vs. Gram Pradhan Gram Sabha Vill. Bhabnauli Pandey and Others** reported in 2022 (6) ADJ 375.

7. Per contra, learned Additional Chief Standing Counsel has stated that though in the complaint, the appellant has mentioned that because of the non-declaration of death of her husband, who has been missing for more than 13 years, she could not get the service benefits of her husband from the Electricity Department as he was an employee of the Electricity Department, but the appellant has not impleaded Electricity Department as a party and also no consequential relief was sought, and the suit is only for a mere declaration, which is not maintainable under Section 34 of the Act, 1963.

8. Respondents nos.1 to 5 did not oppose the appeal and virtually supported the case of the appellant.

9. After hearing the learned counsel for the parties and on perusal of the record, it appears that the suit in question was filed for the declaration of the death of Akhtar Ali (husband of the appellant) who was missing for more than 13 years, and because of this the plaintiff-appellant could not get the service benefit of Akhtar Ali, who was working as a Lineman in Electricity Department. Therefore, the suit in question is not only a declaration of civil death but also to get service benefits for Akhtar Ali. In the judgement of Bombay High Court in **Sou. Swati & Ors. (supra)** as well as the judgement of Allahabad High Court in **Gokul Pandey and Others (supra)** relied upon by learned counsel for the appellant, Hon'ble Court observed that a suit for declaration of civil death of another person on the part of a legal heir is virtually a declaration of legal character as mentioned in Section 34 of the Act, 1963. Therefore, such a suit is maintainable as the plaintiff is not a stranger to the dead person. It was also observed in the above judgement of Allahabad High Court that the suit at the instance of the legal heir for declaration of death of a person is maintainable if he can stand the test that he is entitled to any legal character, even though, he cannot lay to immediate claim to any property. Paragraph no.7 of **Sou. Swati & Ors. (supra)** of Bombay High Court is being quoted as under:

"7. In the light of the dictum laid down by the Apex Court as above, I am of the firm opinion that the Civil Court acting under Section 9, has inherent powers in its plenary jurisdiction de hors with reference to Section 34 of the Specific Relief Act to grant relief qua Section 108 of the Evidence Act. Therefore, the reason that Section 34 of the Specific Relief Act was required to be called in aid does not appear to be sound."

10. Similarly, paragraphs nos. 11 and 12 of the judgement of Allahabad High Court in **Gokul Pandey and Others (supra)** are being quoted as under:

"11. From the bare perusal of the above provision, it is clear that a suit for

declaration could be filed by any person for the following objects: (a) for his or her legal character, (b) for any right as to any property. Thus, it is clear that a suit for a declaration may be instituted for declaring a status or legal character to which a person/party may be entitled. However, in a suit for declaration of a civil death of another person, the plaintiff is not entitled to such legal character under section 34 of the Act. It is because a suit has been brought for a legal character of another person and not of the plaintiff.

12. Section 34 provides that any legal character may be declared for which a plaintiff is entitled. Besides this, he should not be a stranger to a dead person, but he must be interested in such legal character, maybe as his legal heirs. The suit filed at the instance of plaintiff can be contested by anyone denying or interested in denying his title to such character or right. Section 34 of the Act further bars any such declaration where the plaintiff can seek further relief. Legal character is a position recognised by law. A person's legal character is the attribute that the law attaches to him. After the death of a person, his heirs, having an interest in such legal character, have the title to seek a declaration of such legal character as to the person's death. The suit at the instance of any such person for a declaration is maintainable if he can stand the test that he is entitled to any legal character, even though he cannot lay to immediate claim to any property."

11. From the above mentioned judgements, it is clear that though there is no bar under Section 34 of the Act, 1963, for filing a suit for declaration of a civil death of another person, if the plaintiff is a legal heir and such legal character of civil death is for his benefit and the same is attributed to such legal character. Section 9 of CPC permits all suits of a civil nature except the suits which are expressly or impliedly barred. Section 9 of CPC is quoted as under;

"9. Courts to try all civil suits unless barred- The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

12. Therefore, it is clear from Section 9 of the C.P.C that all suits, which are of a civil nature, are maintainable before the civil Court except specifically barred, but the suit for declaration of any legal character (civil death of a person) is not specially barred by Section 34 of the Act, 1963. Section 34 of the Specific Relief Act 1963 is being reproduced as under.

"34. Discretion of Court as to declaration of status or right.?Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:"

13. From the perusal of Section 34 of the Act, 1963 and its proviso, it is clear that it does not bar the suit for declaration of civil death of a person, but it simply regulates the suit which is in the nature of mere declaration without seeking further relief, which the plaintiff is able to seek, but when there is no requirement for further relief, then seeking further relief is not necessary. The declaration seeks to clear what is doubtful, and it prevents future litigation by removing existing causes of

controversy. It gives a remedy to a person against all persons who not only claim adverse interest to his own but against all those who may do so, and it is intended that all such claims may once and for all be determined in one suit. Hon'ble Apex Court in the case of **Anathula Sudhakar vs P. Buchi Reddy; 2008 (4) SCC 594** observed that object of Section 34 of 'Act 1963' is to provide a perpetual bulwark against adverse attacks on the title of the plaintiff, where a cloud is cast upon it, and to prevent further litigation by removing the existing cause of controversy.

14. Declaring a person's civil death is a substantial relief and has an immediate consequential effect. On the declaration of the death of a person, benefits are accrued on the legal heirs of the person declared as dead, therefore relief of all such benefits cannot be sought vaguely in the garb of further relief. Even Section 34 of 'Act, 1963' itself permits seeking declaration without further relief except in those cases where without seeking relief, mere declaration has no effect and such is not a position in the declaration of civil death of a person by a legal heir. **Therefore, this Court holds that suit for mere declaration of civil death is very well maintainable and is not barred by Section 34 of the 'Act, 1963' merely because further relief was not claimed.**

15. Though it is true that Section 108 of the Evidence Act 1872 provides a presumption of civil death of a person who has been missing for more than seven years, but, if any person gets affected by the missing of such person either by express or implied denial by any of the person, than he can very well file suit for a declaration of the death of the person being his legal heir. Though, proviso of Section 34 of the 'Act, 1963' provides that a suit for mere declaration is not maintainable if the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. But in the present case, the basis of the suit itself was to get the service benefit of the late Akhtar Ali from the Electricity Department and for that declaration of the death of Late Akhtar Ali is necessary. For another reason, no further relief is required in the present case regarding seeking the death benefit of Late Akhtar Ali because on the declaration of civil death of Late Akhtar Ali, the Government Department will respect the same. In the present case, there is no averment in the plaint that the Electricity Department had denied to pay service benefits or there is apprehension of none payment despite the decree of the civil Court for the declaration of the civil death of Late Akhtar Ali. On declaration of civil death of late Akhtar Ali, the consequence will be that his wife, along with other legal heirs, would be entitled to the property and service benefit of the late Akhtar Ali as per the law. Relief of the same is not required to be pleaded as the same will automatically flow to them after the declaration of his civil death. Therefore, even if no specific relief is sought against the Electricity Department even then the suit for the declaration of the death of the husband of the appellant cannot be dismissed as not maintainable under Section 34 of the Act, 1963.

16. From the material available on record, it is undisputed that Late Akhtar Ali was missing for more than 13 years, and the appellant has completed all required formalities, including the lodging of FIR. Therefore, there is sufficient material to declare the civil death of Late Akhtar Ali at the instance of the appellant, who is his wife.

17. In view of the above analysis, this Court finds that the order of the learned Civil Judge and the first appellate Court suffers from illegality, which is apparent on the face of the record. Therefore, the judgement dated 18.1.2016 passed by the Additional District Judge, Court No. 15, Lucknow in Regular Civil Appeal No. 142 of 2015 (Smt. Raeesa Bano Vs. Smt. Tabassum Jahan & Others) and judgment and decree dated 31.8.2015 passed by Civil Judge (Senior Division), Mohanlalganj, Lucknow, in Suit No. 128 of 2015 (Smt.Raeesa Bano Vs. Smt. Tabassum Jahan & others) are hereby set aside.

18. The matter is remanded back to the learned Civil Judge, Senior Division, Mohanlalganj, Lucknow to pass a fresh order in light of the above observations.

19. Considering the peculiar facts and circumstances that the suit itself was filed in the year 2015, and all evidence has been adduced before the learned Civil Judge and the suit was itself uncontested; therefore, learned Civil Judge, Senior Division, Mohanlalganj, Lucknow is further directed to complete the proceedings of passing a fresh order in Suit No.128 of 2015, within a period of three months from the date of receiving a copy of this order, in accordance with the law.

20. With the observations above, the appeal is **allowed.**

(2024) 3 ILRA 278
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 756 of 1982

Divisional Forest Officer Noth Kheri ...Appellant

Versus

Surjan Singh & Ors. ...Respondents

Counsel for the Appellant:
C.S.C.

Counsel for the Respondents:
Sajid Raza Rizvi, Satendra Nath Rai

A. Civil Law – Civil Procedure Code, 1908 – Section 100 – Substantial question of law – Significance of its formulation – Similar second appeal was dismissed – Relevance – Held, once the substantial questions of law have been formulated in this second appeal by the court after considering the rival contentions, it cannot be dismissed merely because the similar second appeals have been dismissed by this Court, particularly, when the said orders have been passed without considering the issues raised in this appeal. (Para 13 and 14)

B. Civil Law – Indian Forest Act, 1927 – Sections 4 & 20 – UP Zamindari Abolition and Land Reforms Act, 1950 – S. 229-B – After issuance of notification u/s 4 and 20 of Act, 1927, the suit u/s 229-B was filed and allowed, and based on this order passed u/s 229-B, the civil suit was decreed – Permissibility – Held, once the notification has been issued u/s 4 of the Act of 1927, all claims can be raised before the Forest Settlement Officer, who can consider the same and decide the claim after affording opportunity of evidence exercising the powers of a civil court – No authority or court had power to entertain any dispute in regard to the land declared as reserve forest u/s 20 in view of Section 27(A) as added by U.P. Act No. 23 of 1965, therefore, the suit under Section 229-B of the Act of 1950, that too without impleading the Forest department or concerned Officer of the forest department, was not maintainable. (Para 15, 22 and 40)

C. Civil Law – Declaratory suit u/s 229-B of the Act, 1950 – Non-joinder of party –

Maintainability – Suit was filed after issuance of notification u/s 4 and 20 of Act, 1927 – Though the St. Government was made party, but the Forest Department was not impleaded as party – Effect – Held, even if the St. was impleaded no effective order could have been passed without impleadment of the forest department or the concerned officer of the forest department – In view of S. 27-A of the Act of 1927, the said suit was not maintainable, therefore the exparte judgment and decree dated 30.09.1973, against the St. also, is void. (Para 27)

Appeal allowed. (E-1)

List of cases cited :-

1. St. of U.P. Vs Kamaljeet Singh; MANU/UP/2821/2017

2. St. of U.P. Vs DDC & Ors.; MANU/SC/0612/1996 : (1996) 5 SCC 194

3. St. of U.P. & ors. Vs Sonelal & Ors.; MANU/UP/0151/2022

4. Sukhwant Singh Vs Divisional Forest Officer & ors.; MANU/PH/0435/2009

5. Padhiyar Prahladji Chenaji Vs Maniben Jagmalbhai; MANU/SC/0272/2022

6. Civil Appeal No. 3117 of 2009; Dhanraj Vs Vikram Singh & ors.

7. Daya Shanker Vs DDC Kheri; MANU/UP/1528/2023

8. Moreshar Yadaorao Mahajan Vs Vyankatesh Sitaram Bhedi; 2022 Live Law(SC)802

9. Smt. Shanta Rani Vs Nasib Kaur; JT 2023(10) 103

10. Poonam Vs St. of U. P. & ors.; (2016) 2 SCC 779

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

1. Heard Sri Vimal Srivastava, learned Additional Advocate General assisted by Sri S.K. Khare, learned Standing Counsel for the appellant and Sri Satendra Nath Rai, learned counsel for the respondents.

2. This second appeal, under Section 100 of Civil Procedure Code(hereinafter referred to as CPC), has been filed against the judgment and decree dated 16.04.1982 passed by the 1st Additional District Judge Kheri in Civil Appeal No.152/1980, by means of which the appeal has been dismissed upholding the judgment and decree dated 09.09.1980 passed by the VIth Additional Munsif, Lakhimpur Kheri in Regular Suit No.154/1977(Surjan Singh & 3 Ors. Versus Divisional Forest Officer, North Kheri).

3. The following substantial questions of law have been formulated in this appeal:-

"(a) Whether the suit filed by the plaintiff bearing No.154/1977 seeking a decree of permanent injunction was maintainable on the facts as pleaded giving rise to any subsisting cause of action?

(b) Whether the suit of the plaintiff for permanent injunction was maintainable especially when the notification under Sections 4 and 20 of the Indian Forest Act, 1927 was issued in the year 1966 and 1970 respectively?

(c) Whether the decree passed in a suit filed by the plaintiff under Section 229-B of the U.P. Z.A. & L.R. Act, 1950 without impleading the Forest Department as a party instituted in the year 1973 whereas the notification under Section 4 and 20 of the Indian Forest Act, 1927 has already been issued in the year 1966 and 1970 respectively and in view thereof the suit was maintainable and the effect of a decree passed in such proceedings under

Section 229-B of the U.P. Z.A. & L.R. Act, 1950."

4. Learned counsel for the appellant submitted that the notification under Section 4 of the Indian Forest Act,1927(hereinafter referred to as the Act of 1927) was issued in regard to land, which includes the land in dispute, having area 31.60 acre on 05.01.1966 and published in the Gazette on 12.03.1966 and notification under Section 20 of the said Act was issued in regard to land having area 174.31 acre on 27.12.1970 and published in the Gazette on 11.04.1970, therefore the respondents had no right and title on the said land after the said date. He further submitted that the respondents had filed the suit for permanent injunction in the year 1977 claiming their rights on the land in dispute on the basis of the order passed in their favour under Section 229 B of the U.P. Zamindari Abolition and Land Reforms Act 1950(hereinafter referred to as the Act of 1950), which was filed and **allowed** after the aforesaid notifications, therefore the same was without jurisdiction, and no right or title could have been conferred on the respondents as the same was barred by Section 27 A of the Act of 1927 as per the State amendment of U.P. But without considering the aforesaid, the suit for permanent injunction was decreed, therefore the appellant had filed Civil Appeal, which has also been dismissed upholding the judgment and decree passed by the trial court without considering the aforesaid facts and legal position.

5. Learned counsel for the appellant further submitted that the details of the boundaries of the land of the respondents was not given in the suit and the suit was filed by four persons but their shares were not mentioned,therefore the suit itself was not maintainable. Thus, the submission is that the judgment and decree passed by the trial court as well the first appellate court are not sustainable in the eyes of law and liable to be set aside.

6. Learned counsel for the appellant relied on ***State of U.P. versus Kamaljeet Singh;MANU/UP/2821/2017, State of U.P. Versus DDC & Ors.;MANU/SC/0612/1996; (1996)5 SCC 194, State of U.P. & Ors. Versus Sonelal & Ors.; MANU/UP/0151/2022, Sukhwant Singh versus Divisional Forest Officer & Ors.;MANU/PH/0435/2009, Padhiyar Prahladji Chenaji versus Maniben Jagmalbhai;MANU/SC/0272/2022, Dhanraj vesus Vikram Singh & Others; Civil Appeal No.3117/2009, Daya Shanker versus DDC Kheri;MANU/UP/1528/2023, AND Moreshar Yadaorao Mahajan versus Vyankatesh Sitaram Bhedi; 2022 Live Law(SC)802.***

7. Per contra, learned counsel for the respondents submitted that similar Second Appeal No.383 of 1979 has been dismissed by means of the order dated 21.12.1995 and Second Appeal No.351 of 1980 and 350 of 1980 having identical facts have also been dismissed by this Court, therefore this appeal is also liable to be dismissed accordingly.

8. He further submitted that the name of the respondents was recorded on the basis of the order passed in the case filed by the respondents under Section 229 B of the Act of 1950 in the khatauni of the 1384 Fasli (1977). The State was a party in the said case, therefore even if the forest department was not party, it will not make any difference and the appellant is not entitled for any benefit of the same. He

further submitted that the only photocopy of the notification under Section 4 of the Act of 1927 was produced and the publication whereof also could not be proved, therefore the judgment and decree passed by the trial court as well as the first appellate court have rightly been passed in accordance with law, which does not suffer from any illegality or error. Thus, the submission is that the substantial questions of law formulated by this Court does not arise and the appeal is misconceived and the grounds taken therein are not sustainable in the eyes of law, therefore it is liable to be dismissed.

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

10. Before considering the rival contentions of learned counsel for the parties in regard to the substantial questions of law formulated by this Court, since a plea has been taken that the appeal is liable to be dismissed in view of the orders passed by this Court in similar second appeals, this Court has to see first as to whether this appeal can be dismissed on this ground or not.

11. Second Appeal No.383 of 1979(State of U.P. versus Sri Prem Singh and others), was dismissed by means of the order dated 21.11.1995 on the ground that no substantial question of law is involved in the said case, whereas the said appeal was already admitted. However the said order does not disclose that the legal questions raised in this appeal, on the basis of which the aforesaid substantial questions of law have been framed appears either to had not been raised in the said appeal or not pressed. Be that as it may, the same have not been considered in the said order. So far as the Second Appeal Nos.350 of 1980 and 351 of 1980 are concerned, on perusal of the order dated 22.11.2023 passed in Second Appeal No.350 of 1980, it is apparent that Second Appeal No.351 of 1980 was decided by a coordinate Bench of this Court by means of the judgment and order dated 14.08.2001. The State had filed review of the said order, which was dismissed as abated and considering the same, the Second Appeal No.350 of 1980 has been dismissed. Thus the substantial questions of law formulated in this appeal have neither been considered nor decided in the said appeals.

12. Section 100 of CPC provides that the appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Sub-section 4 of Section 100 of CPC provides that Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and as per sub-section 5, the appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be **allowed** to argue that the case does not involve such question. Section 100 of CPC is extracted hereinbelow:

"1[100. Second appeal.--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be ***allowed*** *to argue that the case does not involve such question:*

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.]"

13. In view of above, in case the Court finds that any substantial question of law is involved in the second appeal, it can be formulated and the appeal shall be heard on the question so formulated and the respondent can argue that the case does not involve such question. However at the time of hearing the Court, for the reasons to be recorded, can hear on any other substantial question of law on being satisfied that it is involved in the case. In the present case, after hearing learned counsel for the appellant as well as the respondents and on being satisfied that the aforesaid substantial questions of law are involved in the instant appeal, the same have been formulated by this Court. Therefore this appeal is to be decided after considering the rival contentions of learned counsel for the parties in regard to the substantial questions of law formulated in this appeal. However learned counsel for the respondent can argue that this case does not involve the said questions. But once the substantial questions of law have been formulated by this Court, this appeal cannot be decided without hearing on the said questions and without recording any finding on those questions. Even otherwise even if a similar appeal has been dismissed as discussed above, it can be considered in view of distinguishing features of substantial questions of law involved in this appeal as formulated by this Court after hearing learned counsel for the parties in view of judgment of Hon'ble Supreme Court, in the case of ***Smt. Shanta Rani versus Nasib Kaur; JT 2023(10) 103***, the relevant paragraph 13 of which is extracted here-in-below:-

13. At the outset, it may be noticed that the Civil Appeal has been admitted by referring to a few similar petitions/appeals pending in this Court. The similarity of an issue with a pending matter has been raised as one of the grounds for granting Special Leave, and the Civil Appeal is numbered. With the dismissal of the connected matters, the natural result is that the instant Appeal must follow.

Since a distinguishing feature is raised by the Learned Counsel for the Appellant, we would consider the maintainability of the Civil Appeal. We notice that the Appellant confined the challenge to the Order of Eviction only to three grounds before the High Court. Either by choice or for any reason, the Appellant before the High Court did not press any other ground available against the Order of

Eviction or the Order refusing to grant leave to the Appellant. Having done so, in the Civil Appeal, contentions do not expand more than the scope of consideration either by the High Court or the Rent Controller.

14. In view of above, this Court is of the view that once the substantial questions

of law have been formulated in this second appeal by the court after considering the rival contentions, it cannot be dismissed merely because the similar second appeals have been dismissed by this Court, particularly, when the said orders have been passed without considering the issues raised in this appeal. Therefore the contention of learned counsel for the appellant is misconceived and not tenable and liable to be repelled and accordingly repelled.

15. Adverting to the rival contentions of learned counsel for the parties on the substantial questions of law formulated in the present appeal, the main issue to be considered in this second appeal is as to whether the suit filed by the respondents under Section 229 B of the Act of 1950 could have been filed by the respondents and **allowed** in favour of the respondents after issuance of the notification under Section 4 and Section 20 of the Act of 1927 and based on the order passed in the said suit,the suit for permanent injunction could have been filed by the respondents and decreed by the civil court. To consider the issue, it would be apt to consider the relevant provisions of the Act of 1927 and Act of 1950 first.

16. The Act of 1927 was enacted to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce. Chapter XII of the Act of 1927 relates to reserve forest. Section 3 of the Act of 1927 provides the power to reserve forests, which provides that the State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights,a reserve forest. Section 3 is reproduced below:-

3. Power to reserve forests.–The State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

17. Section 3 in its application to the State of Uttar Pradesh, has been substituted by U.P. Act No.XXIII of 1965 with effect from 23.11.1965 in the following manner:-

3. Power to reserve forests.–The State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

Explanation The expression holding shall have the meaning assigned to it in the U.P. Tenancy Act 1939 the expression village abadi shall have meaning assinged to it in the U.P. Village Abadi Act 1947.

18. Section 4 provides that whenever it has been decided to constitute any land a reserved forest, the State Government shall issue a notification in the Official Gazette. Section 4 is reproduced below:- :

"Section 4 : Notification by State Government---(1) Whenever it has been decided to constitute any land a reserved forest, the State Government shall issue a notification in the Official Gazette :

(a) declaring that it has been decided to constitute such land a reserved forest ;

(b) specifying as nearly as possible, the situation and limits of such land ; and

(c) appointing an officer (hereinafter called "the forest settlement officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest produce, and to deal with the same as provided in this Chapter.

Explanation---For the purpose of Clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries.

(2) The officer appointed under Clause (c) of Sub-section (1) shall ordinarily be a person not holding any forest office except that of forest settlement officer.

(3) Nothing in this Section shall prevent the State Government from appointing any number of officers not exceeding three, not more than one of whom shall be a person holding any forest office except as aforesaid, to perform the duties of a forest settlement officer under this Act."

19. Section 5 provides that after the issue of a notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf. Section 6 inter alia gives power to Forest Settlement Officer to issue a proclamation and requiring every person claiming any right mentioned in Section 4 or 5 within such period as prescribed by him to submit his objection claiming his right or appear before him and state his right or the amount of compensation, if any, claimed by him. Section 7 gives power to Forest Settlement Officer to investigate the objections.

20. Section 8 deals with the power of the Forest Settlement Officer, which provides that the forest settlement officer will have all the powers of the civil court in the trial of the suit. Section 9 is with regard to extinction of rights, if no claim is preferred after notification under Section 4 of the Act of 1927 under Section 6 and failed to satisfy that no knowledge could be acquired before publication of notification under Section 20. Sections 8 and 9 are extracted below :

"Section 8--Power of forest settlement officer.--For the purpose of such inquiry, the forest settlement officer may exercise the following powers, that is to say :

(a) power to enter, by himself or any officer authorised by him for the purpose, upon any land, and to survey, demarcate and make a map of the same : and

(b) the powers of a civil court in the trial of the suit."

"Section 9--Extinction of rights,--Rights in respect of which no claim has been preferred under Section 6, and of the existence of which no knowledge has been acquired by inquiry under Section 7, shall be extinguished, unless before the

notification under Section 20 is published, the person claiming them satisfies the forest settlement officer that he had sufficient cause for not preferring such claim within the period fixed under Section 6."

21. Section 11 of the Act of 1927 provides that the forest settlement officer shall pass an order admitting or rejecting the claim to a right in or over any land. The appeal against the order passed by the Forest Settlement Officer is provided under Section 17.

22. In view of above, once the notification has been issued under Section 4 of the Act of 1927, all claims can be raised before the Forest Settlement Officer, who can consider the same and decide the claim after affording opportunity of evidence exercising the powers of a civil court in the trial of the suit. After finalization of the proceedings, the notification under Section 20 is issued declaring the land as reserved forest. Section 20 of the Act of 1927 is extracted here-in-below:

"20-Notification declaring forest reserved.-*(1) When the following events have occurred, namely:-*

(a) the period fixed under section 6 for preferring claims have elapsed and all claims (if any) made under that section or section 9 have been disposed of by the Forest Settlement-officer;

(b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894 (1 of 1894), have become vested in the Government under section 16 of that Act,the State Government shall publish a notification in the Official Gazette, specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

State Amendments

Uttar Pradesh*- In section 20,in sub-section (1), for clause (b), substitute the following clause namely,*

(b) if any such claims have been made, the period limited bySection 17 for appealing from the orders passed on such claims has clasped and all appeal(if any) persented within such period have been disposed by the District Judge; and

[Vide Uttar Pradesh Act 23 of 1965,sec.8 (w.e.f. 23.11.1965]"

23. Section 23 of the Act of 1927 provides that no right of any description shall be acquired in or over a reserved forest except by succession or under a grant or contract in writing made by or on behalf of the Government or some person in whom such right was vested when the notification under section 20 was issued.

24. Section 27 A has been added by U.P. Act No.23 of 1965 which provides for finality of orders, which cannot be called in question in any court of law. Section 27 A on reproduction reads as under:-

'Section 27A--Finality of orders, etc.--No act done, order made or certificate issued in exercise of any power conferred

by or under this Chapter shall, except as herein before provided, be called in question in any Court."

25. In view of above, it is evident that as per scheme of the Act, in the proceeding beginning with notification under Section 4, all claims regarding land included in the notification are adjudicated by an authorised officer i.e. Forest Settlement Officer, who exercises all the powers of the civil court in trial of the suits as per Section 8, the appeal of which can be preferred under Section 17. Section 5 of the Act of 1927 provides that after issue of a notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued. The said notifications published in the official gazettes are public documents which need not be proved and they shall be deemed to have been issued in accordance with law after following the due procedure of law.

26. The Act of 1950 was promulgated for abolition of the zamindari system which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for acquisition of their rights, title and interest and to reform the law relating to land tenure consequent on such abolition and acquisition and to make provision for other matters connected therewith. As per Section 4 of the said Act, after the notification issued by the State Government, all the estates vested in the State. However, certain buildings and appurtenant thereto, wells, tress etc. have been settled in favour of the owners and occupiers thereof under Section 9. Therefore, all the estates in State of U.P. after notification under the said Act vested in State and unless anybody acquired any right or title under the said Act, he is not entitled to claim any right over any land.

27. Adverting to the facts of the present case, the respondents had filed suit under section 229 B of the Act of 1950 after 11.04.1970 i.e. after issuance of the notification not only under Section 4 but Section 20 of the Act of 1927 without impleading the forest department as respondent as admitted by the respondents. However, it has been stated that the State of U.P. was impleaded in the said suit but it has not been disclosed as to through whom State of U.P. was impleaded. However since the land in dispute was already declared as forest land, therefore the forest department was a necessary party to the suit because it could have only given the correct facts and clarified the position. Even otherwise, even if the State was impleaded no effective order could have been passed without impleadment of the forest department or the concerned officer of the forest department. The Hon'ble Supreme Court, in the case of ***Moreshar Yadaorao Mahajan versus Vyankatesh Sitaram Bhedi(supra)***, has held that no effective decree could have been passed in absence of necessary party and if a necessary party is not impleaded, the suit itself is liable to be dismissed. The twin test to be satisfied for being a necessary party is that there must be right to some relief against such party in respect of the controversies involved in the proceedings and no effective decree can be passed in the absence of such a party. Similar view was taken by Hon'ble Supreme Court in the case of ***Poonam vs State of Uttar Pradesh and others; (2016) 2 SCC 779***. Even otherwise, in view of Section 27 A of the

Act of 1927, as inserted by the State amendment of U.P., the said suit was not maintainable, therefore the exparte judgment and decree dated 30.09.1973, against the State also, is void.

28. The respondents, claiming right and title over the land in dispute i.e. Plot No.1 minjumla/50 acres situated in Village Madanpur, Pragana/Tehsil Palia, District Kheri on the basis of aforesaid judgment and decree dated 03.09.1973 passed in suit under Section 229 B of the Act of 1950, filed suit for permanent injunction against the appellant on 05.07.1977 bearing Regular Suit No.154 of 1977. The suit was decided in favour of the respondents. The claim of the respondents is that they are in possession on the land in dispute for the last 30 years and are Sirdar of the land in dispute and they have been declared as such by the Divisional Officer, Kheri in the suit filed under Section 229 B of the Act of 1950 and the forest department had no concern with the land in dispute. Even if it is assumed that the suit u/s 229 B of the Act of 1950 could have been filed and decreed, though it could not have been, the respondents were declared Sirdar of the land in dispute by the said order and decree. The Sirdar has no right or title on the land. The Sirdar is not a proprietor but merely the tenure holder and the propriety right of any such land vested with the State. Thus, even if the respondents were in possession on the land in dispute as Sirdar, they have no right or title over the land in dispute and it could have been declared the forest land by the Government under Section 3 of Act of 1927 and State amendment of U.P. by Act No.XXIII of 1965, as it has propriety rights over the said land. Hence, the State was justified in declaring and notifying the land in dispute as reserve forest.

29. The Hon'ble Supreme Court, in the case of ***State of U.P. versus Deputy Director of Consolidation and others (supra)***, has held that the person who was holding the land as Sirdar was not vested with propriety rights and he was tenure holder and the propriety rights vested with the State. It has further been held that after notification under Section 4of the Forest Act, the objections could not have been raised qua the said notification before the consolidation authorities and the consolidation authorities were bound by the notification which had attained finality as per scheme of the Act of 1927. The relevant paragraphs 7 to 10 are extracted hereinbelow:-

"7.It is thus obvious that a person who was holding the land as Sirdar was not vested with proprietary rights under the Abolition Act. He was a tenure holder and the proprietary rights vested with the State. The High Court, therefore, fell into patent error in assuming that by virtue of their status as Sirdars the respondents were proprietors of the land. The State being the proprietor of the land under the Abolition Act it was justified in issuing the notification under Section 4 of the Act.

8. The nature of the land - whether covered by Section 3 of the Act or not - could only be determined on the date of the notification under Section 4 of the Act which was issued on March 29, 1954. Neither the Consolidation Authorities nor the High Court have gone into the question as to what was the nature of the land on the relevant date. The Consolidation Authorities recorded their findings in the year 1968-69. They were wholly oblivious of the nature of the land 14-15 years back in the year 1954.

9. The crucial question for consideration, however, is whether the

Consolidation Authorities have the jurisdiction to go behind the notification under Section 20 of the Act and deal with the land which has been declared and notified as a reserve forest under the Act. It is necessary, therefore, to examine the scheme of Chapter II of the Act. Section 3 provides that the State Government may constitute any forest land or waste land which is the property of the Government or over which the Government has proprietary rights or to the whole or any part of the forest produce to which the Government is entitled a reserved forest. Section 4 provides for the issue of a notification declaring the intention of the Government to constitute a reserved forest. Section 5 bars accrual of forest rights in the area covered by the notification under Section 4 after the issue of the notification. Section 6, inter alia, gives power to the Forest Settlement Officer to issue a proclamation fixing a period of not less than three months from the date of such proclamation and requiring every person claiming any right mentioned in Section 4 or Section 5 within such period, either to present to the Forest Settlement Officer a written notice specifying or to appear before him, and state the nature of such right and the amount and particulars of the Compensation (if any) claimed in respect thereof. Section 7 gives power to the Forest Settlement Officer to investigate the objections. Section 8 prescribes that the Forest Settlement Officer shall have the same powers as a civil court has in the trial of a suit. Section 9, inter alia, provides for the extinction of rights where no claim is made under Section 6. Section 11(1) lays down that in the case of a claim to a right in or over any land, other than a right of way or right of pasture, or a right to forest produce or water course, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part. In the event of admitting the right of any person to the land, the Forest Settlement Officer, under Section 11(2), can either exclude such land from the limits of the proposed forest or come to an agreement with the owner thereof for the surrender of his rights or proceed to acquire such land in the manner provided by the Land Acquisition Act, 1884. Section 17 provides for appeal from various order under the Act and Section 18(4) for revision before the State Government. When all the proceedings provided under Section 3 to 19 are over the State Government has to publish a notification under Section 20 specifying definitely the limits of the forest which is to be reserved and declaring the same to be reserved from the date fixed by the notification.

10. It is thus obvious that the Forest Settlement Officer has the powers of a civil court and his order is subject to appeal and finally revision before the State Government. The Act is a complete code in itself and contains elaborate procedure for declaring and notifying a reserve forest. Once a notification under Section 20 of the Act declaring a land as reserve forest is published, then all the rights in the said land claimed by any person come to an end and are no longer available. The notification is binding on the Consolidation Authorities in the same way as a decree of the civil court. The respondents could very well file objections and claims including objection regarding the nature of the land before the Forest Settlement Officer. They did not file any objection or claim before the authorities in the proceedings under the Act. After the notification under Section 20 of the Act, the respondents could not have raised any objections qua the said notification before the Consolidation Authorities. The Consolidation Authorities

were bound by the notification which had achieved finality."

30. In the case of ***State of U.P. versus Kamal Jeet Singh(supra)***, the Division Bench of this Court considered the scheme of the Indian Forest Act and has held that the Forest Settlement Officer has the powers of a civil court and once the notification under Section 4 and Section 20 of the Forest Act has been issued, it attains finality and except revision before the State no authority has jurisdiction to determine the rights as contained in Section 27-A of the Forest Act. Thus, the revenue authorities could not have determined the rights under Section 229 B of the U.P. Z.A. & L.R. Act 1950.

31. A coordinate Bench of this Court, in the case of ***State of U.P. versus Sone Lal and others(supra)***, has held that once notification is issued under Section 4 of the Forest Act, no right could have been acquired in or over the land declared as forest land.

32. It is also noticed that though the claim was set up by the respondents in the plaint that they are in possession on the land in dispute for the last 30 years, however in the oral evidence of P.W. 1 Surjan Singh i.e respondent no.1, he admitted in his cross examination that he had not got it from anybody and got it vacant and he also admitted that he has not deposited the land revenue for the last 30 years. He also admitted that he had filed the suit without impleading the forest department but the State was impleaded, however it has not been disclosed as to through whom the State was impleaded in the suit, whereas the State can be impleaded in the suit only through the department concerned in accordance with law.

33. It is also noticed that the commission was issued during the trial, which was conducted on 17.12.1979. The report of commission i.e. GA 2 / 30/1 and Ga 2 30/2 indicates that during the commission, the respondents stated that they have got the patta of the land in dispute in the year 1969 and since then they are in possession of the land in dispute, therefore the respondents could have in possession for the last eight years in view of this. This report has not been challenged by the respondents and nothing has been brought before this Court to show that that this report was challenged and rejected. Therefore a contrary stand has been taken and no patta has been brought on record. Therefore it cannot be said that the respondents have perfected their rights under the Act of 1950 and they are in lawful possession of the land in dispute, even if they may be in possession and such persons are not entitled for any relief in a suit for permanent injunction.

34. In view of above, this Court is of the view that the respondents are not entitled for any benefit of the orders passed in a suit under Section 229 B of the Act of 1950 filed by the respondents and the suit for permanent injunction filed before the civil court. It is settled law that injunction cannot be granted against the true owner. In the present case true owner of the land in dispute is State after enforcement of Act of 1950 and after notification under Section 20 of the Act of 1927, the forest department of the State is the true owner of the land in dispute.

35. A coordinate Bench of the High Court of Punjab & Haryana, in the case of ***Sukhwant Singh versus Divisional Forest Officer and others(supra)***, has held that the trespasser cannot seek injunction against

the true owner. Therefore no injunction could have been granted in favour of the respondents.

36. The Hon'ble Supreme Court, in the case of ***Padhyar Prahladji Chenaji(Deceased) through L.Rs versus Maniben Jagmalbhai (deceased) through L.Rs. And others(supra)***, has held that the plaintiff who is not in lawful possession of the land in dispute is not entitled for any permanent injunction against the true owner.

37. It is also noticed that the trial court examined the legality and validity of the notification issued under Section 4 and Section 20 of the Act of 1927 without being challenged, whereas the same could not have been done because the same could even not have been challenged in suit for permanent injunction. The notification issued under the statutory provision could not be held illlegal without being challenged. Even otherwise, the trial court has held that it is not completely legal, meaning thereby it's legality has not been disputed but it has been held only on the ground that the appellant has failed to prove as to when notice of the notification was given to the respondents and when it's munadi was done, whereas once notification under Section 4 and Section 20 of the Act of 1927 were issued and published in official gazette, it will be deemed that they have been issued in accordance with law after following due procedure of law and it could not have been held illegal or inoperative without challenge to the notifications in appropriate proceedings but not in a suit for permanent injunction.

38. The Hon'ble Supreme Court, in the case of ***Dhanraj versus Vikram Singh and others(supra)***, has held that in absence of any challenge to the validity of the statutory provisions, the High Court ought not to have undertaken the exercise of going into the question of repugnancy. Thus, once the provisions of the Indian Forest Act have not been challenged and are valid, the operation of the same cannot be ignored. Consequently, once the notification was issued under Section 4 followed by Section 20 of the Act of 1927, the natural consequence would be that the land in dispute has been declared as forest land and nobody has right on the said land. Any objection in this regard could have been raised only before the Forest Settlement Officer after issuance of the notification under Section 4 of the Act, which admittedly has not been raised. Therefore it had become final after declaration of reserve forest under Section 20 and under Section 27(A) of the Act of 1927 and the order under Section 229 B of the U.P. Z.A. & L.R. Act was passed in a suit filed after issuance of the notification under Section 20 of the Indian Forest Act, which could not have been done. Similarly the injunction could not have been granted by the civil court.

39. A coordinate Bench of this Court, in the case of ***Daya Shankar and others versus Deputy Director of Consolidation Kheri and others(supra)***, has held that if any order is passed by the incompetent authority, de horse the statutory prescriptions, that order would be nullity in the eyes of law and would be void-ab-initio.

40. In view of the aforesaid discussion, it is apparent that after issuance of the notification under Section 4 and Section 20 of the Act of 1927 in the year 1966 and 1970 respectively, no authority or

court had power to entertain any dispute in regard to the land declared as reserve forest under Section 20 in view of Section 27(A) as added by U.P. Act No.23 of 1965, therefore, the suit under Section 229-B of the Act of 1950, that too without impleading the Forest department or concerned Officer of the forest department, was not maintainable and in any case, no effective relief could have been granted without its impleadment and the orders passed on the back of him cannot be applicable on it. Thus, the suit for permanent injunction, claiming right and title on the said basis was not maintainable and could not have been decreed. Even otherwise, the respondents have failed to prove their case. Thus, the substantial questions of law, formulated by this Court, are answered accordingly.

41. In view of above, this Court is of the view that the judgment and order passed by the trial court as well as the first appellate court are not sustainable in the eyes of law. Thus, the appeal is liable to be **allowed**.

42. The second appeal is, accordingly, **allowed**. The judgment and decree dated 16.04.1982 passed by the 1st Additional District Judge Kheri in Civil Appeal No.152/1980, by means of which the appeal has been dismissed upholding the judgment and decree passed by the trial court and judgment and decree dated 09.09.1980 passed by the VIth Additional Munsif, Lakhimpur Kheri in Regular Suit No.154/1977(Surjan Singh & 3 Ors. Versus Divisional Forest Officer, North Kheri) are hereby set aside. No order as to costs.

(2024) 3 ILRA 291
APPELLATE JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 29.02.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

First Appeal No. 819 of 2019

Col. Manoj Kumar Gupta ...Appellant
Versus
Smt. Sangeeta ...Respondent

Counsel for the Appellant:
Sri Pankaj Agarwal, Sri Tarun Agarwal

Counsel for the Respondent:

A. Family Law – Hindu Marriage Act, 1955 – S. 13(1) (ia) and (ib) – Divorce – Desertion – Irretrievable break down – It's recognition as ground of divorce – Wife-respondent is staying away from the husband-appellant for six years before divorce petition filed in the year 2015 – Effect – Long period of separation, when constitute mental cruelty – Held, when the period of separation should be sufficiently long, and it is relevant factor to consider under mental cruelty continued long separation with dead emotions used to be construed as a case of irretrievable break down of marriage, which is also a facet of mental cruelty – Desertion necessarily includes separate living of the husband and wife and therefore, in other words, two years continuous separation, can be taken as a ground for divorce and has been statutorily provided – The marriage has irretrievably been broken down. Hence, as held by the Apex Court, certainly this case has to be construed as a case of 'mental cruelty' on the appellant as the marriage is totally unworkable and emotionally dead. (Para 15, 28, 32, 33 and 39)

B. Family Law – Hindu Marriage Act, 1955 – S. 13(1) (ia) and (ib) – Desertion – Meaning – Held, desertion means intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. (Para 15)

Appeal allowed. (E-1)

List of cases cited :-

1. Sukhendu Das Vs Rita Mukherjee; AIR 2017 SC 5092

2. Dr. Nirmal Singh Panesar Vs Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar; 2023 (3) ARC 244

3. Transfer Petition (Civil) No. 1118 of 2014; Shilpa Shailesh Vs Varun Sreenivasan decided on 01.05.2023

4. Shashi Bala Vs Rajendrapal Singh; 2020(2) ADJ 745

5. Naveen Kohli Vs Neelu Kohli; AIR 2006 SC 1675

6. Samar Ghosh Vs Jaya Ghosh; 2007 (4) SCC 511

7. Rajib Kumar Roy Vs Sushmita Saha; 2023 SCC Online SC 1221

8. Rakesh Raman Vs Kavita; AIR 2023 SC 2144

9. Prakashchandra Joshi Vs Kuntal Prakashchandra Joshi alias Kuntal Visanji; 2024 SCC Online SC 68

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Tarun Agarwal, holding brief of Sri Pankaj Agarwal, learned counsel for the appellant.

2. Present appeal has been filed against the judgment and order dated 18.10.2019 passed by Principal Judge, Family Court, Moradabad in Case No. 492 of 2015.

3. The plaintiff is the appellant herein. He filed an application under Section 13 (1) (ia) (ib) of the Hindu Marriage Act, 1955 before the court of Principal Judge, Family Court, Moradabad, numbered as Complaint Case No. 492 of 2015. The said petition was dismissed vide order dated 18.10.2019. Aggrieved by the same, present appeal has been filed.

4. The plaintiff-appellant solemnized first marriage with Anuradha on 15.11.1989 as per Hindu Customs and Rites. The said marriage was dissolved on 31.05.2007. After that plaintiff solemnized his second marriage on 21.11.2007 with the respondent herein. The first husband of the respondent herein had died and she has two children out of the wedlock with the first husband. During the marriage, the first husband has adopted one girl child namely, Astha, she is living with the plaintiff-appellant. Both the appellant and the respondents were doctors and they lived in District Budaun and the appellant has served in the Indian Army about 30 years. The defendant-respondent is also a senior doctor and she is presently posted at Ghaziabad and she is also running a private nursing home at Buddhi Vihar in Moradabad.

5. After marriage, the defendant-respondent has deserted the appellant and lived separately at Moradabad, that she deserted the appellant for six years before filing the suit and has stated that no physical relationship has been established between the appellant and the respondent. Further, she is accusing plaintiff as well as the adopted daughter and subjected to mental cruelty and misbehaved with the appellant and there is no cordial relationship with the adopted daughter of the appellant and she called Astha as a orphan and illegitimate child and she should be thrown out of the house. Due to

the above said behaviour of the defendant-respondent, mental condition of the appellant's daughter Astha started deteriorating. The respondent behaved indecently and insulted the appellant in front of his friends and relatives, which caused great embarrassment to him. She used to quarrel with the appellant's daughter over small issues and hates her. More so, she assassinated the character of the appellant without any proper reason and also alleged that he was involved in illegal activities in his house at Greater Noida.

6. The respondent has filed her objections to the above said allegations by denying the statements and allegations and she has stated that she married the appellant by knowing the former wife had adopted a girl child Astha as the defendant-respondent is also having two children namely, Pallavi Swaroop and Rijul Swaroop from her former husband. The respondent was a doctor in Central Police Hospital, Moradabad, but is currently working in the District Hospital, Ghaziabad. Eight years have passed since her marriage with the appellant. Whenever the respondent got leave she kept visiting the appellant and the appellant also keep coming to her from time to time. She has denied that she never misbehaved with the appellant and she always had good relations with the appellant and adopted daughter Astha as well. In fact, the marriage of the respondent's sister's daughter took place on 20.02.2015, in which the adopted daughter Astha was also present and had good relationship with the respondent.

7. Based on the above averments, the court below has framed following issues:

"1- क्या प्रत्यर्थी के द्वारा याची के साथ क्रूरता पूर्वक व्यवहार किया गया ?

2- क्या प्रत्यर्थी के द्वारा याचिका प्रस्तुत किये जाने के दो वर्ष पूर्व से याची का परित्याग किया हुआ है ?

3- याची किस अनुतोष को प्राप्त करने का अधिकारी है ?"

8. In response to the above issues, the court below has answered that the plaintiff-appellant has stated regarding his adopted daughter Astha for having cruely treated by the defendant-respondent. As per plaintiff, defendant used to call Astha as orphan/illicit child and used to say to throw her in dustbin. It has also been stated by plaintiff that defendant used to treat Astha cruely and used to quarrel with her for minor issues. The defendant has denied the said allegations in her defence as the plaintiff and defendant both are doctors by profession and it is an admitted fact that adopted daughter Astha, who is adult and eligible for marriage and Astha is an intelligent girl, but Astha has not got examined by the plaintiff during recording of statements, who is corroborating the misbehaviour done and filthy language used by defendant towards her and no statement has been given by the Astha in the corroboration of statements of plaintiff by appearing in court and the plaintiff had not proved the statement from his evidence. No such evidences have been produced by the appellant which confirms ill-treatment, insulting behaviour and filthy words used by the respondent to his adopted daughter Astha.

9. In view of the said circumstances, appellant filed the petition against the respondent for dissolution of marriage on the ground of cruelty, but the appellant could not prove the cruelty, hence, this issue is disposed of negatively.

10. As far as issue no. 2 is concerned, both the appellant and respondent got

married on 21.11.2007 with consent and admitted that both the parties were already married before this marriage and at the time of marriage, the respondent being lady doctor was working as Medical Officer in Central Hospital, Moradabad. The statement of the appellant that the respondent has deserted the appellant for more than six years before the date of filing the petition i.e. on 19.05.2015. As per the statement of the respondent, on 10.02.2015, her daughter Pallavi's marriage was solemnized in Mumbai and the appellant attended the pre-marriage rituals in Moradabad and also attended the wedding in Mumbai. The statement of the appellant that the respondent has deserted him has not been proved by the appellant. Hence, the issue is disposed of negatively.

11. The said appeal was admitted by this Court vide order dated 3.12.2019. As per the office report dated 23.01.2020, notices issued to the sole respondent through ordinary post fixing 24.01.2020 were not returned and nobody has put in appearance. Subsequent office report dated 4.9.2021 reflects that the sole respondent has been served by ordinary post personally. This fact was noticed by this Court in its order dated 6.9.2021. Apparently in the interest of justice, vide order dated 1.10.2021 fresh notices were issued to the respondent by way of publication in the newspaper. After publication, the appellant has filed affidavit of service dated 1.11.2021 and annexed therewith original copy of newspapers 'Times Nation', 'Hindustan', 'Hindu' and 'Times of India' dated 16.10.2021. In such view of the matter, the Court find that the service on sole respondent is deemed to be sufficient.

12. Based on the above findings of the court below, Sri Tarun Agarwal, learned counsel for the appellant has submitted that the court below has not appreciated the facts in perspective manner, in fact, the respondent has made allegations against the appellant in her written statement and the cruelty made by the appellant was not specifically controverted in the defence statement filed by the respondent, and in fact, in paragraph 40 and 41 of the said reply, she has made character assassination of the appellant, the said aspect has not been considered by the court below while deciding the application filed by the appellant under Section 13 (1) (ia) (ib) of the Hindu Marriage Act, 1955. The court below while giving finding with regard to issue no. 1 has travelled beyond the pleadings of the parties and totally ignored the relevant statements as well as cross-examination of DW-1.

13. He further submitted that despite service of notice, the respondent has not chosen to appear before this Court and in fact, admittedly even after the date of filing of the suit till today, she is living separately, that itself shows that the respondent is not interested to live with the appellant, even on this ground alone, the suit filed by the appellant has to be decreed by granting divorce. He further submitted that it is well accepted proposition that 'cruelty' is a course or conduct of one party, which adversely affects the others. The 'cruelty' may be mental or physical, intentional or unintentional.

14. In the instant case, admittedly the respondent is staying away from the appellant since long, that comes under mental cruelty as held by the Apex Court in catena of judgments. The cruelty has to be construed and interpreted considering the type of life the parties are accustomed to or their economic and social conditions and

their culture and human values to which they attach importance. In the instant case, both the appellant and respondent are doctors and they are living a high profile life. She is not interested to live with the appellant and she is living separately.

15. As decided by the Apex Court consistently in various judgments that the desertion means intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. In the instant case, that could be taken into consideration that the wife deserted the husband or treated him with cruelty. When the period of separation should be sufficiently long, and it is relevant factor to consider under mental cruelty continued long separation with dead emotions used to be construed as a case of irretrievable break down of marriage, which is also a facet of mental cruelty.

16. In support of his contentions, learned counsel for the appellant relied on the judgments of the Apex Court in **Sukhendu Das Vs. Rita Mukherjee, AIR 2017 SC 5092, Dr. Nirmal Singh Panesar Vs. Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar, 2023 (3) ARC 244, Shilpa Shailesh Vs. Varun Sreenivasan, Transfer Petition (Civil) No. 1118 of 2014.** He also relied upon the judgment of this Court passed in **Shashi Bala Vs. Rajendrapal Singh, 2020(2)ADJ 745.**

17. Relevant paragraph of **Sukhendu Das (supra)** is as under:

"8. This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel. Admittedly, the Appellant and the Respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in matrimony [Rishikesh Sharma v. Saroj Sharma]. The daughter of the Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, 1950."

18. Relevant paragraphs of **Dr. Nirmal Singh Panesar (supra)** is as under:

"2. The appellant is a qualified doctor, and was Commissioned Air Force Officer. He retired on 30.04.1990 as Wing Commander. The respondent is also a qualified teacher, who was working in a Central School, and has retired now. The appellant had filed the Divorce proceedings on 12.03.1996 before the District Court, Chandigarh on two grounds, namely 'cruelty' and 'desertion' as contemplated in Section 13(1)(ia) and 13(1)(ib) respectively of the Hindu Marriage Act 1955 (hereinafter referred to as the said Act)."

8. Per contra, the learned advocate Ms. Madhurima Tatia for the respondent submitted that the respondent being an aged lady does not want to die with the stigma of a "Divorcee." According to her, the respondent had made all efforts to respect the sacred relationship between the parties all through out and is still ready

to look after the appellant with the assistance of her son. Mere long period of separation could not tantamount to irretrievable break down of the marriage. She lastly submitted that the appellant having failed to make out any ground either of cruelty or desertion, the Court may not interfere with the concurrent findings recorded by the Single Bench and the Division Bench of the High Court in this regard.

9. We have given anxious thought and consideration to the submissions made by the learned advocates for the parties in the light of the evidence on record. There could not be any disagreement with the proposition of law canvassed by the learned counsel for the appellant that the allegations of 'cruelty' and 'desertion' are legitimate grounds for seeking a decree of divorce under Section 13(1) of the said Act. It is well accepted proposition that "cruelty" is a course or conduct of one party which adversely affects the other. The "cruelty" may be mental or physical, intentional, or unintentional. This court in Naveen Kohli (supra) has summarised the principles of law on "cruelty" as under: -

"46. The principles of law which have been crystallised by a series of judgments of this Court are recapitulated as under:

In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan [(1981) 4 SCC 250 : 1981 SCC (Cri) 829] this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

47. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] this Court had an occasion to examine the concept of cruelty. The word "cruelty" has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i-a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the

ground that there has been no deliberate or wilful ill-treatment.

48. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

49. ……..

50. …….

51. ……..

52. This Court in ***Savitri Pandey v. Prem Chandra Pandey [(2002) 2 SCC 73]*** *stated that mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."*

10. The crux of the various decisions of this Court on the interpretation of the word "cruelty" is that it has to be construed and interpreted considering the type of life the parties are accustomed to; or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

11. Similarly, the law is also well settled as to what could be said to be "Desertion" in the divorce proceedings filed under Section 13 of the said Act. The expression "Desertion" had come up under the judicial scrutiny of this Court in Bipin Chandra Jai Singh Bai Shah vs. Prabhavati AIR 1957 SC 176, which was again considered in case of Lachman Utam Chand Kirpalani vs. Meena alias Mota, AIR 1964 SC 40. This Court collating the observations made in the earlier decisions, stated its view as under: -

"Collating the aforesaid observations, the view of this Court may be stated thus: Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home."

13. Coming back to the facts of the present case, the Single Bench of the High Court holding that the appellant-petitioner had failed to prove the grounds of "cruelty" and "desertion" as contemplated in Section 13(1) of the said Act, had reversed the decree of divorce passed by the Trial Court. The Division Bench vide the impugned order confirmed the order passed by the Single Bench and observed by holding as under: -

"16. Coming now to the facts of the present case, it is undisputed that the wife continued to live with the husband without any grievance for 21 years and gave birth to three children. She looked after the children. One daughter was married in the year 1984 before separation. The grievance put-forward by the husband for the first time was that the wife did not join him when he was transferred to Madras. The parties were settled at Amritsar and lived there for 21 years where children and parents of the appellant were also living. Case of the wife is that the husband got himself transferred of his own volition. At this stage of life when there

were three grown up children and the wife had been living with the husband for 21 years, if unilateral decision was taken by the husband and the wife expressed her opposition, could it be held that the wife deserted the husband or treated him with cruelty. We have already referred to the settled principles on the subject. If the wife did not agree to have herself transferred to Madras, in the given situation, it could not be held that the wife wanted to bring cohabitation permanently to an end without reasonable cause. This did not show any animus deserendi nor it could be held that the wife was cruel to the husband. Taking an overall view of the matter, it cannot be held that the view taken by the learned Single Judge is not a possible view so as to call for interference in an appeal under Letters Patent. The fact remains that the wife continued to look after the children and arrange their marriages. There is nothing to show that the husband made any effort to join the wife, who was living in the matrimonial home or to look after any of the children. The burden of proof is on the appellant to prove desertion and cruelty."

"17. Learned counsel for the appellant refers to Exh.A-8, which is a letter addressed to the wife, in response to her representation for maintenance. The contents of the letter are as under: -

"2. lt is informed that we have tried our best to help you both to reconcile in the long-term interest of the welfare of the family and children. Accordingly, it is learnt that Wg Cdr. N.S. Panesar, in good faith and on our counsel signed for 15 reconciliation. But it seems that you are not ready to reconcile even in the interest of children. Under the circumstances, there is no other alternative for this HQ except to advice you to redress your grievance, if any, in the Court of law. However, on moral and humanitarian grounds we have counselled your husband to continue remitting Rs.800/- p.m. till the matter is settled to mutual satisfaction."

He also refers to Exh.A-17, which is letter written by the son of the appellant, asking the appellant to send money to the Court."

"18. Next contention raised is that the jewellery should not be given to the wife. Learned counsel for the appellant suggested that a grand-daughter of the appellant should visit the appellant, in which case, the appellant will have no objection to the jewellery being given to the grand daughter. Learned counsel for the wife states that the grand-daughters will visit the appellant as often as possible and also depending on desire and attitude of the appellant but not as a condition for finding of learned Single Judge to be upheld. Finding of learned Single Judge in this regard is as under: -

" ... This is a fit case to hand over the jewellery which was given to appellant (wife) at the time of marriage and thus, I direct the Manager, Bank of Baroda, Sector 22, Chandigarh to hand over all the jewellery to the appellant lying in the locker ... "

19. Relevant paragraph of **Shilpa Shailesh (supra)** is as under:

"33. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation

and, therefore, dissolution of marriage is the right solution and the only way forward. That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration."

20. Relevant paragraphs of **Shashi Bala (supra)** is as under:

7. Court below upon consideration of pleadings, oral and documentary evidence on record decided issues framed by it. In respect of Issue no.1, Court below concluded that Plaintiff is clearly entitled to grant of decree of divorce in terms of Section 13 (1) (1b) of Act 1955 i.e. on the ground of 'desertion'. Court below however concluded that Plaintiff has failed to establish commission of any physical or mental 'cruelty' upon him by Appellant. In the opinion of Court below, from material filed by Plaintiff it is apparent that it is Plaintiff, who has committed mental cruelty upon Appellant. However, since it is an admitted position that Appellant has 'deserted' Plaintiff for the last 11 years and aforesaid fact, is an admitted fact therefore same is not required to be proved under Indian Evidence Act. Consequently, suit for divorce filed by Plaintiff was decreed by Court below on the ground of 'desertion' vide judgement dated 13.03.2015 and decree dated 27.03.2015.

18. Section 13(I) (ib) of Act 1955 is a mandatory provision and therefore, if a suit for divorce is filed on the ground of 'desertion', the precondition provided in above Section for grant of decree of divorce on the ground of desertion must be fulfilled on the date of presentation of suit. Admittedly, date of desertion by Appellant, pleaded in plaint is 28.02.2004 whereas plaint was presented on 07.03.2005. Evidently, period of two years of desertion on the part of Appellant had not expired on the date of presentation of plaint. Therefore, precondition provided in Section 13(I) (i-b) of Act 1955 was not fulfilled on the date of presentation of suit. Subsequent events which have taken place after the institution of suit are irrelevant as same cannot be taken into consideration under scheme of Act 1955. Therefore, we have no hesitation to hold that decree passed by Court below decreeing suit for divorce filed

by Plaintiff on ground of 'desertion' is manifestly illegal.

21. Similarly this Court in First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita) decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ

667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

21. We would also like to make reference to some old landmark judgments and some latest judgments on the issue involved.

22. Reference may be made to the judgments of **Naveen Kohli Vs. Neelu Kohli, AIR 2006 Supreme Court 1675, Samar Ghosh Vs. Jaya Ghosh, 2007 (4) SCC 511, Rajib Kumar Roy Vs. Sushmita Saha, 2023 SCC Online SC 1221, Rakesh Raman Vs. Kavita, AIR 2023 SC 2144 and Prakashchandra Joshi Vs. Kuntal Prakashchandra Joshi alias Kuntal Visanji, 2024 SCC Online SC 68.**

23. Relevant paragraphs of **Naveen Kohli (supra)** are as under:

"78. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

79. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

80. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

81. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the

decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

82. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

83. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

90. Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

91. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

92. The High Court ought to have visualized that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

93. The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

94. In our considered view, looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the Trial Court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would ultimately be conducive in the interest of both the parties."

24. Relevant paragraph of **Samar Ghosh (supra)** is as under:

"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may

be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a

legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

25. Relevant paragraph of **Rajib Roy (supra)** is as under:

"7. We have heard the learned counsel for the petitioner as well as the learned counsel for the respondent (wife) at length. Today, the parties are also before us through virtual mode, and we had a chance to interact with both. Considering the entire gamut of facts which are there before us, we have absolutely no doubt in our mind that this is a case of irretrievable breakdown of marriage.

8. The husband and wife have been living separately, the wife is at Udaipur (district Gomati), Tripura and husband at Agartala, Tripura for the last 12 years. Nothing would give us more satisfaction if the two could work out their differences and decide to live together, if only for the sake of their child. But under the circumstances, with the rigid attitude of both the parties, who have failed to appreciate the beauty of compromise, we have been forced to convince ourselves, albeit regrettably, that the two cannot now live together. Twelve years of separation, is a sufficiently long period of time to have sapped all emotions which the two perhaps may have had once for each other. We therefore cannot take the 11 same hopeful view as that of the High Court, which still believes that the matrimonial bond between the two has not ruptured beyond repair or that the two cannot still give a new lease of life to their relation. Frankly, no matter how much we would have liked this to happen but in reality, this is a possibility, which under the facts and circumstances of the case, can only be called wishful.

9. Continued bitterness, dead emotions and long separation, in the given facts and circumstances of a case, can be construed as a case of "irretrievable breakdown of marriage", which is also a facet of "cruelty". In Rakesh Raman v. Kavita reported in 2023 SCC OnLine SC 497, this is precisely what was held, that though in a given case cruelty as a fault, may not be attributable to one party alone and hence despite irretrievable breakdown of marriage keeping the parties together amounts to cruelty on both sides. Which is precisely the case at hand.

10. Whatever may be the justification for the two living separately, with so much of time gone by, any marital love or affection, which may have been between the parties, seems to have dried up. This is a classic case of irretrievable breakdown of marriage. In view of the Constitution Bench Judgment of this court in Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC OnLine SC 544 which has held that in such cases where there is irretrievable breakdown of marriage then dissolution of marriage is the only solution and this Court can grant a decree of divorce in exercise of its power under Article 142 of the Constitution of India.

11. We therefore declare the marriage to have broken down irretrievably and therefore in exercise of our jurisdiction under Article 142 of the Constitution of India we are of the considered opinion that this being a case of irretrievable breakdown of marriage must now be dissolved by grant of decree of divorce."

26. Paragraph 18 of **Rakesh Raman (supra)** is as under:

"18. We have a married couple before us who have barely stayed together

as a couple for four years and who have now been living separately for the last 25 years. There is no child out of the wedlock. The matrimonial bond is completely broken and is beyond repair. We have no doubt that this relationship must end as its continuation is causing cruelty on both the sides. The long separation and absence of cohabitation and the complete breakdown of all meaningful bonds and the existing bitterness between the two, has to be read as cruelty under Section 13(1) (ia) of the 1955 Act. We therefore hold that in a given case, such as the one at hand, where the marital relationship has broken down irretrievably, where there is a long separation and absence of cohabitation (as in the present case for the last 25 years), with multiple Court cases between the parties; then continuation of such a 'marriage' would only mean giving sanction to cruelty which each is inflicting on the other. We are also conscious of the fact that a dissolution of this marriage would affect only the two parties as there is no child out of the wedlock."

27. Relevant paragraphs of **Prakashchandra Joshi** (supra) is as under:

"5. The petition proceeded ex parte as, despite due service, the respondent remained unrepresented. After considering the pleadings and evidence, the learned Family Court dismissed the petition of the appellant, inter alia, observing that no case had 4 been made from the alleged cruelty caused to the appellant by the respondent.

6. Being aggrieved with and dissatisfied by the dismissal of the petition by the learned Family Court, the appellant moved a Family Court Appeal before the High Court. The High Court dismissed the appeal by holding that no case has been made out by the appellant for seeking a decree of divorce on the ground of either cruelty or desertion. Hence, this appeal.

7. Considering the facts and circumstances, a short question arises for our consideration as to whether a decree for divorce can be granted for the reason that the marriage has irretrievably broken down.

8. Notice was issued to the sole respondent/wife on 21.01.2022, which was duly served upon the respondent. The respondent once again did not put in appearance either inperson or through an advocate.

12. It is also to be seen that in the proceedings initiated by the appellant for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, the respondent did not appear despite receiving the summons. Similarly, in the present divorce proceedings also the respondent failed to enter appearance despite service of notice in the Trial Court, High Court and Supreme Court as well. Thus, it is apparent that the respondent does not wish to continue the marital chord and is 7 not responding to court summons much less the request made by the appellant.

15. Reverting back to the case in hand, to accord satisfaction as to whether the present is a fit case for exercise of power under Article 142 (1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown, we see that the parties are residing separately since February, 2011 and there have been no contact whatsoever between them during this long period of almost 13 years. The respondent-wife is not even responding to the summons issued by the courts. It seems she is no longer interested in continuing the marital 10 relations with the appellant. Therefore, we have no hesitation in holding that the

present is a case of irretrievable breakdown of marriage as there is no possibility of the couple staying together."

28. The above discussion would clearly reflect that the ground of irretrievable break down is being consistently recognized for ground of divorce by the Hon'ble Apex Court since long.

29. Even the need of amending the Act by including ground of irretrievable break down for grant of divorce was felt and expressed as back as in the year 2006 by Hon'ble Apex Court in **Naveen Kohli (supra).**

30. Needless to point out that the case as referred to above clearly reflects that in exercise of power under Article 142 of the Constitution of India, decree of divorce is being consistently granted on the ground of irretrievable break down by the Hon'ble Apex Court.

31. The Apex Court, realising the absence of this ground in the statute, ultimately realised that under such circumstances this amounts to mental cruelty on both parties as continuation of matrimonial ties in normal circumstances, is not possible.

32. Considering the submissions made by learned counsel for the appellant and also the law laid down by the Apex Court as noted above, admittedly, the respondent is staying away from the appellant for six years before divorce petition filed in the year 2015 and despite receipt of the notice, she is not inclined to appear before this Court to defend her case, which shows that she is not interested to live with the appellant and she is not interested to continue the matrimonial life with the appellant and the marriage has become totally unworkable and emotionally dead.

33. Apart from the facts and circumstances of the present case, generally speaking, the Hindu Marriage Act is of the year 1955. Section 13 of the Act provides for grounds of divorce. Needless to point out that several amendments have been carried out in the aforesaid section in the grounds so provided under the section originally. The ground of desertion for a continuous period of not less than two years, immediately preceding the presentation of the petition is also one of the ground. Needless to highlight that this desertion necessarily includes separate living of the husband and wife and therefore, in other words, two years continuous separation, can be taken as a ground for divorce and has been statutorily provided. The law must keep pace with the time. When the Hindu Marriage Act was enacted in the year 1955, the manner in which the marriages were taking place and the sentiments and respect attached to such matrimonial ties were different and the manner in which marriages are taking place in the present days were unheard of in those days. For a fairly long period, the term 'cruelty' came to be interpreted as physical cruelty only but now it is settled that the cruelty need not be physical only but can be mental as well.

34. We, however, have no intention to make an impression that we have anything negative about the same. It is because of education, financial independence, breaking of caste barriers, modernization, effect of western culture. The time is changing and the society is becoming more and more open and individualistic in

nature, leading to lesser need of emotional support as well. Whether it is a love marriage or is an arranged marriage, all such factors do affect the relationship between the two. However, needless to say that to every action, there is equal reaction. Easily entered marriages like love marriages are also easily resulting in matrimonial dispute between the two. No matter, who is responsible for the same. The parties are not willing to continue such relationship or atleast one party starts living separately. These facts are clearly emerging from our experience, while dealing with the such disputes. There may be so many reasons for living separately, however, on the other hand, there may be or there are several reasons for opposing the divorce petition as well. Hence, when the parties mutually agree for divorce, petition is filed under Section 13B of the Hindu Marriage Act.

35. In view of this changing time and experience, the Courts cannot remain mute spectators to such ground realities of life. The Courts are answerable to the litigant seeking justice. Needless to say that the law must keep pace with the time.

36. In **Naveen Kohli (supra)** in the year 2006 itself, Union of India was strongly recommended by the Hon'ble Apex Court to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce and copy of the judgment was sent to Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps. Paragraph 96 of the aforementioned judgment is as under:

"96. Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps."

37. It is known to all concerned with the subject that even after expiry of about 18 years, nothing has been done in this regard. On one hand, the law recognises desertion of a petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition as one of the grounds for grant of divorce, whereas on the other hand, it is not understandable as to why the ground of irretrievable break down is not being recognized as one of the grounds, when the parties are living separately for so many years and in some cases, for decades together.

38. In so many cases, the matrimonial life between the parties is only for the namesake, whereas factually the marriage has become totally unworkable and emotionally dead, even if respondent is insisting upon carrying on with such emotionally dead relationship. It is only for this reason recognizing ground realities of such dead relationship, it is being consistently felt by the Hon'ble Apex Court that continuance of such unworkable matrimonial ties is nothing but mental cruelty on the parties and atleast on the petitioner, even when the divorce petition is being opposed by the other side. To our mind, irretrievable break down is an assessment of circumstances prevailing in lives of the parties to the marriage and if proved, would amount to mental cruelty.

39. Reverting back to the facts of the case and the discussion made hereinabove, we find that the marriage has irretrievably been broken down. Hence, as held by the Apex Court, certainly this case has to be construed as a case of 'mental cruelty' on the appellant as the marriage is totally unworkable and emotionally dead. On that note, divorce can be granted.

40. Accordingly, the judgment, order and decree dated 18.10.2019 passed by Principal Judge, Family Court, Moradabad in Case No. 492 of 2015 is set aside. The appeal is **allowed.**

41. We hereby grant a decree of divorce in favour of the appellant-husband Col. Manoj Kumar Gupta against Smt. Sangeeta, the respondent-wife herein.

42. We direct the Registrar (Compliance) to send a copy of this judgment to Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India and Law Commission to consider the matter in view of the observations of the Hon'ble Apex Court in the case of **Naveen Kohli (supra)** and other judgments.

43. Learned A.S.G.I. is also directed to forward a copy of this judgment to the authorities noted above for serious consideration.

(2024) 3 ILRA 308
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

First Appeal No. 1391 of 2023

Km Ankita Devi ...Appellant
Versus
Shri Jagdependra Singh @ Kanhaiya ...Respondent

Counsel for the Appellant:
Sri Vinay Mishra, Sri Mata Achal Mishra

Counsel for the Respondent:

A. Family Law – Hindu Marriage Act, 1955 – Sections 5 (i), (iv) & (v), & 11 – Void marriage – Non-existence of any ground – Effect – Ground of non-performance of Saptapadi ceremony and the registration of marriage, being consequential in nature, was taken by the plaintiff-appellant – Permissibility – Held, appellant-plaintiff herein was working as Executive Officer, Nagar Panchayat, Manjhanpur, District Kaushambi and she is, thus, a well-educated service class lady holding important post and, therefore, presumably, she must be having sufficient financial means as well. Therefore, it is unbelievable that any kind of fraud or use of force could have been used on her for making signatures for the registration of marriage – Therefore, a bald oral assertion in absence of any cogent evidence cannot be accepted and, therefore, in our opinion, has rightly been rejected by the Family Court. (Para 7 and 12)

B. Family Law – Hindu Marriage Act, 1955 – Ss. 11 and 12 – Void marriage and voidable marriage – Distinction – A void marriage is regarded as non-existent or as never having taken place and such declaration that the marriage is void ab initio can be sought under Section 11 of the Act on the grounds as provided therein whereas a voidable marriage is regarded as valid and subsisting unless a competent Court annuls it until the decree of nullity is obtained in accordance with the Hindu Marriage Act. (Para 11)
Appeal dismissed. (E-1)

List of cases cited :-
1. MAT. APP. (F.C.) 204 of 2023 (Delhi High Court)

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Mata Achal Mishra, learned counsel for the appellant and perused the record.

2. The appellant-plaintiff (wife) has come forward to challenge the impugned judgement and order dated 22.11.2023 passed by the Family Court in Matrimonial Suit No. 272 of 2018 (Km. Ankita Devi vs. Shri Jagdependra Singh @ Kanhaiya), whereby petition filed under Section 11 of the Hindu Marriage Act, 1955 was dismissed.

3. Submission of the learned counsel for the appellant is that the dismissal of the petition under Section 11 of the Act is patently illegal. He submits that the appellant-plaintiff (wife) had initially filed a Matrimonial Petition No. 272 of 2018 on 10.2.2018 under Section 12 of the Act wherein an amendment application dated 30.3.2019 was filed, which was allowed by the Family Court vide order dated 22.2.2021 on payment of cost and Section 12 of the Hindu Marriage Act (hereinafter referred to as the 'Act') was deleted and in place thereof, Section 11 of the Act was incorporated. It is pointed out that the respondent-husband (defendant) challenged the said order by filing First Appeal No. 649 of 2021 (Jagdeevendra Singh @ Kannahaiya vs. Km. Ankita Devi) before this Court, which was dismissed vide order dated 1.3.2023 and the proceedings of the divorce petition were directed to be decided expeditiously. It is further submitted that thereafter vide order dated 25.5.2023 the matter was directed to be proceeded exparte against the husband, who although appeared before the Court below and filed his written statement but absented himself. The appellant-wife (plaintiff) appeared as PW-1 and examined herself and filed the marriage registration certificate, Allahabad Bank passbook and Aadhar Card of the appellant. It is submitted that she was working as Executive Officer, Nagar Panchayat, Manjhanpur, District Kaushambi and the marriage was got registered under duress as mother of the appellant-wife was a heart patient and her treatment in AIIMS was required and she was not in a position to get her treated in AIIMS because of financial constraints. It was submitted that therefore the marriage was an outcome of fraud and thus, the impugned judgement is liable to be set aside and the petition filed under Section 11 of the Act is liable to be allowed.

4. It is also submitted that admitted fact of the case is that initially petition was filed before the Family Court under Section 12 of the Act, which was deleted and Section 11 of the Act was incorporated, therefore, any other relief in the facts and circumstances was also liable to be considered and granted. Submission, therefore, is that even by ignoring the grounds of Section 11 of the Act, the relief should have been granted to the appellant-plaintiff herein and the marriage was liable to be declared void.

5. We have considered the submissions of learned counsel for the appellant and perused the record.

6. Before proceeding further, it would be appropriate to take notice of Sections 5, 11 and 12 of the Hindu Marriage Act, 1955, which are quoted as under:

"5. Conditions for a Hindu marriage- *A marriage may be solemnized*

between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of marriage, neither party-

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder or such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity;

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

11. Void marriages- *Any marriage solemnized after the commencement of this Act shall be null and void any may, on a petition presented by either party thereto, against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.*

12. Voidable marriages- *(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-*

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5, as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1), shall be entertained if-

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband and wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1), shall be entertained unless the Court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that the proceedings have been instituted in the case of a marriage solemnized before the commencement of

this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

(emphasis supplied)

7. We find that the Court below has considered the provisions of Sections 5 and 11 of the Act and found that none of the grounds as given in Section 11 of the Act are existing in the present case and therefore, the petition was dismissed on merits. During course of arguments, on a pointed query, learned counsel for the appellant fairly conceded that no ground as provided in Section 11 of the Act is available in the present case and the petition should have been considered on the other grounds and also on the grounds as available in Section 12 of the Act. It was pointed out that the ceremony of Saptapadi (Sat Fera) was not performed and no marriage ceremony had taken place, therefore, the marriage was not valid and therefore, registration of marriage was inconsequential in nature.

8. On perusal of the record, we find that in the written statement, it has been categorically stated by the respondent-husband that the marriage had taken place in a simple ceremony on 14.2.2017 and thereafter the marriage was got registered on 25.3.2017 by appellant herself appearing and admitting factum of marriage before the Sub Registrar, Kanpur Nagar as stated in para 18 of the written statement, therefore, there is no question of any fraud having been played by the respondent-husband. In paragraph 23 of the written statement, it has been categorically stated that as the petition under Section 12 of the Act should have been filed within a year after the knowledge of the alleged fraud, which is not available in the present case. Therefore, it appears that for this reason, subsequently an amendment application for changing the provision from Section 12 of the Act to Section 11 of the Act had been filed, which was allowed. Therefore, changing the provision of law under which the petition was filed before the Family Court was clearly a conscious decision of the appellant herself. During course of arguments, learned counsel for the appellant has admitted that none of the grounds as available in Section 11 of the Act are made out, therefore, we find that the argument of learned counsel for the appellant that even though the provisions of Section 12 of the Act has been changed to Section 11 of the Act, petition should have been considered as per the provisions of Section 12 of the Act, is patently misconceived. We find that ultimately no fruitful purpose would be served by keeping this litigation pending in view of the admitted legal position. A bare reading of Sections 5, 11 and 12 as quoted above would clearly disclose that the grounds of Section 12 of the Act are different from the grounds as given in Section 11 of the Act and therefore, specific assertion as made in the petition must have been proved by the appellant (plaintiff), which she failed to prove.

9. In the present case, it is being asserted by the appellant-plaintiff that she met the respondent-defendant in an office and thereafter he along with so-called mother (Ex. Cadre Minister, Revenue Adviser) used to visit the house of the appellant-plaintiff. The mother of the appellant-plaintiff was a heart patient and

she needed money for her treatment. The respondent-defendant persuaded her for her treatment at AIIMS, New Delhi and kept the proposal of marriage, which was not accepted by her, however, she was influenced to go to Kanpur from Agra and the respondent-defendant prepared some documents for registration of marriage by misleading, however, he persuaded her to make signature and so that the marriage can be performed subsequently. It is further asserted that under such compelling circumstances, when treatment of her mother was required, she made signatures for solemnization of marriage with the respondent-defendant. Therefore, the claim of the appellant-plaintiff is that a fraud was played by respondent-defendant (husband) and hence, she filed a petition under Section 12 of the Hindu Marriage Act wherein admittedly, the provision was got amended on her own application from Section 12 to Section 11 of the Act.

10. The Delhi High Court in MAT. APP. (F.C.) 204 of 2023 (wherein names of the parties have not been given) filed for annulment of marriage on the ground of fraud under Section 12 (1)(c) of the Hindu Marriage Act considered the various aspects of the matter and noticed that the term "fraud" has not been defined in the Act and observed that 'not every kind of misrepresentation or concealment of fact' can be termed as "fraud" as envisaged under Section 12 of the Act. Several judgements of other High Courts have also been considered, paragraphs 12, 13, 14, 15, 16, 17 and 18 whereof are quoted as under:

12. The term "fraud" has not been defined in the Act. Under the Hindu Marriage Act not every kind of misrepresentation or concealment of fact can be termed as fraud as envisaged under Section 12 of the Act. Clause 'c' of Section 12(1) of HMJ thus provides that the marriage may be annulled by a decree of nullity if:

(i) the consent of the petitioner is obtained by force or by fraud;

(ii)such force or fraud must be to "the nature of the ceremony" or as to "any material fact or circumstance concerning the respondent".

13. Mulla, in Principles of Hindu law, 11th Edition, deals with this aspect at page 739 and observes that by way of illustration, the concealment of a fact that the wife had been in a "naikin" by profession and even in the keeping of more than one person prior to the marriage was not a fraud if there was consent to the marriage. So long as the person "freely consents" to solemnization of the marriage in accordance with customary ceremonies, understanding the nature and having an intention to marry, objection as to the validity of marriage on the ground of fraudulent representation or concealment cannot be taken subsequently. The marriage cannot be avoided by showing that the petitioner was induced to marriage by fraudulent statements relating to family or fortune, caste or religion or age or character of the respondent. Where, however, a party is kept under the impression that what is being performed is only a betrothal or there is a deception as to the identity of the other person, then it would amount to fraud giving a cause for annulment of marriage.

14. In Anath Nath De vs. Smt. Lajjabati Devi, AIR 1959 Cal. 778, the Calcutta High Court explained that the question of consent of the parties to the marriage arise at two stages ; firstly at the time when the parties consent to solemnize the marriage and secondly, at the time when the marriage itself is solemnized. The

Hindu Marriage not being a contract, the consent at the first stage though obtained by fraud, cannot affect the validity of the marriage. The consent at the time of solemnization of marriage is the material consent and if it is obtained by fraud, it affects the validity of the marriage.

15. Similar view was expressed by Punjab & Haryana High Court in the case of Harbhajan Singh vs. Smt. Briji Balab, AIR 1964 Punjab 339, wherein it was further observed that in case of a marriage under Hindu law fraud is not used in a general way and the marriage cannot be dissolved by on every misrepresentation or concealment. If the term "fraud" was to be interpreted in accordance with Indian Contract Act, then it would become impossible to maintain the sanctity of marriage. By way of illustration, it was stated that if a respondent is a person of Bad Character before the solemnization of marriage, it cannot be termed as a fraud. The legislature did not intent that the past conduct of the respondent except what is mentioned in Section 12 of the HMA, should become a ground for dissolution of marriage.

16. Similarly, Bombay High Court in Raghunath vs. Vijaya, AIR 1972 Bom. 132 observed that term „fraud" used in Section 12(1)(c) of the HMA does not speak of fraud in any general way, nor does it mean every concealment or misrepresentation may be considered as fraudulent. If the consent is given to the solemnization of marriage, the same cannot be avoided on the ground of fraud.

17. In Sujatha vs. Hariharan, 1995 (II) M.L.J 327 DB of Madras High Court observed that to constitute a "fraud" under Section 12(1)(c) of the HMA there must be an abuse of confidential position, some intentional imposition or some deliberate concealment of material facts which are the fundamental basis of the marriage contract.

18. The meaning of material fact or circumstances concerning the respondent was examined in the case of Pradeep s/o Namdeorao Ambhore vs. Pallavi Pradeep Ambhore 2017 (6) Mh.L.J., where the moot question was whether the concealment of the wife suffering from sickle cell anemia, amounted to material fact or circumstance. It was observed that while it is difficult to define with certainty what amounts to a material fact, it is safe to say that a fact or circumstance which is of such a nature that was likely to interfere with the marital life of the parties, then it is material fact or circumstance. Such a material fact or circumstance must be in respect of a person or the character of the person and it is immaterial whether it is curable or not. Further, a fact crucial to the extent that if disclosed would result in either of the parties not consenting to the marriage, would also be termed as a material fact."

11. In our opinion, the Family Court, under such circumstances, ultimately after change of provision from Section 12 of the Act to Section 11 of the Act, has rightly proceeded to consider the grounds of declaration of marriage as void as provided in Section 11 of the Act in the light of Section 5 (i), (iv) and (v) of the Act. It cannot be disputed that there is a difference between void marriage and voidable marriage. Needless to point out that a void marriage is regarded as non-existent or as never having taken place and such declaration that the marriage is void ab initio can be sought under Section 11 of the Act on the grounds as provided therein whereas a voidable marriage is regarded as valid and subsisting unless a competent Court annuls it until the decree of nullity is

obtained in accordance with the Hindu Marriage Act. Unless the decree is granted, the lis remains binding and continues to subsist. The marriage performed in contravention of Clauses (i), (iv) and (v) of Section 5 of the Act is void and incapable of being cured or ratified whereas in a case of voidable marriage, a declaration is necessary, otherwise the marriage continues to remain is regarded as marriage and continues to subsist.

12. In the present case, we have noticed the fact that the appellant-plaintiff herein was working as Executive Officer, Nagar Panchayat, Manjhanpur, District Kaushambi and she is, thus, a well-educated service class lady holding important post and, therefore, presumably, she must be having sufficient financial means as well. Therefore, it is unbelievable that any kind of fraud or use of force could have been used on her for making signatures for the registration of marriage and that too when signatures were admittedly made by her and are reflected from the certificate of registration of marriage at page 25 of the paper book. Therefore, a bald oral assertion in absence of any cogent evidence cannot be accepted and, therefore, in our opinion, has rightly been rejected by the Family Court. The Family Court has also rightly taken into account Section 8 of the Act, which provides for registration of marriages. The certificate of registration duly signed by the appellant herein clearly carries a declaration that marriage was solemnized on 14.2.2017 at Kamleshwaram Guest House, Chhapeda Pulia, Kakadev, Kanpur, Kanpur Nagar, Uttar Pradesh. There is no reason to disbelieve this documentary evidence of marriage and clear-cut declaration therein. In this background, even though no final finding is being recorded but we have reservation if the petition even if filed under Section 12 of the Act could have succeeded.

13. In such view of the matter, we do not find any legal infirmity in the order impugned herein. As only legal question about availability of grounds under Section 11 is involved, which, as conceded by the learned counsel for the appellant are not available, therefore, we are not inclined to admit the present appeal.

14. Therefore, we do not find an merit in the present appeal and no fruitful purpose would be served by admitting the appeal or even keeping this appeal pending.

15. Present appeal is, accordingly, dismissed at the admission stage itself.

(2024) 3 ILRA 314
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2024

BEFORE

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

Second Appeal No. 1623 of 1992

Mahesh Chand ...Appellant
Versus
Brijesh Kumar & Anr. ...Respondents

Counsel for the Appellant:
Mr. Kunal Shah, Advocate

Counsel for the Respondents:
Mr. Ravi Kant, Sr. Advocate assisted by Mr. I.N. Singh, Mr. Gajendra Pratap, Sr. Advocate assisted by Mr. Abhishek Kumar, Advocate

A. Civil Law – Civil Procedure Code, 1908 – Section 100 – Substantial question of law

– UP Zamindari Abolition and Land Reforms Act, 1950 – S. 229-B – Non concurrent finding – Suit for ejectment, recovery of arrears of rent and *mesne* profits – Suit property was earlier situated in a Gram Sabha, but subsequently included within the local limits of the town area – Applicability of Act of 1950 – Held, the provisions of the Act of 1950 would apply to agricultural land located in an area that has fallen within the limits of a town area upon extension of its boundaries after the date of vesting; more specifically, after 07.07.1949. (Para 31 and 32)

B. Civil Law – UP Zamindari Abolition and Land Reforms Act, 1950 – Ss. 3(14) and 143 – Land was let out for running a petrol pump, a non-agricultural activity – Applicability of Act of 1950 – Consequence of declaration u/s 143 – Held, a declaration under Section 143(1) does not place the land, otherwise governed by the Act of 1950, completely out of its regime. It continues to be governed by the provisions of the Act of 1950 except that the provisions of Chapter VIII of the said Act become inapplicable in relation thereto – Its devolution is then governed by personal laws and not the Act of 1950. (Para 50 and 51)

C. Civil Law – UP Zamindari Abolition and Land Reforms Act, 1950 – S. 143 – No declaration of suit property u/s 143 could be made – Effect – How far, Civil Court has jurisdiction – Held, we endorse the Lower Appellate Court's opinion that the Civil Court had no jurisdiction to try the suit for eviction. *A fortiori*, it had to be filed before the Revenue Court of competent jurisdiction as Chapter VIII of the Act of 1950 would apply – High Court directed return of the plaint to the plaintiff for presentation to the Court of competent jurisdiction under Order VII Rule 10 of the Code. (Para 60, 61 and 68)
Appeal allowed. (E-1)

List of cases cited :-

1. Narayan Bhagwantrao Gosavi Balajiwale Vs Gopal Vinayak Gosavi; AIR 1960 SC 100

2. Second Appeal No. 302 of 1953; M/s. Mahabir Jute Mills Ltd. Vs Gauri Shanker Das & ors. decided on 7th January, 1964.

3. Review Petition No. 624 of 2014 (arising out Misc. Single No. 4227 of 2014); Smt. Gomti Devi Vs District Judge, Unnao & ors. decided on 10.09.2014

4. Commissioner of Income Tax, Madras Vs Gemini Pictures Circuit Pvt. Ltd.; (1996) 4 SCC 216

5. Ajaz Carpets & ors.Vs Birla International Pvt. Ltd.; 2013 (4) AWC 4286

6. Alauddin alias Makki Vs Hamid Khan; 1971 RD 160

7. Bhagwati Devi Vs Radhey Shyam & ors.; (1976) 2 RD 178

8. Magnu Ahir & ors. Vs Mahabir; 1987 RJ 146

9. U.P. St. Sugar Corporation Ltd., Lucknow & anr. Vs Vinod Chand Gupta & anr.; 2007 (3) AWC 3058

10. Additional Commissioner, Revenue & ors. Vs Akhalaq Hussain & anr.; (2020) 4 SCC 507

11. Chandrika Singh & ors.Vs Raja Vishwanath Pratap Singh & anr.; (1992) 3 SCC 90

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

1. This is a plaintiff's second appeal. It arises out of a suit for eviction, recovery of arrears of rent and *mesne* profits.

2. The plaintiff's suit aforesaid, being O.S. No.250 of 1974 was decreed by the Trial Court for eviction, recovery of arrears of rent from 01.07.1972 to 15.05.1974 and *mesne* profits from the date of

determination of tenancy at the rate of Rs.10/- per day.

3. The defendant-respondent appealed to the District Judge of Bulandshahr from the Trial Court's decree, which was numbered as Civil Appeal No.409 of 1981. The plaintiff filed a separate appeal from the Trial Court's decree, seeking enhancement of the *mesne* profits awarded. This appeal was numbered as Civil Appeal No.20 of 1982. Both the appeals were consolidated, heard together and decided by a common judgment, but separate decrees passed by the learned Special Judge/ Additional District Judge, Bulandshahr dated 27.07.1992. The defendant's appeal was allowed whereas that by the plaintiff dismissed.

4. Aggrieved by the judgment and decree passed in Civil Appeal No.409 of 1981, the present second appeal has been preferred. The plaintiff appealed to this Court from the judgment and decree passed in Civil Appeal No.20 of 1982 as well, which was dismissed in default by an order dated 24.08.2011. Until time that this appeal was heard by this Court, none of the parties said that the plaintiff's appeal, bearing No.1694 of 1992 had been restored to file. The present appeal alone was, therefore, heard.

5. The facts giving rise to this appeal are:

Mahesh Chandra and Ramesh Chandra, two brothers instituted Original Suit No.250 of 1974 against Shyam Sundar Sharma with a case that they are owners of a part of Plot Nos.2135 and 2136, admeasuring 0-16-6 and 0-8-2 respectively, that abut the wall of the police station on the Jewar side, situate at Jewar, within the limits of the Town Area Jewar, District Bulandshahr (it now falls in District Gautam Buddh Nagar). On the 1st of January, 1970, Mahesh Chandra and Ramesh Chandra, the plaintiff-appellants (for short, 'the plaintiffs') granted lease of a part out of their holdings in Plot Nos.2135 and 2136 in favour of Shyam Sundar Sharma, admeasuring 100' along the road and about 100' on the western side, abutting the wall of Police Station Jewar. The demise was made on a rent of Rs.150/- per month for the purpose of enabling Shyam Sundar Sharma to establish and carry on the business of his petrol retail outlet, being an agency of the Indian Oil Corporation. A rent note dated 31.07.1970 was executed between parties and presented for registration on the same day. It was registered on 08.09.1970 as Document No.2740 in Book No.1, Volume 832 at Pages 62-67 by the Sub-Registrar. Something described as a 'hand note', carrying a map of the plot let out to Shyam Sundar Sharma, also signed by him, was duly executed by parties.

6. Shyam Sundar Sharma died pending suit and was substituted by his heirs and LRs, to wit, Smt. Nirmala Devi, his widow, Brijesh Kumar, a minor aged 3 years and Rajesh Kumar, a minor aged one year, both sons of Shyam Sundar Sharma through their next friend Jayanti Prasad Sharma, their grandfather. These LRs continued to represent the interest of the late Shyam Sundar Sharma in the suit and in appeal before the Lower Appellate Court. Here also, all the three heirs and LRs were made parties, but at a subsequent stage, under orders of this Court dated 06.01.2004, the name of Smt. Nirmla Devi, Shyam Sundar Sharma's widow was deleted and in this appeal, Shyam Sundar Sharma's interest is represented by Brijesh

Kumar and Rajesh Kumar, his sons. Hereinafter, the original defendant Shyam Sundar Sharma, represented by his heirs and LRs Brijesh Kumar and Rajesh Kumar, shall be referred to as 'the defendant'. The Indian Oil Corporation was impleaded in the suit as defendant No.2 and to this appeal as defendant-respondent No.2. No relief has been claimed against the Indian Oil Corporation and they are admittedly what is called a *proforma* defendant.

7. To revert to facts, it is the plaintiffs' case that the defendant fell in arrears of rent w.e.f. 01.07.1972. This led the plaintiffs to serve a notice dated 08.04.1974 upon the defendant to quit and pay arrears of rent. By the said notice, the defendant's tenancy was determined and he was asked to deliver vacant possession of the suit property on 15.04.1974. It is the plaintiffs' further case that the defendant is in arrears of rent from 01.07.1972 to 15.05.1974, that worked out to a figure of Rs.3375/-. It is pleaded that the suit property can easily fetch a sum of Rs.25/- per day in damages for use and occupation and the plaintiffs have been deprived of the said damages, amounting to Rs.325/-. The cause of action was said to arise on everyday that the defendant remained in possession of the suit property after the period of notice expired on 16.05.1974. A decree for ejectment against the defendant and also against the *proforma* defendant, if they object, was claimed, besides one for recovery of a sum of Rs.3375/- as *mesne* profits at the rate of Rs.25/- per day with *pendente lite* and future interest. A further decree for *mesne* profits was sought pending suit until delivery of possession to the plaintiffs at the rate of Rs.25/- day, upon payment of court-fees in the Execution Department.

8. The defendant filed a written statement generally denying the plaint allegations. In the additional pleas, the defendant came up with a case that the plaintiffs were not the exclusive owners of Plot Nos.1235/1 and 1236/2. These plots were held in the share of one-third each by the plaintiffs, one Fakira and another Krishna. The plaintiffs, representing themselves to be the exclusive owners, demised the suit property for a year, executing the registered rent note. The plaintiffs have realized from the defendant rent up to 30.06.1973. It is the defendant's case that the two other co-owners Fakira and Krishna insisted that the plaintiffs alone did not have right to let out the suit property nor do they have the exclusive right to realize rent. After the said insistence by Fakira and Krishna, it was decided amongst the three of them, to wit, the defendant, Fakira and Krishna that the defendant would pay rent to Fakira and Krishna and none of it would be paid to the plaintiffs until such time that their share of the rent was evenly received with the plaintiffs. The defendant paid rent from 01.07.1972 to 30.06.1973 to Fakira and secured a receipt. Likewise, the defendant paid rent from 01.07.1973 to February, 1974 to Krishna and obtained a receipt thereof from him as well. Later on, Krishna and Fakira executed sale deeds of their share in the two plots in favour of the defendant on 16.03.1974 and 26.03.1974, respectively. The defendant is, in consequence, the owner of a two-third share in the suit property. The suit property and the remainder part of the two plots in question is a *bhumidhari*, which has not yet been partitioned by any Court. The defendant's petrol pump is located in a one-third part of the land comprising the two plots, but the plaintiffs are beneficially holding more than a one-third share therein. Therefore, the plaintiffs have no right to claim anything against the defendant, including rent or *mesne* profits. In addition,

the defendant is co-sharer and in possession in his own right. He is not the tenant. The notice to quit etc. served upon the defendant is against the law and it has been already answered detailing correct facts. There cannot be any determination of the defendant's tenancy since he is not a tenant. He is co-sharer. The plaintiffs are not entitled to any *mesne* profits. The rent note is against the law and, therefore, it does not entitle the plaintiffs to recover any damages etc. Through an amended plea carried in Paragraph No.16-A of the written statement, introduced vide order dated 15.02.1986, it is pleaded that since the rent note is illegal and void under Section 156 of the U.P. Z.A. & L.R. Act, the defendant by virtue of Section 165 of the Act last mentioned has acquired *sirdari* rights, and, later on, a *bhumidhari*, because combining the area of the suit property to that already available with him and his family members, the total does not exceed twelve and a half acres. The defendant is, therefore, not liable to eviction. The further plea raised is that no cause of action has arisen to the plaintiff to institute the present suit, which is not maintainable. The plaintiffs have no right to sue. The Civil Court has no jurisdiction to try the suit. The suit is also pleaded to be barred by estoppel and acquiescence.

9. Upon the pleadings of parties, the following issues were struck:

"(1) Whether the defendant No.1 took the land in suit from the plaintiff on a rent of Rs.150/- per mensum on 1.1.70?

(2) Whether a sum of Rs.3375/- on account of arrears of rent for the period from 1.7.72 to 15.5.74 was due against the defendant no.1?

(3) Whether the defendant no.1 has purchased 2/3rd share of other co-sharers of the plaintiff in the land in suit. If so, its effect?

(4) Whether the court has no jurisdiction to try the suit?

(5) Whether the tenancy of the defendant was illegal?

(6) Whether the plaintiffs have got no right to sue?

(7) Whether the suit is barred by principles of waiver, estoppel and acquiescence?

(8) Whether the defendant is estopped from denying the title of the plaintiff?

(9) Whether the plaintiff is entitled to recover any *mesne* profits? If so, its amount?

(10) Whether the notice to quit is invalid?

(11) Whether the suit as framed is not maintainable?

(12) Whether the relationship of the landlord and tenant subsisted between the parties after the expiry the period of lease stipulated in the original lease deed?

(13) To what relief if any, the plaintiff entitled?"

10. The plaintiffs, in support of their case, examined Mahesh Chand as PW-1, Shaukat Ali, PW-2 and a Handwriting Expert, who testified as PW-3.

11. The defendant examined Jayanti Prasad, DW-1, Shankar Lal, DW-2, Prabhu Dayal, DW-3 and B.S. Chaudhary, Handwriting Expert, DW-4. Documentary evidence was also produced by both parties. So much of this evidence, documentary or oral, would alone be referred to as relevant to the substantial questions of law, that fall for consideration in this appeal.

12. The Trial Court answered Issue No.1 in the plaintiffs' favour and against

the defendant, after the defendant admitted in his statement under Order X Rule 2 of the Code of Civil Procedure, 1908 (for short, 'the Code') that he had been demised the suit property on a monthly rent of Rs.150/-, in terms of the rent note executed in the defendant's favour.

13. Issue Nos.2 and 3 were decided together. The learned Trial Judge held that on a perusal of the judgment passed by the Assistant Collector, Bulandshahr dated 06.10.1970 in a suit titled, Chhiddan v. Missi, it is evident that co-sharer Krishna had a share of 1/24 in the suit property, which Krishna sold to a man called Ram Chandra on 11.11.1963. The relative sale deed was noticed to be on record, bearing Paper No.64-A. This document was produced by the plaintiffs. Ram Chandra's name was mutated in the revenue records on the basis of the sale deed, Paper No.64-A, and to this end, *Khatauni* for the year 1371 *fasli*, bearing Paper No.118-C has been taken note of. It was, therefore, concluded that Krishna had no share in the suit property, which he could transfer to the defendant by way of sale. So far as the other co-sharer Fakira is concerned, the plaintiffs' case was that they had purchased Fakira's share. In support, the plaintiffs produced a sale deed dated 09.07.1965. This sale deed was executed much earlier than the sale deed said to be executed in the defendant's favour by Fakira. It was, therefore, concluded by the learned Trial Judge that Fakira had nothing to transfer in the defendant's favour as his share in the suit property. The Trial Court has also remarked that if for some reason, Fakira's name had continued to be recorded in the revenue records, the inference cannot be that Fakira continued to be owner of his share, which he could again transfer to another. The Trial Court has also noticed Paper No.65-C, a *Khatauni*, which shows that on 10.07.1974, the revenue record, that was inaccurate about mentioning Fakira's name, too was corrected. The learned Trial Judge has also remarked that neither Fakira nor Krishna were produced by the defendant in the witness box, depriving the plaintiffs of the opportunity of cross-examining them about their right to transfer. The case, therefore, set up by the defendant that from 01.07.1972 to 30.06.1973, he paid rent to Fakira and from 01.03.1973 to February, 1974 to Krishna, regarding which he had produced rent receipts, is of no consequence. The defendant's case that there was an agreement between him, Fakira and Krishna, when those two had obstructed the use of the suit property, to pay them rent, was discarded by the Trial Court, because no document to establish the fact could be produced by the defendant. To the contrary, the lease deed executed by the plaintiffs was a registered document and according to it, the defendant was obliged to pay the plaintiffs due rent. It was also observed by the Trial Court that if there had to be any change of the terms of tenancy, it had to be done through a registered instrument. Thus, Issue No.2 was answered in the manner that the defendant was in arrears of rent payable to the plaintiffs for the period 01.07.1972 to 15.05.1974 to the tune of Rs.3375/-. Issue No.3 was answered in the manner that the defendant was not a co-sharer with the plaintiffs to the extent of a two-third share in the suit property.

14. Issue No.4 was decided against the defendant as a preliminary on 14.05.1976, holding that the Civil Court had jurisdiction. The said issue appears to have been re-agitated when the suit was finally heard, but the Trial Court did not disturb the earlier determination of the

issue with the remark that there was no such change in circumstances, warranting a review of the finding on Issue No.4.

15. In deciding Issue No.5, the Trial Court reasoned that the suit property was not leased out for agricultural purposes. The documentary evidence showed that the suit property was situate in Town Area Jewar within the local limits of Nagar Palika. It has been declared to be an *abadi*. In the circumstances, it was opined that on the execution and registration of the lease deed, there has been no violation of the law and the defendant's tenancy was not unlawful.

16. Issue No.7 was decided in the plaintiffs' favour and against the defendant holding that the suit was not barred by estoppel or acquiescence.

17. Issues Nos.6, 8 and 11 were dealt with together, where Issue No.6 was answered in the negative and in the plaintiffs' favour, holding that looking to the terms of the lease deed, it could not be said that the plaintiffs had no right to institute the suit. Issue No.8 was decided in the affirmative and in the plaintiffs' favour, holding that going by the terms of the lease deed, there was relationship of ‘landlord’ and ‘tenant’ between the plaintiffs and the defendant, on account of which he could not deny the plaintiffs' title. Issue No.11 was decided in the negative holding the suit maintainable.

18. Issue No.10 was also decided in the negative and in the plaintiffs' favour holding that the notice to quit was valid. The next that was determined by the Trial Court was Issue No.12. This issue was answered again in the plaintiffs' favour, holding that there was relationship of landlord and tenant, post expiry of the term of the lease. Issue No.13 was also answered in the plaintiffs' favour and against the defendant, which was an issue about the relief to which the plaintiffs were entitled.

19. The suit was decreed with costs for eviction and recovery of rent from 01.07.1972 to 15.05.1974, being a sum of Rs.3375/-. The said decree of the Trial Court was passed on 30.11.1981. It was further decreed that post determination of the lease, the plaintiffs would be entitled to *mesne* profits at the rate of Rs.10/- per day.

20. The Trial Court's decree was appealed by the defendant to the District Judge of Bulandshahr. The defendant's appeal was registered on the file of the District Judge as Civil Appeal No.409 of 1981. The appeal aforesaid came up for hearing before the learned Special Judge/ Additional District Judge, Bulandshahr on 27th July, 1992, when it was allowed, the decree of the Trial Court reversed and the plaintiffs' suit for ejectment, recovery of arrears of rent and *mesne* profits dismissed.

21. Aggrieved, the present second appeal has been preferred by the plaintiffs.

22. This appeal was admitted to hearing on 04.12.1992. The substantial questions of law involved were those carried in Ground Nos.1 to 9. No substantial questions of law were formulated by the Court. When this matter came up before this Court for hearing on 20.02.2020, the following substantial questions of law were formulated:

"1. Whether the provisions of U.P.Z.A.&L.R. Act, 1950 would apply to the (sic) land let out for non agricultural purposes?

2. Whether the provisions of U.P.Z.A.&L.R. Act, 1950 would apply to the (sic) agricultural land located in an area that has fallen within the limits of a town area upon extension of boundaries after the date of vesting?

3. Whether the land situate in an urban area utilized for to (sic) a non agricultural purposes would still be deemed to an agricultural land in the absence of a declaration under Section 143 U.P.Z.A.&L.R. Act?

4. Whether a tenant is estopped from disputing the nature of the land demised after utilizing the same for non agricultural purposes?

5. Whether the provisions of Section 165 U.P.Z.A.&L.R. Act would be attracted either in its amended form or un-amended, to land that has been found to be utilized for non agricultural purposes post letting?"

23. Heard Mr. Kunal Shah, learned Counsel for the plaintiffs, Mr. Ravi Kant, learned Senior Advocate assisted by Mr. I.N. Singh and Mr. Gajendra Pratap, learned Senior Advocate assisted by Mr. Abhishek Kumar, learned Counsel appearing for the defendant.

24. It would be convenient in the logical sequence of things to answer substantial questions breaking *seriatim* and determining the questions in an order that eschews examining matters, without going into which the appeal can still be effectively decided.

25. This Court proposes to examine Substantial Question of Law No.2 for a first.

26. It was urged on behalf of the plaintiffs on the second substantial question that the suit property falls within the Town Area Jewar and the provisions of the Uttar Pradesh *Zamindari* Abolition and Land Reforms Act, 1950 (for short, 'the Act of 1950') do not apply to it at all. It is pointed out that in Paragraph No.1 of the plaint, it is pleaded that the suit property is located within the town area aforesaid. The remark in the judgment of the Lower Appellate Court that Chapter VIII of the Act of 1950 applies to land falling within a town area is erroneous. The remark of the Lower Appellate Court is said to be erroneous because under the provisions of Section 64 of the U.P. Urban Areas *Zamindari* Abolition and Land Reforms Act, 1956 (for short, 'the Act of 1956'), a land falling within the limits of a town area becomes amenable to the Act of 1950 if the land is an agricultural area, acquired and notified as such by the State Government. The term 'agricultural area' has been defined under Section 2(1) of the Act of 1956. It is said that a perusal of the provisions of the Act of 1956 shows that facts are to be proved for showing an area to be an agricultural area within the limits *ZamindariZamindariZamindarizamindariz amindariZamindarizamindarizamindariZa mindariZamindarizamindariZamindari* of a town by virtue of the Act of 1956. It is pointed out on behalf of the plaintiffs that the defendant in his written statement has not alleged that the suit property was ever included in an agricultural area under the Act of 1956, to which a *fortiori* the provisions of the Act of 1950 became applicable under Section 64 of the Act of 1956. There was much contention on behalf of the plaintiffs as to the manner of notification and demarcation of agricultural area under the Act of 1956, within the

limits of a town, in order to make it amenable to the Act of 1950.

27. The learned Counsel appearing for the defendant, Mr. Ravi Kant submitted that it is not the position of the law that if agricultural land is included within the limits of a municipality or town area, it is *ipso facto* excluded from the purview of the Act of 1950. It is argued by the learned Senior Advocate that under Section 1(2) of the Act of 1950, any area which is included within the limits of a municipality or a town area on 07.07.1949, is excluded from the operation of the last mentioned Act. It is emphasized that the date of vesting under the Act of 1950, which is 01.07.1952, has no relevance to the applicability of the said Act to land located within the local limits of a town area or municipality. It is, particularly, emphasized that there is no pleading on behalf of the plaintiffs that the suit property was included in the town area on or before 07.07.1949. There is no evidence produced by the plaintiffs either that it was so included, on or before the date aforesaid. It is, therefore, submitted that the provisions of the Act of 1950 would continue to apply to the suit property. It is further on submitted that it is the plaintiffs' admission in their dock evidence that the suit property is *bhumidhari*. The learned Senior Advocate for the defendant has drawn this Court's attention to the following testimony of the plaintiff recorded on 10.04.1979, when he appeared in the dock as PW-1:

"…..... इन खेतों पर काश्तकारी 1968-1969 से नहीं हो रही है। इन खेतों के बावत गजट नही दाखिल किया है। यह खेत भूमिधरी के थे। अब 2-3 साल से भूमिधरी नही हैं।"

28. It is also pointed that the plaintiff further said in his testimony on 21.07.1987:

"…..... यह बात सही है और अब भी विवादित जमीन को खेतिहर जमीन ही मानता हूँ। .....विवादित भूमि से पश्चिम व दक्षिण तरफ जो भूमि है उसकी बेदखली का मुकदमा माल की अदालत में किया है जिसका खसरा नम्बर 2135 व 2136 है। और विवादित जमीन का भी नम्बर 2135 व 2136 है।"

29. It is argued that the suit property is, therefore, *bhumidhari* as the fact is admitted to the plaintiffs. It is urged that admission is the best piece of evidence unless it is withdrawn or proved erroneous. In support of this contention of his, the learned Senior Advocate has placed reliance upon the authority of the Supreme Court in **Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi, AIR 1960 SC 100**. The learned Senior Advocate for the defendant, in particular, drew the attention of the Court to the following remarks in **Narayan Bhagwantrao Gosavi Balajiwale** *(supra)*:

"11. In the present case, the burden of proof need not detain us for another reason. It has been proved that the appellant and his predecessors in the title which he claims, had admitted on numerous occasions that the public had a right to worship the deity, and that the properties were held as Devasthan inams. To the same effect are the records of the revenue authorities, where these grants have been described as Devasthan, except in a few cases, to which reference will be made subsequently. In view of all these admissions and the revenue records, it was necessary for the appellant to prove that the admissions were erroneous, and did not bind him. An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. We shall

now examine these admissions in brief and the extent to which they went and the number of times they were repeated."

30. We do not think that admission on a question, such as the one present, can be of much use to the other side, because it is essentially a matter of the law, going by the date of inclusion of the suit property within the town area if the Act of 1950 would apply to it. There is on record a copy of the notification issued under Section 3 of the U.P. Town Areas Act, 1914, which shows that a portion of the Gaon Sabha Jewar, which includes the suit property, came to be notified and included within the town area with effect from the said date. Section 1 of the Act of 1950 reads:

"1. Short title, extent and commencement.- (1) This Act may be called the Uttar Pradesh *Zamindari* Abolition and Land Reforms Act, 1950.

(2) It extends to the whole of the Uttar Pradesh except the areas which, on the 7th day of July, 1949, were included in a municipality or a notified area under the provisions of the United Provinces Municipalities Act, 1916 or a Cantonment under the provisions of the Cantonment Act, 1924 or a town area under the provisions of the United Provinces Town Areas Act, 1914:

Provided that in relation to areas included in the Rampur Municipality, this sub-section shall have effect as if for the words and figures '7th day of July, 1949' the words and figures '3lst day of July, 1949', were substituted therein:

Provided further that where any area which on July 7, 1949 was included in a Municipality, Notified Area, Cantonment or Town Area, cease to be so included therein at any time after that date and no notification has been made in respect thereof under Section 8 of the Uttar Pradesh Urban Areas *Zamindari* Abolition and Land Reforms Act, 1956-

(i) in case it has ceased to be so included at any time before June 29, 1971, this Act shall extend to such area from June 29, 1971; and

(ii) in any other case, this Act shall extend to such area from the date on which the area ceases to be so included.

(3) It shall come into force at once except in the areas mentioned in Clauses (a) to (f) of sub-section (1) of Section 2 where it shall, subject to any exception or modification under sub-section (1) of Section 2, come into force on such date as the State Government may by notification in the Gazette appoint and different dates may be appointed for different areas and different provisions of this Act."

(emphasis by Court)

31. A perusal of the said provision makes it explicit that the Act of 1950 applies to the whole of Uttar Pradesh, save for areas which on the 7th day of July, 1949 were included in a municipality, a notified area, a cantonment or a town area under the specified statutes. It is, therefore, trite to say that the date for the purpose of excluding an area from the operation of the Act on account of that area being situate within the local limits of a municipality or a town area etc. is quite distinct and different from the date of vesting to be notified under Section 4 of the Act of 1950 by the State Government and published under Section 5 thereof. The date of vesting is 01.07.1952 and the relevant date for any area to be excluded from the operation of the Act on account of it being included in the local limits of a municipality, town area etc. is 07.07.1949. Here, admittedly, the area which includes the suit property was a

part of Gaon Sabha Jewar on 07.07.1949 and came to be included in the Town Area Jewar by a notification, as already mentioned, issued under Section 3 of the Uttar Pradesh Town Areas Act, 1914 w.e.f. 31.12.1956. For the said reason, the Act of 1950 would continue to apply to the suit property, notwithstanding its inclusion within the local limits of the town area.

32. This question is answered in the terms that the provisions of the Act of 1950 would apply to agricultural land located in an area that has fallen within the limits of a town area upon extension of its boundaries after the date of vesting; more specifically, after 07.07.1949.

33. This would take us to answering Substantial Question of Law No.1. This question is cast in the terms, whether the provisions of the Act of 1950 would apply to land let out for non-agricultural purposes.

34. It would be convenient to answer Substantial Question of Law No.1 together with Substantial Question of Law No.3 because the issue, subject matter of these questions, is overlapping, if not the same.

35. Mr. Kunal Shah, learned Counsel for the plaintiffs submits that the provisions of the Act of 1950, in particular, Chapter VIII of the said Act, stand excluded in their application to such land, which was let out and is being used for purposes not connected with agriculture, horticulture or animal husbandry etc. He has drawn the Court's attention to the definition of land in Section 3(14) of the Act of 1950, which reads:

"**3. Definitions.**- (1)-(13) x x x

(14) *"Land"* except in Sections 109, 143 and 144 and Chapter VII means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming;"

36. The submission proceeds that a bare perusal of Section 3(14) makes it evident that the legislature in plain and unambiguous words has provided that except where the expression 'land' is used in Sections 109, 143 and 144 and Chapter VII of the Act of 1950, it has to be ascribed a uniform meaning throughout the Act, which is 'land' held or occupied for purposes connected with agriculture etc. A *fortiori* for construing the expression 'land', occurring in the various provisions under Chapter VIII of the Act of 1950, the meaning ascribed to 'land' in Section 3(14) would apply, inasmuch as Chapter VIII has not been excluded from the ambit of Section 3(14). Upon a perusal of Section 3(14) of the Act of 1950, the conclusion is inescapable that the provisions of Chapter VIII, dealing with the land, would apply to such parcels of lands alone, which are 'held' or 'occupied' for agricultural purposes.

37. The learned Counsel for the plaintiffs, in order to understand the expression 'held' employed in Section 3(14) of the Act of 1950, has drawn on extrinsic aid in construing it. He has relied on P. Ramanatha Aiyar's Law Lexicon 5th Edition, which defines 'held' and 'occupied' thus:

"**"Held"** or **"occupied"**. The words "held" or "occupied" carry the same meaning and there is no manner of doubt that if the land is in the lawful possession of the factory and was being used for the purpose of the factory, the land vested in the Government as per Section 3 of the 1971 Act. [Gaurav Aseem Avtej v. Sugar

Corporation Limited, (2018) 6 SCC 518, para 19] [U.P. Undertaking (Acquisition) Act (23 of 1971), S. 3]."

38. It is mooted that the words 'held' or 'occupied', occurring in Section 3(14) of the Act of 1950 have to be understood according to the dictionary meaning, which imply land, which is kept in possession or one that is owned for using it for agricultural purposes. It is argued by Mr. Shah that the reason or the purpose for which land is owned or possessed is then the determinative factor. On 1st of January, 1970, the plaintiffs were holding and occupying the suit property not for the purpose of carrying out any agricultural activity, but for the purpose of letting it out to the defendant in order to undertake non-agricultural activity thereon in consideration of the plaintiffs enjoying rent payable by the defendant. The purpose of holding the suit property on 01.01.1970 was to let it out to the defendant for a non-agricultural activity, to wit, for the installation and running of a petrol retail outlet. The suit property was leased out for one year w.e.f. 01.01.1970 to 31.12.1970. The purpose of letting it out on 01.01.1970 was not to enable or permit the lessee to do agricultural activity. It was decidedly let out for the lessee to undertake or accomplish his commercial pursuits. To support his submission in this regard, learned Counsel for the plaintiffs has called in aid an unreported decision of this Court in **M/s. Mahabir Jute Mills Ltd. v. Gauri Shanker Das and others, Second Appeal No.302 of 1953,** decided on 7th January, 1964. In M/s. Mahabir Jute Mills Ltd. *(supra)*, it is pointed out that land, let out for manufacturing purposes, that is, for putting up a mill or factory, was held not to qualify as 'land' within the meaning of the *pari materia* provision in the Uttar Pradesh Agricultural Tenants (Acquisition of Privileges) Act, 1949. It was held not to qualify as land within the meaning of the last mentioned Act as it had been let out for a non-agricultural purpose. In **M/s. Mahabir Jute Mills Ltd.,** it was observed by S.K. Verma, J. (as the learned Chief Justice then was):

"The trial court decreed the suit for recovery of Rs.1800/-. On appeal the learned Additional Civil Judge of Gorakhpur affirmed the decree of the trial court. The two grounds urged in the courts below have been urged before me in second appeal. Before the defendant-appellant can claim any benefit by virtue of the certificate under section 7 of the U.P. Agricultural Tenants Acquisition of Privileges Act (U.P. Act VII of 1950) the land has to be "land" as defined in the Act. The definition of the land in the Act is the same as in the U.P. Tenancy Act which is as follows-

"'land' means land which is let or held for growing of crops, or as groveland or for pasturage. It includes land covered by water used for the purpose of growing singhara or other produce, but does not include land for the time being occupied by buildings or appurtenant thereto other than building which are improvements:"

The land was leased out for manufacturing purposes. The Certificate granted to the defendant appellant under section 7 of the U.P. Act VII of 1950 was, therefore, without jurisdiction and it cannot be of any help to him. It was contended that the plaintiffs should have got the certificate cancelled under section 12 of the U.P. Act VII of 1950. If the granting of the certificate was without jurisdiction the plaintiffs-respondents were at perfect liberty to treat it as non-existent. If they chose to file a suit to recovery the money due under the lease instead of first getting

the certificate cancelled under section 12 of U.P. Act VII of 1950 it does not mean that the suit was not maintainable."

39. It is next submitted that Section 142 of the Act of 1950 confers a right upon a *bhumidhar* with transferable rights, like the plaintiff to use his land for any purpose and, as such, there is no embargo upon a *bhumidhar* to convert his land to a non-agricultural one before letting it out. It is submitted that this is precisely what has happened in this case. If the suit property was converted to a non-agricultural purpose before it was let out to the defendant, it would no longer be land within the meaning of Section 3(14), to which Chapter VIII applies. In aid of this submission of his, learned Counsel for the plaintiffs has placed reliance upon the decision in **Smt. Gomti Devi v. District Judge, Unnao and others, Review Petition No.624 of 2014** (arising out Misc. Single No.4227 of 2014), decided on 10.09.2014. In **Smt. Gomti Devi** *(supra)*, it was held:

"12. Section 142 of U.P. Act No. 1 of 1951 confers a right upon *bhumidhar* to use his land for any purpose, which means that there is no restriction for a *bhumidhar* to convert his land as non-agricultural land. Section 143 (1) confers a privilege upon *bhumidhar*, who has converted his land as non-agricultural land get a declaration in this respect. Section 143 (3) of U.P. Act No. 1 of 1951 provides that where a *bhumidhar* has been granted loan by Uttar Pradesh Financial Corporation on security of any land held by such *bhumidhar*, provisions of Chapter VIII will cease to apply. Judge, Small Causes Court by order dated 18.03.2005 held that the predecessors of the plaintiffs had taken loan from Uttar Pradesh Financial Corporation mortgaging the land in dispute as such provisions of Chapter VIII of U.P. Act No. 1 of 1951 will cease to apply.

13. Now the question arises as to whether a declaration under Section 143 of U.P. Act No. 1 of 1951 is only mode for treating a land as non-agricultural land. Had the intention of legislature been such and making Section 143 exhaustive, there would have been no other provision under the Act. Insertion of Section 331-A in the Act, by U.P. Act No. 37 of 1958 makes it clear that Section 143 is not the only provision under which nature of the land can be decided. Suppose while deciding the issue referred under Section 331-A, Deputy Collector comes to the conclusion that on the date of letting land, was not land within the meaning of Section 3 (14) of the Act, then same consequences as given under Section 143 (2) will follow. Under the lease deed, it was admitted between the parties that the land in question was appurtenant land to the factory premises, which was let out to the petitioner for industrial purpose. The agreement, being admitted, is binding and in view of Section 92 of Evidence Act, 1872 no contrary plea can be raised by the petitioner as such in this case there is no issue in this respect between the parties, which require reference under Section 331-A."

40. It is next submitted on the strength of the authority of the Supreme Court in **Commissioner of Income Tax, Madras v. Gemini Pictures Circuit Pvt. Ltd., (1996) 4 SCC 216** that the manner in which the parties visualized the transaction, the purposes for which the land is sold or let out, are determinative of the fact if the land is to be treated as agricultural land or otherwise. In **Gemini Pictures Circuit Pvt. Ltd.** *(supra)*, it has been held by the Supreme Court:

"4. The land is situated within the limits of the Madras Municipal Corporation. It is located on the Mount Road which is the main artery of the city and its business centre. Even when the assessee purchased it in 1950, there was a hotel building located in the said land. In the municipal records, the property was registered as urban land and urban land tax was being levied thereon. It bore the Municipal door number "151-Mount Road, Madras". After purchasing the land, the assessee put up two more buildings thereon in the northern portion which together occupied an extent of 20 grounds which means that they were substantially large buildings. One of them was occupied by the assessee for its own business purposes and the other was occupied by its sister concern. After laying a road and reserving certain portion to serve as frontage for the buildings, an area of about 39 grounds was remaining open. The assessee was raising bananas thereon until 1962 and thereafter vegetables until the year 1966-67 when it was sold to three parties as aforestated. It is significant to notice that even when the assessee purchased an extent of about 4 acres of land with a hotel building in 1950, for a consideration of Rs 5.53 lakhs, it could not have been for the purpose of raising banana plantation or vegetables. And when it was sold in 1966-67 (which is the relevant point of time for our purposes) it was sold at the rate of about *Rs 260 per sq. yard*. Neither the sale deed under which the assessee purchased the said land nor the sale deeds executed by it in 1966-67 describe the land as an agricultural land. It could not be so described for the simple reason that it was registered in the municipal records as an urban land and urban land tax was levied thereon. After purchasing the land, the assessee itself constructed two large buildings thereon. Indeed, the buildings were being used for non-residential purposes. The land is situated on Mount Road, Madras which is the most important and the busiest thoroughfare in the city. The land is surrounded on all sides by industrial and commercial buildings. No agricultural operations were being carried on any land nearby. In the face of the above circumstances, the mere fact that vegetables were being raised thereon at the time of the sale or for some years prior thereto does not change the nature and character of the land. Obviously, it was only a stop-gap activity. It was not a true reflection of the nature and character of the land. It is a matter of common knowledge that in the heart of New Delhi, there are houses with large compounds wherein a portion of the open land is used for raising vegetables. That does not make those portions agricultural lands. In the case of the assessee too, the raising of vegetables was a stop-gap activity until the assessee found a better use for it, whether construction of buildings or sale. It is well to remember that the question whether a particular land is an agricultural land has to be decided on a totality of the relevant facts and circumstances. There may be circumstances for and against. They have to be weighed together and a reasonable decision arrived at. One has to take a realistic view and see how were the persons selling and purchasing it understood it. Is it believable that in 1966-67, the assessee and the aforesaid purchasers were under the impression that they were selling and purchasing agricultural land? Did they consider and treat the land as agricultural land? The answer is too evident to call for an elucidation.

5. Certain decisions have been cited before us by counsel for both the parties in support of their respective stands.

It must, however, be remembered that facts of no two cases will be identical. The tests evolved by the courts are in the nature of guidelines. No hard and fast rules can be laid down in the matter, for the reason that it is essentially a question of fact. Even so, a brief reference to the cases cited would be in order. Strong reliance was placed by Shri Aruneshwar Gupta upon two decisions of the Gujarat High Court in *Gordhanbhai Kahandas Dalwadi v. CIT* [(1981) 127 ITR 664 (Guj)] and *Motibhai D. Patel* (Dr) v. CIT [(1981) 127 ITR 671 (Guj)] . In the first case, the land was registered as agricultural land in the revenue records and land revenue was being paid thereon. No permission was taken for converting it to non-agricultural use before the date of sale. Potential non-agricultural use or the fact that development had taken place in the vicinity of the land, it was held, do not militate against the fact that it was an agricultural land. In the next case too the land was registered as an agricultural land and permission to convert it into non-agricultural land was not obtained before the date of sale. In the circumstances, it was held that mere fact that it was sold at a high price only indicates its potentiality for non-agricultural use. On a consideration of entirety of the circumstances, it was held that it was an agricultural land.

6. A recent decision of this Court in Sarifabibi Mohmed Ibrahim v. CIT [1993 Supp (4) SCC 707 : (1993) 204 ITR 631] , rendered by a Bench comprising one of us (B.P. Jeevan Reddy, J.) is relied upon by the learned counsel for Revenue. The Bench observed: (SCC p. 712, para 12)

"Whether a land is an agricultural land or not is essentially a question of fact. Several tests have been evolved in the decisions of this Court and the High Courts, but all of them are more in the nature of guidelines. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. The Court has to answer the question on a consideration of all of them — a process of evaluation. The inference has to be drawn on a cumulative consideration of all the relevant facts."

Several judgments of this Court and the High Courts were referred to including a judgment of the Bombay High Court in CIT v. V.A. Trivedi [(1988) 172 ITR 95 : 1988 Tax LR 373 (Bom)] . On a consideration of the factors for and against, the Bombay High Court observed in V.A. Trivedi [(1988) 172 ITR 95 : 1988 Tax LR 373 (Bom)] that for ascertaining the true character and nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span of time prior to the date of sale and further whether on the date of sale the land was intended to be put to use for agricultural purposes for a reasonable span of time in future. Examining the case from the said point of view, the High Court held that the fact that the agreement of sale was entered into by the assessee with a housing society is of crucial relevance since it showed that the assessee had agreed to sell the land for admittedly non-agricultural purposes. The ratio of the said decision was approved in Sarifabibi [1993 Supp (4) SCC 707 : (1993) 204 ITR 631]."

41. The Court may now consider briefly the submission of the learned Counsel for the plaintiffs on Substantial Question of Law No.3 and decide both the questions, to wit, Substantial Questions of Law Nos.1 and 3 together.

42. It is argued that there is no issue on facts between parties that the suit property was let out and being used for a

non-agricultural purpose, to wit, to establish and run a petrol retail outlet. If that is the purpose for which the suit property was let out and then used, the fact that there was no declaration under Section 143 of the Act of 1950, would have no bearing upon its nature or on the issue, if it was still 'land' within the meaning of Section 3(14) of the Act, last mentioned. In the submission of the learned Counsel for the plaintiffs, it would not be land as defined under Section 3(14). To further substantiate his submission, learned Counsel for the plaintiffs has placed reliance upon the authority of this Court in **Ajaz Carpets and others v. Birla International Pvt. Ltd., 2013 (4) AWC 4286. In Ajaz Carpets** *(supra)*, it was held:

"17. If a land is not being used for agricultural purposes then it is not necessary that in every situation certificate under Section 143 of U.P.Z.A.L. & R. Act must be obtained otherwise that land will continue to be governed by U.P.Z.A.L. & R. Act. …….

18. From the above it is quite clear that if a suit relating to land held by bhoomidhar is instituted in a court other than revenue record (Assistant Collector/S.D.O.) and a question arises whether the land in question is or is not used for purposes connected with agricultural then matter has to be referred to the Assistant Collector. However if in any such suit filed before the Civil Court or J.S.C.C., there is no dispute that the land is actually being used for purposes not connected with agricultural and it is admitted that the land is having constructed portion and is being used for residential, commercial or industrial purposes then there will be absolutely no necessity to refer the matter to the Assistant Collector. The necessary corollary which follows is that if plaintiff claims and defendant admits that on an agricultural land constructions have been made and the same is being used for residential, commercial or industrial purposes then there will be no necessity of a certificate under Section 143 of U.P.Z.A.L. & R. Act and the Civil Court or J.S.C.C. or any other Court other than revenue court will have full jurisdiction to decide the matter."

43. The submission, therefore, is that the grant of a declaration under Section 143 of the Act of 1950 is not a *sine qua non* for what was otherwise land under Section 3(14) of the Act of 1950, but ceased to be so being regarded as one used for a non-agricultural purpose. It would all depend upon the actual user.

44. Mr. Ravi Kant and Mr. Gajendra Pratap, learned Senior Advocates, on the other hand, have submitted that the position of the law is completely different as regards whatever has been mooted on behalf of the plaintiffs in their submissions on Substantial Questions of Law Nos.1 and 3. It is argued that there is consistent authority on the issue if the provisions of the Act of 1950 would apply to land let out for non-agricultural purpose. All that authority, it is urged, says that land as defined under Section 3(14) of the Act of 1950, if used for non-agricultural purposes, would continue to be 'land' governed by the Act last mentioned, unless there is a declaration of change of its user to abadi granted under Section 143 of the Act of 1950. In support of this contention of theirs, learned Senior Counsel have placed reliance upon the decision of this Court in **Alauddin alias Makki v. Hamid Khan, 1971 RD 160; Bhagwati Devi v. Radhey Shyam and others, (1976) 2 RD 178; Magnu Ahir and others v. Mahabir, 1987 RJ 146; and,**

U.P. State Sugar Corporation Ltd., Lucknow and another v. Vinod Chand Gupta and another, 2007 (3) AWC 3058. These authorities and how they bear on the point involved, would be shortly dealt with during the course of this judgment. The essence of both Substantial Questions of Law Nos.1 and 3 is whether 'land' held by a *bhumidhar*, if let out for a non-agricultural purpose without a declaration under Section 143 of the Act of 1950 and used for a non-agricultural purpose ceases to be land within the meaning of Section 3(14) of the Act of 1950. The corollary is if 'land' utilized for a non-agricultural purpose, would still be regarded as 'land', unless a declaration under Section 143 of the Act of 1950 in regard thereto is issued.

45. So far as the decision relied on behalf of the plaintiffs in **M/s. Mahabir Jute Mills Ltd**. is concerned, the point decided there is in the context of the Uttar Pradesh Agricultural Tenants (Acquisition of Privileges) Act, 1949 (for short, 'the UP AT Act'), as amended by the Uttar Pradesh Agricultural Tenants (Acquisition of Privileges) (Amendment) and Miscellaneous Provisions Act, 1950 (U.P. Act VII of 1950). No doubt, it has been held that in the event of land as defined in that Act, which broadly would mean agricultural land held by a tenant thereof, whose rights were enlarged under that Act, being leased for a manufacturing purpose, in a suit brought for ejectment of the lessee from such land, the provisions of the UP AT Act, as amended by UP Act VII of 1950, would not apply. This is so because the land was leased out to put up a mill or factory. There was in that case a declaration issued under Section 6 of the UP AT Act, referred to in the decision as a certificate, obtained by the tenant, who was sued for eviction by his landlord. The certificate would have entitled the tenant to reduction of rent and protection from ejectment, which was a defence urged to resist the suit. The other defence was that the suit being one for ejectment of a tenant from land, the Civil Court had no jurisdiction as a suit for ejectment from land would lie in the Revenue Court. The suit was decreed by the Trial Judge and the Lower Appellate Court, and before this Court, it was mooted that since the land was leased to the tenant for a manufacturing purpose, the declaration, called a certificate under Section 6, would be of no help to the tenant-defendant.

46. It appears that there is a reference in the decision regarding the certificate being issued under Section 7 of the UP AT Act, which in fact is a reference to a declaration under Section 6, entitling the tenant to privilege under Section 7. It was precisely these privileges that the tenant had pleaded to resist his eviction. The moot point was, if the lease, that was one for a manufacturing purpose, would entitle the tenant to a benefit of the declaration under Section 6 as envisaged under Section 7, without the certificate being cancelled under Section 12 of the UP AT Act. It was held that the lease being one for a manufacturing purpose, the certificate granted was without jurisdiction and non est. The suit for ejectment and recovery of rent could not be defended on the basis of a declaration or certificate under Section 6 of the UP AT Act. No doubt, the decision of this Court in **M/s. Mahabir Jute Mills Ltd**. comes close in point to the one involved here, because, after all, the UP AT Act was held excluded, and the certificate issued to the tenant thereunder, without jurisdiction as the lease was not for an agricultural purpose, rendering the demised property, not 'land' as envisaged under the

UP AT Act. But, the principle there would be of little assistance to the plaintiffs because the UP AT Act was a statute that had a completely different object than the Act of 1950, though it may have been enacted in aid of the Act of 1950.

47. The UP AT Act did not abolish *zamindari* by itself or create new estates in land. Rather, it was an appendage in the enterprise of abolition of *zamindari* and principal purpose was to provide for reduction of rent for existing tenants, who were holding on tenures created under the U.P. Tenancy Act, 1939 and to protect them from ejectment. The object of the UP AT Act, as amended by UP Act VII of 1950, and its enacting clause read:

"An Act to provide for payment by tenants with a view to facilitate the abolition of Zamindari and to provide for reduction of rent and protection from ejectment and for certain other matters.

Whereas it is expedient to provide for payment by tenants with a view to facilitate the abolition of zamindari and to provide for reduction of rent and protection from ejectment and for certain other matters connected therewith."

48. Therefore, while interpreting the UP AT Act, it would always be the endeavour of the Court to extend privileges under Section 7 given by virtue of the said Act to an agricultural tenant, who had obtained a declaration under Section 6 after making an application under Section 3 and depositing the requisite rent payable. A *fortiori* a person, who had taken agricultural land on lease for a manufacturing purpose, would not be granted benefit of the UP AT Act. The mere purpose of the lease being to manufacture and its user as such, would be enough to deprive the tenant of the privileges of the last mentioned Act, even if he had a declaration under Section 6. Those privileges were meant for a tenant, who was utilizing the tenanted land or holding for agriculture or other purposes, as defined under Section 3(10) of the United Provinces Tenancy Act, 1939 (for short, 'the Tenancy Act'), on payment of rent to his landlord. By contrast, the Act of 1950 is the principal Act and the engine of law, by which not only *zamindari* was abolished, but also a new order of agricultural tenures introduced. The Act of 1950, after abolishing all existing estates of zamindar and their tenants, created new ones, until then unknown. It was a constitutive Act; not a mere appendage to another statute enacted to aid that other, as was the case with the UP AT Act. The object and the enacting clause of the Act of 1950 read:

"An Act to provide for the abolition of the Zamindari system which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected therewith.

Whereas it is expedient to provide for the abolition of the Zamindari system which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land tenure consequent on such abolition and acquisition and to make provision for other matters connected therewith."

49. In interpreting the provisions of the Act of 1950, the approach would be slightly different than that in case of the

provisions of the UP AT Act. Here, as already remarked, after abolishing the *zamindari* system and acquisition of rights, title and interest of the zamindar and the various tenancy estates created by them, all lands were vested in the State in the first instance and then settled with different bodies and individuals on completely new terms. It just needs to be mentioned in the passing that under the Act of 1950, while the estates of zamindar and intermediaries were abolished, except certain classes of land held by them, the tenants of different classes under the Tenancy Act became holders of different kinds of tenancies, such as *bhumidhar*, sirdar, asami, with some, of course, being made hereditary tenants as envisaged under Section 16. It is in the context of the wholesome scope of the Act of 1950 that the provisions of Section 143 have to be understood. Section 143 of the Act of 1950 is part of Chapter VIII, falling under Part II of the Act of 1950. Chapter VIII deals with tenure and includes subjects, like classes of tenure; acquisition of *bhumidhari* rights; transfers; prevention of fragmentation; devolution; division; surrender, abandonment, extinction and acquisition; ejectment; and, rent. It also envisages the various classes of suits that can be brought in respect of tenures by the holders of *bhumidhari* estates against others, or those claiming rights to such estates under the Act of 1950, including suits for declaration, partition, ejectment etc. Section 143 of the Act of 1950 reads:

"143. Use of holding for industrial or residential purposes.—(1) Where a *bhumidhar* with transferable rights uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector in charge of the sub-division may, *suo motu* or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

(1-A) Where a declaration under sub-section (1) has to be made in respect of a part of the holding the Assistant Collector in charge of the sub-divisions may in the manner prescribed demarcate such part for the purposes of such declaration.

(2) Upon the grant of the declaration mentioned in sub-section (1) the provisions of this chapter (other than this section) shall cease to apply to the *bhumidhar* with transferable rights with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.

(3) Where a *bhumidhar* with transferable rights has been granted, before or after the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1978, any loan by the Uttar Pradesh Financial Corporation or by any other Corporation owned or controlled by the State Government, on the security of any land held by such *bhumidhar*, the provisions of this chapter (other than this section) shall cease to apply to such *bhumidhar* with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject."

50. A *bhumidhar* with transferable rights like the plaintiff, no doubt, has the right to use his holding or any part thereof for a purpose other than agriculture, horticulture etc. and in that event, the Assistant Collector, in charge of the sub-division, either *suo motu* or on an application made to him for the purpose, after undertaking necessary inquiry, has the power to declare the *bhumidhar*'s holding

or a part not used for agriculture etc., to be land no longer used for the purposes envisaged under Section 3(14) of the Act of 1950. It is upon a declaration made under sub-Section (1) of Section 143 that the consequences in sub-Section (2) of Section 143 ensue. The effect of the declaration under sub-Section (2) of Section 143 of the Act of 1950 is that the provisions of Chapter VIII of the last mentioned Act, other than Section 143, become inapplicable to the land put to a different user. Amongst other things, its devolution is then governed by personal laws and not the Act of 1950. It is for this reason that a declaration under Section 143(1) is often referred to as a 'declaration of the land as abadi by the SDO'.

51. What is of importance, to be understood, is that a declaration under Section 143(1) does not place the land, otherwise governed by the Act of 1950, completely out of its regime. It continues to be governed by the provisions of the Act of 1950 except that the provisions of Chapter VIII of the said Act become inapplicable in relation thereto. Thus, the regulatory regime about use, transfer etc. relating to land as defined under Section 3(14), that would otherwise be governed by Chapter VIII is no longer governed by the said Chapter. The other provisions of the Act of 1950 continue to apply. This point was particularly made during the hearing by Mr. Ravi Kant, learned Senior Advocate and we agree with that submission. This apart, from a plain reading of the terms of Section 143, the submission appears to be well-founded. It is particularly so when one looks to Section 144 of the Act of 1950. Section 144(1) says that wherever any land held by a *bhumidhar*, which is not used for purposes connected with agriculture etc., comes to be used as land for purposes of agriculture etc., the Assistant Collector, in-charge of the Sub-Division, may *suo motu* or on an application after necessary inquiry, make a declaration that land would be subject to provisions of Chapter VIII. Thus, land, as defined under Section 3(14) of the Act of 1950, which is governed by the said Act, upon the making of a declaration under Section 143, does not essentially cease to be land within the meaning of Section 3(14). It is only that until time that the declaration under Section 143(1) is not superseded by another declaration under Section 144(1), the provisions of Chapter VIII of the Act of 1950 become inapplicable to such land. All other provisions of the Act of 1950 would continue to apply to a land held by a *bhumidhar*, in relation to which a declaration under Section 143(1) has been made.

52. Now, this scheme of the Act of 1950 is essentially different from the UP AT Act, where the effect of a declaration under Section 6 and the consequences under Section 7 cannot at all be regarded as *pari materia* to Section 143 of the Act of 1950. Whereas in the nature and scheme of the UP AT Act, a land not used for purposes of agriculture etc., that has the protection of a declaration under Section 6 granted to it in accordance with law upon deposit of prescribed rent etc., would lose that benefit, stipulated under Section 7 by virtue of user of the land for a purpose not connected with agriculture etc., this is not the case if land governed by the Act is not used for purpose of agriculture, pisciculture etc. In the former case, in the scheme of things, a land leased to a tenant for the purpose of agriculture etc., in regard whereto, a declaration under Section 6 has been issued, would protect the tenant from eviction and entitle him to reduction of

rent. Inherent in that kind of a scheme is the existence of a declaration granted by the Authority under Section 6 regarding land used for agriculture etc. If the tenant then leases out the land for a manufacturing purpose or himself undertakes activity thereon, which is not in accordance with Section 3(1) of the Tenancy Act, the benefit of protection from eviction and reduction of rent envisaged under Section 7 of the UP AT Act, would automatically disappear. The reason is that the privilege upon the issue of a declaration under Section 6 is one meant to benefit the tenant of agricultural land, engaged in the specified kind of agricultural activities. If an activity not connected with agriculture or one defined under Section 3(10) of the Tenancy Act is undertaken, the protection notwithstanding the existence of the declaration under Section 6 would vanish. It is in this sense that this Court in **M/s. Mahabir Jute Mills Ltd.** has held that there is no need to seek a cancellation of the declaration granted under Section 6 of the UP AT Act, if the land is leased out for a manufacturing purpose or used for manufacturing purposes.

53. By contrast, again in the nature of things, if land envisaged under Section 3(14) of the Act of 1950 is put to a different user or leased out by the *bhumidhar* to another for a purpose not connected with agriculture, pisciculture, poultry farming etc., there is no automatic exclusion of the provisions of Chapter VIII. It is quite another matter that the SDO, upon taking cognizance *suo motu* of the fact that the land is no longer used for purposes envisaged under Section 3(14), may grant a declaration under sub-Section (1) of Section 143, or may do that on the application of a party. But, there is no scope to contend that until a declaration of that kind, which has to be preceded by an inquiry by the SDO into the actual user of the land, is granted, Chapter VIII of the Act of 1950 is excluded from its application to land held by a *bhumidhar*. The exemption from application of Chapter VIII comes from the issue of a declaration issued under Section 143(1). It is almost impossible to think that a mere change of user of 'land' held by a *bhumidhar* for purposes not connected with agriculture, pisciculture, poultry farming etc., would lead to an automatic exclusion of Chapter VIII. This is not simply in the state of things under the Act of 1950 or the scheme of the said statute and, particularly, what a plain reading of the provisions of section 143 together with Section 144 would show.

54. Here, this Court must notice the contrary opinion of a learned Single Judge of this Court in **Smt. Gomti Devi**. We have referred to the holding in **Smt. Gomti Devi** while noticing the submissions made by the learned Counsel for the plaintiffs. The remarks in Paragraph No.13 of the judgment in **Smt. Gomti Devi** that Section 143 is not exhaustive and not the only provision under which 'nature of the land' can be decided, appear to be contrary to the law in point laid down by the Supreme Court, to which allusion would shortly be made.

55. There is another decision that has been laid much emphasis on by the learned Counsel for the plaintiffs to say that a declaration under Section 143 of the Act of 1950 granted by the SDO is not a *sine qua non* for a change in the nature of land from agricultural to one not covered by Section 3(14) of the last mentioned Act or abadi. This authority is **Ajaz Carpets**, to which too allusion has been made while noticing the plaintiffs' submission. The relevant part

of the holding in **Ajaz Carpets** has been quoted while noticing the submissions of the plaintffs on the point. The principle in **Ajaz Carpets** also seems to run contrary to the holding of the Supreme Court on the issue.

56. In **Additional Commissioner, Revenue and others v. Akhalaq Hussain and another, (2020) 4 SCC 507,** the issue arose before the Supreme Court in the context of proceedings of exchange under Section 161 of the Act of 1950. It was a case, where one **Akhalaq Hussain** and another, Saqir Hussain exchanged their land with one Mangal Singh, a member of a Scheduled Tribe, by a registered deed of exchange, exchanging their respective *bhumidhari*. Mutation in terms of the deed of exchange was granted by the Tehsildar. **Akhalaq Hussain** and Saqir Hussain constructed a hotel on the *bhumidhari* that they received in exchange. The Sub-Divisional Officer issued a notice to the two hotel owners saying that the exchange violated the provisions of sub-Section (1) of Section 161, inasmuch as the deed of exchange had been executed without obtaining prior permission of the Assistant Collector. It was held that the exchange being in violation of Section 167 of the Act of 1950, the transaction was void and land subject matter of dispute stood vested in the Government of Uttar Pradesh from the date of its transfer. The order was upheld in appeal and revision, but all orders of the statutory Authorities were quashed by the High Court. There are other issues relating to validity of exchange involved, but those are not relevant to the issue in hand. One of the contentions that was raised was that the land is not an agricultural land to which Chapter VIII of the Act of 1950 applies. The issue was dealt with and answered by their Lordships in **Akhalaq Hussain** *(supra)*, thus:

"14. *Re. Contention* — Land is not an agricultural land : on behalf of the respondents, it was contended that the land in question is not an "agricultural land" and that it does not fall within the definition of "land" under Section 3(14) of the Act and therefore, provisions of Chapter VIII of the Act are not applicable. The question as to whether a particular land is "land" as defined under Section 3(14) of the Act to which the provisions of the U.P. ZA and LR Act are applicable would require determination. The question, whether such land is held or occupied for purposes connected with agriculture, horticulture or animal husbandry has to be determined in accordance with the provisions of Sections 143 and 144 of the Act. Section 3(14) of the Act defines "land" as under:

"3. Definitions.— …

(1)-(13)***

(14) **"Land"** except in Sections 109, 143 and 144 and Chapter VIII means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming."

15. The respondents have placed reliance upon the recitals in the exchange deed in which it is mentioned that the land in question is not an "agricultural land" and also the counter-affidavit of the State filed before the High Court, wherein it is mentioned that the hotel in the disputed land is situated in the market area of Munsiari township. In this regard, it is pertinent to note that for changing the nature of land from "agricultural" to "abadi", declaration as stipulated in Sections 143 and 144 is required. The provisions under Section 143 of the Act are initiated *suo motu* or on an application moved by a *bhumidhar* with transferable rights and an enquiry is required to be conducted by the Assistant Collector as

prescribed under the Act. Section 143 of the Act reads as under:

"143. Use of holding for industrial or residential purposes.—(1) Where a *bhumidhar* with transferable rights uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector-in-charge of the sub-division may, *suo motu* or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

***

(2) Upon the grant of the declaration mentioned in sub-section (1) the provisions of this chapter (other than this section) shall cease to apply to the *bhumidhar* with transferable rights with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.

(3) Where a *bhumidhar* with transferable rights has been granted, before or after the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1978, any loan by the Uttar Pradesh Financial Corporation or by any other Corporation owned or controlled by the State Government, on the security of any land held by such *bhumidhar*, the provisions of this Chapter (other than this section) shall cease to apply to such *bhumidhar* with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject."

Where such a declaration is made under Section 143 of the Act, the provisions of Chapter VIII of the U.P. ZA and LR Act (except Section 143) ceased to apply to the *bhumidhar* with transferable rights with respect to such land.

16. It has been held in *Chandrika Singh v. Vishwanath Pratap Singh [Chandrika Singh v. Vishwanath Pratap Singh*, (1992) 3 SCC 90] that in order to exclude the applicability of provisions of the U.P. ZA and LR Act on the ground that the land is abadi land, it is necessary to determine that it is in accordance with the provisions of Sections 143 and 144 of the Act and whether such a declaration under Sections 143 and 144 of the Act has been made in accordance with the provisions of the Act. In paras 9 and 15, it was held as under : (SCC pp. 97 & 99)

"9. The aforesaid provisions show that under Section 331(1) exclusive jurisdiction in respect of suits, applications and proceedings referred to in Schedule II to the Act has been conferred on the courts specified in the said schedule and the said proceedings, suits and applications cannot be entertained by the civil courts. The proviso to Section 331(1) lifts the said bar in relation to any holding or part thereof where a declaration has been made under Section 143. Section 143 empowers the Assistant Collector after making enquiry as may be prescribed, to make a declaration that a holding or part thereof is being used or held by a bhumidar for purposes not connected with agriculture, horticulture or animal husbandry. Where such a declaration is made in respect of a part of the holding, the Assistant Collector is required to demarcate the said part. The effect of the grant of such a declaration is that the provisions of Chapter VIII (except Section 143) cease to apply to the bhumidar with transferable rights with respect to such land.

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15. … In our opinion, the question as to whether a particular land is "land" under Section 2(14) to which the

provisions of the Act are applicable would require determination of the question whether the land is held or occupied for purposes connected with agriculture, horticulture or animal husbandry and that is a matter which has to be determined either in accordance with the provisions of Sections 143 and 144 and if such a determination has not been made and such a question arises or is raised in a suit before a court, the procedure laid down in Section 331-A must be followed by the court. This would be so even in a case where a building exists on the land and the land is claimed to be appurtenant to the building because in such a case it will be necessary to determine the extent of the land that is appurtenant to the building i.e. whether the entire land or only a part of it is so appurtenant to the building and for that reason is not held or occupied for purposes connected with agriculture, horticulture or animal husbandry. This determination has to be made in accordance with the provisions of Sections 143 and 144 or Section 331-A of the Act."

17. In the present case, the respondents have not produced any such document which shows that declaration required under Section 143 of the Act has been made, much less registered. In the absence of such declaration, the land is deemed to be an "agricultural land" as per the provisions of Section 3(14) of the Act.

18. The respondents placed reliance upon the recitals in the exchange deed to show that the land is not an "agricultural land". The recitals in the exchange deed can be of no help to the respondents as the said document is a self-serving document and cannot operate as a document to prove that the land is an "abadi land". Likewise, the respondents sought to place reliance upon the counter-affidavit filed by the appellants where it is averred that the suit property is situated in the market area of Munsiari township. The averments in the counter-affidavit filed by the State can be of no assistance to the respondents. For claiming the nature of the land as "abadi land", a declaration as stipulated in Section 143 is required and the said declaration is also required to be registered. As pointed out earlier, the respondents have not produced any document which shows that the declaration as required under Section 143 of the Act has been made. In the absence of such declaration, the land cannot be said to be "abadi land". Since the land is an "agricultural land", the provisions of the U.P. ZA and LR Act are applicable to the land in question."

57. Apparently, the learned Single Judges of this Court, who decided **Smt. Gomti Devi** and **Ajaz Carpets**, did not notice the decision of the Supreme Court in **Chandrika Singh and others v. Raja Vishwanath Pratap Singh and another, (1992) 3 SCC 90**, which has been followed in **Akhalaq Hussain** by a three Judge Bench of their Lordships.

58. Now, in this case, the Lower Appellate Court, about the status of declaration under Section 143 of the Act of 1950, has recorded the following finding:

"4.....

In the instant case a suit was filed under section 143 Z.A. Act. The S.D.O. Khurja by its order dated 10.12.1975 paper no.39-C declared both the plots 2135 and 2136 as Abadi land. The order dated 10.12.1975 was ex-parte. An application for restoration was moved, whose copy of order 112-C is on record whereby the ex-parte order dated 10.12.1975 was set aside on 13.9.1979. There are other two paper

no.31-C and 33-C on record which show that the suit under section 143 U.P.Z.A. & L.R. Act was dismissed and its appeal was also dismissed. It means that no declaration under section 143 Z.A. Act could be made so far. The position is obvious that in absence of any declaration under section 143, the property in question shall be deemed *Bhumidhari* land."

59. The Lower Appellate Court, upon the finding that there is no declaration under Section 143 of the Act of 1950 with regard to the suit property, proceeded to hold that the Civil Court had no jurisdiction to try the suit in terms of the following remarks:

"14. Learned counsel for the appellant argued that civil court has no jurisdiction to try the suit. I have carefully gone through the record. It has already been observed that the disputed property falls within the definition of land, besides no declaration under section 143 of the U.P.Z.A. & L.R. Act has been made so far. Therefore, the suit for eviction shall lie before the Revenue Court. Civil Court has no jurisdiction to evict a Sirdar or *Bhumidhar* or a person from the land. It is, therefore, held that Civil Court has no jurisdiction to try the suit."

60. The Lower Appellate Court, based on the status of proceedings under Section 143 and the outcome thereof, has reached a conclusion about the Civil Court not being possessed of jurisdiction to try the suit and rightly so. The said opinion expressed by the Lower Appellate Court on the state of proceedings under Section 143 accords with the legal position noticed by this Court hereinabove.

61. For the reasons indicated hereinabove, we endorse the Lower Appellate Court's opinion that the Civil Court had no jurisdiction to try the suit for eviction. A *fortiori*, it had to be filed before the Revenue Court of competent jurisdiction as Chapter VIII of the Act of 1950 would apply.

62. In view of what has been said above, Substantial Question of Law No.1 is answered in the affirmative and in terms that the provisions of the Act of 1950 would apply to land let out for non-agricultural purposes and Substantial Question of Law No.3 is also answered in the affirmative in terms that land situate in an urban area, if one to which the Act of 1950 applies, would be deemed to be an agricultural land, unless a declaration under Section 143 of the Act of 1950 is made.

63. This Court has held on Substantial Questions of Law Nos.1 and 3 that in the absence of a declaration under Section 143 of the Act of 1950, the suit property continues to be land within the meaning of the said Act, to which Chapter VIII applies. The Lower Appellate Court has also taken the same view and opined that the Civil Court had no jurisdiction to try the suit. Thereafter, the Lower Appellate Court has considered the plaintiffs' plea that the defendant could not have denied the plaintiffs' right to bring a suit to evict him, because he had accepted the plaintiffs to be his landlord. The pleas of estoppel and acquiescence urged by the plaintiffs were rejected on the principle that there is no estoppel against statute. This finding is based on a different finding elsewhere recorded by the Lower Appellate Court on the merits of the parties' case, where the Lower Appellate Court has held that the plaintiffs having let out the suit property in violation of Section 156 of the Act of 1950, the consequences under Section 165 would

attach and the defendant would become a *bhumidhar* thereof with non-trasferable rights. This Court assumes that this finding has been recorded because either it was admitted or it was nobody's case that the defendant or any member of his family had land with them in excess of twelve and a half acres together with the area of the suit property. Now, to judge the validity of these findings, Substantial Questions of Law Nos.4 and 5 have been formulated.

64. Considering the submissions advanced by the learned Counsel for the defendant (respondent here), this Court is of opinion that both those substantial questions of law do not really arise in this appeal because once the Lower Appellate Court held that the suit property being land governed by the Act of 1950 the Civil Court had no jurisdiction to try the suit, there was no occasion for the Lower Appellate Court to have recorded findings about the merits of the parties' case. It was on account of the remarks of the Lower Appellate Court on the merits of the parties' case that the defendant would become the *bhumidhar* with non-transferable rights vis-a-vis the suit property under Section 156 read with Section 165 of the Act of 1950 that Substantial Questions of Law Nos.4 and 5 were formulated.

65. This Court, therefore, holds that Substantial Questions of Law Nos.4 and 5 are not involved in the present appeal and refrains from deciding the same.

66. The Lower Appellate Court has dismissed the suit on merits while holding that the Civil Court had no jurisdiction to try it. We have affirmed those conclusions in answering Substantial Questions of Law Nos.1 and 3.

67. The only order, in the opinion of this Court, that could have been made by the Lower Appellate Court, once it came to the conclusion that the Civil Court had no jurisdiction to try the suit, was a direction to return the plaint. That is the order, which we think that this Court ought to make, because, after all, what the Lower Appellate Court and this Court have held, is inherent lack of jurisdiction with the Civil Court to try the suit.

68. In the result, this appeal **succeeds** and is **allowed in part.** The impugned decree passed by the Lower Appellate Court shall stand **set aside** and substituted by an order, under Order VII Rule 10 of the Code, directing a return of the plaint to the plaintiff for presentation to the Court of competent jurisdiction. The Trial Court shall carry out the aforesaid order and ensure return of the plaint within 15 days of receipt of the lower court records.

69. Costs easy.

70. Let the lower court records be sent down to the Trial Court concerned through the learned District Judge, Bulandshahr.

71. Let an order be drawn up accordingly.

(2024) 3 ILRA 339
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Public Interest Litigation (P.I.L.) No. 163 of 2024

Akbar Abbas Zaidi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Priyavrat Tripathi, Sri Ram Adhar Yadav

Counsel for the Respondents:
C.S.C., Sri Ifran Chaudhary, Sri Gaurav Tripathi

Public Interest Litigation - Abuse of Process - Suppression of Material Facts - Petitioner sought removal of alleged illegal constructions and unauthorized occupation by private respondents (Nos. 7, 8, 9) on land (Khata No. 24, 2.2940 hectares, Village Kairana, Shamli) declared as 'enemy property' under Enemy Property Act, 1968, and decision on his representation (02.11.2023). Petitioner, claiming to be a social worker with no vested interest, concealed ongoing litigation with private respondents, including partnership deeds (2015, 2019), a pending suit (Original Suit No. 73 of 2019), injunction orders (04.12.2021, 11.12.2023), and pending petitions (Article 227 Nos. 648/2024, 7848/2023). Non-disclosure violated Chapter XXII, Rule 1(3-A) and Rule 1(3)(ii) of Allahabad High Court Rules, 1952, mandating disclosure of petitioner's credentials and related proceedings. Supreme Court rulings, including St. of Uttaranchal Vs Balwant Singh Chaufal (2010 AIR SCW 1029), Janata Dal Vs H.S. Chowdhary (1992) 4 SCC 305, and K.D. Sharma Vs Steel Authority of India (2008) 12 SCC 481, emphasize that PILs filed with ulterior motives or suppression of facts constitute abuse of process, warranting dismissal with costs. Petition dismissed as a gross misuse of process, with Rs. 50,000/- cost imposed, to be deposited with Registrar General within three weeks for transfer to Tara Sansthan's old age home in Prayagraj for welfare of underprivileged elderly. Non-compliance to trigger recovery as land revenue arrears. (Paras 6-35)

Case Law Cited:

1. St. of Uttaranchal Vs Balwant Singh Chaufal, 2010 AIR SCW 1029 (Paras 9, 13)

2. Janata Dal Vs H.S. Chowdhary, (1992) 4 SCC 305 (Para 17)

3. Dr. B. Singh Vs U.O.I., (2004) 3 SCC 363 (Para 18)

4. Chandra Shashi Vs Anil Kumar Verma, (1995) 1 SCC 21 (Para 19)

5. Buddhi Kota Subbarai (Dr.) Vs K. Parasaran, (1996) 5 SCC 530 (Para 20)

6. Arunima Baruah Vs U.O.I., (2007) 6 SCC 120 (Para 21)

7. Prestige Lights Ltd. Vs St. Bank of India, (2007) 8 SCC 449 (Para 22)

8. K.D. Sharma Vs Steel Authority of India Ltd., (2008) 12 SCC 481 (Para 23)

9. Dalip Singh Vs St. of U.P., (2010) 2 SCC 114 (Para 24)

10. Amar Singh Vs U.O.I., (2011) 7 SCC 69 (Para 25)

11. Kishore Samrite Vs St. of U.P., 2012 (10) SCALE 330 (Para 26)

12. ABCD Vs U.O.I., (2020) 2 SCC 52 (Para 27)

13. Dhananjay Sharma Vs St. of Har., (1995) 3 SCC 757 (Para 28)

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

1. Short counter affidavit filed by Shri Gaurav Tripathi on behalf of respondent Nos.7 and 8 is taken on record.

2. Heard learned counsel for the petitioner, Shri Rajiv Gupta, learned Additional Chief Standing Counsel for the State-respondent Nos.1 to 4 and Shri Gaurav Tripathi for the contesting-respondent Nos.7 and 8. Shri Irfan Chaudhary has accepted notice on behalf of respondent No.5-Nagar Palika Parishad.

3. This petition has been filed purportedly in public interest by the petitioner-Akbar Abbass Zaidi against nine respondents, out of whom, respondent

Nos.7, 8 and 9 are private respondents. The prayer made in this petition is that respondent No.2-District Magistrate, Shamli be directed to remove illegal constructions and unauthorized occupation from the land covered by Khata No.24, area 2.2940 hectare, situated at Village Kairana Under Hadud, Tehsil Kairana, District Shamli, in view of the report submitted by the respondent-Authorities dated 16.09.2023, terming the property as 'enemy property'. The petitioner further seeks a direction to the respondent-Authorities to decide the petitioner's representation dated 02.11.2023 within stipulated period of time.

4. Although, it has not been mentioned in the first relief as to who is in unauthorized occupation of the said property, from the pleadings contained in the writ petition as well as from the representation dated 02.11.2023 and other identical representations annexed to the petition, it is apparently clear that the petitioner has termed the respondent Nos.7, 8 and 9 as land mafias in unauthorized possession over the aforesaid property.

5. When the matter was taken up, learned counsel for the respondent Nos.7 and 8, by referring to the short counter affidavit, contended that the present petition is a gross misuse and abuse of the process of law as the same has been filed by concealing various proceedings held between the petitioners and the private respondents. This Court, accordingly, proceeded to consider the record of petition and the short counter affidavit.

6. As per the pleadings contained in the petition, the petitioner claims to be a permanent resident in House No.24, Mohalla Kalalan, Tehsil Kairana, District Shamli and states his aim to eradicate the evils persistent in the society and irregularities committed by the Authorities. He claims to be a social worker stating that he has no vested interest in the property. It is further stated that the property covered by Khata No.24 was declared as 'enemy property' under the order passed by the Collector, Muzaffarnagar on 27.03.1974 under the provisions of Enemy Property Act,1968 and is recorded as such in the revenue records. Details of various Khasras covered by Khata No.24 have been mentioned in paragraph No.7 of the petition and in paragraph Nos.7A, 7B, 7C and 7D of the petition, meaning of the words "Public Interest" with reference to certain Authorities and dictionaries has been sought to be explained.

7. The case of the petitioner is that father of respondent Nos.7, 8 and 9 claimed ownership over the land in dispute but his claim was rejected by the Assistant Collector, First Class, Muzaffarnagar on 09.11.1981, against which, an appeal was filed before the Additional Commissioner, Meeurt, Division, Meerut which was allowed on 15.04.1982 accepting the claim of respondent Nos. 7 to 9 over 1/5th property of land in dispute. It is stated that against order dated 15.04.1982, the father of the said respondents filed Second Appeal No.201 of 1982 before the Board of Revenue, U.P., Allahabad which remanded the matter to the Competent Authority on 20.04.1999, against which order, Writ B No.21897 of 1997 has been filed before this Court which is pending and, despite that, Bhumafias of the Mohalla concerned have started plotting work over the land and several houses and shops have been constructed thereon, as a result whereof, public at large is suffering but the authorities, despite submission of various representations by the petitioner, are sitting

tight over the matter. Specific allegations of making encroachments have been levelled against respondent Nos.7 to 9 and, in pith and substance, the reliefs claimed in the writ petition are to the effect that the persons in possession over the aforesaid property, i.e. respondent Nos.7 to 9, be removed therefrom.

8. On the other hand, Shri Gaurav Tripathi, learned counsel for respondent Nos.7 and 8, by referring to the record of short counter affidavit, submits that the petitioner has deliberately concealed various proceedings held in between the petitioner and private respondents and has not approached this Court with clean hands. He further submits that there is gross violation of provisions of Chapter XXII, Rule 1 (3-A) of the Allahabad High Court Rules, 1952 (hereinafter referred to as 'the Rules') as the petitioner has not disclosed his credentials in the petition.

9. Having heard learned counsel for the parties, before referring to the amended Rule incorporated in the High Court Rules pursuant to the judgment of Hon'ble Apex Court in the case of **State of Uttranchal vs. Balwant Singh Chaufal and others, 2010 AIR SCW 1029**, it is necessary to refer to the litigation in between the petitioner and the private respondents, as stands reflected from the documents annexed to the short counter affidavit.

10. A partnership deed was executed on 16.08.2015 (registered on 19.12.2015), in which, the petitioner-Akbar Abbass Zaidi was shown as one of the partners in relation to business of Egg, Layer Farming etc. in the name and style of M/S ROSY LAYERS FARM, at Ramda Road, Kairana, Shamli. Respondent No.7 (Shamsuddin) was one of the witnesses to execution of the deed. Another partnership deed was executed on 07.01.2019 (registered on 10.01.2019) which shows that one of the partners namely Mohd. Aashif retired from the partnership w.e.f. 07.01.2019 and Shamsuddin (respondent No.5) was inducted as a partner to act alongwith the remaining two partners. Third partnership deed dated 07.01.2019 (registered on 10.01.2019) is also on record which discloses names of five partners including the petitioner and respondent No.7 alongwith other persons.

11. A plaint of Original Suit No.73 of 2019 (M/S Amirbano and others vs. Akbar Abbas Zaidi and another) is on record whereby the plaintiffs have claimed a decree for declaring them as owners of property covered by Khata No.647 and also a decree for permanent prohibitory injunction based upon stipulations contained in the aforesaid partnership deeds. Apparently, the petitioner herein is defendant No.1 in the said suit and has filed his written statement therein. The record further reveals that the Civil Judge, Senior Division, Kairana, Shamli passed an order dated 04.12.2021 restraining the defendants from interferring in the business being carried out by the plaintiffs of the suit as well as their possession over the property while allowing injunction application (paper No.6-C). The defendants, including the petitioner, filed Misc. Appeal No.10 of 2021 against the injunction order and the same was dismissed by the District Judge, Shamli by order dated 11.12.2023 confirming injunction order. Another order dated 19.04.2023 passed by the Additional District Judge, Kairana, Shamli in the same suit is on record which shows that the petitioner alongwith co-defendant in the same suit had challenged order dated 16.11.2021 passed by the Trial Court on an

application under Order VII Rule 11 of the Code of Civil Procedure, 1908, by means of Civil Revision No.2 of 2022, however, the same was also dismissed. It appears that two petitions being Matter Under Article 227 Nos. 648 of 2024 (Akbar Abbas Zaidi and another vs. M/S Ameer Bano and 5 others) and 7848 of 2023 (Akbar Abbas Zaidi and another vs. M/S Ameer Bano and 5 others) at the instance of the petitioner are pending before this Court arising out of the aforesaid orders. Certain First Information Reports lodged in between the parties raising a dispute regarding partnership business are also annexed to the short counter affidavit.

12. From perusal of the aforesaid documents, it is apparently clear that the petitioner is in continuous litigation with the private respondents, especially respondent No.7 and, as of now, there are judicial orders passed against him and in favour of respondent No.7 who is plaintiff No.5 in Original Suit No.73 of 2019 and was inducted as a partner in the partnership business alongwith the petitioner. There is absolutely no disclosure of any of the aforesaid proceedings in the entire petition. Apparently, the present petition in the nature of Public Interest Litigation has been prepared on 20.12.2023 and filed on 25.01.2024 i.e. immediately after the Misc. Appeal filed by the petitioner against the injunction order was dismissed by the District Judge and even before the Matter Under Article 227 No.648 of 2024, arising out of the order of District Judge was filed before this Court. Hence, it is clear that the petitioner is guilty of supressing material facts and proceedings from this Court and deserves to be dealt with as per law settled in this regard.

13. As regards the public interest litigation, the Apex Court in **State of Uttaranchal vs. Balwant Singh Chaufal (supra)** placing reliance on various previous judicial pronouncements, in order to ensure that Writ Jurisdication may not be misused and abused by the unscruplous litigants, issued various directions. It is necessary to refer to the directions contained in paragraph 198 of the judgment as under:-

"198. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

. (5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public

interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations. "

14. Our High Court, in furtherance of the directions issued by the Apex Court, incorporated amendment in Rule 1 of Chapter XXII of the Rules and added sub-rule (3-A) in Rule 1, which reads as follows:-

"(3-A) In addition to satisfying the requirements of the other rules in this chapter, the petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to espouse; that he has no personal or private interest in the matter; that there is no authoritative pronouncement by the Supreme Court or High Court on the question raised; and that the result of the litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

15. The newly incorporated Rule clearly mandates that the petitioner seeking to file Public Interest Litigation petition should precisely and specifically disclose his credentials and the public cause he is seeking to espouse with clear mention that he has no personal or private interest in the matter. Significantly, requirements incorporated under sub-rule (3-A) are "in addition to specifying the requirements of other Rules in the Chapter." Therefore, this Court feels it appropriate to refer to sub-rule 3(ii) of Rule 1 of Chapter XXII which reads as follows:-

"3(ii). If there is any related proceedings pending elsewhere, the full details thereof shall be mentioned."

(emphasis supplied by Court).

16. A conjoint reading of the aforesaid Rules/sub-rules makes it apparently clear that, in case, the said requirements are not fulfilled by the petitioner filing a petition in the nature of a Public Interest Litigation, the High Court would be obliged to deal with such non-compliance as per the judicial pronouncements made by the Apex Court from time to time with regard to abuse and misuse of process of law by filing Public Interest Litigation petitions.

17. In **Janata Dal vs. H.S. Chowdhary, (1992) 4 SCC 305**, the Supreme Court, apart from making various observations, observed in paragraph No.109 that only a person acting *bonafide* and having sufficient interest in the proceedings of Public Interest Litigation will alone have a *locus standi* and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. It further observed that vexatious petition under the colour of PIL brought before the Court for vindicating any personal grievances, deserves rejection at the threshold. (emphasis supplied by Court)

18. In **Dr. B. Singh vs. Union of India and others, (2004) 3 SCC 363**, the Supreme Court placed reliance on various previous judgments on the issue as to how genuine and ingenuine PIL petitions should be dealt with by the Courts. It clearly laid down that it would be desirable for the courts to filter out the frivolous petitions and dismiss them with cost so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts. It also observed that when there is material to show that a petition styled as a Public Interest Litigation is nothing but a camouflage to foster personal disputes or vendatta to bring to terms a person, not of ones liking, or gain publicity or a facade for blackmail, said petition has to be thrown out. (emphasis suppled by Court).

19. In **Chandra Shashi Vs. Anil Kumar Verma, (1995) 1 SCC 21**, the Apex Court has observed that to enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in courts when they would find that "truth alone triumphs" is an achievable aim there.

20. In **Buddhi Kota Subbarai (Dr.) Vs. K. Parasaran, (1996) 5 SCC 530)**, the Supreme Court has held that no litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions.

21. In **Arunima Baruah Vs. Union of India (2007) 6 SCC 120**, Supreme Court held that it is trite law that to enable the Court to refuse to exercise its discretionary jurisdiction when material facts are suppressed. It was further held that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands.

22. In **Prestige Lights Limited Vs. State Bank of India, (2007) 8 SCC 449,** the Supreme Court observed that it is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.

(emphasis supplied by Court)

23. In **K.D Sharma Vs. Steel Authority of India Limited and others, (2008) 12 SCC 481**, Supreme Court held that no litigant can play "hide and seek" with the courts or adopt "pick and choose" and one should come with candid facts and clean breast. Suppression or concealment of material facts is forbidden to a litigant or even as a technique of advocacy. In such cases the Court is duty bound to discharge rule nisi and such applicant is required to

be dealt with for contempt of Court for abusing the process of the court.

(emphasis supplied by Court)

24. Supreme Court in **Dalip Singh Vs. State of Uttar Pradesh and others, (2010) 2 SCC 114** came down heavily on unscrupulous litigants and after noticing the progressive decline in the values of life, it observed as follows:

"For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings."

.....

"In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

25. In **Amar Singh Vs. Union of India (2011)7 SCC 69**, Supreme Court held that Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants who come with "unclean hands", are not entitled to be heard on the merits of their case.

26. In **Kishore Samrite Vs. State of U.P. and others, 2012 (10) SCALE 330**, The Supreme Court held that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.....With the passage of time, it has been realized that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Apex Court further observed that the Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth..... It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorized or unjust gain to anyone as a result of abuse of the process of the Court.

One way to curb this tendency is to impose realistic or punitive costs.

27. In **ABCD Vs. Union of India and others, (2020) 2 SCC 52**, Hon'ble Supreme Court in the matter where material facts had been concealed, while issuing notice to the petitioner therein and while exercising its *suo-motu* contempt power, observed that making a false statement on oath is an offence punishable under Section 181 of the IPC while furnishing false information with intent to cause public servant to use his lawful power to the injury of another person is punishable under Section 182 of the IPC. These offences by virtue of Section 195(1)(a)(i) of the Code can be taken cognizance of by any court only upon a proper complaint in writing as stated in said Section.

28. In **Dhananjay Sharma Vs. State of Haryana and others (1995) 3 SCC 757**, it has been observed that filing of a false affidavit was the basis for initiation of action in contempt jurisdiction and the concerned persons were punished.

29. In view of the aforesaid judicial pronouncements, now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim *supressio veri, expression falsi*, i.e. suppression of truth is equivalent to the expression of falsehood, gets attracted in such cases including the present one. (emphasis supplied by Court)

30. In view of the above discussion, we are fully convinced that the instant petition is a gross misuse and abuse of process of law and deserves dismissal with heavy cost so that it may set a deterrent example to discard unscruplous persons from invoking Writ Jurisdiction for their vested interest under the camouflage of PIL.

31. The instant PIL petition is **dismissed with cost of Rs.50,000/-.**

32. We may note that "Tara Sansthan", a Government registered charity organisation, conducts varous charitable activities throughout India which include running of eye hospitals for free check-ups and treatment, old age homes, widow monthly pension scheme, food donation scheme etc. etc. One of such old age homes is named as Rabindra Nath Gaur Anand Old Age Home, located at 25/39, LIC Colony, Tagore Town, Prayagraj (U.P.), where many old people, either having no family members or, though have family members, but have been thrown out from their homes, are passing last stages of their lives in distress. Such organizations including the Old Age Home, Prayagraj is mainly dependant upon the donations made by the general public or some organizations. Since the Public Interest Litigation petitions are meant to wipe out the tears of poor and needy, suffering from violation of their fundamental rights, the Court feels it appropriate that the cost imposed upon the petitioner should also be utilized for those who are in need of money, i.e. to say that it must go for the welfare of the society, particularly, those who are under-privileged or downtrodden for any reason.

33. Therefore, the petitioner is directed to deposit the cost before the Registrar General of this Court within **three weeks** from the date of this

judgment, failing which, the Registrar General shall send a copy of this order alongwith letter to the District Magistrate, Shamli (respondent No.2) to issue a recovery citation against the petitioner for recovering the said sum as arrears of land revenue within **one month** from the date of receipt of copy of the instant order from the Registrar General.

34. On receipt of aforesaid amount, Registrar General of this Court shall credit the same to the account of Tara Sansthan, SBI Account No. 31840870750, IFSC Code SBIN0011406, after due verification of the particulars of the said account in consultation with the Head/ Incharge of the said Sansthan. The amount, so remitted, shall be used exclusively for the welfare of the old-age people staying in Rabindra Nath Gaur Anand Old Age Home, located at 25/39, LIC Colony Tagore Town, Prayagraj (U.P.). A copy of this order shall also be served upon the Head/Incharge of the said old age home for necessary compliance of this order.

35. The Head/Incharge of said Sansthan shall submit statement(s) of account before Registrar General of this Court disclosing the manner of utilization of cost till the amount is spent for the above welfare purpose, failing which, the Head/Incharge of the said old age home shall be answerable.

(2024) 3 ILRA 348
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABABAD 10.01.2024
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters Under Article 227 No. 3046 of 2023

Naimullah Sheik & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Khursheed Alam

Counsel for the Respondents:
G.A., Sri Mohd. Warish Khan

Protection of Women from Domestic Violence Act, 2005 - Sections 2(a), 2(f), 2(q), 2(s), 12 & 20 - Constitution of India,1950 - Article 227 - Maintenance for Major Unmarried Daughters - - Petitioners (father and stepmother) challenged trial court's order (30.05.2022) granting interim maintenance of Rs. 3,000/- per month to each of three major daughters (aged 25, 22, 20) under Section 12 of DV Act, and appellate court's affirmation (08.12.2022). Daughters alleged domestic violence (physical assault, denial of education) by father and stepmother after their mother's death. Petitioners contended daughters, being major, were not entitled to maintenance, were earning independently, and application was instigated by maternal uncle. Court held that DV Act provides a broader, quicker remedy for women subjected to domestic violence, including monetary relief under Section 20, which encompasses maintenance under Section 20(1)(d) in addition to or under Section 125 Cr.P.C. or other laws. Supreme Court and High Court precedents (Noor Saba Khatoon Vs Mohd. Quasim, (1997) 6 SCC 233; Jagdish Jugtawat Vs Manju Lata, (2002) 5 SCC 422; Ajay Kumar Vs Lata @ Sharuti, 2019 Supreme (SC) 612; Menti Trinadha Venkata Ramana Vs Menti Lakshmi, 2021 SCC Online AP 2860; Mustakim Vs St. of U.P., 2015 (3) ADJ 693) confirm that major unmarried daughters, Hindu or Muslim, can claim maintenance under personal law or DV Act if subjected to domestic violence in a domestic relationship. Section 20(1) also recognizes independent monetary relief for expenses/losses due to domestic violence, irrespective of age or dependency. No illegality found in impugned orders; petition dismissed under Article 227. (Paras 4-15)

Petition Dismissed.

Case Law Cited:

1. Noor Saba Khatoon Vs Mohd. Quasim, (1997) 6 SCC 233 (Paras 11, 12, 14)

2. Jagdish Jugtawat Vs Manju Lata, (2002) 5 SCC 422 (Paras 11, 12, 14)

3. Ajay Kumar Vs Lata @ Sharuti, 2019 Supreme (SC) 612 (Para 11)

4. Menti Trinadha Venkata Ramana Vs Menti Lakshmi, 2021 SCC Online AP 2860 (Para 11)

5. Mustakim Vs St. of U.P., 2015 (3) ADJ 693 (Para 11)

6. Amod Kumar Srivastava Vs St. of U.P., 2008 (62) ACC 591 (Para 11)

7. Abhilasha Vs Parkash, (not fully cited in judgment) (Para 11)

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

1. Heard Sri Khurshed Alam, learned counsel for the petitioners, Sri Mohd. Warish Khan, learned counsel for the respondent nos. 2, 3 and 4 and learned AGA for the State.

2. This petition under Article 227 of the Constitution of India has been filed by parents of three daughters who are respondent nos. 2, 3 and 4, challenging the order dated 30.05.2022 passed by the Judicial Magistrate, F.T.C., Court No. 2, Deoria in Case no. 4782 of 2020 (Hina and Others vs. Naimullah and Another) filed under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the DV Act') and further to challenge the order dated 08.12.2022 passed in Criminal Appeal No. 40 of 2022, by which the order of the trial court was affirmed.

3. The facts relevant for the purpose of this petition are as below:-

(i) Km. Hina, Km. Tabassum and Km. Tarannum filed a case under section 12 of the DV Act, claiming maintenance with the submissions in brief that their real mother Naseema Khatun died in February 2015 and that their father married another woman during the life time of their deceased mother and that now their father and step-mother have been mistreating, physically assaulting them and have also stopped them from pursuing their education;

(ii) The applicants filed an application for grant of interim maintenance. The opposite side gave written objection, in which in essence, it was submitted that the O.Ps has been facing financial difficulties and that his daughters are healthy and have been earning independently and that they have been staying with him also and he has been bearing all their expenses;

(iii) The learned trial court heard both the sides and directed the O.Ps to pay Rs. 3,000/- per head, every month as interim maintenance allowance;

(iv) Aggrieved by the aforesaid order, O.Ps preferred an appeal in which, besides other averments, it was submitted that his daughters are major, aged about 25 years, 22 years and 20 years respectively and this fact was completely ignored by the trial court, while granting interim maintenance;

(v) The appellate court passed a detailed order, dismissing the appeal.

4. It is submitted on behalf of the petitioners that the learned court below failed to consider the fact that their father is an old and infirm person, having no source of income and that he has already been

maintaining the respondents and that the application for grant of maintenance under the Protection of Women from Domestic Violence Act, was filed at the behest of their maternal uncle. Since the death of his wife, his daughters were staying with him and the expenses were being borne by him only and that they are educated and have been earning by taking tuitions. The most important contention from the petitioners is that his daughters are major and therefore they cannot claim any maintenance.

5. The Protection of Women from Domestic Violence Act, 2005 has been enacted with an object to provide for 'more effective protection to women', guaranteed under the Constitution, who are the victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The use of the word 'more' before the phrase 'effective protection of rights of woman' is not an insignificant addition. The matter shall be further elaborated at appropriate places in the judgment.

6. Under the aforesaid Act of 2005, any aggrieved person may apply to the Magistrate for seeking one or more relief under the Act. Broadly the reliefs available under the Act are titled as "Right to reside in a shared household under section 17, Protection orders under section 18, Residence orders under section 19, Monetary reliefs under section 20, Custody orders under section 21 and Compensation orders under section 22."

Section 20 under which monetary relief may be granted to an aggrieved person has been worded as below:-

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to—

(a)the loss of earnings;

(b) the medical expenses;

(c)the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay

to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent."

7. Perusal of the above provision demonstrates that any aggrieved person including any child of the aggrieved person, who has been subjected to domestic violence, may claim monetary relief to meet the expenses incurred and losses suffered as a result of domestic violence and also monetary relief for such incidental matters like monetary relief for loss of earnings, medical expenses, loss of any property and also for maintenance. This provision of law further provides that such reliefs of monetary nature can also be claimed which do not fall under the categories enumerated above as the provisions clearly lay down that reliefs need not be limited to reliefs as described under section 20(1), 20(1)(a), 20(1)(b), 20(1)(c) and 20(1)(d). Section 20(1)(d) of the DV Act further expands the scope of monetary relief for maintenance. For better understanding I am reproducing section 20(1)(d) again as below:-

"(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force."

This part of the provision of law says that not only the aggrieved persons but also her children, if any, may claim maintenance **'under'** and **'in addition'** to order of maintenance under section 125 Cr.P.C. And further that the maintenance can be claimed under or in addition to any other law for the time being in force. The way provision has been worded, gives a clear indication that section 12 of the DV Act is essentially a procedural law, which can be resorted to by any aggrieved person, who draws a substantive right for maintenance from any other law, whether under section 125 Cr.P.C. or personal law applicable to the parties or any other law for the time being in force. Thus law is quite clear to the extent that maintenance can be claimed under any law which provides for the same. Further that even if maintenance has already been granted under one law, the aggrieved person can ask for monetary relief for maintenance under any other law in addition, under the provisions of the DV Act. Thus this law seeks to avoid multiplicity of proceedings. Now a question may arise that when rights have been provided for elsewhere, why such enactment was needed at all? In my opinion the legislature has, keeping up with the objective of this enactment, has cut down the procedural formalities and facilitated grant of quicker reliefs.

Section 20(2) of the DV Act says that the monetary relief granted under this section shall be adequate, fair, reasonable and consistent with the standard of living to which the aggrieved person is accustomed. The scope for grant of particular kind of monetary relief that is "maintenance" is further widened in section 20(3) of the DV Act which says that an appropriate lump-sum may be ordered to be paid as maintenance in the nature of circumstances of a particular case. **In my opinion, if the provisions of section 20(1)(d) of the DV Act are interpreted in harmony with rights given to an aggrieved person under any other law, it appears that the substantive right to receive maintenance may emanate from other laws, however quick and shorter procedure to obtain**

the same, has been provided in the the DV Act, 2005. The rights which the parties may have under other laws whether civil or criminal, have been given a cutting edge by the Act. In my view, this explains the use of words "more effective protection to women" in the foreword which described the reasons behind this enactment.

8. Having said that, now I come to some other provisions in the DV Act which strengthen and fortify the above view regarding giving more effective protection to women. Section 2(a) of the DV Act defines "aggrieved person" as any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. The woman who has been in domestic relationship with the respondent and who has been subjected to any domestic violence, is entitled for relief under the Act, irrespective of her minority or majority. The rights of an aggrieved person flow from the fact that she has been subjected to violence which may be of physical, mental, sexual, verbal and emotional nature and may even in the nature of the economic abuse. The other essential requirement is that the aggrieved person has been living in a shared household or had, at any point of time lived together in a shared household with the respondent, who is related to her by marriage, adoption, consanguinity or living together, in a joint family as a family member.

9. Now an important question is whether an independent substantive right for monetary relief flows from section 20 of the DV Act or whether section 20 read with section 12 of the DV Act, 2005 merely provides for procedure and no more?

10. I examined the provisions as given under section 20 of the DV Act. Section 20(1) of the DV Act (first part) speaks of expenses incurred and losses suffered consequent upon domestic violence. From reading this part, this impression gains ground that irrespective of other factors like dependency, age or marital status etc (which may be relevant in or under any other law) the aggrieved person has an independent right to obtain monetary relief for expenses incurred and losses suffered because of domestic violence. In my view principles of law of torts have found a statutory recognition here. All monetary reliefs under section 20 of the DV Act are in the nature of expenses or losses suffered as a result of domestic violence. However, the grant of maintenance forms altogether a different branch of law though domestic violence remains the triggering factor here as well. The law as regard grant of maintenance even, if it is to be granted under the DV Act has to be seen in a different perspective.

11. With the above perspective in mind, lets go through some of the judgments of the Supreme Court and the High Court as below:-

In ***Noor Saba Khatoon vs. Mohd. Quasim; (1997) 6 SCC 233***, before the Supreme Court, a Muslim woman claimed maintenance from her husband for herself and her three minor children under section 125 Cr.P.C. The trial court allowed the application and directed the OP (her husband) to pay maintenance to his wife as well as his children till attaining the age of majority. The respondent divorced her wife and thereafter filed an application seeking modification of the order dated 19.01.1993 in view of the provisions of the Muslim Women (protection of Rights on Divorce) Act, 1986 (hereinafter referred to as 'the Act of 1986'). The trial court modified the

order on the ground that after divorce, she was entitled for maintenance for 3 months only i.e. period of 'iddat', as per the provisions of the aforesaid Act of 1986, while maintaining the maintenance order for children. The respondent thereupon filed a petition before the High Court and the High Court, accepting his plea held that the Muslim woman was entitled to claim maintenance from her previous husband, for her minor children only up to the period of 2 years. However the Supreme Court held that the children of Muslim parents have an independent right to claim maintenance under section 125 Cr.P.C. and that the right cannot be allowed to be defeated except through clear provisions of a statutes. The Muslim father's obligation, like a Hindu father to maintain his minor children, as contained in section 125 Cr.P.C. is absolute and is not at all affected by section 3(1)(b) of the Act of 1986.

In para no. 10, it was held as below:-

"10. Thus, both under the personal law and the statutory law (Sec. 125 Cr. P. C.) the obligation of a muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and <u>in case of females till they get married,</u> is absolute, notwithstanding the fact that the minor children are living with the divorced wife."

In **Jagdish Jugtawat vs. Manju Lata and Others; (2002) 5 SCC 422,** the Supreme Court applied the law laid down in ***Noor Saba Khatoon vs. Mohd. Quasim (supra)*** and drawing force from the aforesaid judgments held that the right of a minor girl to obtain maintenance from the appellants even after attaining majority till her marriage, is recognized in Section 20(3) in the Hindu Adoptions and Maintenance Act, 1956 and therefore the order for granting maintenance was right.

The relevant portion is as below:-

"3. In view of the finding recorded and the observations made by the learned Single Judge of the High Court, the only question that arises for consideration is whether the order calls for interference. A similar question came up for consideration by this Court in the case of Noor Saba Khatoon v. Mohd. Quasim , AIR 1997 SC 3280 : 1997 (6) SCC 233 : 1997 SCC (Cri) 924 relating to the claim of a Muslim divorced woman for maintenance from her husband for herself and her minor children. This Court while accepting the position that Section 125, CrPC does not fix liability of parents to maintain children beyond attainment of majority, read the said provision and Section 3(l)(b) of the Muslim Women (Protection of Rights on Divorce) Act together and held that under the latter statutory provision liability of providing <u>maintenance extends beyond attainment of majority of a dependent girl.</u>

4. Applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenance from parents <u>after attaining majority till her marriage is recognized in Section 20(3) of the Hindu Adoptions and Maintenance Act.</u> Therefore, no exception can be taken to the judgment/order passed by the learned Single Judge for maintaining the order passed by the Family Court which is based on a combined reading of Section 125 CrPC and Section 20(3) of the Hindu Adoptions and Maintenance Act. For the reasons aforesated we are of the view that on facts and in the circumstances of the case no interference with the impugned judgment/order of the High Court is called for."

The High Court of Andhra Pradesh in ***Menti Trinadha Venkata Ramana vs. Menti Lakshmi and Others; 2021 SCC Online AP 2860***, observed in para nos. 4 and 5 as below:-

"4. While dealing with a similar issue in Jagdish Jugtawat v. Manju Lata and others1, a three Judge Bench of the Hon'ble Apex Court held though a girl, on attaining majority, may not be entitled to maintenance from her parents under Section 125 of Cr.P.C., such right can be traced to Section 20(3) of the Hindu Adoptions and Maintenance Act, 1956 (for short, 'the Act of 1956') and on a combined reading of the two provisions, the Family Court is entitled to grant maintenance to an un-married daughter even after attaining majority, provided she is unable to maintain herself. However, the aforesaid observations in Jagdish Jugtawat (supra) were recently clarified by another three Judge Bench of the Hon'ble Apex Court in Abhilasha v. Parkash and others2, wherein the Bench inter alia observed though a Family Court is entitled to grant maintenance to a major un-married girl by combining the liabilities under Section 125 Cr.P.C. and Section 20(3) of the Act of 1956, a Magistrate exercising powers under Section 125 of Cr.P.C. is not authorized to do so.

5. However, it may be apposite to note that the Magistrate is entitled to entertain an application under the Protection of Women from Domestic Violence Act, 2005 (for short, 'the DV Act') and grant monetary relief i.e., to meet the expenses incurred and losses suffered by an aggrieved person under Section 20 of the DV Act, in the event of domestic violence by way of economic abuse is established. A conjoint reading of Section 2(a) and 2(f) of the DV Act would show that a daughter, who is or was living with her father in a domestic relationship by way of consanguinity, is entitled to seek reliefs including monetary relief on her own right as an aggrieved person under Section 2(a) of the DV Act irrespective of the fact whether she is a minor or major. In the present case, the relationship between the parties as father and daughter is admitted and they had stayed together in a shared household. In view of the fact that the petitioner neglected to maintain the 1st respondent-wife and 2nd respondent-daughter, proceedings under section 125 Cr.P.C. came to be instituted and maintenance was awarded to respondents including to the 2nd respondent. As the award was not paid, the learned Magistrate issued the impugned order, dated 14.03.2012, directing recovery of maintenance to the tune of Rs. 22,000/- for a period of 11 months from 17.12.2009 to 16.11.2010. In the aforesaid facts, the order of learned Magistrate may be traced to his powers to grant monetary relief under the DV Act and by a combined reading of the provisions of Section 125 of Cr.P.C. and Section 20 of the DV Act, the said order cannot be said to be illegal on the mere ground that the 2nd respondent had become a major. I am further fortified to arrive at such finding as the relief under the DV Act can be granted in addition to other reliefs available to the aggrieved person as envisaged under Section 26(2) of the DV Act."

The Allahabad High Court in ***Mustakim vs. State of U.P. and Another; 2015 (3) ADJ 693,*** has observed in para nos. 10, 11 and 12 as below:-

"10. Now a look at the judgment of this Court in the case of Amod Kumar Srivastava v. State of U.P. and others, 2008 (62) ACC 591. This judgment takes a

view that upon attaining majority an illegitimate/legitimate child including an unmarried daughter, is not entitled to claim maintenance, but it does not take into consideration the judgments of the Apex Court in the cases of Noor Saba Khatoon and Jagdish Jugtawat (both supra), wherein it has been held that notwithstanding the ineligibility of a major unmarried daughter to claim maintenance under Section 125 Cr.P.C, yet an order granting maintenance to such a daughter is not liable to be interfered with a view to avoid multiplicity of proceedings provided she has a right to claim maintenance from her father under the personal law.

11. The Apex Court in the case of Noor Saba Khatoon (supra), after examining the personal law of muslims, has already held that a muslim father is liable to maintain his major daughter till such time she is not married. It is not disputed that O.P. No.2 is major and that she is not yet married.

12. It is held that notwithstanding the ineligibility of a muslim major unmarried daughter to claim maintenance under Section 125 Cr.P.C, yet an order granting maintenance to her is not liable to be interfered, with a view to avoid the multiplicity of proceedings, as such a daughter, who is unable to maintain herself can claim maintenance from her father under the personal law."

The Supreme Court in ***Ajay Kumar vs. Lata @ Sharuti & Others; 2019 0 Supreme (SC) 612,*** in the light of the provisions of section 12 and section 20(1) of the DV Act held that the monetary relief may include but is not limited to an order of maintenance of the aggrieved persons as well as his children, if any, including an order under or in addition to order of maintenance under section 125 Cr.P.C. or any other law for the time being in force. The Supreme Court thereafter alluded to the definition of 'respondent' as given in section 2(q) of the DV Act, definition of 'domestic relationship' as given in section 2(f) of the DV Act and definition of 'shared household' as given in section 2(s) of the DV Act and went on to observe in para no. 15 as below:-

"15. All these definitions indicate the width and amplitude of the intent of Parliament in creating both an obligation and a remedy in the terms of the enactment."

12. In my opinion, in the above words, the Supreme Court has recognized that the scope of DV Act, 2005 is quite wide. The statement of object and reasons which finds place at the top of any particular enactment may be of utility while interpreting the provisions of law. The objective of enacting this Act has been worded as below:-

"An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matter connected therewith or incidental thereto."

13. In my view the legislature, while enacting this Act had this realisation in mind that though existing provision of law provide for rights of maintenance to eligible persons, however the procedural delays defeat the very purpose. The enactment seeks to grant a quicker relief where the aggrieved woman has been subjected to domestic violence and was in a domestic relationship with the respondent. This explains the use of words "more

effective protection to women", hence it is being held that where a sufferer has a right to obtain maintenance as provided in criminal law or in civil law or personal law and that she has been subjected to domestic violence from a person who stood in domestic relationship, she may resort to quicker method of obtaining reliefs under section 12 of the Protection of Women from Domestic Violence Act, 2005.

14. From perusal of the judgments as have been referred to earlier, there remains no doubt that unmarried daughter, whether Hindu or Muslim has a right to obtain maintenance, irrespective of her age. This is made clear again that the courts have to look for other laws applicable when the question pertains to right to be maintained. However, where issue does not pertain to mere maintenance, the independent rights are available to an aggrieved under section 20 of the DV Act itself.

15. Hence, I do not find any good ground to interfere in the impugned orders in exercise of powers under Article 227 of the Constitution of India, therefore, this revision is **dismissed.**

16. Let a copy of the order be immediately transmitted to the court concerned.

(2024) 3 ILRA 356
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABABAD 09.01.2024
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters Under Article 227 No. 5914 of 2023 (Criminal)

Diwakar Singh ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri Utkarsh Birla, Aarushi Birla

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 243 - Constitution of India,1950 - Article 227 - Defence Witnesses - - Petitioner challenged the order dated 18.01.2023 by Judicial Magistrate, Varanasi, rejecting applications (dated 19.07.2021 and 02.08.2021) to summon retired police officers (Bua Singh, Atul, Vijay Kumar Agrawal) as defence witnesses in a trial under Sections 392, 218, 467, 468, 120-B IPC. Petitioner, a former Sub-Inspector, was charged for fabricating a false loot incident after lodging an FIR (Case Crime No. 444/2000). Applications sought to summon documents, case property, recall prosecution witnesses, and call retired officers to verify departmental enquiry records. Revisional court partly allowed earlier revision (26.04.2022), directing reconsideration only for summoning defence witnesses. Trial court's subsequent order (20.09.2022) allowing summoning was set aside by revisional court (22.12.2022) for lack of reasoning. Fresh order (18.01.2023) rejected applications, finding no material relevance of witnesses, deeming the request vexatious and dilatory. Court upheld the order, noting Section 243(2) Cr.P.C. allows refusal if summoning is for vexation or delay, and the proviso restricts recalling witnesses unless essential for justice. Petitioner failed to demonstrate witnesses' relevance to disprove prosecution or prove innocence. No miscarriage of justice or violation of law found. Petition dismissed under Article 227. (Paras 8-15)

Petition Dismissed.

Case Law Cited:
1. Mrs. Kalyani Baskar Vs M.S. Sampoornam, Criminal Appeal No. 1293/2006, decided on 11.12.2006 (Para 4)

2. In Re: To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials

Vs St. of Andhra Pradesh, Suo Moto Writ (Crl.) No. 1/2017, decided on 20.04.2021 (Para 4)

3. Shyam Manohar Saxena Vs C.B.I., Criminal Revision No. 1169/2018, decided on 01.07.2019 (Delhi HC) (Para 4)

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

1. Heard Sri Utkarsh Birla, learned counsel for the petitioner and Sri Ram Kumar Verma, learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed by the petitioner-Diwakar Singh with a prayer to set aside the order dated **18.01.2023** passed by the Judicial Magistrate, Court no. 5, Varanasi in criminal case no. 3272 of 2019, by which the applications dated 19.07.2021 and 02.08.2021 were rejected, with a further prayer to issue an appropriate direction to the Judicial Magistrate/ the court concerned to comply with the interim order passed by this court in criminal misc. petition no. 2160 of 2023 dated 27.04.2023.

3. Relevant facts are as below:-

(i) The petitioner Diwakar Singh was posted as Sub-Inspector of police and he lodged an FIR, case crime no. 444 of 2000 under sections 307 and 392 IPC and section 3 of FEMA Act against Durga Prasad Agarwal and few others;

(ii) The police investigated the matter and filed a chargesheet, not against the persons named therein but against the petitioner the first informant Diwakar Singh himself, under sections 392, 218, 467, 468, 120-B IPC on 25.07.2003, stating therein that Sub-Inspector Diwakar Singh, with his unknown associates hatched a conspiracy showing a fake incident of loot and he also prepared false papers to show a false incident as genuine one. Durga Prasad Agarwal and number of others were made witness against Sub-Inspector Diwakar Singh;

(iii) During the course of proceedings of the trial, the accused Diwakar Singh moved an application on 13.10.2020, requesting the trial court concerned to summon the files of departmental proceedings and to summon/direct the police officers to remain present on the dates of hearing.

(iv) The trial court wrote a letter dated 20.10.2020 to Additional Director General of Police, Anti-Corruption for production of original record. The department concerned sent the original record by a covering letter dated 29.10.2020;

(v) The prosecution examined its witnesses and the prosecution evidence stood closed on 04.05.2021. Thereafter the statement the accused were recorded under section 313 Cr.P.C.;

(vi) At the stage of defence evidence, the accused moved an application dated 19.07.2021 with following prayers:-

" …….to pass order directing the prosecution to provide copy of DFR dated 05.06.2022, Interrogation Report dated 15.09.2000 and Statements of PW-5 Shri Shashank Agrawal and Pw-6 Shri Durga Prasad Agrawal which were recorded by the SIT, summon the case property Rs. 2,47,500/- and re-call PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal and summon Shri Bua Singh (Retd. DGP) and Shri Atul (Retd. DGP) as defense witnesses to meet the ends of justice."

(vii) He moved another application dated 02.08.2021 with following prayer:-

"……. to pass order directing to the prosecution to re-call the PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal. It is further prayed that Shri Bua Singh (Retd. DGP), Shri Atul (Retd. DGP) and Shri Vijay Kumar Agrawal (Retd. IGP) may also be summoned as defense witnesses for verifying letters, approval orders and DFRs and exhibiting them as Exhibit-Kha to meet the ends of justice."

(viii) The learned Magistrate dismissed his both the applications (dated 19.07.2021 and 02.08.2021) by a detailed order passed on ***16.09.2021****;*

(ix) The accused preferred a criminal revision no. 242 of 2021. The revisional court partly allowed the revision and passed an order on 26.04.2022 as below:-

"निगरानीकर्ता द्वारा प्रस्तुत निगरानी आंशिक रूप से स्वीकार किया जाता है। अवर न्यायालय द्वारा श्री बुआ सिंह, श्री अतुल, श्री विजय कुमार अग्रवाल को तलब न किये जाने के बिन्दु पर पारित आदेश दिनांकित 16.09.2021 निरस्त किया जाता है। दिनांक 16.09.2021 के पारित आदेश के द्वारा प्रार्थनापत्र दिनांकित 02.0702021, 02.08.2021 व 19.07.2021 के परिप्रेक्ष्य में अन्य बिन्दुओं पर पारित आदेश को पुष्ट किया जाता है। अवर न्यायालय को निर्देशित किया जाता है कि साक्षीगण के तलबी के बिन्दु पर निगरानीकर्ता को पुनः सुनकर विधिनुसार आदेश पारित किया जाना सुनिश्चित करें। निगरानीकर्ता को निर्देशित किया जाता है कि दिनांक 12.05.2022 को अवर न्यायालय में उपस्थित हों।"

(x) The order dated 26.04.2022 of revisional court was challenged in misc. petition no. 3972 of 2022 before the High Court, which is still pending;

(xi) During the pendency of aforesaid misc. petition, the trial court proceeded and passed a fresh order dated ***20.09.2022*** *allowing the applications of the accused dated 19.07.2021 and 02.08.2021 to the extent that Bua Singh (Retd. DGP), Atul (Retd. DGP) and Vijay Kumar Agrawal (Retd. IGP) may be produced as defence witnesses. This order dated* ***20.09.2022*** *was passed in the light of the order of the revisional court dated 26.04.2022 and the case was posted for defence evidence;*

(xii) This order passed by the trial court for summoning the defence witness, was challenged in ***criminal revision no. 393 of 2022*** *by the State, which was decided by order dated* ***22.12.2022*** *by the District Judge, Varanasi. By this order, the revision was allowed and the order of summoning the police officers, as defence witnesses was set-aside and the trial court was directed to pass a fresh order, mentioning therein the reasons and the grounds for summoning those persons as defence witnesses;*

(xiii) In the light of the aforesaid order of the revisional court, the Judicial Magistrate, Court no. 5, Varanasi passed a fresh order dated ***18.01.2023*** *and the applications dated 19.07.2021 and 02.08.2021 were rejected by the court concerned, on the basis of discussions and reasons disclosed in the order;*

(xiv) The aforesaid order dated ***18.01.2023*** *is now under challenge in this petition.*

4. The submissions of the petitioner are that in his applications dated 19.07.2021 and 02.08.2021, he has given detailed reasons for the purpose of summoning Bua Singh (Retd. DGP), Atul (Retd. DGP) and Vijay Kumar Agrawal (Retd. IGP), as defence witnesses; further submission is that adducing evidence in support of defence is a valuable right, denial whereof is equivalent to denial of fair trial. Further that the court below did not cite any good reason for rejecting the applications. The petitioner relied on the judgment of the Supreme Court given in

Criminal Appeal No. 1293 of 2006 (Mrs. Kalyani Baskar vs. M.S. Sampoornam) decided on 11.12.2006. Further on Suo Moto Writ (Crl.) No. 1 of 2017 (In Re: To Issue Certain Guidlines Regarding Inadequacies and Deficiencies in Criminal Trials vs. The State of Andhra Pradesh and Others) decided on 20.04.2021 and also on the judgment of ***the Delhi High Court in Criminal Revision No. 1169 of 2018 (Shyam Manohar Saxena vs. C.B.I. and others) decided on 01.07.2019.***

5. The accused made following prayer in his application dated 19.07.2021:-

" It is, therefore, respectfully prayed to this Hon'ble Court may be pleased to pass order directing to the prosecution to provide copy of DFR dated 05.06.2022, Interrogation Report dated 15.09.2000 and Statements of PW-5 Shri Shashank Agrawal and Pw-6 Shri Durga Prasad Agrawal which were recorded by the SIT, summon the case property Rs. 2,47,500/- and re-call PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal and summon Shri Bua Singh (Retd. DGP) and Shri Atul (Retd. DGP) as defense witnesses to meet the ends of justice."

In continuation of this application dated 19.07.2021, the accused moved another application dated 02.08.2021 to supplement the earlier one with following prayer as below:-

"It is, therefore, respectfully prayed that this Hon'ble Court may be please to pass order directing to the prosecution to re-call the PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal. It is further prayed that Shri Bua Singh (Retd. DGP), Shri Atul (Retd. DGP) and Shri Vijay Kumar Agrawal (Retd. IGP) may also be summoned as defense witnesses for verifying letters, approval orders and DFRs and exhibiting them as Exhibit-Kha to meet the ends of justice."

Broadly, four kinds of prayers were made:-

(i) summoning certain papers;

(ii) summoning the case property;

(iii) recall of certain prosecution witnesses who were already examined/cross-examined;

(iv) calling certain persons as defence witnesses.

6. The matter has gone into several rounds of litigation. In the first round, the trial court heard the matter of summoning/recall/re-examination of the witness/papers/case property and dismissed the same by an order dated **16.09.2021**. The court of revision partly allowed the same and directed the trial court to re-hear only the matter of summoning three persons as defence witnesses namely, Bua Singh, Atul and Vijay Kumar Agrawal, all retired police officers. The revisional court at the same time affirmed the rest of the order passed by the trial court. The learned trial court, therefore, passed a fresh order on **20.09.2022** and summoned the aforesaid persons, as defence witnesses. The State started a second round of litigation by filing a criminal revision no. 393 of 2022, which was allowed by order dated **22.12.2022**. The trial court was directed to hear the matter again and pass a speaking order, mentioning therein the reasons, in case the trial court found the witnesses fit to be summoned, as defence witnesses, therefore, the trial court passed an order for the third time on **18.01.2023** and this time rejected the prayer for summoning the aforesaid persons, as defence witnesses.

7. Admittedly the interim stay orders were passed by the High Court in Misc. Petition No. 2160 of 2023 after a fresh order was already passed by the trial court, hence is of no consequence.

8. This is significant to note that the accused made several prayers in his applications but the point in issue has narrowed down to the question of summoning three persons as defence witness. This may be noted that none of the orders passed in revision i.e., Criminal Revision no. 242 of 2021 passed on **26.04.2022** and in Criminal Revision no. 393 of 2022 passed on **22.12.2022**, are under challenge in this petition. In the former criminal revision, part of the order passed by the trial court was affirmed meaning thereby that the order of trial court rejecting the prayer to summon the witnesses PW1 and PW6, who stood already examined and a further prayer to summon Rs. 2,47,500/-, seized in the incident as case property were not interfered at by the court of revision. The findings on those points have become final and cannot be re-agitated in the present petition for the simple reason that those orders have not been challenged. It may be reiterated that the petitioner has challenged only the third order passed by the trial court, by which the matter of summoning three persons was rejected. In these circumstances, the matter has boiled down to above issue only i.e., whether to summon retired police officers namely, Shri Bua Singh (Retd. DGP), Shri Atul (Retd. DGP) and Shri Vijay Kumar Agrawal (Retd. IGP), as defence witnesses or not.

9. Now the question which arises is whether the trial court was correct in rejecting the prayer on the grounds that it was made for the purpose of vexation or delay or for defeating the ends of justice. For this purpose, it will be appropriate to reproduce the provisions of section 243 Cr.P.C. as below:-

"243. Evidence for defence.

(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such. process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing: Provided that, when the accused has cross-examined or had the opportunity of cross- examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(3) The Magistrate may, before summoning any witness on an application under sub- section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court. B.- Cases instituted otherwise than on police report."

10. From bare perusal of section 243 Cr.P.C., it occurs that a clear distinction has been maintained between the persons who are sought to be produced by the defence

before the court for the first time with the persons who have been already produced as witnesses. The law provides two kinds of parameters, first one which shall apply to the witnesses for the purpose of fresh examination and the second when some witness who has already been examined and cross-examined or the accused had an opportunity to cross-examine them before he entered on his defence. The law provides that in the first case ordinarily the Magistrate may issue process unless he considered that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the second case (i.e., when a person who has already been cross-examined by the defence or the defence had an opportunity of cross-examining him), the attendance of such witness shall not be compelled unless the Magistrate is satisfied that it is necessary for the ends of justice. The first part of section 243(2) Cr.P.C. has been worded in a positive manner while the proviso to section 243(2) Cr.P.C which applies in a latter case, has been worded giving only a little scope to the defence. The law imposes obligation on the Magistrate not to compel the attendance of any such witnesses unless it is satisfied that it is necessary for the ends of justice. The aforesaid distinction should be kept in mind while dealing the matter under section 243 Cr.P.C.

11. From here, I find it necessary to relate the matter to the submissions as contained in the applications moved by the accused before the trial court. The accused has submitted in his application that the proposed D.F.R. i.e., draft final report was approved by Bua Singh, the then HOD, Anti-Corruption Organization, UP. Except the above averments, there is no other material fact brought before the court as regard summoning of Bua Singh, as defence witness. As regard the second witness namely, Shri Atul, the then ADG, Police is concerned, the defence seeks to examine him for verification of inquiry closure report and no more. This is all which is contained in the application dated 19.07.2021 seeking Shri Bua Singh and Shri Atul to be produced as defence witnesses. A second application, which was moved on 02.08.2021 to supplement the previous application, there is mention of name of Vijay Kumar Agrawal, the then SP, Anti-Corruption Organization, UP in para no. 2(c) of the application. In the aforesaid portion of the application, there is a plain statement suggesting that there was close nexus between the investigating agency and Vijay Kumar Agrawal, the then SP, Anti-Corruption Organization, UP. From bare perusal of the statements, as mentioned in the original applications dated 19.07.2021 and 02.08.2021, it can fairly be inferred that the defence has not been able to demonstrate that how and why examination of these witnesses is important for his defence and that why and how their evidence may prove helpful to disprove the prosecution case or to prove his innocence or even to create cracks or doubts in the prosecution story.

12. In the background of above facts, the learned trial court rightly observed as below:-

"On the perusal of record and the observation made in the order dated 22.12.2022, the Court is of the view that through application dated 19.07.2021 and 02.08.2021, the accused summoning Shri Bua Singh, Shri Atul & Shri Vijay Kumar as defence witnesses because they have sanctioned the permission to conduct departmental enquiry on the basis of

documents and certain evidences. Accused has mentioned in detail the lacunae in those departmental & privileged documents & proceedings which has been conducted in the departmental enquiry. For this purpose, the accused has presented application dated 19.07.2021 & 02.08.2021 in order to summon the defence witnesses which are mentioned above.

It is found that, on perusal of records and hearing both the parties, Shri Bua Singh, Shri Atul & Shri Vijay Kumar are retried senior officers who have been sought to be summoned as defence witnesses by accused/applicant are neither eye witnesses, nor circumstantial witnesses. They have neither been questioned by investigating officer during investigation nor their statements have been recorded. On the perusal of record, it is found that Shri Bua Singh, Shri Atul & Shri Vijay Kumar have sanctioned the departmental enquiry to conduct against the applicant. It is on the because of this act which these officers have done in discharge of their official duty, the accused through application dated 19.07.2021 & 02.08.2021 seek permission under section 243 Cr.P.C. to summon them as defence witnesses. In the light of above, facts & circumstances, the court is of the view that the accused has failed to show as to how the evidences of these persons are material in the present case."

After mentioning the above facts and circumstances, the learned trial court has taken a view that the defence seeks to summon these retired officers as witness for the purpose of vexation or delay and to defeat the ends of justice. In the light of the material as disclosed in the applications moved by the defence, the observations made by the trial court appear to be cogent and pertinent. And the opinion formed that defence in fact seeks to summon the retired police officers as witness for the purpose of vexation or causing delay do not appear to be far-fetched or unfounded.

13. As a matter of caution, I went through all the averments made in the applications as well as in the petition and all the material on record, to find out some good ground the accused may have taken. There are long winding statements and descriptions all weaved together to give a false impression of having a good case, but a discerning judicial eye can see through the web created by a legal mind. Outwardly the contentions are appealing but they do not have any substance. The case laws cannot help when there is no substance in the submissions.

14. The power under Article 227 of the Constitution of India is definitely supervisory in nature, but it should be exercised sparingly and in appropriate cases, only to prevent miscarriage of justice or flagrant violation of law.

Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected.

15. I do not find any good reason to interfere in the order impugned in exercise of powers under Article 227 of

the Constitution of India, hence the petition is **dismissed.**

(2024) 3 ILRA 363
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABABAD 08.01.2024
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters Under Article 227 No. 8240 of 2023 (Criminal)

Judith Maria Monika Killer@ Sangeeta J.K. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Manoj Kumar Mishra

Counsel for the Respondents:
G.A., Sri Surendra Yadav

Criminal Law - Indian Penal Code, 1860 - Section 504 - Constitution India,1950 - Article 227 - Petitioner challenged the summoning order dated 24.09.2021 by Chief Judicial Magistrate, Varanasi, under Section 504 IPC in Complaint Case No. 8564/2018, and its affirmation by revisional court on 31.05.2023. Complainant, an advocate and RTI activist, alleged that petitioner, Executive Director of Kiran Society, insulted him by calling him "mad" during an inquiry on 19.05.2017, initiated due to his complaint against the society's misuse of funds. St.ments under Sections 200 and 202 Cr.P.C. alleged insult and abusive words in public. Petitioner argued no offence under Section 504 IPC was made out, as the remark lacked intent to provoke breach of public peace, and the complaint was filed after a 16-month delay, barred by Section 468 Cr.P.C. Relying on *Vikram Johar Vs St. of U.P.*, AIR 2019 SC 297, and *Fiona Shrikhande Vs St. of Maharashtra*, (2013) 14 SCC 44, court held that Section 504 requires intentional insult of a degree to provoke breach of peace or commission of an offence. The stray remark, made in the context of an inquiry, was inappropriate but lacked criminal intent. Courts below failed to apply judicial mind under Sections 203 and 204 Cr.P.C., as the evidence did not establish a prima facie case. Summoning order and revisional order set aside; proceedings quashed. Petition allowed. (Paras 9-20)

Petition Allowed.

Case Law Cited:

1. Vikram Johar Vs St. of U.P., AIR 2019 SC 297, Criminal Appeal No. 759/2019, decided on 26.04.2019 (Paras 9, 10, 19)

2. Fiona Shrikhande Vs St. of Maharashtra, (2013) 14 SCC 44, Criminal Appeal No. 1231/2013, decided on 22.08.2013 (Paras 9, 16, 18, 19)

3. Pepsi Food Limited Vs Special Judicial Magistrate, (1998) 5 SCC 749 (Para 16)

4. Dr. Divya Nand Yadav Vs St. of U.P., Criminal Appeal No. 9188/2022, decided on 20.04.2023 (Paras 16, 17)

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

1. Heard Sri Manoj Kumar Mishra, learned counsel for the petitioner, Sri Surendra Yadav, learned counsel for the respondent and learned A.G.A. for the State.

2. This petition under Article 227 has been filed challenging the order dated 24.09.2021 passed by Chief Judicial Magistrate in Complaint Case No. 8564 of 2018 (Dashrath Kumar Dixit Vs. Sangeeta J.K) summoning the accused under section 504 I.P.C. and further to set aside order dated 31.05.2023 passed in Criminal Revision No. 280 of 2021 by which the summoning order was affirmed. A further relief of quashing the entire proceedings of the complaint case has also been sought by means of this petition.

3. The relevant facts are as below.

Dashrath Kumar Dixit (the respondent herein) filed a complaint case against Sangeeta J.K., Executive Director, Kiran Society and ten others under section 500 I.P.C. with the allegations in brief as below:-

That the complainant is an Advocate and has been working for the welfare of handicapped weaker sections and for human rights and is also a R.T.I. activist. Kiran Society has been obtaining funds from foreign countries in the name of welfare of handicapped people, but they have been misusing those funds and exploiting them;

That the complainant therefore complained to the District Magistrate, Varanasi by an application dated 15.05.2017. The District Magistrate, Varanasi instituted an inquiry and Rajesh Kumar Mishra, District Divyangjan Sashaktikaran Adhikari, was deputed as the Inquiry Officer;

That the Inquiry Officer called parties to H.R.T.C. Auditorium on 19.05.2017 in connection with the Inquiry and in the presence of the parties, the complainant was insulted. The production of evidence during the inquiry was recorded by opposite party no.11 - Divyangjan Sashaktikaran Adhikari that is Rajesh Kumar Mishra. The video can be obtained officially;

That during the inquiry, on 19.05.2017, in the presence of all the persons in the Auditorium, the O.P. No. 1, Sangeeta J.K. addressed the complainant in following words "this person is mad". The complainant, who is an Advocate and has been practising for last many years, objected and asked the O.P. No. 11 to include this fact in the inquiry report, but he paid no heed;

That one Raju Kumar Kanaujiya, was threatened by Sangeeta J.K. in front of all the others;

That the Inquiry conducted by O.P. No.11 is doubtful as he never considered the important aspects of the matter;

That the O.P. Nos. 2 -10, under the patronage of O.P. No.11, and the O.P. No.1-Sangeeta J.K. regularly keep threatening the complainant through letters in the office and outside the office in various ways. They regularly mislead the officers of the department;

And that the complainant was deliberately insulted and was put to mental trauma, therefore, a case be registered against them and the passport and visa of Sangeeta J.K. be seized so that she cannot escape to foreign country.

4. On the basis of above allegations, the court proceeded to record the statements of Dashrath Kumar Dixit under section 200 Cr.P.C. and of Vinod Kumar Goswami, Anil Kumar Gupta and Santosh Kumar Pandey under section 202 Cr.P.C. A number of documents were produced at that stage.

5. The C.J.M. proceeded to hear the complainant and passed summoning order on 24.09.2021. By this summoning order, only O.P. No.1 -Sangeeta J.K,, Executive Director, Kiran Society,was summoned under section 504 I.P.C.

6. The accused Sangeeta J.K. preferred a revision before District Judge, Varanasi, assailing the summoning order. Both the sides were heard, the revisional court affirmed the order of summoning by passing an order on 31.05.2023.

7. Now, the accused is before this Court assailing both the orders.

8. The submissions of the petitioner are that the O.P. No. 2 filed a false and frivolous case. The incident allegedly happened on 19.05.2017. And the complaint has been filed more than a year therafter i.e. on 24.09.2017. Further that the complainant in his statement under section 200 Cr.P.C. did not show anything which could have been considered as constituting an offence under section 504 I.P.C. And even the witnesses examined under section 202 Cr.P.C. did not state any material fact which can be taken as coming within the definition of section 504 I.P.C. It is further submitted that the complainant had filed the complaint under section 500 I.P.C., and from the evidence produced by him, no offence under section 504 I.P.C. or any other is made out. It is next contended that there is nothing to suggest that the complainant was intentionally insulted or provoked intending and knowing that such act will cause him to break the public peace. The complaint has been filed after lapse of one year and four months from the date of incident with a view to harass him. Another contention is that the Magistrate took cognizance by summoning the accused-petitioner on 24.09.2021 under section 504 I.P.C. Therefore, the proceeding against him is barred by provisions of section 468 Cr.P.C., further that the witnesses Vinod Goswami, Santosh Kumar Pandey, Anil Kumar Gupta are ex-employees of the Kiran Society and therefore are interested in harassing her. They cannot be relied upon and that they have colluded with the petitioner for initiating this malicious prosecution.

9. The petitioner relies upon a judgment of Supreme Court given in **Vikram Johar Vs. State of Uttar Pradesh Aironline 2019 SC 297 passed in Criminal Appeal No. 759 of 2019, decided on 26.04.2019**. In the aforesaid case before the Supreme Court, the facts were that the accused came with 2 -3 unknown persons, one of whom was holding revolver and he abused him in filthy language. The complainant was rescued by a neighbour when the accused persons were about to assault him. The accused was summoned. Summoning order was challenged. In the aforesaid judgment, the Supreme Court referred to a judgment given in **Fiona Shrikhande Vs. State of Maharashtra and Another 2013 14 SCC 44 passed in Criminal Appeal No. 1231 of 2013 (arising out of S.L.P. (Cri). No. 382 of 2013), decided on 22.08.2013,** wherein it was held that the Magistrate is merely concerned with the allegations made in the complaint and has only to *prima facie* satisfy whether there are sufficient ground to proceed against the accused. In **paragraph 13** of the judgment in **Fiona Shrikhande (supra),** the Supreme Court had noticed the ingredients of section 504 I.P.C. in following words:

"13. Section 504 IPC comprises of following ingredients, viz., (a) intentional insult, (b) the insult must be such as to give provocation to the person insulted, and (c) the accused must intend or know that such provocation would cause another to break the public peace or to commit any other offence. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The person who intentionally insults intending or knowing it to be likely that it will give provocation to any other person and such provocation will cause to break the public peace or to commit any other offence, in such a situation, the ingredients of Section 504 are satisfied. One of the essential elements constituting

the offence is that there should have been an act or conduct amounting to intentional insult and the mere fact that the accused abused the complainant, as such, is not sufficient by itself to warrant a conviction under Section 504 IPC."

10. The Supreme Court in **Vikram Johar (supra)** case observed in **para-26** as below:

"26. Now, we revert back to the allegations in the complaint against the appellant. The allegation is that appellant with two or three other unknown persons, one of whom was holding a revolver, came to the complainant's house and abused him in filthy language and attempted to assault him and when some neighbours arrived there the appellant and the other persons accompanying him fled the spot. The above allegation taking on its face value does not satisfy the ingredients of Sections 504 and 506 as has been enumerated by this Court in the above two judgments. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The mere allegation that appellant came and abused the complainant does not satisfy the ingredients as laid down in paragraph No.13 of the judgment of this Court in Fiona Shrikhande (Supra)."

The Court allowed the appeal and set aside the judgment given by High Court as well as by the trial court.

11. I went through the material on record including the copy of the statements given by the complainant under section 200 Cr.P.C. and the statements given by his witnesses under section 202 Cr.P.C. It is important to keep in mind that main contention of the petitioner is that no offence under section 504 I.P.C. is made out as there has not been any intentional insult which may be construed as provocation for breaking public peace or to commit an offence.

12. The petitioner has attracted attention of this Court to relevant portions of statements of the complainant as below:-

"मैं ज्यों ही कुछ कहने जा रहा था कि कुछ उल्टा सीधा करने लगे माँ-बहन की भद्दी-भद्दी गालियाँ देने लगे, मेरे द्वारा मिश्रा जी से कहने पर उन्होंने कहा कि मैंने कुछ नहीं सुना। मुझे पागल बोला गया था।"

His witness P.W.1- Vinod Kumar Goswami stated as below:-

"अधिवक्ता दशरथ कुमार दीक्षित को भरी सभा में पागल व अपशब्दों का प्रयोग किया।"

PW2-Anil Kumar Gupta stated as below:-

"दिनाँक 19.05.2017 को N.R.T.C. आडिटोरियम में किरण सोसायटी के पक्षों को बुलाया गया जिसमें विकलांग अधिकारी, सोसायटी के सदस्य तथा मेरे अधिवक्ता दशरथ कुमार दीक्षित उपस्थित थे। जहाँ सबके समक्ष मुझे तथा मेरे अधिवक्ता दशरथ कुमार दीक्षित को अपशब्द कहा गया तथा पागल कहा गया। "

Another witness Santosh Kumar Pandey stated as below:-

"जाँच के दौरान हमारे अधिवक्ता श्री दशरथ दीक्षित जी को संगीता जे० के० द्वारा पागल बोला गया तथा बेइज्जत किया गया। "

13. There is no dispute that on the basis of above statements the learned trial court gave an opinion that *prima facie* offence under section 504 IPC is made out and ordered for summoning of the accused Sangeeta J.K., Executive Director of Kiran Society.

14. Before the revisional court, the contention of the accused revisionist was that mere use of insulting words without

intention to make the person addressed to commit breach of peace will not attract section 504 IPC and that even if the allegations made are taken as true, no offence is made out. Further, one of the contentions is that besides her, a number of other persons have been arrayed as accused and the complainant has not imputed any specific role to any of them and that the trial court passed the order without application of judicial mind. Perusal of impugned order demonstrates that after noting down all the averments of the revisionist, the learned court of revision, briefly dealt with the main issue i.e., whether offence under section 504 IPC was made out or not. The revisional court gave an opinion that as in front of a number of persons, the accused Sangeeta J.K. said that this person (the complainant) is mad, therefore, the offence under section 504 IPC is made out and refused to interfere in the order of summoning passed by the trial court.

15. In my opinion, two main issues are involved in this matter. Firstly, from the statements given by the complainant and his witnesses, if presumed as truthful, whether offence under section 504 IPC is made out? Secondly, whether the learned Magistrate applied its judicial mind to arrive at **requisite satisfaction** before he decided to take cognizance.

The phrase 'sufficient ground to proceed' has been treated at par with the word 'satisfaction' which the Court/the Magistrate is expected to arrive at, before issuance of process in the background of provisions of law under section 204 Cr.P.C. Section 204 Cr.P.C. is a very first section in Chapter XVI under the title **"commencing of proceedings before the Magistrates"**. From this stage the Magistrate has to tread very cautiously before jumping to take cognizance and proceed against the accused. On one hand, there is law which says that the Magistrate has to find out whether commission of an offence is disclosed from the material before him and that he has to go through the evidence and apply his judicial mind for this limited purpose, on the other hand the law says that he has to avoid meticulous analysis of the evidence and has not to hold a mini trial. There cannot be two opinions that a Magistrate shall not proceed in a casual and cursory manner. He is, of course expected to apply its judicial mind and the application of judicial mind suggests that he is well within his powers to go through the evidence for the purpose of ascertaining the credibility, truthfulness, inherent improbabilities, if any, although he has to refrain from threadbare analysis of evidence or splitting of hairs. A Magistrate ought to be prudent, a discerner and realistic. A fine balance has to be maintained in order to decide whether or not to proceed any further. Section 203 Cr.P.C and Section 204 Cr.P.C. are two sides of the same coin and here lies the real test of a judicial mind.

16. This Court in **Criminal Appeal No. 9188 of 2022 (Dr. Divya Nand Yadav and Another vs. State of U.P. and Another) decided on 20.04.2023**, equated the word *'prima facie satisfaction'* with the sufficient ground to proceed on the basis of the judgment of the Supreme Court passed in **Fiona Shrikhande vs. State of Maharashtra and Another; (2013) 14 SCC 44.** Further the relative scope of Sections 203 and 204 Cr.P.C. were noted and considered by the Supreme Court in **Pepsi Food Limited and another vs. Special Judicial Magistrate and others; (1998) 5 SCC 749**, which said:-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused."

The Supreme Court emphasized the need that the Magistrate should not sit like a silent spectator.

In para no. 14 of the judgment of **Dr. Divya Nand Yadav and Another (supra)**, this court has held as below:-

"14. The fact of the matter is that the court shall not proceed in a mechanical or a routine manner. It shall apply its mind, which is called a judicial mind and discretion as well. The court/the Magistrate, though shall not go deep into the evidence given and shall not weigh the evidentiary value in a meticulous manner. Except this rider, there is no other obstacles before the court below for arriving at the "prima facie satisfaction" a word which can be equated with the word "prima facie case".

17. In the aforesaid judgment in **Dr. Divya Nand Yadav and Another (supra)**, this legal position has been reiterated that at the time of summoing, the trial court has to confine itself to the evidence produced on behalf of the complainant, however when the accused has been summoned and he prefers a revision, the revisional court is at an advantageous position in the sense that it has opportunity to hear both the sides i.e., the complainant as well as the accused, therefore the revisional court is in a better position to take an independent view on the basis of material before itself. Further this court emphasised the need for conducting of the inquiry as envisaged in section 202 Cr.P.C. by the **Magistrate himself** and the pitfalls when the Magistrate does not play the expected role and therefore is faced with a situation where he may have to take a one sided view on the basis of plain statements given by the complainant and his witnesses. The Allahabad High Court's meaningful observations in para nos. 6 and 9 of the judgment in **Dr. Divya Nand (supra)** are worth mention in this respect.

The para nos. 6 and 9 of the aforesaid judgment are being reproduced here.

"6. There is certain purpose behind enacting this provision in this manner. When a Magistrate who is trained in law, himself asks the questions he may elicit the facts which are nearer to truth. Obviously then there are much better chance to check the veracity of allegations, the evaluation of evidence before him and thereby come to the right conclusion for summoning the real culprits and at the same time putting his foot down that no innocent person is

summoned unnecessarily. The purpose is lost when this power is not utilized.

9. The phrase occurring in Section 202 Cr.P.C. "inquire into the case himself" enjoins the Magistrate that he actually plays its part by examining the witnesses himself, rather than depending upon the statements which might be clouded, cryptic, obscure or ambiguous and sometime very direct and bald. The experience in courts strengthens the impression that more often then not unsupervised, one sided statement may have more to conceal than to reveal. It is said that law is a living being. It grows and develops according to the exigencies of the times. It will not be out of context to mention that the superior courts have observed in a number of cases that the trial courts ought to be quite alert when they decide to take cognizance or summon the accused persons, may be at the stage of Section 204 Cr.P.C. or otherwise. The superior courts have consistently kept on cautioning the courts to be quite circumspect, careful, alert and wakeful while putting the legal machinery in motion. The vicissitudes of cases, peculiar facts and situations do impact the interpretations of law and contribute towards the developments and progress of legal arena."

18. Now I come to the question whether an offence under section 504 IPC is made out. In **Fiona Shirkhande Vs. State of Maharashtra and Another (supra)**, the Supreme Court emphasised that intentional insult must be such as to give provocation to the person insulted to break the public peace or to commit any other offence. As alluded to earlier, the only allegation is that in front of several others, participating in the meeting, the accused said that this person (the complainant) is mad. This may be noted that these words were uttered when both the sides were called in connection with an inquiry which was initiated on the basis of a number of allegations made by the complainant against the accused and her society.

19. From all the facts and circumstances, it appears that it was a stray statement made in a careless manner, not intending that it may provoke a person to break the public peace or commit any other offence. Even if, for the sake of argument, uttering of such words are taken as intentional insult however in my opinion the same cannot be construed as of such degree so as to provoke any person to cause breach of peace. Circumstances suggest that uttering of such words could be an unintended spontaneous remark made in the prevailing atmosphere in the backdrop of number of allegations, which were flown at the accused and her society. More often than not, in informal atmosphere such remarks may be carelessly thrown and may even form part of casual conversation having no criminal element for intentional causing of breach of peace. Any such stray statements made by any person, may be inappropriate, improper and rude, however, in my view, they do not bring the Act within the four corners of section 504 as defined in Indian Penal Code. Definitely what may be the impact of spoken words, can only be inferred from the peculiar facts and circumstances of a case. In the case in hand, the remark was inappropriate or even rude but circumstances *prima facie* do not establish that it was intended to provoke the person to cause breach of peace. The courts concerned failed to apply law in correct perspective.

20. In my opinion, *prima facie* no offence under section 504 IPC is made out

and therefore this is a case where this court, in exercise of powers under Article 227 of the Constitution, should interfere to prevent and nip in the bud misuse of law, hence the impugned orders are set-aside and this petition is **allowed.**

(2024) 3 ILRA 370

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Application U/S 482 No. 8808 of 2023

Raghvendra Kumar Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ravindra Prakash Srivastava

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

Criminal Law – Criminal Procedure Code, 1973 – Sections 196, 197 & 482 – St. Emblem of India (Prohibition of Improper Use) Act, 2005 - Sections 3, 6, 7, 8 & 9: - Application U/s 482 Cr.P.C. – for quashing of the entire criminal proceedings – Police Security duty – Recovery Memo – offence of misusing the *Ashok Stambh*, the national emblem by affixing it to the number plate of his motorcycle – custody of motorcycle by the police - FIR – investigation – St.ment recorded - charge-sheet – order of cognizance – court finds that, the prosecution lacked valid sanction from the Central Government as required by Section 8 of the Act - Although the charge-sheet correctly cited the 2005 Act, the sanction order was issued by the St. Government under Section 196 of the CrPC, which applies only to IPC offences and not to those under the 2005 Act - The Magistrate's cognizance order made no reference to the sanction, suggesting it was never presented – held - the proceedings and cognizance were invalid, the charge-sheet itself remains intact, allowing the St. to reinitiate prosecution after obtaining proper sanction from the Central Government - The Court quashed the cognizance order and proceedings against applicant under Section 3/7 of the St. Emblem of India Act, 2005 – consequently, application succeeds and is allowed.
(Para – 49, 50, 51, 52, 53)

Application Allowed. (E-11)

List of referred Cases: -

1. Sable Waghire and Co. & ors.Vs U.O.I. & ors., (1975) 1 SCC 763,

2. Criminal Petition No. 4270 of 2016, G.B. Athri Vs Smt. Mangla Gauri, decided on 15.02.2017,

3. Dr. R.K. Balasubramaniam Vs Inspector of Police, 2013 (3) MWN (Cr.) 96,

4. Abdul Faqir Vs St. of Rajasthan & anr., S.B. Criminal Misc. (Pet.) No. 2755 of 2015, decided on 14.09.2017,

5. G.B. Athri Vs Smt. Mangala Gowri, Criminal Misc. Petition No. 4270 of 2016, decided on 15.02.2017,

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

This application under Section 482 of the Code of Criminal Procedure, 1973 *(for short, 'the Code')* seeks to quash the proceedings of Case No. 3558 of 2018, State v. Raghvendra Kumar Yadav (arising out of Case Crime No. 2264 of 2016), under Section 3/7 of the State Emblem of India (Prohibition of Improper Use) Act, 2005, Police Station – Khalilabad, District – Sant Kabir Nagar pending on the file of the Chief Judicial Magistrate, Sant Kabir Nagar.

2. Heard Mr. Ravindra Prakash Srivastava, learned Counsel for the applicant, Mr. Jagdev Singh, learned

Counsel appearing on behalf of opposite party no. 2 and Mr. D.K. Srivastava, learned Additional Government Advocate appearing on behalf of the State.

3. A First Information Report was lodged on 12.11.2016 by one J.N. Tripathi, Sub-Inspector of Police at Police Station – Khalilabad, District – Sant Kabir Nagar, alleging in his recovery memo of a bullet motorcycle that on 12.11.2016, the informant along with Constable, Umesh Mishra, was on security duty at the Punjab National Bank, Main Branch - Khalilabad and had just reached there when he noticed a man move close to the Bank on his motorcycle, which he parked there.

4. A look at the rear side of the motorcycle showed that it bore no registration number. Instead, the number plate had the national emblem of *Ashok Stambh* on it. Upon inquiring about the rider's name and address, he revealed it as Raghvendra Kumar Yadav, son of Ram Achal Yadav, a resident of Kuikol colony, Police Station – Kotwali, Khalilabad, District – Sant Kabir Nagar. Upon the rider being asked why he had placed the national emblem on the number plate, he allegedly said that it was affixed there for status. He produced his Driving License that was valid up to 07.07.2023.

5. The First Information Report goes on to allege that Raghvendra Kumar Yadav aforesaid was found misusing the *Ashok Stambh*, the national emblem by affixing it to the number plate of his motorcycle, which constitutes an offence under Section 3/9 of the State Emblem of India (Prohibition of Improper use) Act, 2005. He did not produce any papers relating to the motorcycle which is an offence under the Motor Vehicles Act. The applicant was, accordingly, informed of the offence committed by him and at 4.00 O' Clock in the evening, the motorcycle was taken into custody by the Police. A number of persons were moving on the spot where the applicant was apprehended but despite request, none of those asked to witness the recovery agreed, citing their business with the Bank as pre-occupying.

6. The First Information Report further shows that a report under the Motor Vehicles Act is being separately presented. The recovery memo had been drawn up on the spot, read over and explained. A copy of the recovery memo was handed over to Raghvendra Kumar Yadav, the applicant. The case was investigated by the Police where statements of the first informant and Constable, Umesh Mishra were taken down. After investigation, the Police submitted the impugned charge-sheet on 10.02.2018 whereon the learned Magistrate took cognizance on 17.09.2018.

7. Learned Counsel for the petitioner, Mr. Ravindra Prakash Srivastava points out that the Registration Certificate of the motorcycle is on record as Annexure No. 3.

8. This Court may say straightaway that we do not wish to comment about those matters because there is nothing related to the prosecution under the Motor Vehicles Act impugned here. The Registration Certificate, of whatever worth it is, might be of relevance in the other case said to have been instituted against the applicant by the Police on account of riding the motorcycle, without the necessary documents or the number plate bearing the registration number, but not here.

9. This prosecution is limited to the offence under Section 3/7 of the Emblems

and Names (Prevention of Improper use) Act, 1950. About this issue also, it may remarked at the outset, that the First Information Report was registered by the Police for an offence under Section 3/9 of the State Emblem of India (Prohibition of Improper Use) Act, 2005 *(for short, 'the Act of 2005')*. The offence under the Act of 2005 would be one under Section 3/7 and not under 3/9 of the Act, aforesaid.

10. During investigation, the Police have submitted a charge-sheet under Section 3/7 of the Emblems and Names (Prevention of Improper Use) Act, 1950 *(for short, 'the Act of 1950')*. Here the Section appears to be correctly described but the statute mentioned in error. The Act of 1950 was enacted in that year by the Parliament in exercise of its legislative power traceable to Entry 49 List 1. The power was held traceable to Entry 97 of the said list, as well in **Sable Waghire and Co. & others v. Union of India & others, (1975) 1 SCC 763** but that is not the point here. On the same subject, the Act of 2005 is a subsequent legislation enacted by the Parliament.

11. It is no doubt true that the Act of 2005 does not repeal the Act of 1950, but *vide* Section 10 it gives overriding effect to itself or any Rule made thereunder *vis-a-vis* any other Act to the extent that it is inconsistent with the Act of 2005.

12. Be it as it may, the question in this application does not squarely arise as to which of the two enactments would apply, and if the Act of 1950 has indeed been repealed. Learned Counsel for the parties, have not shed much light on the issue, perhaps since it did not arise as the point for consideration in this application.

13. Nevertheless, it appears that looking to the First Information Report, the case has been registered under the Act of 2005, correctly mentioning the provisions as Section 3/7 but in the check First Information Report, the statute has been incorrectly mentioned as the Act of 1950, a mistake that has been mechanically carried forward to the impugned charge-sheet.

14. This Court, therefore, proceeds to decide this application as one seeking to quash the prosecution under Section 3/7 of the Act of 2005.

15. It is on the merits of the matter submitted by the learned Counsel for the applicant that the Investigating Officer has without perusing the material in the case diary and collecting credible e*vide*nce, charge-sheeted the applicant under Section 3/7 of the Act of 2005.

16. It is urged that the charge-sheet has been filed in a routine and mechanical manner, without application of mind. It is also urged that under Section 8 of the Act of 2005, the institution of a prosecution is prohibited without the previous sanction of the Central Government or any Officer authorised in this behalf by a general or special order of the said Government.

17. The learned Counsel for the applicant has drawn the Court's attention to the averments in paragraph no. 8 of the affidavit to say that the Police in this case, without obtaining sanction of the competent Authority, have unlawfully submitted a charge-sheet against the applicant, whereof cognizance has been taken by the learned Magistrate, not noticing the absence of sanction.

18. According to the learned Counsel for the applicant, this renders the prosecution not maintainable. He has placed reliance upon the decision of the

Karnataka High Court in **Criminal Petition No. 4270 of 2016, G.B. Athri v. Smt. Mangla Gauri, decided on 15.02.2017,** where the order of cognizance passed by the learned Magistrate was quashed for want of sanction under the statute.

19. It is also urged by the learned Counsel for the applicant, inviting the Court's attention to paragraph no. 10 of the affidavit filed in support of the application, that the prosecution is *mala fide* because it all happened in the manner that the applicant had gone to the Punjab National Bank, Main Branch, where the informant-Sub-Inspector illegally demanded money of the applicant which he refused. This annoyed the informant so much that he lodged a First Information Report to harass the applicant with no truth whatsoever to the allegations carried therein.

20. It is urged on the strength of the averments in paragraph no. 11 of the affidavit that the applicant never had the *Ashok Stambh* on the number plate of his motorcycle. He was falsely implicated on account of malice.

21. This Court does not propose to go into the question of malice and, therefore, *vide order* dated 16.03.2023, while notice was issued to the complainant-opposite party, the order discloses in ample measure that the Court took note of the submission alone that the prosecution was not maintainable *prima facie* in view of the bar to its institution without the sanction of the Central Government though, it must be said that the reference in that order is made to the Act of 1950 and the bar to a prosecution that is mentioned there is one under Section 6 of the aforementioned statute. But, this does not make any material difference because under both the statutes the provisions about necessity of a prior sanction by the Central Government are *pari materia*. Section 6 of the Act of 1950 is *pari materia* to Section 8 of the Act of 2005.

22. This Court, while passing an interim order dated 16.08.2023, did call for an affidavit in answer from the Superintendent of Police, Sant Kabir Nagar showing cause how the Supervising Officers of the Police permitted a charge-sheet to be filed without the necessary sanction under Section 6 the Act of 1950.

23. A report was also called from the Judicial Magistrate, asking him to indicate the circumstances under which the absence of the mandatory sanction was not taken note of by him, while passing the order taking cognizance and summoning the applicant to stand his trial.

24. A personal affidavit was filed on behalf of the Superintendent of Police, Sant Kabir Nagar, who seems to have acknowledged the mistake at the level of the Supervisory Officers of the Police, and said in his affidavit that a preliminary inquiry has been ordered in the matter.

25. The counter affidavit filed on behalf of the State by Pawan Kumar, Sub-Inspector of Police, Police Station – Kotwali, Khalilabad, District - Sant Kabir Nagar asserts in paragraph no. 7 that sanction against the applicant was granted and the Investigating Officer, after collecting credible e*vide*nce, filed the impugned charge-sheet. However, all that the papers annexed to the counter affidavit show is the correspondence between the District Magistrate and the Secretary (Home), Government of U.P. or the Deputy

Secretary to the Government and the Superintendent of Police, Sant Kabir Nagar regarding grant of sanction to prosecute or papers being called from the Police to consider it.

26. It does not appear from any document annexed to the counter affidavit dated 29.03.2023 that sanction was granted to this prosecution, even by the State Government. The question whether the State Government were the competent Government to grant a sanction envisaged by the Act of 2005 is quite another matter. The fact that it was not granted until time the charge-sheet was filed is e*vide*nt from C.D. No. 4 dated 10.12.2016 annexed as C.A. 5 to the charge-sheet. Towards the tail end of this *parcha*, it is recorded as follows by the Investigating Officer:

"अतः अब तक की तमामी तफ्तीश, वयान वादी, वयान गवाह, निरीक्षण घटना स्थल से अभियुक्त राघवेन्द्र कुमार यादव एस/ओ० श्री रामअचल यादव आर/ओ० कुईकोल पीएस० को० खलीलावाद, जनपद-संतकबीरनगर के विरूद्ध जुर्म धारा-3/7 द स्टेट इम्बलेम आफ इण्डिया (प्रोहिबिशन आफ इमप्रापर यूज) एक्ट-2005 का अपराध वाखूवी सावित है। आरोप-पत्र प्रेषित करने हेतु अभियोजन स्वीकृति आवश्यक है। अभियोजन स्वीकृति प्रदान करने हेतु अलग से रिपोर्ट दी जा रही है।"

27. To the counter affidavit and the supplementary counter affidavit, the applicant has filed a rejoinder affidavit dated 23.04.2023. Along with this rejoinder affidavit, a Registration Certificate relating to the motorcycle has been filed. A supplementary counter affidavit dated 26.04.2023 was later on filed wherein a copy of a Government Order dated 09.06.2017 has been annexed purporting to be the sanction for the applicant's prosecution that is impugned here. The order is one made on behalf of the Governor duly signed by a Secretary to the Government, granting a sanction under Section 196 of the Code, permitting the applicant's prosecution in the present crime for the offence punishable under Section 3/7 of the Act of 2005.

28. Mr. D.K. Srivastava, learned Additional Government Advocate and Mr. Jagdev Singh, learned Counsel appearing on behalf of the informant/opposite party no. 2 have submitted that now that a sanction has been granted, there is absolutely no impediment to the taking of cognizance by the Magistrate on 17.09.2018.

29. It is emphasized that the order of sanction is one dated 09.06.2017 whereas the order of cognizance has been passed on 17.09.2018. The mere fact that there is no reference to the order of sanction in the order of cognizance, or even in the formal part of the charge-sheet, would at best be a curable regularity. It does not oust the jurisdiction of the Court to take cognizance and try the applicant in accordance with law.

30. This Court has carefully considered the submissions advanced on behalf of both sides and perused the record. In order to clarify matters further, which have already been mentioned hereinabove, we must say that this prosecution is indeed one under Section 3/7 the Act of 2005 and the mention Act of 1950, is no more than a clerical error. It is, particularly, clear from the formal part of the charge-sheet where the applicant has been *challaned* under Section 3/7 of the Act of 2005 and the fact that the order of sanction upon which reliance is placed by the respondents is an order passed by the State Government on 09.06.2017, sanctioning prosecution under

Section 3/7 of the Act of 2005; not the Act of 1950.

31. Provisions of Section 3 and 7 of the Act of 2005 read:

"3. Notwithstanding anything contained in any other law for the time being in force, no person shall use the emblem or any colourable imitation thereof in any manner which tends to create an impression that it relates to the Government or that it is an official document of the Central Government, or as the case may be, the State Government, without the previous permission of the Central Government or of such officer of that Government as may be authorised by it in this behalf.

Explanation.- For the purposes of this section, "person" includes a former functionary of the Central Government or the State Governments.

7(1) Any person who contravenes the provisions of section 3 shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both or, if having been previously convicted of an offence under this section, is again convicted of any such offence, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which shall not be less than six months, which may extend to two years and with fine which may extend to five thousand rupees.

(2) Any person who contravenes the provisions of section 4 for any wrongful gain shall be punishable for such offence with imprisonment for a term which shall not be less than six months, which may extend to two years and with fine which may extend to five thousand rupees."

32. Section 8 of the aforesaid statute pro*vide*s:

"8. No prosecution for any offence punishable under this Act shall be instituted, except with the previous sanction of the Central Government or of any officer authorized in this behalf by general or special order of the Central Government."

33. A plain reading of the provisions of Section 3/7 together with Section 8 of the Act of 2005 leads one to the irresistible conclusion that a prosecution under the said Act cannot be instituted except with the previous sanction of the Central Government or an Officer authorized in this behalf by a general or special order of the said Government.

34. The prohibition carried in Section 8 of the Act of 2005 envisages a bar to the institution of a prosecution under the Act, without the previous sanction of the Central Government, or an Officer authorized in this behalf by a general or special order. The bar envisaged under Section 8 is not about the Court's jurisdiction to take cognizance without an order of the Central Government granting previous sanction; it forbids the institution of proceedings without a previous sanction. If one were to compare the language employed by the legislature in Section 8 of the Act of 2005 with that in Section 197 of the Code, there is an essential difference.

35. Section 197 of the Code in the material part reads:

"Prosecution of Judges and public servants.- (1) When any person who is or was a judge or Magistrate or a public servant not removable from his

office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise pro*vide*d in the Lokpal and Lokayuktas Act, 2013-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union; of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

Pro*vide*d that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government were substituted;

Explanation.-For the removal of doubts it is hereby declared that no sanction shall be required in case of public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB or section 509 of the Indian Penal Code (45 of 1860).

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government"

36. While under Section 197, the bar is against the Court taking cognizance without the previous sanction of the appropriate Government, the bar in Section 10 the Act of 2005 forbids the institution of a prosecution without the previous sanction of the Central Government. This is a cardinal distinction between the nature of the bar created under the statute here, and the chief provisions of the Code carrying a similar provision about sanction in certain class of cases. There is no further need to delve into the consequence of the difference here because the point does not arise.

37. What is of relevance here is the fact that the charge-sheet has been presented against the applicant, alleging commission of an offence under Section 3/7 the Act of 2005 and the Magistrate has proceeded to take cognizance *vide order* dated 17.09.2018, without adverting to the order of sanction, or the terms thereof, or the authority by which it was issued.

38. This Court is inclined to think that the order of sanction that has been placed on record before this Court, as part of Annexure No. S.C.A. 1 annexed to the supplementary counter affidavit dated 26.04.2023, was not at all brought to the Magistrate's notice. May be, it was never included in the charge-sheet. This is what the order of cognizance suggests. The order of cognizance passed by the magistrate on 17.09.2018 reads:

"17-9-18

आज यह आरोप पत्र मय दीगर पुलिस प्रपत्रों के प्राप्त होकर पेश हुआ। अवलोकन किया गया। अभि0 के विरूद्ध प्रथ्झम

दृष्टया सा० आधार पर धारा 3/7 समप्रतिक एवम अनुचित प्रयोग नि० अधि0 1950 में प्रसज्ञान लिया जाता है। अपराधिक वाद दर्ज रजिस्टर हो । दि० 5-11-18 के लिए अभि0 समन द्वारा तलब हो ।

ह०अ०"

39. The moot question that arises for consideration in this case is, if the order of sanction that has been passed by the State Government on 09.06.2017, qualifies for a valid sanction under Section 8 of the Act of 2005 so as to entitle the Police to institute the impugned proceedings?

40. To the face of the order of sanction passed by the State Government, it is an order purporting to be made in exercise of powers by his Excellency, the Governor under Section 196 of the Code.

41. Now, Section 196 of the Code relates to something that is quite foreign to and different from the offence punishable under Section 3/7 of the Act of 2005. Section 196 of the Code relates to sanction of prosecution as regards certain offences mentioned therein, all of which are punishable under the Indian Penal Code. The various Authorities competent to grant sanction for the specified offences have been enumerated in Section 196.

42. The provisions of Section 196 of the Code read:

"Prosecution for offences against the State and for criminal conspiracy to commit such offence-

(1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under section 153A, section 295A or sub- section (1) of section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860),

except with the previous sanction of the Central Government or of the State Government.

(1A)No Court shall take cognizance of-

(a) any offence punishable under section 153B or sub-section (2) or sub-section (3) of section 505 of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Pro*vide*d that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary

(3) The Central Government or the State Government may, before according sanction under sub-section (1) or sub-section (1A) and the District Magistrate may, before according sanction under sub-section (1A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a

police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of section 155."

43. There is nothing discernible across the length and breadth of Section 196 of the Code that may give rise to an inference that the Central Government or the State Government, or in certain matters the District Magistrate, empowered to grant sanction in respect of particular offences mentioned therein and punishable under the Indian Penal Code, have anything to do with the power to grant a sanction to prosecute for an offence punishable under the Act of 2005. The said power is exclusively conferred upon the Central Government by Section 8 of the Act of 2005 or upon such other Officer as the Central Government may specify by a general or special order. It is not the case of the State that any Officer of the State Government has been authorized by the Central Government, in accordance with the provisions of Section 8 of the Act of 2005, to grant sanction for a prosecution under the Act.

44. Apparently, the State Government have no authority to grant sanction envisaged under Section 8 of the Act of 2005. It is exclusively the Central Government or any Officer authorized by them in this behalf, who can grant sanction for a prosecution regarding an offence punishable under the Act of 2005.

45. A perusal of the order dated 09.06.2017, passed by the State Government granting sanction under Section 196 of the Code, shows that the order has been passed mechanically without application of mind about the Government's jurisdiction or their Authority under the law in the exercise of which sanction was required in the present case. If the matter had been considered by the State Government, this Court has no reason to believe that they would ever invoke a non existent power under Section 196 of the Code to grant sanction for a prosecution under the Act of 2005.

46. It needs be pointed out that the order of sanction in this case passed by the State Government in exercise of power under Section 196 of the Code is not merely one that mentions a wrong provision of the law. It is an order of sanction passed without jurisdiction for reasons already indicated hereinabove. Interpreting the para materia provisions of Section 6 of the Act of 1950 in a slightly different context on facts, the exclusivity of power to grant sanction inhering in the Central Government or the Officer authorized by them, was emphasized by the Madras High Court in **Dr. R.K. Balasubramaniam v. Inspector of Police, 2013 (3) MWN (Cr.) 96. In Dr. R.K. Balasubramaniam** *(supra)* it was observed:

"4. In the Petition, it was stated that no sanction was obtained for the prosecution as contemplated under the Emblem Act and therefore, he must be discharged. The Petition was dismissed on the ground that the direction issued by the Senior Economic Adviser for Government of India to the Chief Secretary of Government of Tamil Nadu to investigate the matter and to take action, would amount to sanction. This Order is under challenge in this Revision Petition.

5. Under Section 6 of the Emblems and Names (Prevention of Improper Use) Act, 1950, no prosecution for any offence punishable under this Act

shall be instituted, except with the previous sanction of the Central Government or of any Officer authorized in this behalf by General or Special Order of the Central Government. Therefore, in order to maintain prosecution, it must be shown that sanction to prosecute was obtained from the Central Government or from any Officer authorized by the Central Government.

5.1. It is the contention of the Accused that it is only the Secretary, Department of Consumer Affairs, New Delhi, is the Competent Authority to grant sanction and not the Senior Economic Adviser, Ministry of Consumer Affairs. Even assuming that the Senior Economic Adviser is the Sanctioning Authority, the Order issued directing the Government of Tamil Nadu to take action would not amount to sanction to prosecute is the second contention.

5.2. The records produced on the side of the Accused, procured using the provisions of Right to Information Act, go to show positively that it is only the Secretary, Department of Consumer Affairs, New Delhi, who has been designated to issue sanction for prosecution and that the Senior Economic Adviser, Ministry of Consumer Affairs, is not the Sanctioning Authority. Therefore, it is clear that sanction for prosecution has not been given by the Competent Authority.

6. The next question is whether the alleged communication issued by Senior Economic Adviser to Government of India would amount to sanction. The communication issued by the Senior Economic Adviser is only a direction to take action and not a sanction to prosecute. Therefore, the contention that this communication itself would amount to grant of sanction is not correct. When the Senior Economic Adviser is not competent to issue sanction, the proceedings issued by him is not valid."

47. In **Abdul Faqir v. State of Rajasthan and another, S.B. Criminal Misc. (Pet.) No. 2755 of 2015**, decided on 14.09.2017, it was held by Rajasthan High Court:

"10. It is clear that as per the Section 8 of the Act of 2005, no prosecution for any offence punishable under this Act shall be instituted without sanction of the Central Government or any authorized officer and it is an admitted case that no such sanction is there. In light of the clear legislative intention, without prosecution under the Section 8 of the Act of 2005, the offence under Section 3, 4 & 5 cannot be carried on."

48. In **G.B. Athri v. Smt. Mangala Gowri, Criminal Misc. Petition No. 4270 of 2016**, decided on 15.02.2017, it was held by the Karnataka High Court:

"In the instant case, the accusations pertain to the improper use of emblem in contravention of the provisions of Section 3 of The Emblems and Names (Prevention of Improper Use) Act, 1950. It has nothing to do with the performance of the official acts. The offences under this Act are not restricted to public servants. The Act is applicable to all and sundry and as applicable to the whole of India. Section 8 of the Act, 2005 specifically pro*vide*s that "no prosecution for any offence punishable under this Act shall be instituted, except with the previous sanction of the Central Government or of any officer authorized in this behalf by general or special order of the Central Government." Section 10 of the Act, 2005 has over-riding effect over all

other provisions of law. Section 10 reads as under:-

"The provisions of this Act or any Rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or instrument having effect by virtue of such enactment."

8. In view of the above provisions the prior sanction of the Central Government is a sine qua non for institution of prosecution of the petitioner for the alleged offence under section 7 of the Act. As the prosecution has been initiated without compliance of the said mandatory requirement, the cognizance taken by the learned Magistrate and the consequent proceedings therefore cannot be sustained in the eye of law and as a result, the petition deserves to be allowed."

49. The conclusion in this case, on the facts noticed and the provisions of the law applicable is, therefore, inescapable and, that is, that the order of cognizance dated 17.09.2018 and the impugned proceedings pending on the file of the Chief Judicial Magistrate, Sant Kabir Nagar cannot be permitted to continue and have to be quashed.

50. It is, however, clarified that what this Court proposes to quash are the order of cognizance and the proceedings before the learned Magistrate. We do not propose to quash the charge-sheet. It will be open to the State to proceed against the applicant in accordance with law, should they so elect.

51. Before parting with the matter, this Court wishes to place on record our concern about the fact that neither the learned Chief Judicial Magistrate concerned, who took cognizance, nor the Superintendent of Police or other Supervisory Officer, who approved the charge-sheet, took note of the provisions regarding sanction carried in the Act of 2005. What is all the more concerning is that the State Government granted sanction *vide order* dated 09.06.2017, blissfully ignorant of the fact that the power to grant sanction for an offence punishable under the Act of 2005 is vested in the Central Government; not the state government. This is not expected to happen where there is a department of law to assist the Government.

52. In the circumstances, this application **succeeds** and is **allowed**. The impugned proceedings of Criminal Case No. 3558 of 2018, State v. Raghvendra Kumar Yadav (arising out of Case Crime No. 2264 of 2016) under Section 3/7 of the State Emblem of India (Prohibition of Improper Use) Act, 2005, Police Station – Khalilabad, District – Sant Kabir Nagar pending before the Chief Judicial Magistrate, Sant Kabir Nagar, including the order of summoning dated 17.09.2018, are hereby **quashed.**

53. It is made clear that the charge-sheet has not been quashed and it will be open to the respondents to proceed afresh, in accordance with law, after complying with the provisions of Section 8 of the Act of 2005.

(2024) 3 ILRA 380

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482 No. 18824 of 2023

Abu Talib Husain & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashfaq Ahmed Ansari

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 197 & 482 – Indian Penal Code, 1860 - Sections 21, 323, 354, 504 & 506 - Wakf Act, 1995 – Sections 64 & 101 - Application under Section 482 of Cr.P.C. - seeking to quash criminal proceedings, including charge-sheet as well as the summoning order – FIR – Charge-sheet – investigation - cognizance taken by the court - Applicants argue that since the mutawalli is deemed a public servant under Section 101 of the Wakf Act, prosecution without prior government sanction under Section 197 Cr.P.C. is invalid - the court held that, although Section 101 of the Wakf Act, 1995 deems mutawallis and managing committee members of a wakf as public servants under Section 21 IPC, they are not entitled to protection under Section 197 Cr.P.C. because they can be removed by the Wakf Board without requiring sanction from the Central or St. Government, thus failing to meet the second essential condition for the application of Section 197 Cr.P.C. - consequently, the application seeking quashing of proceedings is rejected.
(Para – 7, 8, 9, 10)

Application Allowed. (E-11)

List of referred Cases: -

1. Tara Singh Retd. Sub-Registrar Vs The Saggal Cooperative Agricultural Service Society Ltd. - 1994 CRI.L.J. 1465,

2. Manish Trivedi Vs St. of Rajasthan reported in (2014) 14 SCC 420,

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

1. Heard Sri Ashfaq Ahmad Ansari, learned counsel for the applicants and learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the the entire proceedings of Case No.1618 of 2022, State Vs. Abu Talib Husain including chargesheet no.190/22 dated 09.08.2022 arising out of Case Crime No.163 of 2022, under Sections-323, 504, 506, 354 I.P.C., Police Station-Kotwali Nagar, District-Saharanpur as well as summoning order dated 3.9.2022 passed by learned Additional Chief Judicial Magistrate, Saharanpur and (Case No.1740 of 2022) is pending before the learned Ist Additional Civil Judge (Jr. Div)/Judicial Magistrate, Saharanpur.

3. Contention of learned counsel for the applicants is that the impugned FIR was lodged and charge-sheet was filed after conducting investigation on which cognizance was also taken by the Court but as per Section-101 of Wakf Act, 1995 (hereinafter referred to as the 'Act, 1995'), *mutawalli* of wakf would be deemed to be a public servant within the meaning of Section-21 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). Applicant no.1 is *mutawalli* of wakf Karbala, Nai Basti, Behat Road, Saharanpur, therefore, as per Section-197 Cr.P.C., cognizance is bad by the Court because no sanction from appropriate Government was taken before taking such cognizance. It is further submitted that applicant no.2 is father of applicant no.1 and also assisted the applicant no.1 in discharge of public duty. In support of his contention, learned counsel for the applicants also relied upon the judgement dated **07.09.1993** of Punjab and Haryana High Court reported in **1994 CRI.L.J.**

1465 (Tara Singh Retd. Sub-Registrar Vs. The Saggal Co-operative Agricultural Service Society Ltd.) in which it was observed that prosecution of Sub-Registrar is illegal without sanction from Government as he is public servant.

4. On the other hand, learned AGA has opposed the above submission and submitted that Section-101 of the Act, 1995 is a deeming provision for the discharge of duty and Section-197 Cr.P.C. is applicable only on public servant who cannot be removed without sanction of the State Government whereas for the removal of applicant no.1, sanction of State Government is not required and Section-197 Cr.P.C. is not applicable in the present case.

5. Considering the submission of learned counsel for the applicant as well as learned AGA for the State, the sole question arises if the *mutawalli* was deemed to be public servant under Section-101 of the Act, 1995, then merely because he is deemed to be public servant is also entitled to protection under Section-197 Cr.P.C. For detailed analysis of this issue, Section-101 of the Act, 1995 is being quoted as below:

"101. Survey Commissioner, members and officers of the Board deemed to be public servants.- *(1) The Survey Commissioner, members of the Board, every officer, every auditor of the Board and every other person duly appointed to discharge any duties imposed on him by this Act or any rule or order made thereunder, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).*

(2) Every mutawalli of a wakf, every member of managing committee, whether constituted by the Board or under any deed of wakf, every Executive Officer and every person holding any office in a wakf shall also be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860)."

6. From perusal of the above section of the Act, 1995, it appears that not only *mutawalli* of wakf but every member of Managing Committee of wakf are also deemed to be a public servant within the meaning of Section-21 IPC. But despite the above deeming provision *mutawalli* can be removed by the wakf board as per Section-64 of the Act, 1995. Section 64 of the Act, 1995 is quoted as below:

"64. Removal of mutawalli.- *(1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli?*

(a) has been convicted more than once of an offence punishable under section 61; or

(b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or

(c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or

(d) is an undischarged insolvent; or

(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a paid legal practitioner on behalf of, or against, the wakf; or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or b1. Heard Sri Ashfaq Ahmad Ansari, learned counsel for the applicants and learned AGA for the State.

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4. On the other hand, learned AGA has opposed the above submission and submitted that Section-101 of the Act, 1995 is a deeming provision for the discharge of duty and Section-197 Cr.P.C. is applicable only on public servant who cannot be removed without sanction of the State Government whereas for the removal of applicant no.1, sanction of State Government is not required and Section-197 Cr.P.C. is not applicable in the present case.

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every officer, every auditor of the Board and every other person duly appointed to discharge any duties imposed on him by this Act or any rule or order made thereunder, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(2) Every mutawalli of a wakf, every member of managing committee, whether constituted by the Board or under any deed of wakf, every Executive Officer and every person holding any office in a wakf shall also be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860)."

6. From perusal of the above section of the Act, 1995, it appears that not only *mutawalli* of wakf but every member of Managing Committee of wakf are also deemed to be a public servant within the meaning of Section-21 IPC. But despite the above deeming provision *mutawalli* can be removed by the wakf board as per Section-64 of the Act, 1995. Section 64 of the Act, 1995 is quoted as below:

***"64. Removal of mutawalli.**-(1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli?*

(a) has been convicted more than once of an offence punishable under section 61; or

(b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or

(c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or

(d) is an undischarged insolvent; or

(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a paid legal practitioner on behalf of, or against, the wakf; or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or

(j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the wakf.(2) The removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his right, if any, as a sajjadanashin.

(3) No action shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a

prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (i) of sub-section (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the wakf, by an order suspend such mutawalli until the conclusion of the inquiry:

Provided that no suspension for a period exceeding ten days shall be made except after giving the mutawalli a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub-section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the wakf pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the wakf and direct the receiver so appointed to ensure that the customary or religious rights of the mutawalli and of the wakf are safeguarded.

(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the wakf property.

(8) A mutawalli of a wakf removed from his office under this section shall not be eligible for re-appointment as a mutawalli of that wakf for a period of five years from the date of such removal."

7. For applicability of Section-197 Cr.P.C., following three conditions must be satisfied:

(a) accused is a public servant;

(b) that the public servant can be removed from the post by or with the sanction either of Central or the State Government as the case may be;

(c) the act giving rise to the alleged offence had been committed by the public servant in the actual or purported discharge of his duty.

8. Section-197 Cr.P.C. is being quoted as below:

"197. Prosecution of Judges and public servants.--*(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013.*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government; (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence

employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation.?For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB or section 509 of the Indian Penal Code (45 of 1860)

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(3A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 (43 of 1991), receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

9. Therefore, for applicability of Section-197 Cr.P.C. even for the person who are deemed to be servant under any statute other than IPC, he must be removable by or with the sanction of Central or the State Government. Hon'ble Apex Court in the case of **Manish Trivedi Vs. State of Rajasthan reported in (2014)**

14 SCC 420 observed that if any act creates a legal fiction to a particular category of employee by adopting the condition of Section-197 Cr.P.C. then those employees are entitled to get the protection of Section-197 Cr.P.C. In the above mentioned judgement, Section-87 of Rajasthan Municipalities Act, 1959 created legal fiction that members of municipal board will be deemed to be public servant as per Section-21 IPC but the word 'Government' mentioned in Section-197 Cr.P.C. was deemed to be substituted by municipal board and for that reason member of municipal board Rajasthan was declared as public servant for the purpose of Section-197 Cr.P.C. Paragraph no.14 of the **Manish Trivedi Vs. State of Rajasthan (supra)** is being reproduced as under:

"14. Section 87 of the Rajasthan Municipalities Act, 1959 makes every Member to be public servant within the meaning of Section 21 of the Indian Penal Code, 1860 and the same reads as follows:

"87. Members etc., to be deemed public servants.-*(1) Every member, officer or servant, and every lessee of the levy of any municipal tax, and every servant or other employee of any such lessee shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860 (Central Act 45 of 1860).*

(2) The word "Government" in the definition of "legal remuneration" in Section 161 of that Code shall, for the purposes of sub-section (1) of this section, be deemed to include a municipal board."

From a plain reading of the aforesaid provision it is evident that by the aforesaid section the legislature has created a fiction that every Member shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. It is well settled that the legislature is competent to create a legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. In our opinion, the legislature, while enacting Section 87 has, thus, created a legal fiction for the purpose of assuming that the Members, otherwise, may not be public servants within the meaning of Section 21 of the Indian Penal Code but shall be assumed to be so in view of the legal fiction so created. In view of the aforesaid, there is no escape from the conclusion that the appellant is a public servant within the meaning of Section 21 of the Indian Penal Code."

10. In the present case, though by a deeming provision of Section-101 of the Act, 1995 *mutawalli* was declared as public servant but to satisfy the second condition of Section-197 Cr.P.C., the word 'Government' was not replaced by wakf board, therefore, despite the fact that *mutawalli* was declared to be public servant by Section-101 of the Act, 1995. All condition for applicability of Section-197 Cr.P.C. are not fulfilled, **therefore *mutawalli* of wakf board despite being deemed to be a public servant are not entitled to protection under Section-197 Cr.P.C.**

11. With the aforesaid observations, the present application is **rejected.**

(2024) 3 ILRA 388

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.12.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482 No. 19231 of 2016

Saurav Gupta & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Akhilesh Chandra Shukla, Sri Ajay Kumar

Counsel for the Opposite Parties:
G.A., Sri Amit Saxena, Sri Madan Mohan Chaurasia, Sri Vidya Prakash Singh

Criminal Law – Criminal Procedure Code, 1973 – Sections 200, 202, 202(1), 202(2), 204 & 482 – Indian Penal Code, 1860 – Sections 406 - Application U/s 482 Cr.P.C. – for quashing the summoning order in a complaint case – offence of criminal breach of trust - applicants argued that the complaint is retaliatory, filed after a matrimonial dispute, and based on false claims, including allegations of dowry which they deny – and since they reside outside the Magistrate's jurisdiction, an enquiry under Section 202 Cr.P.C. was mandatory but not properly conducted – hence instant application - court finds that, upon careful scrutiny of the complaint, supporting documents, and witness testimonies, the Magistrate applied his mind and recorded satisfaction that a prima facie case was made out - The court emphasized that such satisfaction must not be mechanical and must reflect judicial application of mind, which was evident in this case - The applicants' claims regarding dowry and the nature of the marriage were deemed matters of defence to be tested during trial - Court held that the Magistrate had duly complied with the mandatory requirements under Sections 200, 202, and 204 Cr.P.C. before issuing the summoning order - against the applicants in a complaint under Section 406 I.P.C. – Consequently, the application seeking quashing of the summoning order was found to be meritless and was dismissed.
(Para – 19, 20, 21, 22)

Application Dismissed. (E-11)

List of referred Cases: -

1. Birla Corporation Limited Vs Adventz Investments & Holdings Ltd. & ors.- AIR 2019 SC (Criminal) 1025,

2. Mahmood Ul Rehman Vs Khazir Mohammad Tunda & ors.- AIR (2015) SC 2195,

3. U.O.I.Vs Ashok Kumar Sharma (2021) 12 SCC 674,

4. Jagdish Ram Vs St. of Rajasthan & anr.(2004) 4 SCC 432,

5. Deepak Gaba Vs St. of U.P. (2023) (3) SCC 423.

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Ajay Kumar, Advocate holding brief of Sri Akhilesh Chandra Shukla, learned counsel for the applicants, Sri Vidya Prakash Singh, learned counsel for opposite party no.2 and Sri Pankaj Srivastava, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of summoning order dated 02.05.2015 passed by learned Additional Chief Judicial Magistrate, Court No.3, Ghaziabad in Complaint Case No.2953 of 2014, under Section 406 I.P.C., Police Station - Sihani Gate, District Ghaziabad.

3. Learned counsel for the applicants submits that the instant criminal complaint

filed by opposite party no.2 is a counter blast to the Application under Section 9 of Hindu Marriage Act, filed by applicant no.1 herein as the opposite party no.2 had left the company of applicant no.1 without any reasonable cause, therefore, the instant complaint has been filed on false and fabricated facts. The opposite no.2 had sent a notice on 02.07.2017 and asked the applicants to return the articles. The said legal notice was duly replied by applicant no.1 and it was stated that no such articles as has been mentioned in the list annexed with the notice, have ever been received by the applicants, therefore, there is no question of returning the same. Learned counsel for the applicants further submits that no dowry was given by opposite party no.2 or her family members as the marriage between the parties has taken place through their interaction on the Facebook etc. Learned counsel for the applicants further argued that as per Section 202 Cr.P.C., since the applicants herein were residing outside the jurisdiction of learned Magistrate then the enquiry under Section 202 Cr.P.C. is mandatory and no such enquiry has been conducted. Learned counsel for the applicants further submits that the impugned summoning order dated 02.05.2015 is illegal, which has been passed without conducting any enquiry under Section 202 Cr.P.C. In support of his submission, learned counsel for the applicants has relied upon the paragraph no.34 of the judgment of Apex Court in Birla Corporation Limited Vs. Adventz Investments and Holdings Limited and others : AIR 2019 SC (Criminal) 1025, which reads as follows:

"34. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction....."

4. On a query made to learned counsel for the applicants that whether even if it is accepted that the enquiry under Section 202 Cr.P.C. is mandatory and if learned Magistrate in terms of Section 202 Cr.P.C. decides to conduct an enquiry himself, as the discretion is given to the Magistrate, then what type of enquiry the Magistrate is required to conduct in the matter when a complaint and the statement under Sections 200 and 202 Cr.P.C. are available before the Magistrate, the learned counsel for the applicant has relied upon the observations made by the Apex Court in Mahmood Ul Rehman Vs. Khazir Mohammad Tunda & others : AIR (2015) SC 2195, which reads as follows:

"..... There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction....."

5. In view of the aforesaid, learned counsel for the applicants submits that such enquiry has been conducted without issuing any notice to the applicants.

6. Per contra, learned counsel for opposite party no.2 has relied upon paragraph no.61 of the said judgment of Apex Court in Birla Corporation Limited (supra), which reads as follows:

"61. The object of investigation under Section 202 Cr.P.C. is "for the purpose of deciding whether or not there is sufficient ground for proceeding". The enquiry under Section 202 Cr.P.C. is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused. The issuance of process should not be mechanical nor should be made as an instrument of harassment to the accused. As discussed earlier, issuance of process to the accused calling upon them to appear in the criminal case is a serious matter and lack of material particulars and non-application of mind as to the materials cannot be brushed aside on the ground that it is only a procedural irregularity…."

7. Learned counsel for opposite party no.2 submits that before summoning the applicants, learned Magistrate, after perusal of the allegations made in the complaint, decided to conduct an enquiry into the allegations made in the complainant before issuing the summons to the accused persons and after recording the statement of the complainant under section 200 Cr.P.C. also recorded the statement of witnesses produced by the complainant under section 202 Cr.P.C. to complete the enquiry as contemplated under section 202 Cr.P.C. and after considering the entire material including the statement of witnesses, the Magistrate has recorded his satisfaction that there is a prima facie case against the applicants herein, and thereafter, has summoned the applicants for trial in the said complaint filed by the Opposite Party No. 2. Therefore, the summoning order dated 02.05.2015 is not mechanical, but was passed by the learned Magistrate after conducting the enquiry as contemplated under section 202 Cr.P.C. and recording his satisfaction that a prima case is made out against the applicants herein, as if the averments made in the complaint and in the statements under section 200 and 202 Cr.P.C., goes unrebutted during the trial, this material is sufficient to convict the accused for which they are summoned.

8. Having heard the submissions made by learned counsel for the parties, this Court has carefully perused the record of the case.

9. For the proper adjudication of the instant application, it is relevant to quote the provisions of Section 200, 202 and 204 Cr.P.C.

"200. Examination of complainant - A magistrate taking cognizance of an offence on complaint shall, examine upon oath the complainant and witnesses present, if any and the substance of such examination shall be reduced into writing and shall be signed by the complainant and witnesses and also by the magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after

examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

202. Postponement of issue of process: 1. Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding;

Provided that no such direction for investigation shall be made—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

2. In an inquiry under Sub-Section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath;

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

3. If an investigation under Sub-Section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

204. Issue of process – (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accuse, or

(b) a warrant-case, he may issue a warrant, of, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid an, if such fees are not paid within a reasonable time, the Magistrate mayu dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.

10. From reading of the provisions of Section 200 and 204 Cr.P.C. it is clear that on presentation of the complaint filed under section 200 Cr.P.C. by an individual, the Magistrate is required to examine the complainant and the witnesses present, if any. Thereafter, on perusal of the allegations made in the complaint, the statement of the complainant on solemn affirmation and the witnesses examined, the Magistrate has to get himself satisfied that

there are sufficient grounds for proceeding against the accused and on such satisfaction, the Magistrate may direct for issuance of process as contemplated under section 204 Cr.P.C. The purpose of the enquiry under Section 202 Cr.P.C. is to determine whether a prima facie case is made out and whether there is sufficient ground for proceedings against the accused.

11. Under the amended sub-section (1) to Section 202 Cr.P.C. (as amended by Cr.P.C. (Amendment) Act, 2005, with effect from 23.6.2006), it is obligatory upon the Magistrate that before summoning an accused, who is residing beyond its jurisdiction, to conduct an enquiry, However, the Magistrate has discretion to opt any of the three options available to him to conduct such enquiry. a) he may enquire into the case himself or; b) direct the investigation to be made by a police officer or; c) by such other person as he thinks fit. The object of such enquiry is to find out whether or not there is sufficient ground for proceedings against the accused. The need for such amendment was felt by the legislature, as false complaints were filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire.

12. The Apex Court in the case of Vijay Dhanuka and Others v. Najima Mamtaj and Others (2014) 14 SCC 638, considering the scope of amendment to Section 202 Cr.P.C., has held as under:-

"12. ….The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar and Another (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488."

(Emphasis supplied)

13.. In Jagdish Ram v. State of Rajasthan and Another (2004) 4 SCC 432, the Apex Court has held as under:-

"10. ….The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at

the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons."

(Emphasis supplied)

14. In Union of India Vs. Ashok Kumar Sharma (2021) 12 SCC 674, the Supreme Court in paragraph 50 held as under:

"50. The learned Amicus Curiae, when queried about the procedure to be adopted when a complaint is lodged by persons falling in Section 32(C) and (d), viz., the aggrieved person or a voluntary association, it was submitted that the Magistrate can, under Section 202 of the CrPC, order an investigation by the Police Officer or any other person. A perusal of Section 202 would show that in regard to an offence falling under Chapter IV of the Act, being exclusively triable, by a Court of Sessions, the proviso to sub-Section (1) to Section 202 prohibits the direction for investigation under Section 202. The proviso to sub-Section (2) of Section 202 contemplates that when an offence is exclusively triable by the Court of Sessions, and the Magistrate proceeds under Section 202 of the CrPC, he is duty bound to call upon the complainant to produce all its witnesses and examine them on oath. Thus, the effect of the two provisions in sub-Sections (1) and (2), respectively, is as follows: a Magistrate proceeding under Section 202 of the CrPC, is subjected to two conditions:

(a) Unlike in an ordinary case, meaning thereby, an offence which is not exclusively triable by a Court of Sessions, in a case where it is an offence exclusively triable by a Court of Sessions, the inquiry can be conducted only by a Magistrate himself. It is not open to him to cause an investigation be it by a Police Officer or any other person.

(b) In regard to the inquiry so conducted by him, he must call upon the complainant to produce all his witnesses and they must be examined not on the basis of any affidavit, and not without the support of an oath but the examination must be under an oath. It is to be remembered that under the provisions existing under the previous Code, an elaborate preliminary inquiry where even an accused had right of cross-examination of witnesses, was contemplated at the hands of the Magistrate before the committal order was passed. This no longer survives after the amendment."

(Emphasis supplied)

15. The Supreme Court relying upon the judgement in the case of Birla Corporation Limited (supra), in the case of Deepak Gaba Vs. State of U.P. (2023) (3) SCC 423 has held in paragraphs 31 and 32 as under:

"30. Even though at the stage of issuing process to the accused the Magistrate is not required to record detailed reasons, there should be adequate evidence on record to set the criminal proceedings into motion. The requirement of Section 204 of the Code is that the Magistrate should carefully scrutinize the evidence brought on record. He/she may even put questions to complainant and his/her witnesses when examined under Section 200 of the Code to elicit answers to find out the truth about the allegations. Only upon being satisfied that there is sufficient ground for summoning the accused to stand the trial, summons should be issued.

31. Summoning order is to be passed when the complainant discloses the offence, and when there is material that supports and

constitutes essential ingredients of the offence. It should not be passed lightly or as a matter of course. When the violation of law alleged is clearly debatable and doubtful, either on account of paucity and lack of clarity of facts, or on application of law to the facts, the Magistrate must ensure clarification of the ambiguities. Summoning without appreciation of the legal provisions and their application to the facts may result in an innocent being summoned to stand the prosecution/trial. Initiation of prosecution and summoning of the accused to stand trial, apart from monetary loss, sacrifice of time, and effort to prepare a defence, also causes humiliation and disrepute in the society. It results in anxiety of uncertain times."

16. The Supreme Court in the case of Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose and Another AIR 1963 SC 1430 and in a series of judgments has held that the object of an enquiry under Section 202 Cr.P.C. is for the Magistrate to scrutinize the material produced by the complainant to satisfy himself that the complaint is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process under Section 204 Cr.P.C. It is the duty of the Magistrate to elicit every fact that would establish the bona fides of the complaint and the complainant.

17. Reference to the judgments of the Supreme Court, would clearly show that the allegations in the complaint and complainant's statement and other materials must show that there are sufficient grounds for proceeding against the accused. In the light of the above principles, the court proceeded to consider the instant case whether the allegations in the complaint and the statement of the complainant and other materials before the Magistrate were sufficient enough to constitute prima-facie case to justify the Magistrate's satisfaction that there were sufficient grounds for proceeding against the accused and whether there was application of mind by the learned Magistrate in taking cognizance of the offences and issuing process to the accused.

18. The enquiry under section 202 Cr.P.C. is to ascertain the fact that the complaint has any valid foundation calling for issuance of process to the persons complained against or whether it is a baseless case on which no action need be taken. It is the serious responsibility of the Magistrate to decide as to whether there is sufficient ground for proceeding against the accused and process should not be mechanical nor should be made as an instrument of harassment to the accused.

19. As pointed out earlier, the object behind the amendment to Section 202 Cr.P.C. is to ensure that innocent persons who are residing at far off places are not harassed by unscrupulous persons. The amendment therefore, makes it obligatory upon the Magistrate that before summoning the accused residing beyond the jurisdiction, the Magistrate has to enquire the case either himself or direct investigation to be made by the police officer or any other person, so authorised. When in exercise of the obligation as mandated under section 202 Cr.P.C., when the accused is the resident of beyond the jurisdiction of such Magistrate, the Magistrate applying his discretion decides to conduct such enquiry himself, then the scope and method of enquiry is provided in section 202(2) Cr.P.C., which mandates that the Magistrate shall call upon the Complainant to examine the witnesses on oath in support of his complaint and after

such statement under section 202 (2) Cr.P.C. are recorded, that is the sufficient compliance of mandatory enquiry to be conducted under Section 202(1) Cr.P.C. Thus, if on perusal of such material i.e. the Complaint, the documents placed in support of the complaint and the Statement of complainant under section 200 and Statement of witnesses under section 202, the Magistrate after applying his mind, is satisfied that a prima facie case is made out against the accused, the he is justified in summoning the accused under section 204 Cr.P.C.

20. In the present case the learned Magistrate has opted to hold the enquiry as contemplated under section 202(1) Cr.P.C. himself and called upon the Complainant to produce her witnesses. After recording the statements of witnesses under section 202(2), the Magistrate considered the entire material including the complaint, Statement of complainant under section 200 and the statements of witnesses under section 202 Cr.P.C., who had supported the averments made in the complaint and thereupon the Magistrate has recorded his satisfaction that a prima facie case is made out against the applicants herein, therefore, the Magistrate vide order dated 02.05.2015 has summoned the applicants herein. The impugned summoning order dated 2.5.2015 passed by the Magistrate reads as under:

"02.05.2015

पुकार करायी गयी। पत्रावली पेश हुयी। तलबी के बिन्दु पर पारिवादिनी के विद्वान अधिवक्ता को सुना तथा पत्रावली का अवलोकन किया।

संक्षेप में परिवादिनी का अपने परिवाद पत्र में कथानक इस प्रकार है कि परिवादिनी का विवाह सौरभ गुप्ता के साथ दिनांक 15.4.12 को हुआ था जिसमें परिवादिनी के माता पिता ने बीस लाख रूपये खर्च किया था तथा दान दहेज व स्त्रीधन के रूप में काफी सामान दिया था जिसकी सूची संलग्न है। लेकिन दो तीन माह के पश्चात कम दहेज का ताना देकर अतिरिक्त दहेज की मांग करते हुये 6 लाख रूपये की मांग करने लगे तथा परिवादिनी को तरह तरह से तंग व परेशान करने लगे। विपक्षीगण ने शादी की सालगिरह दिनांक 15.04.13को परिवादिनी को मारपीट कर रात करीब दस बजे केवल पहने हुए कपड़े में अपने घर से निकाल दिया तथा तब से आज तक वह अपने मायके में रह रही है। शादी में दिया गया सभी दान दहेज उपहार स्त्रीधन अब विपक्षीगण की हिरासत में है को परिवादिनी को लौटाने तथा उसकी मर्जी के बगैर अपने इस्तेमाल में न करने व खुर्द बुर्द न करने के लिये एक कानूनी नोटस डाक द्वारा अपने अधिवक्ता के माध्यम से भेजा लेकिन विपक्षीगण ने बाबजूद कानूनी नोटिस के परिवादिनी के उक्त स्त्रीधन को न तो लौटा रहे है तथा न ही उसको अपने इस्तेमाल में लेना बन्द किया है। तथा उसे खुर्द बुर्द कर दिया है। जिसकी शिकायत संबंधित थाना सिंहानी गेट में की लेकिन उसकी कोई रिपोर्ट दर्ज नहीं की उसके उपरान्त एक लिखित प्रार्थनापत्र एस एस पी गाजियाबाद को दिया जिसकी बाबत आज तक कोई कार्यावही नहीं हुई। तब जाकर यह प्रार्थनापत्र न्यायालय के समक्ष प्रस्तुत किया है।

इसी आशय का बयान परिवादिनी ने धारा 200 द०प्र०सं० के अन्तर्गत लेखबद्ध कराया है तथा धारा 202 दं०प्र०सं० में साक्षी पी०डब्लू०1 महेन्द्र पाल पुत्र फूलचन्द व पी०डब्लू० 2 उमेश अग्रवाल पुत्र महेन्द्र पाल को पेश किया है जिसमें परिवादिनी के अनुसार बयान दिया है। उपरोक्त परिवाद कथानक परिवादी व परिवादी द्वारा प्रस्तुत साक्षी के बयानों के प्रकाश में प्रथम दृष्टया विपक्षी सौरव गुप्ता जगदीश श्रीमती किरनबाला समीर गुप्ता के बयानों द्वारा भ०दं०सं० की धारा 406 का अपराध कारित किया जाना दर्शित होता है। विपक्षीगण तद्नुसार उपरोक्त धारा में अभियुक्त विचारण हेतु तलब किये जाने योग्य है।

आदेश

विपक्षी सौरव गुप्ता जगदीश श्रीमती किरनबाला समीर गुप्ता को भा०दं०सं० की धारा 406 के तहत अभियुक्त के रूप में विचारण हेतु तलब किया जाता है। परिवादी अन्दर 10 दिवस पैरवी करे। परिवाद वास्ते हाजिरी अभियुक्त दिनांक 04.08.15 को पेश हो।

अपर मुख्य न्यायिक मजिस्ट्रेट

कोर्ट सं० 3 गाजियाबाद "

21. From the above, it is amply clear that the Magistrate adopted to hold enquiry himself and thereafter after considering the statements of the complainant and the witnesses, namely, Mahendra Pal and Umesh Agarwal under sections 200 and 202 Cr.P.C. arrived at a conclusion that prima facie a case is made out against the

applicants herein, thereafter summoned the applicants herein. In the present case perusal of the impugned summoning order clearly shows that the Magistrate has recorded his satisfaction and applied his mind and after considering the statements of the complainant and the witnesses has passed the impugned summoning order, which requires no interference by this Court.

22. From perusal of complaint as well as the statement under Section 200 and 202 Cr.P.C., recorded by the Magistrate in terms of Section 202 Cr.P.C. the court is of the considered opinion that prima facie a case is made out against the applicants under Section 406 I.P.C. Section 202 Cr.P.C. does not mandate that the Magistrate should conduct any enquiry to collect the material which was not before him. On the basis of material available before him a prima facie satisfaction has been recorded and a prima facie case is made out against the applicants herein which is sufficient for compliance of an enquiry under Section 202 Cr.P.C. What is prohibited in terms of the judgment of Apex Court in Birla Corporation Limited (supra) that the Magistrate could not pass any order mechanically and he has to apply his mind to the material available before him and on the basis of scrutiny of the material he should record his satisfaction, which has been categorically recorded in the instant case. So for as the submissions of learned counsel for the applicants with regard to his claim that no dowry etc. was given by opposite party no.2 and her family members and the marriage between the parties had taken place out of their interaction through Facebook, that is defence of the applicants, which has to be established during trial of the applicants.

23. In view of the above, the instant application is devoid of merit and is hereby dismissed.

(2024) 3 ILRA 396

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.11.2023

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application U/S 482 No. 41397 of 2023

Dinesh Jatav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajesh Kumar Patel, Sri Ashutosh Kumar Gautam

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 156(3), 173(2), 190 & 482 - Indian Penal Code, 1860 - Sections 279 & 304-A - Application u/s 482 – challenging the summoning order – accident – complaint - FIR registered – informant alleged that his brother died due to a motorcycle accident caused by the rash driving of accused applicant – investigation – police submitted final report – mention that deceased was driving carelessly with two pillion riders and accidentally struck a gas cylinder tied to accused's motorcycle, finding no evidence against accused and recommending his exoneration - Protest petition – FR was rejected - summon order – challenges this order, accused applicant argued that the Magistrate erred in law by not following the procedure under Chapter XV Cr.P.C. and cites precedent to support setting aside the impugned order and accepting the final report – court finds that, the impugned order was based solely on investigation material, not on any additional documents from the complainant, making the precedent cited by the applicant

inapplicable - held - under Section 190 Cr.P.C., a Magistrate has broad powers to take cognizance of offences based on the material in the police report and is not bound by the Investigating Officer's conclusions – hence, despite the final report exonerating accused the Magistrate rightly took cognizance based on witness St.ments and medical evidence suggesting his involvement - Consequently, Court does not find any merit, therefore, the application fails and stands dismissed.
(Para – 13, 14, 15, 16)

Application Dismissed. (E-11)

List of referred Cases: -

1. Minu Kumari & anr.Vs The St. of Bihar & ors., (2006) 4 SCC 359,

2. Abhinandan Jha & ors.Vs Dinesh Mishra, AIR 1968 SC 117,

3. Wakil Ahmad & ors.Vs St. of U.P. & anr.- Application U/S 482 No. 14314/2006 Decided on 06.03.2020.

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicant being accused has approached this Court through this application under Section 482 Code of Criminal Procedure seeking quashing of the impugned summoning order dated 20.7.2023 passed by Civil Judge (J.D.)/ Judicial Magistrate, Konch, District Jalaun by disagreeing with the final report under Section 173(2) Cr.P.C. filed in Criminal Case No. 925 of 2023, titled Rinku Jatav Vs. Dinesh Jatav, arising out of Case Crime No. 57 of 2019, under Sections 279, 304-A I.P.C., Police Station Kotwali Konch, District Jalaun.

2. The facts leading to the application are as under:-

3. The above F.I.R. was registered on the basis of the complaint given by complainant Rinku Jatav, who alleged that he is a resident of village Unchagaon, District Jalaun and on 1.2.2019, the date of incident, at around 8:00 AM complainant's brother Mansingh Jatav s/o Sri Panna Lal was going from his house at Unchagaon to village Bhed, Police Station Konch, District Jalaun on his motorcycle bearing registration no. CG 085 6288. Mansingh Jatav was accompanied by pillion riders namely, Churaman Jatav and Parshuram Jatav both sons of Mohan Lal r/o village Unchagaon. At around 11:00 AM, when his brother's motorcycle reached near village Gurawati, Police Station Konch, District Jalaun near a turn, then the motorcycle bearing registration no. U.P. 92 R 7650 driven carelessly by Dinesh Jatav s/o Ramsiya r/o village Unchagaon, Police Station Kailiya, struck the motorcycle of complainant's brother and it resulted in serious injuries leading to death of his brother. Complainant prayed that lawful action be taken against the accused persons. On these broad allegations, the above F.I.R. was registered against the accused, for the alleged commission of offences punishable under Sections 279 and 304-A I.P.C.

4. After registration of the case, the investigation was carried out and through the final report dated 8.8.2019 (Annexure No.3), the Investigating Officer concluded that the victim was driving the vehicle rashly and carelessly with two pillion riders and in order to cross the vehicle driven by Dinesh Jatav, he struck against the gas cylinder tied with the motorcycle of Dinesh Jatav and died accidentaly. As per the final report, the adequate evidence against Dinesh Jatav was not found, therefore, it was requested that the report exonerating the accused-Dinesh Jatav be accepted.

5. Being dissatisfied with the final report bearing No. 64/2021 dated 8.8.2019 filed under Section 173(2) Cr.P.C.,

the complainant filed protest petition dated 12.7.2023 (Annexure No.4) and requested for rejecting the final report and made a prayer for taking cognizance against accused-Dinesh Jatav. The Judicial Magistrate, Konch, Distcit Jalaun vide impugned order dated 20.7.2023 rejected the conclusion of the investigator and summoned the accused for alleged commission of offences punishable under Section 279, 304-A I.P.C. and further directed to register the case as a State case. Hence, this application.

6. Learned counsel for applicant has argued that allegations made by the complainant were thoroughly looked into by the Investigating Officer after registration of the case and a just conclusion was drawn that the applicant was not responsible for causing the death of victim Mansingh, much less by driving his two wheeler rashly and negligently. He submits that trial court while considering the final report as well as the protest petition has committed a serious error of law in taking cognizance against the applicant by further directing to register the case as a State case as once the cognizance is based on the protest petition, the procedure contained in Chapter XV Cr.P.C. has to be followed. Learned counsel for applicant has further drawn the attention of the Court to the statement of eye witness namely, Churaman recorded under Section 161 Cr.P.C. to contend that according to the statement of this witness, it was not a collision of two wheelers, but the handle of the motorcycle of Mansingh had touched the gas cylinder tied with the other two wheeler, which resulted in accident, and complainant lodged the false F.I.R.

7. Learned counsel for applicant in support of his submissions has placed reliance upon the decision of this court vide order dated 6.3.2020 passed in Application U/S 482 No. 14314 of 2006, titled *Wakil Ahmad and others Vs. State of U.P. and another*, and submitted that in the cited case as well, the Magistrate had on one hand rejected the final report submitted by police under Section 173(2) Cr.P.C., but at the same time, had proceeded to take cognizance against the accused as a police case, and the said order was set aside by this Court with a direction to proceed from the stage of consideration of final report submitted by police, and protest petition by complainant for passing appropriate orders in accordance with law. Learned counsel for applicant submits that case in hand is squarely covered by the said decision, therefore, interference is warranted by this Court and the impugned order dated 20.7.2023 be set aside and the final report dated 8.8.2019 submitted by the police be accepted.

8. Learned counsel for the applicant has been heard and with his assistance, the case file has been perused carefully.

9. Before adverting to the merits of the case, this Court deems it appropriate to have a glance at Section 190 Cr.P.*(a)*C., which contemplates the cognizance of offences by Magistrate. The Section 190 Cr.P.C. reads as under:-

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.

10. A careful reading of the above would show that this provision empowers the Magistrate to take cognizance of offences allegedly committed, and though the expression cognizance has not been defined in the Code of Criminal Procedure, but it would certainly mean the application of judicial mind. At this stage, the Magistrate is required to satisfy, if, the material on record i.e. private complaint/ police report/ information received from the third person, as the case may be, discloses commission of a cognizable offence. Thus, it becomes clear that wide powers have been vested with the Magistrate through this provision, in order to commence the criminal proceedings against the accused.

11. By now, it is well settled law that at this stage, where the Magistrate is seized of the police report, he is not bound to follow the conclusion drawn by the Investigating Officer, and, if, the material collected during investigation suggests commission of cognizable offence, the Magistrate would be well within his powers to disagree with the police report exonerating the accused, and further may proceed to issue process against the accused based on the police report itself. The above provision was analysed by the Hon'ble Apex Court in the case of ***Abhinandan Jha and others Vs. Dinesh Mishra, AIR 1968 SC 117***, and the relevant observations made by the Hon'ble Supreme Court in the said decision read as under:-

15. Then the question is, what is the position, when the Magistrate is dealing with a report submitted by the police, under section 173, that no case is made out for sending up an accused for trial, which report, as we have already indicated, is called, in the area in question, as a 'final report'? Even in those cases, if the Magistrate agrees with the said report, he may accept the final report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case in our opinion the Magistrate will have ample jurisdiction to give directions to the police, under section 156 (3), to make a further investigation. That is, if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory, or incomplete, or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation, under section 156 (3). The police, after such further investigation, may submit a charge-sheet, or,, again submit a final report, depending upon the further investigation made by them. If, ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he, can take cognizance of the offence under section 190(1) (c), notwithstanding the contrary opinion of the police, expressed in the final report.

16. In this connection, the provisions of section 169 of the Code, are relevant. They specifically provide that

even though, on investigation, a police officer, or other investigating officer, is of the opinion that there is no case for proceeding against the accused, he is bound, While releasing the accused,, to take a bond from him to appear, 'If and. when required, before a Magistrate. This provision is obviously to meet a contingency of the Magistrate, when he considers the report of the investigating officer, and judicially takes a view different from the police.

17. We have to approach the, question, arising for consideration in this case, in the light of the circumstances pointed out above. We have, already referred to the scheme of Chapter XXIV, as well as the observations of this Court in Rishbud and Inder Singh's Case(1) that the formation of the opinion as to whether or not there is a case to place the accused on trial before a Magistrate, is 'left to the officer in-charge of the police station. There is no express power, so far as we can see, which gives jurisdiction to pass an order of the nature under attack; nor can any such powers be implied. There is certainly no obligation, on the Magistrate, to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of tile police, to take cognizance, under section 190(1)(c) of the Code. That provision, in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute. or the police, either wantonly or through bona fide error, fail to submit a report, setting out the facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence. not only when he receives information about the commission of an offence from a third person, but also where he has knowledge or even suspicion that the offence has been committed. It is open to the Magistrate to take cognizance of the offence, under section 190(1) (c), on the ground that, after having due regard to the final report and the police records placed before him, be has reason to suspect that an offence has been committed. Therefore, these circumstances will also clearly negative the power of a Magistrate to call for a charge-sheet from the police, when they have submitted a final report. The entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to, place the accused for trial, is that of the officer in-charge of the police station and that opinion determines whether the report is to be under section 170, being a 'charge-sheet', or under section 169 'a final report'. It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us.

12. The above judgment was further followed by Hon'ble Apex Court in the case of ***Minu Kumari and another Vs. The State of Bihar and others, (2006) 4 SCC 359***, the relevant observations read as under:-

In Abhinandan Jha and another v. Dinesh Mishra (AIR 1968 SC 117), this Court while considering the provisions of Sections 156(3), 169, 178 and 190 of the Code held that there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge sheet, when they have sent a report under Section 169 of the Code,

that there is no case made out for sending up an accused for trial. The functions of the Magistracy and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion so as to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding formation of the opinion by the police which is the final stage in the investigation has been provided for in Section 190(1)(c).

When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take congnizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See M/s. India Carat Pvt. Ltd. v. State of Karnataka and another (AIR 1989 SC 885)].

13. In view of the above decisions by Hon'ble Apex Court, it emerges that the final report submitted by the police under Section 173(2) Cr.P.C. does not bind the Magistrate and in case, if, the material on record suggests commission of offence, the Magistrate would be justified in taking cognizance of the same.

14. Now, while reverting to the merits of the case in hand, this Court finds that as per the prosecution, the victim was the driver of two wheeler, whereas prosecution

witnesses namely, Churaman and Parshuram both sons of Late Mohan Lal were the pillion riders. The statement of these two witnesses recorded under Section 161 Cr.P.C. suggests the involvement of the motorcycle driven by accused Dinesh Jatav and case of the prosecution is further supported by medical evidence as well. Thus, the argument that applicant has been falsely implicate is misconceived at least at the stage of cognizance by Magistrate under Section 190 Cr.P.C. Apart from this, a careful reading of the impugned order would show that the Magistrate has minutely examined the final report under Section 173(2) Cr.P.C. while, refusing to accept the conclusion and rightly proceeded to take cognizance of the offences. The impugned order is based upon the material collected by the Investigating Officer during investigation and is not based upon any other material, much less filed by complainant along with his complaint/ protest petition.

15. Therefore, in these circumstances, the decision in ***Wakil Ahmad's case (Supra)*** relied upon by the applicant would not be applicable, as in the said case, the Magistrate not only rejected the final report submitted by police, but also placed reliance upon two affidavits, which were filed by complainant along with his protest petition. It was in this background, this Court observed that once the cognizance is based upon the other material, which is not part of the final report submitted under Section 173(2) Cr.P.C., therefore, the Magistrate ought to have followed the procedure contained under Chapter XV Cr.P.C. In this case, no doubt the Magistrate used the expression that the final report is rejected, but it only means that the Magistrate has shown his disagreement to the conclusion drawn by the Investigating Officer, because in the end the Magistrate has directed that the case be registered as the case based on the police report.

16. Resultantly, in view of the above discussion, this Court does not find any merit in this case, therefore, the application fails and is hereby dismissed.

(2024) 3 ILRA 402
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2024
BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
HON'BLE ATTAU RAHMAN MASOODI, J.

Special Appeal No. 36 of 2024

Karmesh Pratap Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Ajay Singh, Sakshi Singh, Sameer Singh

Counsel for the Respondents:
Abhinav Trivedi, Lalta Prasad Misra

A. Service Law – Constitution of India – Article 14 – Public Recruitment – Basic principles governing it – Open competition – Significance – Held, recruitment in the matter of public employment is founded on two basic principles. Firstly that the recruitment agency must have credibility of the highest order in executing the principle of open competition and secondly, the implementation of rules applicable insofar as the process is concerned must equally stand the tests of Article 14 of the Constitution of India. (Para 26)

B. Service law – UP Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1974 – Rule 6 (ii), 49 and 50 – Post of Information Officer – Recruitment – Academic qualification –

Appointment was made making relaxation *dehors* the rules – Permissibility – Held, the manner in which the relaxation of academic qualification for appointment was granted by the competent authority, the same was clearly indicative of nothing but nepotism besides it being in blatant disregard of the well settled principles of recruitment. The appointment of an ineligible person that too without declaration of result, was clearly *dehors* the rules. (Para 31)

C. Service law – Constitution of India – Article 14 and 16 – Appointment was made *dehors* the rules – Worked for more than six years, how far accrue right to hold the post – Held, the appointment of the appellant *dehors* the Rules, who is not at all eligible to be considered for appointment, is illegal and has rightly been set aside. (Para 32 and 36)
Appeal dismissed. (E-1)

List of cases cited :-

1. Syed Khalid Rizvi & Ors. Vs U.O.I. & ors.;1993 Supp. (3) SCC 576

2. Management of Narendra & Company Private Limited Vs Workmen of Narendra & Company; (2016) 3 SCC 340

3. Special Appeal No. 562 of 2005; Devendra Singh Vs District Administrative Committee decided on 04.04.2019

4. Kishorilal Charmakar & anr. Vs Distt. Education Officer & anr.; (1998) 9 SCC 395

5. St. of Madhya Pradesh & anr. Vs Dharam Bir; JT 1998 (4) SC 363

6. St. of Karnataka & ors. Vs Gadilingappa & ors.; (2010) 2 SCC 728

7. Basawaraj & anr.Vs Special Land Acquisition Officer; (2013) 14 SCC 81

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

(1) The appellant herein feeling aggrieved against the judgment dated 25.01.2024 passed by the learned Single Judge in Writ-A No. 20207 of 2016 has filed the present intra-Court appeal questioning the legality of the same.

(2) Briefly stated the facts of the case are that a post of Information Officer fell vacant in the Secretariat of Legislative Assembly, Uttar Pradesh in the year 2015. An advertisement was issued for filling up the said post on 27.05.2015, which, for ready reference, to the extent of prescription of essential academic qualification and preferential, is extracted hereunder:-

"2. शैक्षिक योग्यता एवं अन्य अर्हतायें।
(क)– अनिवार्य अर्हता
(एक)–भारत में विधि द्वारा स्थापित किसी विश्वविद्यालय से एक विषय के रूप में हिन्दी के साथ स्नातक उपाधि या सरकार द्वारा समकक्ष मान्यता प्राप्त कोई उपाधि,
(दो)–पत्रकारिता में डिप्लोमा या 5 वर्ष का पत्रकारिता का अनुभव।
(ख)–अधिमानी अर्हता
(1)–समाचार पत्रों और पत्रिकाओं में लेख, पटकथा और फीचर लिखते का अनुभव
(2)–भारत में विधि द्वारा स्थापित किसी विश्वविद्यालय से या सरकार द्वारा उसके समकक्ष मान्यता प्राप्त किसी संस्था से पत्रकारिता में स्नातक उपाधि
(3)–सरकार द्वारा मान्यता प्राप्त किसी संस्था से संगीत/
प्रकाश–व्यवस्था/अभिनव/निर्देशन इत्यादि में डिप्लोमा।
पात्र अभ्यर्थियों में से साक्षात्कार के आधार पर चयन किया जायेगा। साक्षात्कार में सम्मिलित होने हेतु अभ्यर्थियों को कोई यात्रा भत्ता आदि देय नही होगा।

यदि कोई अभ्यर्थी अपने उम्मीदवारों के लिए प्रत्यक्ष या अप्रत्यक्ष रूप से अथवा अन्य साधनों द्वारा अपने पक्ष में समर्थन प्राप्त करने का प्रयत्न करेगा तो वह अनर्ह कर दिया जायेगा।"

The process of selection was by way of interview, besides some other norms.

(3) The period for submission of application forms against the advertisement was specified from 27.05.2015 to 17.06.2015. The appellant's application itself came to be filed under surreptitious circumstances. As per the material placed on record that too at the appellate stage, an application is said to have been presented before the Hon'ble Speaker, Legislative Assembly, U.P. on 15.06.2015 which was registered vide Sl. No. 716 and on the same very application, Hon'ble the Speaker made an endorsement to the effect of granting permission to participate in the selection. The application seeking permission to participate in the process of selection on the post of Information Officer did not mention the rule under which the same was presented. The advertisement, on the other hand, required the eligible candidates to submit their application forms in the prescribed format. There is no explanation in the counter affidavit filed by the appellant as to when the application form alongwith the permission was filed by the appellant.

(4) It appears that the process of selection i.e., interview took place on 28.12.2015 and the appellant as well as respondent No. 4 alongwith other candidates participated in the selection. The result of the selection remained undeclared although some complaints raising sense of doubt regarding induction of the appellant alone came to be made which went unnoticed. The counter affidavits filed by the appellant as well as Vidhan Sabha nowhere have disclosed as to when the result of the selection was declared. There is also a contradiction in paras – 8 and 11 of the counter affidavit filed by the Vidhan Sabha. In the process of scrutiny only 23 candidates were found eligible which shows that the appellant was not inclusive. In para – 11, it is stated that 24 candidates were called for interview.

(5) The record reveals that an order of appointment was issued in favour of the appellant on 14.07.2016, whereafter, the respondent No.4/petitioner feeling aggrieved approached this Court by means of Writ Petition No. 20207 (SB) of 2016. The writ petition was dismissed by means of judgment and order dated 27.02.2018 on the ground that after participation in the selection, the respondent No.4 (petitioner in the writ petition) could not turn around and challenge the selection.

(6) The judgment rendered by the Writ Court was assailed by the respondent No.4/petitioner by filing a Review Application No. 64707 of 2018 and the same, on being heard with due opportunity to the parties, was allowed vide judgment dated 31.08.2022. After allowing of the review application, the writ proceedings revived and during the interregnum period, jurisdiction of service matters cognizable before a division bench was reclassified. After reclassification of the jurisdiction under the orders of Hon'ble the Chief Justice, the matter became cognizable by a learned Single Judge. It is in this manner that the matter came up before the learned Single Judge, who in turn has decided the same.

(7) It would be apt for this Court to take note of the fact that while dealing with the application for review, the issue as to the locus of the respondent No.4/petitioner was dealt with on the premise of settled principles of law and the judgment so rendered was not questioned by the present

appellant or the Vidhan Sabha, therefore, the same **attained** finality.

(8) It is in pursuance of the above judgment that the Writ Court proceeded with the matter afresh and has rendered the judgment impugned here in this appeal. Although the arguments have been advanced on the aspect as to the locus of respondent No.4/petitioner to institute the proceedings before the Writ Court, but such a ground urged before us was open to be raised in the review application or even before the Writ Court, therefore, such an argument at the first blush did not impress us for any consideration.

(9) We may also take note of the fact that no material whatsoever as regards the possession of essential eligibility of academic qualification, filing of the application in prescribed form or disclosure of result declaration was placed before the Writ Court in the counter affidavit filed by the appellant, as such, to question the locus of respondent No.4/petitioner on the ground that he does not have a consequential right of appointment based on the declaration of result, in our humble view, is afterthought, misconceived and short of a legal ground. The only stand taken before the Writ Court in para 20 of the counter affidavit filed by the appellant was that the appellant was permitted to appear by the Hon'ble Speaker who was vested with the power to relax the rule and the appellant having obtained more marks was stated to have been appointed. It was on this much of premise set-out by the appellant before the Writ Court that he contested the matter inclusive of the review application. The Vidhan Sabha or the appellant never challenged the order passed on the review application questioning the locus of the respondent No.4/petitioner. The case laws cited by the learned counsel for the appellant in absence of any challenge to the judgment dated 31.08.2022 passed on the review application are wholly misplaced and misconceived.

(10) Sri Sandeep Dixit, learned Senior Counsel assisted by Sri Ajay Singh, learned counsel for the appellant laid emphasis on the following case laws in particular:-

(i) Md. Zamil Ahmed v. State of Bihar and others [(2016) 12 SCC 342]

(ii) Ayaaaubkhan Noorkhan Pathan v. State of Maharasthra and others [(2013) 4 SCC 465]

(iii) State of Uttar Pradesh v. Karunesh Kumar and others [2022 SCC OnLine SC 1706]

(iv) Dr. Pragya Shukla v. Union of India and another [2022 SCC OnLine Del 3522]

(11) Having heard learned counsel for the appellant at length, we are not convinced that the respondent No.4/petitioner did not have a locus for the reason that the said question between the parties had attained finality in terms of the judgment rendered in the review application. Further, for want of declaration of result, any participant in the selection held on 28.12.2015 was an aggrieved party inclusive of the respondent No.4/petitioner. We may emphasize that every selection held for filling up the posts in public employment is bound to be concluded in accordance with law before it is acted upon. Therefore, while rejecting the arguments advanced on the issue of locus, we find ourselves in agreement with the judgment rendered on 31.08.2022 which has attained finality.

CONSIDERATION ON MERIT

(12) Coming to the merits of the case, it is to be noticed that the post of Information Officer having fallen vacant became open for being filled up in the Secretariat of Legislative Assembly, U.P.. Any post in the Secretariat of Legislative Assembly is to be filled up as per the Act or Rules framed under Article 187 of the Constitution, which, for ready reference, is reproduced below:-

"Article 187. Secretariat of State Legislature -- (1) The House or each House of the Legislature of a State shall have a separate secretarial staff:

Provided that nothing in this clause shall, in the case of the Legislature of a State having a Legislative Council, be construed as preventing the creation of posts common to both Houses of such Legislature.

(2) The Legislature of a State may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House or Houses of the Legislature of the State.

(3) Until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the Assembly or the Council, and any rules so made shall have effect subject to the provisions of any law made under the said clause."

(13) The Governor in exercise of the powers conferred under sub-Article (3) of Article 187 had framed the Uttar Pradesh Legislative Assembly Secretariat (Recruitment and Conditions of Service) **Rules, 1974** [in brevity, it is referred to as 'Rules, 1974'] for the purpose of appointment on the posts in the Vidhan Sabha Secretariat, whereas the post in question was not enumerated in the said Rules.

(14) Undisputedly, the post in question was advertised for being filled up as per the essential academic qualification mentioned in the advertisement and open competition was based on the marks obtained in the interview. The essential qualification in the advertisement, as noted above, clearly prescribes that **a candidate must possess a degree of graduation with Hindi as a subject.** Prescription for such a qualification was in consonance with the Rules applicable by reference under Rule 50 of Rules, 1974.

(15) The case set-up by the respondent No.4 (petitioner) before the Writ Court was to the effect that as per the advertisement issued on 28.05.2015, the essential qualification for Information Officer is Graduation with one subject as Hindi alongwith Diploma in Journalism or 5 years experience in the field of Journalism. The preferential qualifications were also prescribed. The respondent No.4/petitioner possessed the requisite qualification of B.A. and was rather M.A. in Hindi with Post-Graduate Diploma in Journalism and Mass Communication. The appellant on the other hand was stated not to have the requisite qualification of Graduation with one subject as Hindi, yet he participated in the interview held on 28.12.2015 and without declaration of result, the post of Information Officer was filled up by the appellant. Such an appointment became known from the website of Vidhan Sabha, U.P. It was also pleaded that when the result for the post of

Information Officer was not declared, the respondent No.4/petitioner had moved an application under Right to Information Act, but of no avail. Again he had moved applications dated 05.08.2016 and 16.08.2016 under Right to Information Act for providing the appointment letter of appellant which evoked no response. A complaint was moved on 23.12.2015 by a public spirited person to His Excellency the Governor of of U.P. stating therein that the entire selection procedure has been influenced just to accommodate the appellant/respondent No.3 who did not possess the essential qualification required for the post in question. Further, it was averred in the writ petition that though Hon'ble the Speaker was not vested with any power to relax the essential educational qualification, but even then on relaxing the essential qualification for the appellant, the solitary post of Information Officer which fell vacant in the Vidhan Sabha Secretariat was filled up without declaration of the result of the selection held on 28.12.2015. In these circumstances, the respondent No.4/petitioner prayed for quashing of the selection/ appointment of the appellant/opposite party No.3 and for declaration of the result of selection held on 28.12.2015.

(16) In the counter affidavit filed by the Vidhan Sabha before the Writ Court, it was stated that under relevant Rules, neither there is any prescription or mode of recruitment nor the source of recruitment for the post of Information Officer in the Secretariat of Legislative Assembly, U.P. Accordingly, an advertisement dated 25.05.2015 was said to have been issued inviting applications from the eligible candidates for filling up the post of Information Officer. In response to the advertisement issued by the Legislative Assembly, 254 applications were received, however, 23 applicants were found eligible and rest of 231 applications were rejected being ineligible. Further, it has been averred in the counter affidavit that on the application moved by the appellant/opposite party No.3 to the Hon'ble Speaker, he was granted permission to appear in the interview. It has been emphasized in the counter affidavit that in terms of the provisions contained in Rule 49 of the Rules, 1974, the Hon'ble Speaker is vested with the power to relax rules.

(17) It is further averred in the counter affidavit that in terms of the provisions contained in Rule 6 (ii) of 1974 Rules, the selection committee was constituted and 24 incumbents including appellant/opposite party No.3 were intimated about the date of interview as 28.12.2015. Out of 24, 20 candidates appeared in the interview on 28.12.2015 and after considering the academic qualifications, experience and performance of the candidates, appellant/opposite praty No.3 was awarded 35 marks, whereas respondent No.4/petitioner was awarded 27 marks. On this basis, appellant/opposite party No.3 was issued appointment order dated 14.07.2016. It has been stated in the counter affidavit that since the appellant/opposite party No.3 was permitted to participate in the interview on the basis of the application moved by him before the Hon'ble Speaker, who is vested with the power to relax rules and the post of Information Officer is an important post, the discretion of Hon'ble Speaker has to be given due weightage. Lastly, it has been stated in the counter affidavit that requisite reply was sent to the application dated 08.08.2016 preferred by the writ petitioner under Right to Information Act through

post on 11.08.2016, but it was returned undelivered with the noting that the applicant does not reside at the given address.

(18) In the counter affidavit filed by appellant/opposite party No.3 before the Writ Court, it has been stated that he is a Graduate and he was engaged as Assistant Review Officer (Sessional) in 2004-05, 2005-06 and 2006-07. Thereafter, he performed on the post of Review Officer on contract basis since 13.04.2012 and he continued to work on the said post till 14.07.2016, as he was appointed on the post of Information Officer in the month of July, 2016. Since he had worked in the field of journalism from 01.01.2007 to 31.03.2012 in a Hindi Daily newspaper Tarun Mitra and he became a Member of the Press Club from the year 2011 to 2016, he has vast experience in writing news in vernacular language and during this period, he discharged his duties for covering the proceedings of Legislative Assembly.

(19) Sri Sandeep Dixit, learned Senior Advocate for the appellant has argued that once a candidate has participated in the selection and found unsuccessful, he has no right to question the selection proceedings of a successful candidate. The argument on locus we have already dealt with in the first part.

(20) Besides this, all the arguments made on behalf of the appellant and employer are more or less the same with the distinguishing feature that U.P. Vidhan Sabha has not filed any intra-Court appeal against the impugned judgment.

(21) In the light of the factual position narrated above, the submission putforth on merit by the learned counsel for the appellant is to the effect that once relaxation/concession as to the essential academic qualification was granted by the competent authority, his selection based on the merit ought not to have been interfered with at the instance of respondent No.4/petitioner who, even in the event of writ petition having been allowed, does not reap the consequences of the declaration of result, if any.

(22) In order to make out a case for interference, some additional documents have come to be filed before us at the appellate stage which deserve a deeper scrutiny. The selection based on the interview took place on 28.12.2015 and interestingly, the material placed on record indicates that the office noting in relation thereto was only prepared on 05.06.2016 and was placed before the Hon'ble Speaker on 14.07.2016.

(23) Prior to the approval of competent authority, the office note does not indicate as to when the result of the selection was declared. The only fact which the office note indicates is regarding the merit of the 20 candidates that too without mention of their application numbers. Holding of the interview on 28.12.2015 is mentioned. The office note evidently shows that the same is silent about the declaration of the result of selection held on 28.12.2015. Surprisingly, even without declaration of the result until 14.07.2016, no appointments could be made. The order of appointment issued in favour of the appellant was itself issued on 14.07.2016 vide letter No. 1231/fi0l0/vf/k0/94/97. Not only that the permission to participate in the selection was highly objectionable and beyond the scope of Rules but the very appointment of the appellant benefiting the result in a clandestine manner brought the

controversy before this Court through Writ Petition No. 20207 (SB) of 2016 which has finally been allowed by means of the judgment dated 25.01.2024 for the reasons recorded therein.

(24) The counter affidavits filed before the Writ Court by the Vidhan Sabha as well as by the appellant for the purposes of relaxation of essential academic qualification have banked upon Rule 49 of 1974 Rules, which for ready reference is extracted below:-

"49. Power of the Speaker to relax Rules *– The Speaker may, in exceptional circumstances, relax the age limit and other qualifications, other than educational qualification, prescribed for any post in these rules."*

(25) Having heard the arguments putforth by learned counsel for the parties, **the first question that arises for consideration is as to whether the competent authority was well within his jurisdiction to have relaxed the essential conditions of recruitment or the same as per the Rules applicable in this behalf was permissible or not; and secondly, as to whether appointment of an ineligible candidate *dehors* the rules has a right to continue in blatant disregard of Articles 14 and 16 of the Constitution of India read with the Rules applicable.**

DISCUSSION ON FINDINGS

(26) Recruitment in the matter of public employment is founded on two basic principles. Firstly that the recruitment agency must have credibility of the highest order in executing the principle of open competition and secondly, the implementation of rules applicable insofar as the process is concerned must equally stand the tests of Article 14 of the Constitution of India. It is a foundational principle of recruitment as laid down in ***Syed Khalid Rizvi & Ors. vs. Union of India & Ors. [1993 Supp.(3) SCC 576]*** that the essential conditions of recruitment cannot be relaxed. In the context of principle as laid down by the Hon'ble Apex Court, we may profitably refer to Rule – 49 of the Rules, 1974 as has been placed reliance upon. It is true that in exceptional circumstances, Hon'ble the Speaker can relax Rules pertaining to age limit and other qualifications, but not **educational qualifications**, prescribed for any post mentioned in the Rules, 1974. Undisputedly, the Rules framed under Article 187 of the Constitution of India, i.e., 1974 Rules did not enumerate the post of Information Officer. It is strange that against the advertised post of Information Officer, which is not enumerated in the Rules, 1974, on the application of appellant/opposite party No.3, the Hon'ble Speaker has relaxed the educational qualification, which is not at all permissible. Thus, the appointing authority under these circumstances for the purpose of recruitment was firstly bound by the terms of the advertisement and secondly the power of relaxation available, if any, could not be exercised beyond the scope of rules as applicable to the service in question.

(27) Learned counsel for the appellant in order to defend the appointment made has argued that once the permission to participate in the selection was granted by the competent authority, it clearly would signify that an exemption pertaining to the possession of essential academic qualification was implied to have been granted by the competent authority. The

submission putforth before us is unconvincing and does not impress us for the reason that the permission as available on record was firstly not weighed in the light of the academic qualifications possessed by the appellant and secondly, there was no exercise. The reference to Rule 49 of the 1974 Rules as has been placed reliance upon in the counter affidavit filed by the Vidhan Sabha is merely an eyewash. The appellant's further contention that the appointment made by the competent authority in view of the relaxation having been granted was fully in consonance with law and the appellant having rendered more than 7 years and at this stage having become overage, would face uncertainty in his career is again an argument which essentially is, more an emotional argument than legal. Legally in absence of declaration of result of a selection, it cannot be said to have been done culminating into the rights of appointment in favour of a meritorious candidate and in the present case, no stand was adopted in the counter affidavits filed before the Writ Court that the result of selection, prior to the date of appointment of the appellant, was ever declared by the competent authority. Even the office note based on the selection held on 28.12.2015 was drawn nearly six months later. There is no reference to the declaration of result prior or after the approval of such a selection by the competent authority. In these circumstances, the appointment termed to have been made validly though based on an unauthorized relaxation is a far-fetched argument which has no sanctity in the eyes of law.

(28) *Per contra*, learned counsel appearing for the respondent No.4/petitioner taking us through the material available on record has, at the first instance, argued that **the question of relaxation in the present case, when analyzed from the plain reading of application made on 15.06.2015 is purposely silent on the academic qualification possessed by the appellant** and secondly, even if there was a disclosure on the part of appellant for not being possessed with the subject of Hindi at the level of graduation as required in the advertisement, yet **the exercise of power within the scope of Rule 49 of 1974 Rules firstly not being applicable in the present case was wrongly availed of by the competent authority** and secondly, even if the said Rule was available, yet the same does not permit relaxation of the essential academic qualification as is evident from the plain reading of the Rule itself. Once the rule itself forbids the relaxation of essential academic qualification, no question of relaxation in the present case could arise. There did not exist any special circumstances too as has rightly been observed by the learned Single Judge.

(29) The argument putforth by the learned counsel for the respondent No.4/petitioner is sought to be fortified on the strength of case laws for which ready reference, we may refer to, as under:-

(i) Management of Narendra & Company Private Limited vs. Workmen of Narendra & Company [(2016) 3 SCC 340];

(ii) Judgment dated 04.04.2019 passed in Special Appeal No. 562 of 2005, Devendra Singh vs. District Administrative Committee

(iii) Kishorilal Charmakar and another v. Distt. Education Officer and another [(1998) 9 SCC 395]

(iv) State of Madhya Pradesh & another v. Dharam Bir [JT 1998 (4) SC 363]

(v) State of Karnataka and others v. Gadilingappa and others [(2010) 2 SCC 728]

(vi) Basawaraj and another v. Special Land Acquisition Officer [(2013) 14 SCC 81]

(30) Dr. Misra, learned counsel has heavily come down on the aspect of non-declaration of result. It is argued that no stand whatsoever was adopted before the Writ Court, therefore, all the factual pleas taken at the appellate stage are of no consequence.

(31) Having regard to the arguments and observations made above, even if the documents which are additionally filed alongwith the appeal are taken into consideration, the same lead us to a strong conviction that the manner in which the relaxation of academic qualification for appointment was granted by the competent authority, the same was clearly indicative of nothing but nepotism besides it being in blatant disregard of the well-settled principles of recruitment. The appointment of an ineligible person that too without declaration of result, was clearly *dehors* the rules and has rightly been set aside as held by the learned Writ Court. The modus operandi of the competent authority being writ large on the face of record was rightly interfered by the learned Single Judge. In the interest of justice, we caution the Recruitment Agencies and competent authorities not to practice nepotism and favouritism in the matter of public employment as it would shake the very confidence and foundation of public faith in the rule of law.

(32) Now coming to the ground of equity as raised on the basis of working for about more than six years, learned counsel for the respondent No.4/petitioner has relied upon the judgment passed by the Apex Court in ***State of Madhya Pradesh and another v. Dharam Bir (supra)***, wherein it has been observed that the plea that a person appointed illegally is working on the post for more than a decade, his appointment should not be disturbed, cannot be accepted. Relevant paragraph Nos. 32 and 33 of the judgment are reproduced as under:-

"32. "Experience" gained by the respondent on account of his working on the post in question for over a decade cannot be equated with Educational Qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. **If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government.**

33. The post in question is the post of Principal of the Industrial Training Institute. **The Government has prescribed a Degree or Diploma in Engineering as the essential qualification of this post. No one who does not possess this qualification can be appointed on this post. The educational qualification has direct nexus with the nature of the post. The principal may also have an occasion to take classes and teach the students. A person who does not hold either a Degree or Diploma in Engineering cannot possibly teach the students of Industrial Training Institute the technicalities of the subject of Engineering and its various branches."**

(33) The appointment of persons who do not possess the minimum prescribed qualification, are illegal. In ***State of Karnataka v. Gadilingappa & others (supra),*** the Apex Court in paragraph Nos. 6 and 7 observed as under:-

6. Admittedly, the respondents herein were working as Primary School Teachers for a long period of time and they had rendered service as such continuously without any break. However, after perusing the relevant documents on record what comes to light is the fact that none of the respondents had undergone the T.C.H. course, which was the minimum prescribed qualification at the relevant time for being appointed to the post of a teacher. Since the respondents did not possess the minimum prescribed qualification and because of which their appointment was in contravention of the Cadre and recruitment Rules, we are of the considered view that their appointments were illegal appointments.

7. Furthermore, neither has it been brought to our notice nor was it specifically stated before the High Court by the respondents in the Writ Petition Nos. 45859-891 of 2003 that the respondents belonged to the Scheduled Castes or Scheduled Tribes category, which was the case of the petitioners in Writ Petitions Nos. 33173-33220 of 2003 (S-KAT) as well the main factor taken into consideration by the High Court of Karnataka while allowing the claims of the petitioners therein for regularization of their services. Besides, the Constitutional Bench had, in Secretary, State of Karnataka and Others v. Umadevi(3) and Others reported in (2006) 4 SCC 1, clarified in explicit terms that the decisions which run counter to the principles settled and the directions given in the Uma Devi's (supra) case will stand denuded of their status as precedents. Here, we also wish to point out that it is a well settled principle of law that even if a wrong committed in an earlier case, the same cannot be allowed to be perpetuated."

(34) In the cases of ***State of Madhya Pradesh and another v. Dharam Bir (supra) and State of Karnataka v. Gadilingappa & others (supra),*** the facts of both cases are more or less similar. In the former case, the minimum essential qualification prescribed for the the post of Principal of Industrial Training Institute is Diploma in Engineering, whereas in the later case, the minim prescribed qualification is T.C.H. and they had worked for a long period of time. In both cases, since they were not having the minimum prescribed qualification, the Apex Court opined that their appointments were illegal appointments. Here in this case, since the appellant did not possess the minimum qualification prescribed for appointment on the post of Information Officer, the appointment offered to him on the basis of invalid relaxation is *dehors* the Rules and illegal.

(35) Having considered the arguments putforth by learned counsel for the parties as well as the observations made by the Writ Court in its judgment, there is no escape to conclude that the opinion recorded by the learned Single Judge is the only view possible in the facts and circumstances of the case which deserves to be affirmed for all the more reasons recorded above.

(36) For the aforesaid reasons, the answer to both questions is in negative as the power does not vest in the Hon'ble Speaker to relax the essential qualification and consequently, the appointment of the

appellant *de hors* the Rules who is not at all eligible to be considered for appointment is illegal and has rightly been set aside.

(37) In the result, the Special Appeal filed by the appellant fails and is **dismissed** accordingly.

(2024) 3 ILRA 413
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2024
BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
HON'BLE BRIJ RAJ SINGH J.

Special Appeal No. 537 of 2023
along with
Special Appeal Defective No. 930 of 2023

Vishwash Kanaujia ...Appellant
Versus
Dr. Ram Chandra Pathak & Ors. ...Respondents

Counsel for the Appellant:
Utsav Mishra, Abhineet Jaiswal, Gaurav Mehrotra

Counsel for the Respondents:
Raj Kumar Pandey, C.S.C.

A. Service Law – Constitution of India – Article 14 & 15 – Hostile discrimination – U.P. Government Servants (Disciplinary & Appeal) Rules, 1999 – Rule 14 – Disciplinary proceeding – Punishment – Charge of allotting marks to the candidate whimsically, while acting as the Subject expert member in the Selection Committee – Chairman of Committee was exonerated from the charges – Effect – Held, since the allegations have been levelled mainly against the Chairman, against whom exoneration order has been passed by the Central Government, as to how and under what circumstances, the respondent No.1/ petitioner being a Member of Selection Committee, that too in the capacity of Subject Expert can be penalized – The Chairman who is responsible for all misdeeds has been exonerated by the Government of India, but a person who has been nominated as subject expert has been punished for the mistake committed by the Chairman which amounts to hostile discrimination and violation of Articles 14 and 15 of the Constitution – Since there is no role of the respondent No.1/petitioner to appoint the candidates and the inquiry conducted by the department is wholly unfounded, we are of the firm opinion that setting aside of the impugned punishment order by the learned Single Judge is wholly in consonance with law. (Para 63, 64 and 69)

B. Service Law – UP Government Servant Criterion for Recruitment by Promotion Rules, 1994 – Rule 4 – Promotion – Additional Cane Officer – Criteria of promotion – Principle of merit – Applicability – How far seniority has significance – Writ court directed for holding review Departmental Promotion Committee (D.P.C.) – Validity challenged – Held, direction issued by the learned Single Judge for holding review DPC is not an emerging necessity and would offend the principle of merit as prescribed under Rule 4 of the Rules, 1994 – Any procedure giving precedence to seniority as contemplated under para 11 of the Government Order would clearly stand contrary to the essence of merit wherever it is deciphered on the scale of marks – High Court rejected the argument of the respondent/petitioner that seniority would assume the decisive role calling it fallacious. (Para 81)

Appeal allowed in part. (E-1)

List of cases cited :-

1. Premlata Joshi Vs Chief Secretary, St. of Uttarakhand & ors.; (2013) 16 SCC 482

2. Manohar Lal (Dead) by LRs. Vs Ugrasen (Dead) by LRs & ors.; (2010) 11 SCC 557

3. Bharat Amratlal Kothari Vs Dosukhan Samadkhan Sindhi; (2010) 1 SCC 234

4. Akella Lalitha Vs Konda Hanumantha Rao & anr.; 2022 SCC OnLine SC 928

5. UP Power Corporation Limited Vs Ayodhya Prasad Mishra & anr.; (2008) 10 SCC 139

6. St. of U.P. & ors.Vs Babu Ram Upadhyaya; AIR 1961 SC 751

7. P.D. Agrawal & ors.Vs St.of U.P. & ors.; (1987) 3 SCC 622

8. Naga People's Movement of Human Rights Vs U.O.I.& ors.; AIR 1998 SC 431

9. C. Rangaswamaeah & ors.Vs Karnataka Lokayukta & ors.; AIR 1998 SC 96

10. U.O.I.& anr.Vs Ashok Kumar Aggarwal; (2013) 16 SCC 147

11. Government of Andhra Pradesh & ors.Vs P. Laxmi Devi; (2008) 4 SCC 720

12. B. N. Nagarajan & ors.Vs St.of Mysore & ors.; AIR 1996 SC 1942

13. The Inspector of Panchayats and District Collector, Salem Vs S. Arichandran & ors.; 2022 SCC Online SC 1282

14. The St. of U. P. & ors.Vs Rajit Singh; 2022 SCC Online SC 341

15. Chairman, Life Insurance Corporation of India & ors.Vs A. Masilamani; (2013) 6 SCC 530

16. M. Ramesh Vs U.O.I.; (2018) 16 SCC 195

17. Dinesh Kumar Kashyap Vs South East Central Railway; (2019) 12 SCC 798

18. St. of U.P. Vs Rajkumar Sharma; (2006) 3 SCC 330

19. Jatinder Kumar Vs St. of Pun.; (1985) 1 SCC 122

20. UPSC Vs M. Sathiya Priya; (2018) 15 SCC 796

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

(1) Heard Sri Vimal Kumar Srivastava, learned Additional Advocate General assisted by Sri Praful Kumar Yadav, learned Additional Chief Standing Counsel appearing for the applicants/appellants and Sri S.C. Mishra, learned Senior Advocate assisted by Sri Raj Kumar Pandey, learned counsel appearing for the sole respondent on the application for condonation of delay in Special Appeal No. 930 (D) of 2003, as the appeal has been filed beyond time by five days, as reported by the Office.

(2) Learned Counsel appearing for the respondents submits that he has no objection, if the application for condonation of delay is allowed.

(3) In view of above, the application for condonation of delay (C. M. Application No.1 of 2023 moved in Special Appeal No. 930 (Defective) of 2023 is **allowed** and the delay in filing the special appeal is hereby condoned. Office is directed to allot regular number to the appeal.

On the memo of appeals

(4) Heard learned counsel for the respective parties in both the Special Appeals.

(5) Special Appeal No. 537 of 2023 is directed against the judgment and order dated 31.10.2023 passed in Writ-A No. 4705 of 2023, *Dr. Ram Chandra Pathak v. State of U.P. and others,* whereby the writ petition filed by the respondent No.1/petitioner, challenging the inquiry report dated 05.04.2021 and punishment order dated 31.05.2023, has been allowed

with a direction to the State-authorities to hold a review Departmental Promotion Committee (D.P.C.) for consideration for promotion of petitioner/respondent No.1 along with appellant/opposite party No.4/in Special Appeal No. 537 of 2023 on the post of Additional Cane Commissioner, Department of Sugar Industries and Cane Development ignoring the impugned punishment order dated 31.05.2023.

(6) The State has also filed its Special Appeal No. 930 (D) of 2023 assailing the judgment and order dated 31.10.2023 passed in Writ-A No. 4705 of 2023, *Dr. Ram Chandra Pathak v. State of U.P. and others.*

(7) Since both the Special Appeals are directed against the judgment and order dated 31.10.2023 passed in Writ-A No. 4705 of 2023, they are being decided by a common judgment and for the purpose of disposal, the contents made in Special Appeal No. 537 of 2023 are being considered.

BRIEF FACTS

(8) The case has chequered history. The respondent No.1/petitioner (Dr. Ram Chandra Pathak) in Special Appeal No. 537 of 2023 had joined the services on the post of District Cane Officer on 01.01.1999 and later on he was promoted on the post of Deputy Cane Commissioner in the year 2012 and on the post of Joint Cane Commissioner in the year 2015.

(9) While he was discharging his duties on the post of Joint Cane Commissioner, vide order dated 20.09.2015, respondent No.1/ petitioner was sent on deputation as Chief Cane Development Officer to the U.P. Co-operative Sugar Mills Federation Limited, Lucknow for five years, whose term came to an end on 27.09.2020. Thereafter, he was attached in the aforesaid Office vide order dated 19.11.2020 till closure of crushing season 2020-2021 or till issuance of Government Order, whichever was earlier.

(10) While he was on deputation, the respondent/petitioner was required to be a Member of Selection Committee as an expert alongwith four other members for selection on the post of Cane Officer. On the complaints moved by thirteen different persons alleging irregularities, the State Government constituted three member committee for conducting a fact finding inquiry and the said Committee submitted its report on 31.07.2017. In the meantime, in compliance of the order dated 19.08.2018 sent by the Ministry of Agriculture and Farmers Welfare, the Special Secretary sent his Examination/Audit report on 20.01.2020.

(11) Thereafter, a departmental/disciplinary proceeding was initiated against the respondent No.1/petitioner vide Office Memorandum dated 04.06.2020. While serving a copy of the office memorandum on the respondent No.1/petitioner on 23.06.2020, a copy of the charge sheet containing six charges, on the basis of the alleged fact finding/preliminary inquiry report dated 31.07.2017 and the Audit Report dated 20.01.2020 submitted by the Special Secretary/Vigilance Officer, Sugar Industries and Cane Development Department, Government of U.P., were enclosed requiring him to file his reply within fifteen days from the date of service of charge sheet. Consequently, the respondent No.1/petitioner requested the General Manager (Complainant/Personnel)

of Sugar Federation to permit him to peruse the original documents related to selection of the post of Cane Officer and provide him the photocopies of the same. Since the General Manager (Complainant/Personnel) did not accede to his request, he had again requested him by way of a reminder dated 21.09.2020 to provide him the requisite documents expeditiously in order to file a reply to the charge sheet. In the meantime, pursuant to the transfer of Inquiry Officer, Sri Bachchu Lal, Joint Secretary, Sugar Industries and Cane Development Department was appointed as Inquiry Officer on 13.11.2020. Since nothing was provided to the respondent No.1/petitioner, he submitted an inconclusive reply denying all charges levelled against him to the Inquiry Officer.

(12) On receipt of reply from the respondent No.1/petitioner the Inquiry Officer had directed the respondent No.1/petitioner to appear before him on 25.02.2021 at 3.00 P.M. in his chamber for providing evidence in support of the charges levelled against him. It was also mentioned in the said letter that since the respondent No.1/petitioner denied all the charges, the proceedings will be held in accordance with U.P. Government Servant (Discipline and Appeal) Rules, 1999 and the Government Order dated 22.04.2015 issued in this regard. Thereafter, the Inquiry Officer submitted his report on 05.04.2021.

(13) After receipt of letter dated 01.07.2022 alongwith inquiry report dated 05.04.2021, the respondent No.1/petitioner preferred a letter dated 25.07.2022 to provide the requisite documents for submission of effective reply to the inquiry report. The same very request was done by him thrice. Since no heed was paid towards his request, the respondent No.1/petitioner while replying to the inquiry report pointed out the irregularities committed in conducting the inquiry denying all the charges levelled against him. At last, the disciplinary authority culminated the proceedings with the passing of order dated 31.05.2023 by withholding five annual increments with cumulative effect along with censure entry in his character roll.

(14) Challenging the order dated 31.05.2023, the respondent No.1/petitioner preferred his representation dated 08.06.2023 that no further meeting of Departmental Promotion Committee (D.P.C.) be held.

(15) In these circumstances, the respondent No.1/petitioner filed Writ-A No. 4705 of 2023 which was allowed with certain directions.

(16) Sri Gaurav Mehrotra, learned Counsel for the appellant/respondent No.4 has submitted that for promotion to the post of Additional Commissioner, Department of Sugar Industries and Cane Development, the Uttar Pradesh Government Servant Criterion for Recruitment by Promotion Rules, 1994 [for the sake of brevity, it is referred to as 'Rules, 1994'] as amended from time to time. Rule 4 of the **Rules, 1994** provides the criterion for recruitment by promotion to the post one rank below the Head of Department, shall be made on the basis of merit. For ready reference, the same is reproduced as under:-

"4. Criterion for recruitment by promotion – Recruitment by promotion to the post of Head of Department to post just one rank below the Heads of Department and to a post in any service carrying the pay scale the maximum of which is Rs.18,300/- or above shall be made on the basis of merit, and to the rest

of the posts in all services to be filled by promotion including a post where promotion is made from a non-gazetted post to a gazetted post or from one service to another service, shall be made on the basis of seniority subject to the rejection of the unfit."

(17) On 24.06.2023, a Departmental Promotion Committee (DPC) was convened for consideration of promotion of the candidates for the post of Additional Cane Commissioner. Since the criteria for promotion on the post of Additional Cane Commissioner, being the post one rank below the Head of Department, was merit as per Rule 4 of the Rules, 1994, the Annual Confidential Reports (ACRs) of all such candidates falling within the zone of eligibility was considered by the DPC on 24.06.2023.

(18) Learned counsel for the appellant has vehemently submitted that **the marks of the appellant are more than that of the respondent No.1/petitioner on the basis of ACRs for the last 10 years.** Since the appellant having scored more marks than the respondent No.1/petitioner was, therefore, rightly recommended by the DPC for promotion on the post of Additional Cane Commissioner.

(19) Since the post of Additional Cane Commissioner is just below the post of Cane Commissioner, the provisions of Rule 4 of Rules, 1994 would be applicable and the sole criteria is **merit.** Thus seniority has no role and it would come into play when the appellant/respondent No.4 and respondent No.1/petitioner were awarded equal marks in merit.

(20) In support of his submissions that the criterion for promotion on the post in question was merit and it is only when two candidates have equal marks, the role of seniority comes into play, he has relied upon the judgment of Hon'ble Supreme Court in the case of ***Premlata Joshi v. Chief Secretary, State of Uttarakhand and others [(2013) 16 SCC 482].*** Accordingly, in light of the recommendations made by the DPC and relying upon the aforesaid judgment, the appellant/respondent No.4 was promoted vide Office Order dated 12.09.2023.

(21) Learned counsel for the appellant/respondent No.4 has further submitted that in the writ proceedings, by way of an amendment application, the writ petitioner assailed the entire proceedings of the Departmental Promotion Committee (DPC) held on 24.06.2023 which was allowed vide order dated 06.07.2023, but the learned Single Judge did not interfere with the recommendation of DPC convened on 24.06.2023. Since the learned Single Judge did not interfere with the aforesaid recommendations, no occasion arises for issuance of a direction for holding a review DPC, which was not prayed by the writ petitioner and as such, the direction given by the learned Single Judge was beyond the relief sought by the writ petitioner.

(22) When a party does not pray for a specific relief, the Courts ought not to have granted relief. In support of this, he has relied upon the judgments passed by the Apex Court in the cases of ***Manohar Lal (Dead) by LRs. v. Ugrasen (Dead) by LRs and others [(2010) 11 SCC 557], Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi [(2010) 1 SCC 234]*** and ***Akella Lalitha v. Konda Hanumantha Rao and another [2022 SCC OnLine SC 928].***

(23) Further submission of learned counsel for the appellant is that since the

impugned judgment is based upon the findings which are beyond the pleadings pleaded in the writ petition, the judgment rendered by the learned Single Judge is unsustainable on this count alone. More over, the learned Single Judge has not returned any finding as to why a direction for holding review DPC was warranted **when the proceedings of DPC convened on 24.06.2023 were not quashed. Thus, no direction to hold DPC could have been issued by the learned Single Judge for considering the case of the appellant/respondent No.4 and respondent No.1/petitioner.**

(24) In the facts and circumstances of the instant case, the judgment of the Apex Court in ***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and another [(2008) 10 SCC 139]*** relied upon by the writ petitioner is not applicable for the reason that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution of India. The High Court was, therefore, right in holding that Executive Engineers placed in Category I must get priority and preference for promotion to the post of Superintendent Engineer over Executive Engineers found in Category II. Here in this case, both the appellant and respondent No.1 were holding the post of Joint Cane Commissioner and were eligible for promotion to the post of Additional Cane Commissioner. Thus, there are no two categories for applying the observations made by the Apex Court in the aforesaid judgment.

(25) Further submission of the learned counsel for the appellant is that the Government Order dated 27.09.2019 which was relied upon by the writ petitioner to negate the provisions of Rule 4 of Rules, 1994 was neither produced before the learned Single Judge nor any specific pleadings were made in the writ petition in this respect.

(26) In paragraphs 20 to 24 of the counter affidavit dated 12.07.2023 before the writ court, the appellant/respondent No.4 has asserted that since the criteria for promotion on the post of Additional Cane Commissioner being the post one rank below the Head of Department was merit as per Rule 4 of Rules, 1994, the highest marks secured by the candidates are eligible for promotion to the post of Additional Cane Commissioner. Since the appellant/respondent No.4 had secured more marks than the respondent No.1/writ petitioner, he was rightly recommended by the DPC for promotion on the said post.

(27) Learned counsel for the appellant has further submitted that in response to the aforesaid specific contention of the appellant/respondent No.4, the respondent No.1/petitioner instead of denying the provisions of Rule 4 of Rules, 1994 has stated that he was covered by the Government Order dated 27.09.2019 without substantiating the averments. In absence of any pleading by the respondent No.1/petitioner with regard to the applicability of the Government Order dated 27.09.2019, **no cognizance shall be taken for the first time at the appellate stage.**

(28) The contention of the learned Counsel for the appellant is that it is trite law that the arguments of a litigant as also findings cannot traverse beyond the pleadings and have to be in consonance

with the judgments passed by the Apex Court as well as by this Court.

(29) Further, he contends that in the Government Order dated 27.09.2019 nowhere merit has been defined. Thus, the said Government Order is not applicable to the facts and circumstances of the instant matter as it supplants the same instead of supplementing the Rules, 1994.

(30) Elaborating his submissions, he has emphasized the contents of para – 11 of the Government Order wherein it has been provided that on the basis of the provisions contained in paragraph Nos. 7 (1) to (10) of the aforesaid Government Order, those applicants/employees who secure 80 or above out of 100 marks, would be placed in the eligible list and to the extent of posts available, on the basis of their seniority, such employees would be promoted. Further such employees who are placed in the eligibility list would not be discriminated on the basis of merit. For ready reference, contents of paragraph No.7(11) of the Government Order dated 27.09.2019 are reproduced hereunder:-

"(11) उपर्युक्त उप प्रस्तर-1 से 10 के आधार पर 100 अंकों मे से 80 अंक का बेन्चमार्क निर्धारित करते हुए 80 या 80 से अधिक अंक पाने वाले अभ्यर्थी/कार्मिक को "उपयुक्त" श्रेणी में वर्गीकृत करते हुए, वास्तविक रिक्तियों की उपलब्धता की सीमा तक, उनकी पोषक संवर्ग की वरिष्ठता के क्रम में, चयन सूची में शामिल किया जायेगा तथा उनकी पोषक संवर्ग की ज्येष्ठता के आधार पर उनके पदोन्नति के आदेश निर्गत किये जायेंगे। ज्ञातव्य हो कि 'उपयुक्त' श्रेणी में वर्गीकृत अधिकारियों के मध्य मेरिट के आधार पर कोई विभेद नहीं होगा। अर्थात् चयनित अधिकारियों का अधिक्रमण (Surpersession) नहीं होगा। 80 अंक से कम पाने वाले अभ्यर्थियों को अनुपयुक्त श्रेणी में वर्गीकृत किया जायेगा।

उपर्युक्त के अतिरिक्त यदि 80 अंक के बेन्चमार्क के आधार पर रिक्तियों की संख्या के अनुरूप 'उपयुक्त' श्रेणी में वर्गीकृत कार्मिक उपलब्ध नहीं हो पाते है,तो चयन समिति उक्त 80 अंक के बेन्चमार्क को घटाने हेतु सक्षम होगी।"

(31) He further contends that on perusal of the aforesaid Government Order dated 27.09.2019 and more particularly paragraph No. 7(11), it is evident that instead of supplementing the Rules, 1994, it tries to supplant the statutory provisions that for grant of promotion to the employees placed in the eligibility list, **'merit would not be decisive factor'.**

(32) Further contention of the learned counsel for the appellant is that since the contents of paragraph No.7(11) of the Government Order dated 27.09.2019 are in the teeth and derogative of the statutory provisions contained in Rule 4 of the Rules, 1994, the statutory rules cannot be amended or superseded merely by issuance of an executive order. In support of this, he has relied upon the judgments of the Apex Court in ***State of U.P. and others v. Babu Ram Upadhyaya [AIR 1961 SC 751], P.D. Agrawal and others v. State of U.P. and others [(1987) 3 SCC 622], Naga People's Movement of Human Rights v. Union of India and others [AIR 1998 SC 431] and C. Rangaswamaeah and others v. Karnataka Lokayukta and others [AIR 1998 SC 96].***

(33) In the case of ***Union of India and another v. Ashok Kumar Aggarwal [(2013) 16 SCC 147],*** the Apex Court held as under:-

"It is settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to

supplement the statutory rules but not to supplant it."

(34) The Apex Court in the case of ***Government of Andhra Pradesh and others v. P. Laxmi Devi [(2008) 4 SCC 720]*** has explained the 'Grundnorm' in the Indian Constitution and the hierarchy as under:-

"34. ***In India the Grundnorm is the Indian Constitution, and the hierarchy is as follows :***

(i) The Constitution of India;

(ii) Statutory law, which may be either law made by Parliament or by the State Legislature;

(iii) Delegated legislation, which may be in the form of Rules made under the Statute, Regulations made under the Statute, etc.;

(iv) Purely executive orders not made under any Statute;

35. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the Directive Principles which, by Article 37, have been expressly made non enforceable).

(35) In a Constitution Bench judgment of the Apex Court in ***B. N. Nagarajan and others v. State of Mysore and others [AIR 1996 SC 1942]*** it was held that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot, in exercise of executive power under Article 162 of the Constitution of India, ignore or act contrary to that rule or act. Thus, the Government Order dated 27.09.2019 relied upon by the writ petitioner do not supplement the Rules, 1994.

(36) Next he has contended that since the writ petition filed by the writ petitioner was allowed by the learned Single Judge on the ground of fallacies in the inquiry report and not following the procedure for holding disciplinary proceedings, the matter should have been remanded to the concerned authority so that the inquiry could be conducted afresh from the stage of furnishing reply to the charge sheet.

(37) Further submission of the learned Counsel for the appellant is that in the event of the matter being remitted to the Disciplinary Authority for holding fresh inquiry from the point it stood vitiated, the provisions of Government Order dated 28.05.1997 issued by the Department of Personnel, Government of Uttar Pradesh would come into play and the recommendations of the DPC would be kept in a sealed envelope as the disciplinary proceedings against the writ petitioner would still be pending.

(38) The next contention of the learned Counsel for the appellant is that while setting aside the punishment order dated 31.05.2023, liberty was not granted to the State authorities for proceeding against the writ petitioner afresh from the point the inquiry stood vitiated. In support of this submission, he has relied upon the cases of ***The Inspector of Panchayats and District Collector, Salem v. S. Arichandran and others [2022 SCC Online SC 1282], The State of Uttar Pradesh and others v.***

Rajit Singh [2022 SCC Online SC 341] and Chairman, Life Insurance Corporation of India and others v. A. Masilamani [(2013) 6 SCC 530].

(39) Lastly, he has submitted that in the event of the matter being remitted for holding inquiry afresh from the point it stood vitiated, the writ petitioner would still not be entitled for being considered for promotion on the post of Additional Cane Commissioner as the disciplinary proceedings against him would be pending.

(40) Sri Vimal Kumar Srivastava, learned Additional Advocate General assisted by Sri Praful Kumar Yadav, learned Additional Chief Standing Counsel appearing for the State authorities has raised a preliminary objection before the Writ Court that the respondent No.1/petitioner was having statutory alternative remedy to prefer review under Rule 14 of U.P. Government Servants (Disciplinary & Appeal) Rules, 1999 and further he was having an efficacious remedy of filing a claim petition before the Tribunal under U.P. Public Services Tribunal Act, 1976, but the same has not been considered by the learned Single Judge.

(41) The grounds of challenge are that the learned Single Judge has apparently exercised his jurisdiction beyond the scope of judicial review in respect of the punishment order, which is major in nature and the learned Single Judge has acted as an appellate authority over the decision taken by the disciplinary authority inasmuch as the learned Single Judge has substituted his own findings to the findings recorded by the Disciplinary Authority by appreciating the evidence afresh which is not permissible so far as judicial review of matters related to disciplinary proceedings is concerned.

(42) Further ground taken by the learned Additional Government Advocate is that once the evidence on record has been accepted by the Disciplinary Authority and the findings returned by the Disciplinary Authority in respect of misconduct are supported by evidence available on record, setting aside the order of punishment cannot be justified as the allegations were such amounting to misconduct in terms of the provisions of U.P. Government Servants Conduct Rules, 1956. Lastly, he has submitted that if there is any flaw in the procedure followed during the course of conduct of the inquiry, the punishment order could not have been set aside; rather, it should have remanded to the authority concerned for conducting the inquiry from the stage it stood vitiated.

(43) *Per contra*, Sri S. C. Mishra, Senior Advocate assisted by Sri Raj Kumar Pandey, learned Counsel appearing for the writ petitioner submits that complaints were filed by 13 persons against Sri B. K. Yadav, the then Managing Director and Chairman of Selection Committee and appointing authority for the post of Cane Officers. On the basis of the complaints, a preliminary inquiry was held by the Commissioner, Lucknow Division, Lucknow. **In the said inquiry, the respondent No.1/petitioner was not found guilty,** however, **Sri B. K. Yadav was found guilty of five charges.** None of the 13 complainants were ever examined or produced in the inquiry to press and verify their status.

(44) Elaborating the above submissions, he asserted that vide Office Memorandum dated 29.11.2016, a selection

committee consisting of five members was nominated for the post of Cane Officer wherein the writ petitioner was nominated as a Subject Specialist and Sri B. K. Yadav was a Chairman of the Selection Committee. Sri B. K. Yadav was exonerated by the competent authority on the ground that none of the complaints were filed in consonance with the guidelines framed in the Government Orders dated 09.05.1997 and 06.08.2018, whereas the writ petitioner was served with a copy of Office Memorandum/charge sheet dated 04.06.2020 issued by the Principal Secretary, Sugar Industries and Cane Development, U.P. for initiation of disciplinary proceedings against him. In support of the charge sheet only two evidences were relied upon - one is the report dated 31.07.2017 of the Commissioner, Lucknow and the other report is dated 20.01.2020 of the Special Secretary/Vigilance Officer of Sugar Industries and Cane Development Department. No list of witnesses was given nor anyone was examined, meaning thereby both the reports were never got proved. A perusal of the head note and Para – 1 (source) column and para – 2 (gist of allegations) of the said report dated 20.01.2020 itself shows that it was prepared under the directions of order dated 19.08.2018 of Government of India which required the State Government to submit a report in the case of Sri B. K. Yadav as per the prescribed proforma of Central Vigilance Commission, New Delhi for holding disciplinary inquiry against him as per the request of Government of India.

(45) He went on submitting that on the basis of the report of the Commissioner, Lucknow Division, Lucknow dated 31.07.2017, whereby five charges levelled against the Chairman of the Selection Committee were found proved, the State requested the Government of India to hold disciplinary inquiry against Sri B. K. Yadav. It is clear from the report that **no finding was given against the writ petitioner as all the allegations were made against Sri B. K. Yadav.** Consequently, vide letter dated 14.12.2017 sent by the Principal Secretary, Sugar Industries to Department of Agriculture and Farmer's Welfare (Administrative Vigilance Unit), Government of India, New Delhi seeking disciplinary action against the then Managing Director Sri B. K. Yadav who was the Chairman of the Selection Committee as also the Appointing Authority of Cane Officers. **It is made clear that both the inquires were held against Sri B. K. Yadav and not against the writ petitioner.**

(46) In sequence, he has urged that the writ petitioner was never associated either in the inquiry conducted by the Commissioner or in the inquiry of Special Secretary, Vigilance whose reports have been relied as evidence. Both the inquiry officers of inquiry reports were never produced as witnesses in the inquiry proceedings to authenticate and prove their inquiry reports nor named as witnesses. In the second inquiry held by the Vigilance Officer of Sugar Industries and Cane Development Department, objection No.12 refers to the appointment of Cane Officers, but the allegations were made against the Chini Mill Sangh Committee for appointment of less number of Scheduled Caste candidates as per the prescribed quota. Further, it reveals from the report of Vigilance Officer that the entire inquiry is based upon some *ex parte* audit report conducted by Sri Vishisth Lekha Prativedan 2016-17 Sahkari Evam Lekha Pariksha

Sangathan, but the said report was never made available to the writ petitioner.

(47) He has pointed out that one Shri Tulsi Ram, Finance Controller was inducted as subject specialist in the Selection Committee for appointment of Accounts Officer. When the disciplinary proceedings were initiated against him, he was found guilty of charge of backward class candidates being appointed against Scheduled Caste quota posts and the Disciplinary Authority has passed the punishment order dated 13.04.2022 awarding stoppage of one increment and censure entry in his character roll. When he approached this Court by filing Writ-A No. 3074 of 2022, vide judgment and order dated 30.03.2023 the writ petition was allowed setting aside the order dated 13.04.2022 on the ground of vague charges having been levelled against him in the charge sheet. The said order has become final as it has not been challenged by the State Government. Since the case of the writ petitioner is identical to Shri Tulsi Ram, he should be treated on similar terms.

(48) Further discrimination pointed out by the learned counsel for the respondent No.1/petitioner is that there were nine committees for different posts and Sri B. K. Yadav was Chairman of all nine Selection Committees. After obtaining report from the Central Vigilance Commission and no complaints have been authenticated, Sri B. K. Yadav has been exonerated by the Government of India on 24.08.2022.

(49) Learned Counsel for the respondent No.1/petitioner submits that the selection committee has only recommended the names of the suitable candidates in order of their merit in respective categories to the appointing authority, who is Sri B. K. Yadav, Managing Director of the Corporation and it is the appointing authority to approve the list and issue appointment orders following the Rules, Reservation Quota and Regulations prescribed in this matter.

(50) Elaborating his submissions, learned Counsel has submitted that as per The Uttar Pradesh Co-operative Factories Federation Limited, Employees Service Regulations, 1988, the role of the selection committee is to select the candidates on the basis of their merit after which list of selected candidates including the list containing wait-listed candidates has to be forwarded to the appointing authority for appointment and it is the duty of appointing authority to take the final decision of appointment by following the Rules applicable for selection and appointment. In the present case, the appointing authority, Sri B. K. Yadav, has issued all appointment letters to the selected candidates. More over, mere selection does not give any vested right of appointment unless he has given appointment letter by the appointing authority who alone has to follow the Reservation Rules and other Rules applicable in this regard and therefore, the charge that the respondent No.1/petitioner has violated the reservation rules and appointed less number of Scheduled Caste Candidates is perverse.

(51) He further submitted that the punishment order dated 31.05.2023 has been passed without application of mind and no independent findings agreeing/disagreeing with the inquiry officer have been recorded by the punishing authority while passing the order.

(52) Next, he has contended that even though the inquiry officer has proved only

one charge pertaining to reservation rules (charge No.1 and partly charge No.2) against the respondent No.1/writ petitioner but the punishing authority has held that charge No.6 is also proved against the respondent No.1/petitioner without giving any reason as to why he is differing from the view of the inquiry officer because the punishing authority was to retire on 30.06.2023. Therefore, he hurriedly passed the order dated 31.05.2023 and thereafter, he directed for holding Departmental Promotion Committee (DPC) on 24.06.2023.

(53) It was then submitted that the promotion of the respondent No.1/petitioner was due from the post of Joint Cane Commissioner to the post of Additional Cane Commissioner for which Departmental Promotion Committee (DPC) was constituted earlier which had held its meeting on 04.08.2022 and the result of outcome of the Committee was kept in a sealed cover but on account of impugned order of punishment dated 31.05.2023, his promotion could not be issued and the recommendation lapsed.

(54) His next leg of submission is that the Special Appeal filed by Shri Vishwash Kanaujiya, who was impleaded as opposite party No.4 before the writ proceedings after his application for impleadment was allowed in Writ-A No. 4705 of 2023 on the ground that the writ petitioner has sought for quashing of proceedings of Departmental Promotion Committee (DPC) held on 24.06.2023 and no order has been passed against the appellant in the impugned judgment dated 31.10.2023. During pendency of writ petition, the appellant had been promoted on the post of Additional Cane Commissioner vide order dated 12.09.2023.

(55) Elaborating submissions on the maintainability of Special Appeal, learned counsel appearing for the writ petitioner has submitted that the learned Single Judge has only directed to hold a review Departmental Promotion Committee (DPC) on the post of Additional Cane Commissioner considering the candidature of the writ petitioner for the same alongwith respondent No.4/appellant ignoring the punishment order dated 31.05.2023 which has been quashed by the learned Writ Court. The said direction of review DPC has been given **as the recommendation for promotion of the petitioner was kept in sealed cover in earlier DPC held on 04.08.2022** and while holding the subsequent DPC on 24.06.2023 the candidature of the writ petitioner for promotion has been rejected only on account of the punishment order dated 31.05.2023.

(56) The contention of the appellant/opposite party No.4 is that the criteria of promotion is merit which cannot be ground of challenge of the impugned judgment inasmuch as in the review DPC which will be held both the incumbents will be considered as per the relevant Rules and prevailing guidelines on the basis of which promotions are made in all Government Services throughout Uttar Pradesh and which were followed while holding the earlier DPC dated 04.08.2022 and 24.06.2023. Therefore, there is no occasion for the appellant/opposite party No.4 to file special appeal. More over, the appellant/opposite party No.4 has no concern with the inquiry initiated against the writ petitioner or punishment order as also the impugned judgment and order dated 31.10.2023. Thus, he has no locus standi to challenge the impugned judgment and order. Further, he has submitted that

whosoever will be suitable for the promotion as per the prevailing procedure in review DPC will be promoted and the criteria of promotion was not the subject matter of the writ petition. The direction for holding review DPC is as a consequence of quashing of the order of punishment passed against the writ petitioner. The review DPC will obviously be held in accordance with law and prevailing rules and guidelines framed by the competent authority in this regard.

(57) Lastly, he has submitted that after filing of the writ petition, the DPC was held on 24.06.2023 and on 26.06.2023, an interim order was passed to the effect that the result of the DPC be not finalized. However, the said interim order was modified vide order dated 06.07.2023 to the effect that the result of DPC held on 24.06.2023 shall be subject to final outcome of the writ petition. Subsequently, on 12.09.2023, the appellant/respondent No.4 was given promotion with the condition that **the said promotion shall subject to the final order of Writ-A No.4705 of 2023**. In these circumstances, the Special Appeals filed by the State and appellant/respondent No.4 are liable to be dismissed.

(58) After hearing learned counsel for the parties extensively at length and perusing the material on record, we find it necessary to reproduce the relevant directions given by the learned Single Judge in the impugned judgment and order dated 31.10.2023 as under:-

"36. As per material on record, it is also evident that a departmental promotion committee has in the meantime been held on 24th June, 2023 whereafter the opposite party No.4 has been promoted on the post of Additional Cane Commissioner with non consideration of petitioner due to impugned order. Considering the fact that this Court has found not only the inquiry report but also the punishment order to be vitiated in law the impugned order dated 31st May, 2023 is consequently quashed by issuance of writ in the nature of Certiorari. A writ in the nature of Mandamus is issued to the opposite parties to hold a review D.P.C. for consideration for promotion on the post of Additional Cane Commissioner, Department of Sugar Industries and Cane Development considering the petitioner for the same along with opposite party No.4, ignoring the impugned order dated 31st May, 2023.

37. In view of aforesaid directions, there is no occasion for this Court to quash the Departmental Promotion Committee proceedings held on 24.06.2023 which even otherwise would be subject to the Review Departmental Promotion Committee recommendations."

(59) The aforesaid directions contained in the impugned judgment can be categorized into two parts. One part is relating to the inquiry proceedings and the other part is relating to the competent authority for holding review Departmental Promotion of Committee (DPC) of both the persons, i.e., appellant/respondent No.4 and respondent No.1/petitioner. We first deal with the inquiry proceedings, which are as under:-

(60) Before delving into the merits of inquiry proceedings, we would go through the charge No.1, charge No.2 and charge No.6 which are relevant for consideration as under, as the impugned punishment order has been passed on the aforesaid three charges:-

"(a) **Charge No.1** – In the selection for the post of Cane Officer (vacancies-General/Unreserved 07, OBC 05 and SC 03) in the Uttar Pradesh Sugar Factories Federation Ltd., the Selection Committee, in violation of the constitutional provision, had only 02 candidates selected under the SC category while 06 candidates were selected under the OBC category against a vacancy of 05 posts. Thus, instead of carrying forward 01 vacancy under the SC category in case of unavailability of suitable candidates, to the next selection, the same was filled from amongst OBC category candidates.

(b) **Charge No.2** – For selection on the post of Cane Officer, the name of an Applicant namely Shri Pradeep Kumar son of Shri Tilak Ram, who had participated in the interview was shown to have been absent from the aforesaid interview, and against which a Writ Petition was filed before this Hon'ble Court which is still pending consideration. More over, the documents including experience certificate of the aforesaid candidate namely Shri Pradeep Kumar was verified, however, till date, the documents including educational as well as experience certificate of selected candidates have not been verified. Thus, by showing the aforesaid SC candidate namely Shri Pradeep Kumar as absent from the interview, 06 candidates under the OBC category were declared to be selected against a vacancy of 05 posts.

(c) **Charge No. 6** – The Selection Committee, on its own accord, whimsically, had allotted marks to the selected candidates, which were at variance with the marks allotted by the interview board. The merit list was not prepared on the basis of the actual marks obtained by the candidates. On 30.11.2016 alongwith selection for the post of Cane Officer, selection of A.E.D.P., was also held and the Petitioner along with the Managing Director and Shri Lalta Prasad were members of both the Selection Committees. Thus, it is not possible that the Petitioner was part of two selection board at the same time."

(61) Admittedly, the respondent No.1/petitioner was nominated as a Subject Specialist to interview the candidates for the post of Cane Officer alongwith four members. The respondent No.1/petitioner being member of the Committee had joined with other Members including Chairman of the Selection Committee, namely, (1) Sri B.K. Yadav, Managing Director/Chairman, Selection Committee; (2) Shri Anil Kumar Singhal, General Manager (Personnel)/Member; (3) Shri R.C. Pathak, Chief Cane Development Adviser, Expert Member/Subject Matter Specialist **(respondent No.1/petitioner)**; (4) Sri Ram Avatar Singh, General Manager, Expert Member/Subject Matter Specialist/Member and (5) Sri Lalta Prasad, Chief Engineer (representative of Scheduled Caste)/Member to interview the candidates.

(62) When thirteen complaints were filed against the Selection Committee, they were thoroughly probed and disciplinary proceedings were initiated against the Chairman of the Committee initially. Though the allegations made in the complaints were relating to the Chairman, but later on the respondent No.1/petitioner has been dragged to the disciplinary proceedings.

(63) It is strange thing that Chairman of the Selection Committee being Managing Director is the appointing authority. When the matter reached the Central Government to take action, he has been exonerated from the charges levelled

against him on the ground that none of the complaints were got authenticated in terms of the guidelines framed in the Government Orders dated 09.05.1997 and 06.08.2018. Since the allegations have been levelled mainly against the Chairman, against whom exoneration order has been passed by the Central Government, as to how and under what circumstances, the respondent No.1/petitioner being a Member of Selection Committee, that too in the capacity of Subject Expert can be penalized.

(64) Further, it is to be noted that even if the respondent No.1/petitioner has selected any candidate, mere selection does not confer any right of appointment unless and until the selection proceedings are approved by the competent authority. The Chairman who is responsible for all misdeeds has been exonerated by the Government of India, but a person who has been nominated as subject expert has been punished for the mistake committed by the Chairman which amounts to hostile discrimination and violation of Articles 14 and 15 of the Constitution. Here in this case, the competent authority is Managing Director/Chairman of the Selection Committee. Thus, he is solely responsible against whom the Central Government has exonerated him.

(65) In support of above submissions, the case laws of ***'M. Ramesh v. Union of India [(2018) 16 SCC 195], Dinesh Kumar Kashyap v. South East Central Railway [(2019) 12 SCC 798], State of U.P. v. Rajkumar Sharma [(2006) 3 SCC 330], Jatinder Kumar v. State of Punjab [(1985) 1 SCC 122] and UPSC v. M. Sathiya Priya [(2018) 15 SCC 796]*** relied upon by the learned counsel for the respondent No.1/petitioner are applicable.

(66) More over, one Sri Tulsi Ram, who is a similarly situated person like respondent No.1/petitioner, has been nominated as Subject Expert to interview the candidates for the post of Accounts Officer. When the similar allegations have been levelled against him and on initiation of disciplinary proceedings, it had culminated into passing of stoppage of one increment and censure entry in his character rolls, he filed Writ-A No. 3074 of 2022 which was allowed vide judgment and order dated 20.03.2023 and quashed the impugned punishment order dated 13.04.2022 on the ground that the charge-sheet should not contain any vague charge and the charge should be specified so that employee may be put to notice that what is charge against him for giving reply to the same. As per reading of the charge-sheet, in respect of charge no. 1, it is evidently clear that the same is vague and, the inquiry report is also vague.

(67) The aforesaid order has not been challenged by the State till date which indicates that it attains finality.

(68) At this stage, it is necessary to reproduce the relevant paragraphs of the impugned judgment dated 31.10.2023 as under:-

"32. It is the case of opposite parties that petitioner made recommendations regarding selection on the post of Cane Officer, which were contrary to Article 338 of Constitution of India. It is not a case of opposite parties that petitioner had any role in issuance of appointment letters to the selected candidates. Even otherwise the only major charge levelled against petitioner regarding violation of Article 338 of Constitution of India is of a single

recommendation being made over and above the vacancy pertaining to OBC quota. In the considered opinion of this Court, only a recommendation had been made by the selection committee of which petitioner was one of the members. A recommendation even against law may not be construed to be a misconduct, unless specifically indicated in the service rules, particularly since such recommendations are not binding in nature and it is for the appointing authority to adhere to or reject the same. The opposite parties have not been able to indicate any service regulation pertaining to petitioner whereby such a recommendation, even if assumed to be against law, can be held to be a misconduct requiring imposition of such punishment.

33. Learned State Counsel has adverted to judgment rendered by Supreme Court in the case of State of U.P. versus Rajit Singh, 2022 SCC Online SC 341 to submit that doctrine of equality would not be applicable where other officers involved in an incident have been exonerated since misconduct is required to be considered as per role of each individual officer in the light of their duties of office and where charges against individual concerned are held to be proved in a departmental inquiry since there can not be any claim of negative equality.

34. So far as aforesaid judgment is concerned, it is quite evident that opposite parties have failed to make out the distinguishing feature as indicated in the said judgment of Rajit Singh (supra). Neither the inquiry report nor the impugned punishment order have adverted to any individual role of petitioner regarding allegations levelled against him and his role even with respect to same misconduct in the light of his duties of office have also not been distinguished. As has been indicated herein above, the conduct of inquiry itself indicates that the inquiry officer himself was unable to reach any subjective satisfaction regarding involvement of petitioner in the allegations levelled against him. With due respect, in the considered opinion of this Court, the aforesaid judgment would be inapplicable in the present facts and circumstances of the case."

(69) **Since there is no role of the respondent No.1/petitioner to appoint the candidates and the inquiry conducted by the department is wholly unfounded, we are of the firm opinion that setting aside of the impugned punishment order by the learned Single Judge is wholly in consonance with law and the same is hereby affirmed. The matter, even if not remitted to the competent authority for being dealt with afresh, does not suffer from any illegality.**

(70) Consequent upon the setting aside of the punishment order, the next direction issued by the learned Single Judge for holding review DPC will come into play. In this regard, it is necessary to mention that in the writ proceedings, when the punishment order dated 31.05.2023 passed against the respondent No.1/petitioner was set aside, as to whether the Departmental Promotion Committee (DPC) held on 24.06.2023 would consequently require to be reviewed or the emerging position of law is different is the next question that would crop up. The relevant orders which were passed by the learned Single Judge during pendency of writ petition are as under:-

26.06.2023

"As per the submission of learned counsel for the petitioner, the

Additional Chief Secretary has passed the order against the petitioner against which this petition has been filed. Learned C.S.C. contended that there is provision of filing revision against the aforesaid order as per the Rule 13 of U.P. Government Servant (Disciplinary and Appeal) Rules, 1999 and this writ petition cannot be entertained. On which learned counsel for the petitioner contends that the punishing authority itself is the State, therefore, revision cannot be a remedy for the petitioner.

In view of the above, learned C.S.C. is directed to seek instructions in this regard as to who will decide the revision filed against the order in question in this writ petition.

At the request of learned C.S.C., list this case on 28.06.2023 as fresh.

Supplementary affidavit filed by learned counsel for the petitioner today is taken on record in which he has made a prayer that a D.P.C. was held on 24.06.2023 in hurriedly manner to harm the petitioner, therefore, instructions in this regard be also called from the learned C.S.C. and the result of the D.P.C. be not finalized in the meantime/till the next date of listing."

06.07.2023

"On C.M. Application No.NIl of 2023

Heard.

This application seeks amendment in the memo of writ petition.

Application is allowed.

Let necessary amendment is to be incorporated in the memo of writ petition during the course of the day.

On C.M. Application No.Nil of 2023

Heard.

This application seeks impleadment in the array of parties.

Application is allowed.

Let Mr. Vishwash Kanaujia be impleaded as opposite party no.4 in the array of parties during the course of the day.

Since S/Sri Gaurav Mehrotra and Utsav Misra have appeared on behalf of the newly impleaded opposite party no.4, therefore, no notice is required to be issued to opposite party no.4.

On Memo of Writ Petition

The State is directed to file its response/counter affidavit before the next date of listing of this petition.

Counter affidavit shall be served on the learned counsel for the petitioner at least one day before the next date of listing of this petition.

List this petition on 13.7.2023 peremptorily.

Interim order dated 26.6.2023 is modified to that the result of the Departmental Promotion Committee held on 24.6.2023 shall be subject to the final outcome of this petition.

It is made clear that no adjournment shall be granted on the next date to either of the parties on any ground.

When the case is listed next, names of S/Sri Gaurav Mehrotra and Utsav Misra shall be shown in the cause list as counsels for opposite party no.4."

(71) While granting the interim order dated 26.06.2023, it was provided that **the result of the DPC be not finalized in the meantime/till the next date of listing. The said interim order was modified on 06.07.2023 to the extent of DPC held on 24.06.2023 shall be subject to final outcome of the petition.** It is on this basis, the appellant/respondent No.4 has been promoted vide order dated 12.09.2023. Since the promotion of the appellant in Special Appeal No. 537 of 2023 has been made on the basis of recommendations of

DPC based on the sole criteria of merit, number of arguments have been putforth by the learned counsel for the appellant/respondent that the criteria of merit as postulated under Rule 4 of the Rules, 1994 cannot be overriden by the administrative instructions.

(72) The consequence for issuing a direction for review DPC may or may not be a natural concomitant particularly where the criteria of selection is merit, the selection proceedings have to be viewed from a different perspective altogether and the stipulations of the interim order would *ipso facto* not give legitimacy to the direction for review of the selection proceedings held on 24.06.2023, unless the same were faulty in the eye of law.

(73) We have already narrated above that the criteria of selection in the case at hand is 'merit' alone, therefore, it is desirable to have a look at the second part of controversy, i.e., **whether the direction for holding review DPC was at all desirable to be issued in the facts and circumstances of this case where the recommendations of the DPC were acted upon though under the interlocutory orders passed by this Court.** In order to test the operation of Rule – 4 of the abovementioned Rules, 1994 and the Government Order dated 27.09.2019 placed reliance upon, there is no dispute on the point that the aforesaid Rules, 1994 are applicable to the post in question and have an overriding effect.

(74) Insofar as the Government Order dated 27.09.2019 is concerned, it has more significant facets than one. The Government Order in paragraph Nos.7(1) to 7(10) elaborates as to how the candidates in the zone of consideration have to be assessed by the Departmental Promotion Committee (DPC). Marks are specified for each category of ACRs of which the sum becomes relevant both for touching the benchmark and merit.

(75) Learned counsel for the appellant would contend that the marks once provided to be the criteria of merit for touching the benchmark and once scored above 80 marks would equally be relevant for the assessment of merit, therefore, a candidate, whose marks on the prescribed scale of assessment are higher, must reap the benefit of recommendations made by the DPC.

(76) It is further argued that merit of a candidate and punishment are compartmentalized. A candidate, even if higher in merit, would loose his opportunity of promotion, if he is punished in the disciplinary or judicial proceedings. The record produced before this Court demonstrates that the comparative merit of the eligible candidates touching the benchmark is assessed as per the norms prescribed in paragraph Nos.7(1) to 7(10) of the Government Order dated 27.09.2019 and **the appellant has scored 96 marks (rounding off), whereas the respondent No.1/petitioner has scored 86 marks (rounding off).**

(77) On account of the implications of punishment order, such an assessment did not become redundant but for the higher marks the other candidate, viz., the appellant/respondent No.4 has scored. Two situations arise out of the assessment made by the DPC. Firstly, if a candidate obtains higher marks in the zone of eligibility but is punished and the other situation would be that the eligible candidate who is punished

scores lower marks as compared to the one who is offered promotion.

(78) In ***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and another (supra)***, the Apex Court has observed that the Executive Engineers having 90% marks i.e. 180 or more out of 200 are to be placed in Category I, while Executive Engineers having 60% or more i.e. 120 or more (up to 179) are to be found in Category II. Such classification, in the considered opinion of the Apex Court, is perfectly reasonable and wholly rational. The classification neither offends Article 14 nor Article 16 nor is otherwise unreasonable infringing Article 19 of the Constitution. Therefore, the conclusion arrived by the Apex Court is that Executive Engineers placed in Category I and Category II are `unequals'. Further, it has been held that once an Executive Engineer is considered eligible and fit for promotion and placed in a particular category (Category I or Category II) he will retain his inter se seniority in the said category. Relevant paragraphs are reproduced as under:-

"39. An Executive Engineer having 90% marks i.e. 180 or more out of 200 are to be placed in Category I, while Executive Engineer having 60% or more i.e. 120 or more (up to 179) are to be found in Category II. Such classification, in our considered opinion, is perfectly reasonable and wholly rational. The classification neither offends Article 14, nor Article 16 nor is otherwise unreasonable infringing Article 19 of the Constitution. We have, therefore, no hesitation in coming to the conclusion that Executive Engineers placed in Category I and Category II are `unequals'.

43. In our opinion, however, the above principle does not help the appellant- Corporation in the present case. As observed by us, under the Scheme of Regulations, 1970, promotion to the post of Superintending Engineer, Chief Engineer II and Chief Engineer I is based on `merit'. If it is so, consideration of merit alone is relevant and material. ***It is, therefore, provided that once an Executive Engineer is considered eligible and fit for promotion and placed in a particular category (Category I or Category II), he will retain his inter se seniority in the said Category.*** *But that will apply only to those Executive Engineers who are placed in one and the same Category and not in a different Category. An Executive Engineer of Category II cannot, under the scheme of regulations, claim promotion over an Executive Engineer placed in Category I. Such interpretation may possibly result in regulations being declared ultra vires. The High Court, in our opinion, rightly not accepted such interpretation and we see no infirmity therein.*

44. There cannot be two opinions that a concession of law cannot bind a party. [Vide B.S. Bajwa & Anr. v. State of Punjab & Ors.(1998) 2 SCC 523; Union of India v. Mohanlal Likumal Punjabi, (2004) 3 SCC 628; Union of India & Anr. v. S.C. Parashar, (2006) 3 SCC 167]. The learned counsel appearing for the writ petitioner also did not dispute this proposition. In our opinion, however, the so called `concession' was not against law. On the contrary, it was in consonance with the scheme of statutory regulations as also consistent with the Constitution. We have, therefore, kept aside the `so called' concession and have considered the question in the light of statutory regulations referred to above. Under the regulations, only one view is

possible which has been taken by the High Court and to us, the said view is correct."

(79) If the above analogy is applied in this case, at the relevant time, both the appellant/respondent No.4 and respondent No.1/petitioner were Joint Cane Commissioners and they were eligible for promotion on the post of Additional Cane Commissioner and though both had crossed the benchmark, but on account of the punishment order having been passed against the respondent No.1/petitioner and besides his marks being low, he was not to be promoted. Although setting aside of the punishment order of the respondent No.1/petitioner has brought them on an equal footing but they stand classified on the yardstick of marks as have been derived by applying the procedure mentioned in paragraph Nos. 7(1) to 7(10) of the Government Order dated 27.09.2019. There is no other classification prescribed in the Government Order according to which Rule – 4 of the Rules, 1994 may operate, therefore, any deviation from the actual value of marks as has been suggested based on seniority in paragraph No.11 of the Government Order dated 27.09.2019 is nothing but a breach of the statutory Rules, which is impermissible. On comparison of both cases, i.e., the case at hand and the judgment of ***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and another (supra)***, the only difference is that in matter of ***Uttar Pradesh Power Corporation Limited***, if the candidature of category – I is not suitable for promotion on the higher post, then the candidature of category – II can be considered, whereas in the instant case, the benchmark of 80 marks testing the suitability of candidates is merely an eligibility for determination of merit and it is for this reason that the same is not to be rigidly observed in the eventuality of non-availability of candidates touching the same. Considering all these facts of the matter, we are of the firm opinion that the above case law is not fully applicable in the facts and circumstances of the present case because allowing the Court to form an opinion on the strength of actual marks obtained by a candidate is the only classification.

(80) It may also be noted that the records of Annual Confidential Remarks (ACRs) have undergone a drastic change in the matter of official secrecy and the manner in which they are maintained. An entry in the confidential record used to be exposed only when there was an adverse remark. Now, as per law, all entries, irrespective of adverse or not, are being made known to all employees well-in-time. Since there is no grievance raised before us in the matter of assessment of marks, as such, the application of Government Order dated 27.09.2019 for assessment of marks as per paragraphs Nos. 7(1) to 7(10) being unquestionable leads us to no other conclusion except that the merit derived in the selection proceedings is binding upon the eligible/suitable candidates having qualified the benchmark. The assessment of marks being a well guided procedure leaves no scope for interference in the matter of assessment which is binding on the eligible candidates.

(81) In view of above, the direction issued by the learned Single Judge for holding review DPC is not an emerging necessity and would offend the principle of merit as prescribed under Rule – 4 of the Rules, 1994. We may also observe that any procedure giving precedence to seniority as contemplated under para – 11 of the Government Order would clearly stand

contrary to the essence of merit wherever it is deciphered on the scale of marks. Therefore, the argument putforth by the respondent/ petitioner herein that seniority would assume the decisive role on a candidate obtaining the benchmark is fallacious and deserves to be rejected, inasmuch as the real classification is based on the actual marks obtained above the benchmark.

(82) This Court may further note that the respondent/petitioner at no point of time has assailed the proceedings of selection committee or the assessment of merit to be affected on account of punishment order, which on setting aside, may automatically lead to the consequence of review selection. The assessment of merit being an independent process would only lead to the consequence of review when the marks awarded to a candidate are higher as compared to his counterpart in the zone of consideration chosen to have been appointed. The classification of candidates in the zone of consideration being on the scale of marks above the benchmark, therefore, would not constitute a single category giving precedence to the rule of seniority contrary to the mandate of Rule 4 of Rules, 1994.

(83) For all the reasons stated above, we hereby **allow the Special Appeals in part** and set aside the direction issued by the learned Single Judge to the extent of holding the review DPC. Insofar as setting aside of the punishment order is concerned, we affirm the impugned judgment/order dated 31.10.2023. No order as to costs.

(2024) 3 ILRA 433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.02.2024

BEFORE
THE HON'BLE MANISH MATHUR, J.

Writ A No. 633 of 2024

C/M of Aljameatul Gausia Arbi College Utraula Balrampur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Nagendra Bahadur Singh

Counsel for the Respondents:
C.S.C., Afzal Ahmad Siddiqui, Anand Mani Tripathi, Mahendra Bahadur Singh, Rakesh Kumar, Vikas Singh

A. Education Law – UP Board of Madarsa Education Act, 2004 – S. 22 (5) – UP Non Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulation, 2016 – Part II, Reg. 15 – Scheme of Administration – No decision on approval was taken even after a period of six months – Failure of Madrasa Board, when constitute the deemed approval – Interpretation of statutory provision in terms of its being either mandatory or directory – Principle of legitimate expectation – Applicability – Held, the time window of six months provided to the Board of has to be construed strictly as a mandatory condition failing which it would impair the smooth functioning of the institutions concerned and would defeat the very purpose for which the Act of 2004 was promulgated – Since there is no disapproval indicated by the Board of Madarsa with regard to draft scheme of administration of the petitioner institution, the approval to draft scheme of administration is deemed to have been accorded. (Para 29, 31 and 34)

B. Principle of legitimate expectation – Applicability – When a statutory duty has been cast upon authorities concerned, it definitely lends a legitimate expectation in favour of the persons concerned that the statutory conditions indicated in the Act

and the regulations framed thereunder would be adhered to. (Para 22)

C. Service Law – UP Non Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulation, 2016 – Part III, Reg. 11 and 16 – Disciplinary proceeding – Committee's power to initiate proceeding during pendency of matter of approval of Scheme of administration – Distinguishing position of probationer and substantively appointed staffs – Held, the Committee of Management of a Madarsa is fully empowered to take action as prescribed under Reg. 11 of Part III of the Regulations of 2016 regarding a probationer irrespective of pendency of approval to the proposed scheme of administration but cannot initiate any disciplinary action against substantively appointed teaching and non-teaching staff of a Madarsa pending approval of the scheme of administration. (Para 35 and 43)

D. Service law – UP Non Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulation, 2016 – Part III, Reg. 11 and 16 – Punishment – Termination of service – Committee passed the order – How far Registrar has jurisdiction to disapprove it – Held, the Registrar does not have any power whatsoever under the aforesaid Regulations 11 and 16 of Part III of the Regulations of 2016 either to approve or disapprove action taken by Committee of Management against its employees with a probationary or substantively appointed – Registrar had no jurisdiction to interfere with termination order of Committee. (Para 51 and 61)

Writ petition allowed. (E-1)

List of cases cited :-

1. Gorkha Security Services Vs Govt. of NCT of Delhi; MANU/SC/0657/2014; 2014(9) SCC 105

2. Civil Appeal No. 1083 of 1084 of 2022; St. of Odisha & ors. Vs M/s Panda Infraproject Limited, 2022 LiveLaw (SC) 206

3. Civil Appeal No. 777 of 2020; Dr. Vijayakumaran C.P.V. Vs Central University of Kerala & ors.

4. Civil Appeal No. 689 of 2021; Kotak Mahindra Bank Limited Vs A. Balakrishnan & anr.

5. Ardhendu Kumar Das Vs St. of Odisha & ors..; 2022 Live Law (SC) 539

6. X Vs Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi & anr.; (2023) 9 SCC 433

7. St. of Jharkhand & ors.Vs Brahmputra Metallics Limited, Ranchi & anr.; (2023) 10 SCC 634

8. All Kerala Parents' Association of Hearing impaired & anr.Vs St. of Kerala & ors.; (2018) 2 SCC 410

9. St. of Mysore & ors.Vs V.K. Kangan & ors.; (1976) 2 SCC 895

10. Amardeep Singh Vs Harveen Kaur; (2017) 8 SCC 746

11. Devinder Singh & ors.Vs St. of Pun. & ors.; (2008) 1 SCC 728

12. St Johns Teachers Training Institute Vs Regional Director, National Council for Teacher Education & anr.; (2003) 3 SCC 321

13. Writ A No. 13753 of 2020; C/M Madarsa Muhammdiya Faiz-E Rasool & anr.Vs St. Of U.P. & ors. decided on 26.08.2021

14. Writ A No. 10967 of 2022; Arshad Javed Khan Vs St. of U.P & ors. decided on 05.08.2022

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

1. Heard Mr. Sandeep Dixit learned Senior Advocate assisted by Mr. Nagendra Bahadur Singh, learned counsel for petitioner, learned State Counsel for opposite party nos. 1 & 4, Mr. Afzal Ahmad Siddiqui, learned counsel for opposite party nos. 2 & 3 and Mr. A.M. Tripathi, learned counsel for opposite party no. 5.

2. Petition has been filed challenging order dated 20.05.2023 so far as it relates to petitioner, 09.11.2023 and 01.01.2024. Further prayer for a direction to opposite parties not to interfere in the peaceful functioning of petitioner in administrating in the institution in question has also been sought.

3. Vide impugned order dated 20.05.2023, the Registrar has stayed earlier approval granted to petitioner's scheme of administration, vide order dated 09.11.2023 the order passed by petitioner terminating services of opposite party no. 5 have been held to be without jurisdiction and vide order dated 01.01.2024, the District Minority Welfare Officer has imposed single hand operation in the institution in question since petitioner was not including the name of opposite party no. 5 in the salary bills.

4. It has been submitted that the opposite party no. 5 was initially appointed as Assistant Teacher in the institution in question on probation vide order dated 31.07.2021 for a period of one year which was thereafter extended on 30.07.2022 for a further period of one year. The services and conduct of opposite party no. 5 not having been found satisfactory, his services were thereafter terminated vide order dated 30.07.2023 by petitioner whereafter the impugned orders have been passed.

5. It has been submitted that since opposite party no. 5 was continuing only on probationary basis, his termination would be referable to Rule 11 of the U.P Non Governmental Arabic and Persian Madarsa Recognition, Administration and Services Regulation, 2016 whereunder petitioner was only under an obligation to afford an opportunity of hearing to the probationer, which has been done in the present case whereafter finding his services dissatisfactory, his services have been terminated.

6. It is submitted that Rule 11 does not provide any power or jurisdiction to the Registrar to interfere with an order of termination or discontinuance of a probationary teacher once issued by the management of the institution.

7. It is further submitted that earlier petitioner institution had submitted its scheme of administration which was forwarded vide letter 07.08.2021. The State Government had passed order dated 07.01.2022 stipulating that in cases where scheme of administration is pending approval before the U.P. Madarsa Shiksha Board, all proceedings undertaken by the Management of institutions concerned pertaining to disciplinary proceedings and subsequent dismissals would be without jurisdiction. It is submitted that thereafter the Registrar vide order dated 28.04.2022 approved the scheme of administration of petitioner institution which has thereafter been stayed by means of the impugned order dated 20.05.2023 purportedly in exercise of power under Section 22 (5) of the U.P. Board of Madarsa Education Act, 2004. It is submitted that once approval has been accorded to the scheme of administration of an institution, there is no provision under law whereby such approval can be stayed by the Registrar. It is therefore submitted that the order dated 20.05.2023 has been passed without jurisdiction.

8. Similarly it has been submitted that since the services of opposite party no. 5 had been terminated in terms of Regulation 11 of the Regulation of 2016, the same

were beyond purview of being interfered with by the Registrar and therefore the said order also is without jurisdiction.

9. It has been further submitted that even if assuming that the power exercised by the Registrar by means of order dated 09.11.2023 was under Section 16 of the Regulations, a Co-ordinate Bench of this Court in the case of **C/M Madarsa Muhammdiya Faiz-E Rasool And Another versus State Of U.P. And 3 Others the said Writ-A No. 13753 of 2020** has already held that the Registrar is not conferred any power either under the statute or regulation to interfere with an order passed by the Management under Regulation 16. Therefore, it has been submitted that the power exercised by petitioner terminating services of opposite party no. 5 whether under Regulation 11 or under Regulation 16 could not have been interfered with by the Registrar.

10. Learned counsel appearing on behalf of the opposite party no. 2 has refuted submissions advanced by learned counsel for petitioner with the submission that in terms of Regulation 15 of the Regulations of 2016, it is only the Board which is empowered to approve the scheme of administration of any institution and since in the present case, there is no resolution of the Board approving the scheme of administration of petitioner institution, recourse has rightly been placed upon the Government Order dated 07.01.2022 whereunder it has been specifically provided that till approval of the scheme of administration, no management of any institution shall have any powers to initiate any disciplinary proceedings or pass any dismissal order pertaining to an employee of the institution. It is further submitted that the order dated 28.04.2022 issued by the Registrar purportedly approving scheme of administration of petitioner institution is meaningless since it was only the Board which could have passed such an order and realizing this mistake, the impugned order dated 20.05.2023 has been passed staying the operation of earlier order.

11. Learned counsel appearing on behalf of opposite party no. 5 has also refuted submission advanced by learned counsel for petitioner with the submission that earlier during the first year of probation, petitioner institution had issued a show cause notice on 17.06.2022, which was followed up by another show cause notice and was replied to by the said answering opposite parties on 01.07.2022 whereafter he was granted an extension of a further period of one year on 30.07.2022. It is submitted that during the second year of probation, petitioner was issued a show cause notice dated 13.05.2023 followed up by another notice dated 26.05.2023 whereafter another notice dated 07.06.2023 was issued indicating seven charges levelled against petitioner. It is submitted that thereafter an inquiry committee was constituted which submitted its report on 25.07.2023 whereafter the termination order dated 30.07.2023 has been passed on the basis of the aforesaid inquiry report. It is therefore submitted that the aforesaid facts clearly indicate that termination order has been passed not only looking to the satisfactory service of petitioner of the answering opposite parties but in fact alluded to misconduct as well and therefore it would fall within the conditions indicated in Regulation of 16 and not Regulation 11 of the Regulations of 2016. Learned counsel has placed reliance on the following judgments to indicate that once stigmatic charges are levelled against even

a probationer, the notice is required to be specific which it is not in the present case and therefore the termination order dated 30.07.2023 is bad in law. It is further submitted that even otherwise the charges levelled against petitioner clearly indicate that termination order has been passed as a measure of misconduct and not merely as an endeavour to judge his suitability for continuance in service. Learned counsel for opposite party no. 5 has placed reliance on certain judgments rendered by Hon'ble Supreme Court i.e. **Gorkha Security Services versus Govt. of NCT of Delhi reported in MANU/SC/0657/2014; 2014(9) SCC 105, State of Odisha & Ors. versus M/s Panda Infraproject Limited** passed in **Civil Appeal No. 1083 of 1084 of 2022** reported in **2022 LiveLaw (SC) 206, Dr. Vijayakumaran C.P.V. versus Central University of Kerala & Ors. passed in Civil Appeal No. 777 of 2020, Kotak Mahindra Bank Limited versus A. Balakrishnan & Anr.** passed in **Civil Appeal No. 689 of 2021, Ardhendu Kumar Das versus State of Odisha and Ors. reported in 2022 Live Law (SC) 539.**

12. Upon consideration of submission advanced by learned counsel for parties and perusal of material on record, the following questions arise for consideration in this petition:-

I. Whether approval to scheme of Administration of Madarsa can be deemed upon expiry of six months of its receipt by the Board in terms of Regulation 15, Part II of the Regulations of 2016?

II. Whether the Committee of Management of a Madarsa has any jurisdiction to initiate disciplinary proceedings against teaching/non-teaching staff during pendency of approval of scheme of administration?

III. Whether the Registrar has any jurisdiction to approve or disapprove punishment orders by the Committee of Management of a Madarsa inflicted after disciplinary proceedings?

13. **Question No. 1.** So far as the first question is concerned, Section 20 of the Act 2004 provides for making of regulations by the Board for carrying out the purposes of the Act. Section 21 stipulates that all regulations made shall be only with the previous approval of the State Government and published in the gazette. In pursuance of aforesaid powers, the regulations were framed and notified in 2016.

14. Regulation 15 of the regulations provides that the Board shall either approve the scheme of administration within a period of six months of its receipt or shall return it with suggestions pertaining to amendment thereto. There does not appear to be any deeming clause whereby the scheme of administration of a Madarsa can be said to be automatically approved upon expiry of six months. At the same time, some sanctity is required to be attached to the time period of six months stipulated in the regulations and the Board cannot be permitted to act in an arbitrary and whimsical manner ignoring the aforesaid time period so stipulated in the statutory regulations.

15. Regulation 15 of the regulations is as follows:-

"15. परिषद को प्रशासन की योजना प्राप्त होने के मास की प्रथम तिथि से छः मास की अवधि दी जायेगी जिसमें वे या तो उसे स्वीकार कर लेगी अथवा उसको परिवर्तनों अथवा संशोधनों के सुझावों के साथ लौटा देगी।"

16. Hon'ble Supreme Court in the case of **X versus Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another** reported in **(2023) 9 SCC 433** has held that the wordings indicated in statutory provisions or even in sub-ordinate legislations are required to be implemented in order to give effect to its purpose. The relevant paragraph nos. 31 & 35 are as follows:-

"31. The cardinal principle of the construction of statutes is to identify the intention of the legislature and the true legal meaning of the enactment. The intention of the legislature is derived by considering the meaning of the words used in the statute, with a view to understanding the purpose or object of the enactment, the mischief, and its corresponding remedy that the enactment is designed to actualise. Ordinarily, the language used by the legislature is indicative of legislative intent. In Kanai Lal Sur v. Paramnidhi Sadhukhan, Gajendragadkar, J. (as the learned Chief Justice then was) opined that "the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself". But when the words are capable of bearing two or more constructions, they should be construed in light of the object and purpose of the enactment. The purposive construction of the provision must be "illumined by the goal, though guided by the word". Aharon Barak opines that in certain circumstances this may indicate giving "an unusual and exceptional meaning" to the language and words used.

"35. The rule of purposive interpretation was first articulated in Heydon case in the following terms: (ER p. 638)

"... for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: .

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

17. A perusal of the statement of objects and reasons for promulgation of the Act of 2004 has been indicated to the effect that the Arbi Farsi Madarsas were being administered earlier under the Rules of 1987, which having not been made under provisions of any Act, gave arise to various complications in smooth functioning of Madarsas. Therefore, the Act was promulgated with a view to removing the difficulties arisen in running the Madarsas for improving merit therein and making available the best facility of study.

18. It is therefore quite evident that the Act of 2004 and consequently the Regulations framed thereunder have been promulgated and notified for the smooth functioning of the Madarsas since the earlier Rules of 1987 were leading to complications and difficulties.

19. In view of aforesaid, the mischief sought to be controlled by the Act of 2004 is clearly evident with the purpose of establishment of the Board of Madarsa Education under Section 3 of the Act of 2004. Section 22 of the Act of 2004 provides for a scheme of administration for every institution, whether recognized before or after the commencement of the Act and is required to provide for the Constitution of a Committee of Management vested with the authority to manage and conduct affairs of the institution. The said section also provides that the powers, duties and functions of the head of the institution and Committee of Management is required to be specified in the scheme of administration.

20. It is thus evident that the primary purpose of the scheme of administration pertaining to every Madarsa is to effectuate its smooth functioning and delineation of powers of the authorities of a Madarsa. The aforesaid scheme of administration therefore is a necessary requirement for smooth functioning of a Madarsa and it is probably for this purpose that a time limit of six months has been indicated in Regulation 15 of the Regulations of 2016 providing a window to the Board either to approve the scheme of administration or to indicate any amendments required therein.

21. It is also evident that in case the Board does neither of the acts indicated in Regulation 15 pertaining to approval of a scheme of administration, it frustrates the very purpose of the Act and the Regulations framed thereunder. In view of aforesaid, the Board thus is enjoined to adhere to the time limit indicated in Regulation 15 of the Regulations of 2016. From the discussion made hereinabove, it is clear that the Committee of Management of a Madarsa is required to be governed in terms of statutory provisions of the Act of 2004 and the regulations made hereinunder which are binding not only upon the Madarsa and its authorities but upon State authorities as well and the Board of Madarsa.

22. In such circumstances when a statutory duty has been cast upon authorities concerned, it definitely lends a legitimate expectation in favour of the persons concerned that the statutory conditions indicated in the Act and the regulations framed thereunder would be adhered to.

23. With regard to the principles of legitimate expectation, Hon'ble Supreme Court in the case of **State of Jharkhand and others versus Brahmputra Metallics Limited, Ranchi and another** reported in **(2023) 10 SCC 634** has held as follows:-

"46. As regards the relationship between Article 14 and the doctrine of legitimate expectation, a three-Judge Bench in Food Corpn. of India v. Kamdhenu Cattle Feed Industries45, speaking through J.S. Verma, J., held thus: (SCC p. 76, paras 7-8)

"7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this

element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent." (emphasis supplied)

47. More recently, in Noida Entrepreneurs Assn. v. Noida, a two-Judge Bench of this Court, speaking through B.S. Chauhan, J., elaborated on this relationship in the following terms: (SCC pp. 524-25, paras 39 & 41)

"39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a 'democratic form of Government demands equality and absence of arbitrariness and discrimination'. The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. 'Public authorities cannot play fast and loose with the powers vested in them.' A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for

legitimate reasons". It must be exercised bona fide for the purpose and for none other." (emphasis supplied)

As such, we can see that the doctrine of substantive legitimate expectation is one of the ways in which the guarantee of non-arbitrariness enshrined under Article 14 finds concrete expression."

24. Upon applicability of the aforesaid principle of statutory interpretation read with Regulation 15 of the Regulations of 2016, it is evident that the Board of Madarsa has been provided a window of only six months from the date of receipt of the draft scheme of administration either to approve the same or to return it with suggestions.

25. In the case of **All Kerala Parents' Association of Hearing impaired and another versus State of Kerala and others reported in (2018) 2 SCC 410** has held as follows:-

"5. It is well settled that when the language of any statutory provisions is clear and unambiguous, it is not necessary to look for any extrinsic aid to find out the meaning of the statute inasmuch as the language used by the legislature is the indication of the legislative intent."

26. It is also settled law that provisions of statute are either mandatory or directory in nature but the language alone employed in the statutory provision is not the sole determinative of such a factor and has to be considered in the light of effect of such a statutory provision and the consequences which would follow in case it is held not to be mandatory.

27. In three judge bench decision of Hon'ble Supreme Court in the case of **State of Mysore and others versus versus V.K. Kangan and others** reported in **(1976) 2 SCC 895** the proposition has been enunciated as follows:-

"10. In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. We see no reason why the rule should receive a permissible interpretation instead of a pre-emptory construction. As we said, the rule was enacted for the purpose of enabling the Deputy Commissioner (Land Acquisition Collector) to have all the relevant materials before him for coming to a conclusion to be incorporated in the report to be sent to the Government in order to enable the Government to make the proper decision. In Lonappan v. Sub-Collector of Palghat the Kerala High Court took the view that the requirement of the rule regarding the giving of notice to the department concerned was mandatory. The view of the Madras High Court in K. V. Krishria Iyer v. State of Madras is also much the same."

28. Hon'ble Supreme Court in the case of **Amardeep Singh versus Harveen**

Kaur reported in **(2017) 8 SCC 746** has held as follows:-

"18. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The court has to have the regard to the context, the subject-matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's Principles of Statutory Interpretation (9th Edn., 2004), has been cited with approval in Kailash v. Nanhku reported in (2005) 4 SCC 480 as follows: (SCC pp. 496-97, para 34)

"34. ... 'The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject- matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oftquoted passage Lord Campbell said: "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered." ' " (p. 338)

" 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." (pp. 339-40)"

29. In the case of **Devinder Singh and others versus State of Punjab and others** reported in **(2008) 1 SCC 728,** Hon'ble Supreme Court has interpreted statutory clauses in terms of being mandatory or directory in nature. The relevant paragraph no. 55 is as follows:-

"55. The approach of the High Court in this behalf, in our opinion, is totally erroneous. A provision of a statute is either mandatory or directory. Even if a provision is directory, the same should be substantially complied with. It cannot be ignored in its entirety only because the provision is held to be directory and not an imperative one."

30. In view of aforesaid, the time window of six months provided to the Board of Madarsa for approving the draft scheme of administration has to be strictly adhered to. Attaching any other meaning or providing extension of the time limit of six months to the Board of Madarsa would eviscerate the specific statutory provision by undesirable lapses on the part of Board.

31. The only conclusion which can be drawn therefore is that the time window of six months provided to the Board of

Madarsa has to be construed strictly as a mandatory condition failing which it would impair the smooth functioning of the institutions concerned and would defeat the very purpose for which the Act of 2004 was promulgated. In such circumstances, there is no other option but to hold that in case the Board of Madarsa does not return the draft scheme of administration with its suggestions for amendment within the stipulated time limit of six months, approval of the draft scheme of administration would be deemed.

32. This is all the more evident since under Regulation 15 of the Regulations of 2016, no power has been given to the Board of Madarsa to disapprove of a draft scheme of administration. The silences of the statutory provision cannot be a ground to provide the Board of Madarsa untrammeled power to Act arbitrarily by withholding approval to the draft scheme of administration for all times to come.

33. In the present case, it is evident that the scheme of administration of the Madarsa concerned had been forwarded to the Board on 07.08.2021 which was received on 08.08.2021 whereafter it is still pending consideration despite passing of more than two and half years.

34. In the aforesaid circumstance and particularly since there is no disapproval indicated by the Board of Madarsa with regard to draft scheme of administration of the petitioner institution, the approval to draft scheme of administration is deemed to have been accorded.

35. **Question No. 2.** The said question pertains to whether the Committee of Management has any jurisdiction to initiate disciplinary proceedings during the pendency of approval of the scheme of administration.

36. The aforesaid question can clearly be divided into two parts pertaining to Regulations 11 and 16 of the Regulations of 2016. While Regulation 11 of Part III of the Regulations of 2016 pertain to probation and confirmation, Regulation 16 of the aforesaid part pertains to disciplinary proceedings against the Headmaster, teaching and non-teaching staff of a Madarsa. Aforesaid two regulations are as follows:-

"11. परिवीक्षण तथा स्थायीकरण- समस्त नवनियुक्त व्यक्तियों को एक वर्ष की परिवीक्षा पर रखा जायेगा, जिसे आगे एक वर्ष के लिए कारण उल्लिखित करते हुये प्रबन्ध समिति द्वारा बढ़ाया जा सकता है। यदि परिवीक्षण अवधि में सम्बन्धित कर्मचारी का कार्य एवं व्यवहार असन्तोषजनक पाया जाता है, तो प्रबन्ध समिति द्वारा कारण बताओं नोटिस देने एवं स्पष्टीकरण प्राप्त करने के पश्चात् परिवीक्षित सेवा समाप्त की जा सकती है। यदि परिवीक्षण अवधि में कोई नोटिस परिवीक्षण अवधि बढ़ाने का नहीं दिया जाता है तो परिवीक्षण काल पूर्ण होने पर सम्बन्धित कर्मचारी अपने पद पर स्थायी किया हुआ समझा जायेगा।

16. अनुशासनिक कार्यवाही (दण्ड, जाँच तथा निलम्बन) - मदरसों के प्रधानाचार्य, शिक्षक एवं शिक्षणेत्तर कर्मचारियों के सम्बन्ध में अनुशासनिक कार्यवाही, निलम्बन एवं दण्ड तथा नैतिक अधमता से अर्न्तग्रस्त किसी अपराध के लिए किसी दण्डिक मामले मेंअन्वेषण या विचारण की कार्यवाही मदरसा शिक्षा परिषद द्वारा अनुमोदित सेवा एवं प्रशासन योजना के अन्तर्गत की जायेगी।"

37. Regulation 11 indicates that a person can be engaged in service for a period of one year on probation which is extendable to a further period of one year. In case the work and conduct of the probationer is found to be dis-satisfactory, his services can be dispensed with after issuing a show cause notice to him and providing opportunity to rebut the same. The provision also indicates automatic confirmation of a probationer upon

satisfactory completion of the probation period.

38. The aforesaid regulation is clearly an independent provision pertaining to services of a person engaged on probation by a Madarsa. Quite evidently, the said provision is independent of the scheme of administration applicable upon a Madarsa.

39. In stark contrast, Regulation 16 which pertains to disciplinary proceedings is completely dependent on the approved scheme of administration and the conditions of service which would be indicated therein.

40. In such circumstances the only result of such an examination is that the Committee of Management of a Madarsa is fully competent to take action with regard to dispensing with services of a probationer upon expiry of the probation term but subject to fulfillment of conditions indicated in Regulation 11 whereas action against substantively appointed teaching and non-teaching staff of a Madarsa is completely dependent upon the approved scheme of administration.

41. It is thus evident that while provisions regarding probation have been clearly delineated in the Regulations of 2016, those regarding disciplinary proceedings against substantive employees of the Madarsa have been indicated to be subservient to the scheme of administration. Therefore, the provisions of Regulation 11 being a part of sub-ordinate legislation would definitely have precedence over the scheme of administration.

42. The aspect of precedence of delegated legislation has been enunciated by Hon'ble Supreme Court in the case of **St Johns Teachers Training Institute versus Regional Director, National Council for Teacher Education and another** reported in **(2003) 3 SCC 321** in the following terms:-

"10. A Regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the frame work of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the Rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and Regulations made by reason of the specific power conferred by the Statutes to make Rules and Regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the Statute. The process of legislation by departmental Regulations

saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of Rules and Regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being over burdened and the needs of the modern day society being complex it can not possibly foresee every administrative difficulty that may arise after the Statute has begun to operate. Delegated legislation fills those needs. The Regulations made under power conferred by the Statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature. (See Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi.)"

43. In the considered opinion of this Court, it would be appropriate to hold that the Committee of Management of a Madarsa is fully empowered to take action as prescribed under Regulation 11 of Part III of the Regulations of 2016 regarding a probationer irrespective of pendency of approval to the proposed scheme of administration but cannot initiate any disciplinary action against substantively appointed teaching and non-teaching staff of a Madarsa pending approval of the scheme of administration.

44. The aforesaid fact is also evident from the Government order dated 07.01.2022 which also prohibits initiation of any disciplinary proceedings against substantively appointed teaching and non-teaching staff of a Madarsa in terms of Regulation 16 of Part III of the Regulations.

45. **Question No. 3**. The answer to question whether Registrar has any jurisdiction to approve or disapprove punishment order by the Committee of Management of Madarsa either in terms of Regulation 11 or Regulation 16 of Part III of the Regulations is required to be considered in terms of the aforesaid regulations themselves.

46. It has been submitted by learned counsel for opposite parties that the Registrar exercises power of superintendence in terms of Section 16 of the Act of 2004 and therefore he is empowered to approve or disapprove of action taken by the Committee of Management of a Madarsa pertaining either to Regulation 11 or 16 of the Regulations. Section 16 of the Act of 2004 is as follows:-

"16. (1) The Registrar of the Board shall be the Chief Executive Officer of the Board and shall, subject to the superintendence, control and directions of the Board, be responsible for the execution of its decisions. He shall exercise such other powers and perform such other duties as may be prescribed by regulations, and in particulars :-

(a) be responsible to prepare and present the annual estimates and statement of accounts;

(b) be responsible to ensure that all moneys are spent for the purpose for which they are granted or allotted;

(c) be responsible for keeping the minutes of the meeting of the Board;

(d) shall exercise such powers as are necessary for the conduct of the examinations; and

(e) shall exercise such other powers as may be prescribed by the regulations."

47. A perusal of the aforesaid provision clearly indicates that the powers

of Registrar is limited for the exercise of powers and performing duties which may be prescribed by regulations which are indicated in Clauses (a) (b) (c) (d) & (e). The provision does not indicate any power to approve or disapprove of disciplinary action taken by the Committee of Management of a Madarsa. The only exception is Clause 16 (1) (e) with regard to exercise of power as prescribed by the regulations.

48. However, a perusal of both the regulations whether pertaining to services of probationer employee or substantively appointed employee of a Madarsa reveal that there is no provision under the statutory regulations whereby Registrar has been conferred any power to approve or disapprove of action taken by the Committee of Management of a Madarsa under the aforesaid regulations.

49. Hon'ble Supreme Court in the case of **Adani Gas Limited versus Union of India and others** reported in **(2022) 5 SCC 210** has clearly held that the rule or regulation making authority cannot travel beyond the scope of the enabling parent Act. The relevant paragraph nos. 106 & 114 are as follows:-

"106. In State of U.P. v. Renusagar Power Co.61 this Court held that: (SCC pp. 100-01, para 79)

"79. If the exercise of power is in the nature of subordinate legislation, the exercise must conform to the provisions of the statute."

114. It is a well-established principle that the rule or regulation-making authority cannot travel beyond the scope of the enabling parent Act. (State of Karnataka v. H. Ganesh Kamath; St. Johns Teachers Training Institute v. NCTE; Tata Power Co. Ltd. v. Reliance Energy Ltd.). In the decision in Indramani Pyarelal Gupta v. W.R. Natu this Court observed that the proper test applicable would be to consider whether the rule or subordinate legislation is "incompatible" with the purpose for which the body was created or the particular power is contra-indicated by a specific provision: (W.R. Natu case70, AIR p. 281, para 14)

"14.... the proper rule of interpretation would be that unless the nature of the power is such as to be incompatible with the purpose for which the body is created, or unless the particular power is contra-indicated by any specific provision of the enactment bringing the body into existence, any power which would further the provisions of the Act could be legally conferred on it.""

50. A Co-ordinate Bench of this Court in the case of **C/M Madarsa Muhammdiya Faiz-E Rasool And Another versus State Of U.P. And 3 Others, Writ-A No. 13753 of 2020** after perusal of Regulations 2016 has also held that neither the statute nor the regulations provide for conferring any power on the Registrar either disapproving or approving of any suspension or termination of any teaching/non teaching staff.

51. Considering the wordings of Regulations 11 and 16 of Part III of Regulations of 2016, this Court is in respectful agreement with the aforesaid judgment and order and therefore holds that the Registrar does not have any power whatsoever under the aforesaid Regulations 11 and 16 of Part III of the Regulations of 2016 either to approve or disapprove action taken by Committee of Management against its employees with a probationary or substantively appointed.

52. However, a rider to the aforesaid observation is required in the sense that since regulation 16 empowering the Committee of Management to initiate disciplinary action against substantively appointed employees is dependent on the approved scheme of administration, the aforesaid powers of the Registrar would be subject to any such provision in case it is indicated in the scheme of administration. However, the Registrar even otherwise would not derive any power to approve or disapprove of action taken by the Committee of Management of a Madarsa under Regulation 11 of Part III of the Regulations of 2016.

53. In view of what has been held hereinabove, it is evident that the opposite parties have sought to take benefit of their own wrong. On one hand the Board has kept the proposed scheme of administration sent by petitioner in limbo for the past two and half years but on the other hand it seeks to derive benefit from the same by striking down action taken by the Committee of Management against the probationary employee on the pretext that the scheme of administration has not been approved. Such a situation cannot be permitted and would in fact amount to an arbitrary action on the part of opposite parties which would therefore be violative of Article 14 of the Constitution of India.

54. Learned counsel for opposite party no. 5 has strenuously submitted that since the services of the answering opposite parties, even though on probation, were dispensed with on stigmatic grounds and after following procedure for inquiry, the same would be covered under provisions of Regulation 16 and not Regulation 11 of Part III of the Regulations.

55. However, upon careful examination of not only the show cause notices but also the termination order, it is evident that petitioner has followed the provisions of Regulation 11 which clearly provides that prior to dispensing with the services of a probationary employee on grounds of dissatisfactory work or conduct, a show cause notice and opportunity to rebut the allegations is required to be given, has been followed.

56. Even if it is assumed that services of opposite party no. 5 have been dispensed with on stigmatic grounds, only an opportunity of hearing is required which by any stretch of imagination cannot be said to be in terms of Regulation 16 of the Regulations which clearly is applicable only in case of substantively appointed teaching and non-teaching staff whereas the opposite party no. 5 being only on probation, is covered by the provisions of Regulation 11 of Part III of the Regulations.

57. Learned counsel for opposite party no. 5 has placed reliance on a number of judgments to buttress his submissions. However, a perusal of the aforesaid judgments clearly indicates that they are inapplicable in the present facts and circumstances primarily for the reason that the judgments pertain only to the procedure required to be followed in case of a probationary employee in case his services are dispensed with on stigmatic grounds.

58. At the cost of repetition, it is relevant to state that even if the aforesaid propositions of law are implemented, the nature of petitioner's engagement as a probationary employee and not a substantively appointed employee cannot be countenanced.

59. Learned counsel for opposite party no. 5 has also adverted to judgment and order dated 05.08.2022 passed by this Court in **Writ-A No. 10967 of 2022, Arshad Javed Khan versus State of U.P and others.** However, a perusal of aforesaid judgment also makes it evident that the same pertained to a substantively appointed teaching staff of a Madarsa and action against him had been taken in terms of Regulation 16 of the Regulations and not under Regulation 11.

60. It is also a relevant fact that the aspect of whether procedure indicated under Regulation 11 of Part III of the Regulations was followed or not is not an aspect to be considered in this petition since the termination order dated 30.07.2023 is not under challenge at the behest of opposite party no. 5.

61. In view of what has been held hereinabove, it is evident that the Registrar had absolutely no jurisdiction whatsoever to interfere with the order dated 30.07.2023 passed by petitioner institution terminating services of opposite party no. 5.

62. It is also evident that the order dated 01.01.2024 imposing single hand operation has been issued by the Registrar only on account of the fact that name of opposite party no. 5 was not being included by the management in salary bills.

63. In view of what has been held hereinabove, the impugned orders dated 09.11.2023 and 01.01.2024 are hereby quashed by issuance of a writ in the nature of certiorari.

64. In view of Regulation 15 of Part II of the Regulations of 2016, there is no occasion for this Court to interfere with the impugned order dated 20.05.2023. However, in view of specific provisions of Regulation 15 of the regulations of 2016 it is held that the draft scheme of administration submitted by the institution in question received by the Board on 08.08.2021 shall hereby stand approved.

65. An application for impleadment was filed on behalf of one Mohd. Mazhar Khan indicating himself to be an Assistant Teacher in the Institution. He is neither a necessary nor a proper party. The application is therefore rejected.

66. Resultantly, the petition succeeds and is **allowed**. Parties to bear their own cost.

(2024) 3 ILRA 448
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2024
BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal Defective No. 742 of 2023

The State of U.P. & Ors. ...Appellants
Versus
Sunny Yadav & Anr. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Sri Om Prakash Tripathi, Sri Ashok Khare (Sr. Advocate)

A. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – Departmental enquiry – No oral or documentary evidence was produced or taken note of – No date was fixed in the enquiry – Effect – Held, the enquiry officer acts as a quasi-judicial authority and has

to independently decide the issue of misconduct upon consideration of evidence led by either side. It is in this context that the procedure laid down in the Rules of 1999 has to be followed. In the event, enquiry officer is not satisfied with the reply submitted by the delinquent officer, the enquiry officer will have to proceed with the enquiry by fixing a date, time and place and conduct the enquiry. (Para 7)

B. Service Law – Departmental enquiry – Writ court issued direction to hold fresh enquiry and release of arrears of salary as well – Permissibility – Held, while extending the liberty to the employer to conduct a fresh enquiry, a direction is simultaneously issued to release the arrears of salary also, which was clearly impermissible – In the event, charges were found serious, it would have to be left to the discretion of the employer either to take work from the employee concerned or to place him under suspension. (Para 10 and 11)

Appeal disposed of. (E-1)

List of cases cited :-

1. Managing Director, ECIL, Hyderabad & ors. Vs B. Karunakar & ors., reported in (1993) 4 SCC 727

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

In Ref: Delay Condonation Application.

1. Reasons for delay in filing the special appeal have been satisfactorily explained. Delay Condonation Application is consequently allowed.

2. Office is directed to treat the appeal as having been filed within time. Regular Number would be allotted to the appeal.

Order on Appeal

1. Heard Sri Ajit Kumar Singh, learned Additional Advocate General for the State and Sri Ashok Khare, learned Senior Counsel assisted by Sri Om Prakash Tripathi, learned counsel for the respondents

2. This appeal is directed against the judgment and order passed by the learned Single Judge dated 22.3.2023 as corrected on 11.04.2023, whereby the punishment order dated 13.07.2020 against the petitioner has been set aside. Learned Single Judge has returned a finding that the procedure required to be followed for conduct of departmental enquiry i.e. U.P. Government Servant (Discipline and Appeal) Rules, 1999 has not been adhered to. The enquiry report has been perused by learned Single Judge and it is recorded that after considering petitioner's reply no oral or documentary evidence has been produced or taken note of, nor any such evidence has been proved. Learned Single Judge therefore has arrived at the conclusion that order of dismissal based upon such defective enquiry held in violation of the Rules of 1999 cannot be sustained. An opportunity has been given to the appellants to proceed against the petitioner, by holding a fresh enquiry, in accordance with applicable Rules. A further direction has been issued to pay subsistence allowance to the petitioner. The judgment has been corrected later and the petitioner has been held entitled to arrears of salary also in addition to the subsistence amount.

3. Sri Ajit Kumar Singh, learned Additional Advocate General for the State contends that the finding of the Writ Court with regard to non adherence to the procedure stipulated in Rule 7 of 1999

Rules is unsustainable inasmuch as enquiry has been conducted strictly as per law. It is also argued that since the Writ Court has granted liberty to the employer to hold a fresh enquiry. Therefore, the direction to release arrears of salary is impermissble.

4. Reliance is placed upon the judgment of the Supreme Court in ***Managing Director, ECIL, Hyderabad & others Vs. B. Karunakar & others, reported in (1993) 4 SCC 727.*** It is urged that in the event punishment order was interfered with on the ground that procedure for enquiry has not been followed, the limited relief that could have been granted was to allow reinstatement for the purposes of holding of enquiry and option ought to have been given to place the employee under suspension for the purposes of holding of enquiry. Submission is that the course suggested by the Writ Court is completely at variance with the law laid down in ***Managing Director, ECIL, Hyderabad*** (supra), and therefore, the judgment of the learned Single Judge cannot be sustained.

5. Sri Ashok Khare, learned Senior Counsel assisted by Sri Om Prakash Tripathi, learned counsel for the respondents, on the other hand submits that the liberty granted by the Writ Court vide order dated 22.3.2023 has not been availed by the employer and in such circumstances this Court ought not to interfere in the order. It is further submitted that period of three months was sufficient to hold a fresh enquiry. It is also contended that the direction to release financial benefits is in accordance with law. It is also argued that the charges against the respondent petitioner are otherwise not serious enough so as to warrant any major punishment.

6. We have heard Sri Ajit Kumar Singh, learned Additional Advocate General for the State and Sri Ashok Khare, learned Senior Counsel assisted by Sri Om Prakash Tripathi, learned counsel for the respondents and perused the material available on record.

7. So far as the holding of departmental enquiry against the respondents is concerned, we find from a perusal of the enquiry report that after noticing the charges levelled against the employee concerned and his reply he has proceeded to return his findings. There is no reference in the enquiry report to any oral or documentary evidence furnished before the enquiry officer. The enquiry officer acts as a quasi-judicial authority and has to independently decide the issue of misconduct upon consideration of evidence led by either side. It is in this context that the procedure laid down in the Rules of 1999 has to be followed. In the event, enquiry officer is not satisfied with the reply submitted by the delinquent officer, the enquiry officer will have to proceed with the enquiry by fixing a date, time and place and conduct the enquiry. There is nothing on record to show that any date was fixed in the enquiry or any evidence was led, oral or documentary, before returning a finding of guilt against the delinquent employee. Whether the charges were serious enough so as to warrant any major punishment has also not been dealt with.

8. In such view of the matter, we find no error in the view taken by the learned Single Judge in allowing the writ petition on the ground of failure to adhere to the provision of the enquiry Rules. Challenge to the judgment of learned Single Judge on this ground fails.

9. The other part of appellants' submission is with regard to course of action which ought to have been made open for the appellants when the punishment order was interfered with on the ground that the enquiry has not been conducted in accordance with the procedure specified in the Rules. The issue with regard to the course available to the employer in the above circumstances has been elaborately laid down in para 31 of the judgment of Hon'ble Supreme Court in ***Managing Director, ECIL, Hyderabad & others Vs. B. Karunakar & others***, which is reproduced hereinbelow:

"Hence, in all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court! Tribunal, and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court. Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment.

The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short-cuts. Since it is the Courts/ Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Courts/ Tribunals find that the furnishing of the report would have made a: difference to the result in the case that should set aside the order of punishment Where after following the above procedure the Courts/Tribunals sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority, management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

10. The judgment of the learned Single Judge would reveal that while extending the liberty to the employer to conduct a fresh enquiry a direction is simultaneously issued to release the arrears of salary also which was clearly

impermissible in view of the observations made by the Hon'ble Supreme Court in the case of ***Managing Director, ECIL, Hyderabad*** (supra).

11. We are of the considered opinion that for the limited purposes of enabling the employer to conduct proper enquiry a direction ought to have been issued to reinstate the respondent-petitioner for the purposes of conduct of enquiry. In the event, charges were found serious, it would have to be left to the discretion of the employer either to take work from the employee concerned or to place him under suspension. The proceedings of enquiry would have to be restored to the stage from where it had gone bad. Question of paying arrears of salary ought to have been deferred to be decided on the basis of the fresh enquiry. Since such course has not been followed by the learned Single Judge, therefore to that extent, we are inclined to interfere in the judgment of the learned Single Judge and consequently the direction issued by the Writ Court stands modified to such extent. We are informed that subsistence allowance has already been paid to the respondent petitioner. We, therefore, provide that till conclusion of fresh enquiry in Rule 7, the appellant employer shall continue to pay subsistence allowance in case they opt to place the respondent petitioner under suspension. We also provide that the enquiry proceedings would be undertaken expeditiously and concluded within a period of four months from today. The respondent undertakes to co-operate in the enquiry.

12. In light of the above observations and subject to the modification made in the judgment of learned Single Judge, this special appeal stands disposed of.

13. Lastly we are informed that contempt proceedings have been initiated by the respondent for enforcement of the judgement of the Writ Court in which 4th March of 2024 is the date fixed for personal appearance of officers. Since we have modified the judgment of the learned Singe Judge it shall be open for the appellants to inform the contempt court about the order passed today and seek appropriate protection.

(2024) 3 ILRA 452
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2024
BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 1131 of 2018

Ashika Prasad Shukla ...Appellant
Versus
The District Inspector of Schools & Ors. ...Respondents

Counsel for the Appellant:
Sri Shivendu Ojha, Sri Radha Kant Ojha

Counsel for the Respondents:
C.S.C., Sri Satyendra Chandra Tripathi

A. Service Law – UP Secondary Education Service Selection Boards Act, 1982 – UP Secondary education Services Commission (Removal of Difficulties) Second Order, 1981 – Cl. 2 (3) (ii) and (iii) – Post of Assistant Teacher – Payment of salary – Appointment against short term vacancy – Papers was sent for approval, but no communication of decision on approval was intimated to the Committee within a period of seven days or even after expiry of seven days – Issuance of appointment letter before approval – Effect – Principle of deemed approval – Applicability – Held, learned Single Judge is not justified in

dismissing the writ petition only on the ground that appointment was offered to the appellant-petitioner even before deemed approval could be granted to such appointment. The appointment of appellant-petitioner made on 05.081992 become effective only from the date of deemed approval. (Para 10 and 13)

Appeal allowed. (E-1)

List of cases cited :-

1. Ashika Prasad Shukla Vs D.I.O.S. & ors.; 1998 (3) UPLBEC 1722

2. A. K. Pathshala Vs Smt. M.D. Agnihotri; 1971 Alld.LJ 983

3. Lalit Mohan Misra Vs D.I.O.S.; 1979 All. 1075

4. Pramod Kumar Pandey Vs D.I.O.S.; 2019 (11) ADJ 127

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. This appeal is directed against the judgment and order dated 31.10.2018, passed by learned Single Judge in Writ-A No.5050 of 2001, whereby the claim of appellant-petitioner of appointment as Assistant Teacher is turned down primarily on the ground that the procedure prescribed in Clause 2(3)(ii)&(iii) of Uttar Pradesh Secondary education Services Commission (Removal of Difficulties) Second Order, 1981 (hereinafter referred to as 'Second Order of 1981') was not followed and consequently the appointment of appellant-petitioner was nullity.

2. There exists an educational institution known as Krishak Inter College, Kashauta, Allahabad (Prayagraj) [hereinafter referred to as 'Institution'], which is duly recognized under the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act of 1921') and provisions of U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 are applicable upon it. The provisions of U.P. Secondary Education Service Selection Boards Act, 1982 (hereinafter referred to as 'Act of 1982') regulated the appointment of Teachers in the Institution.

3. Vide letter/order dated 13.11.1991, which was effective from 01.04.1991, one post of Principal; two post of L.T. Grade Teacher; and four post of C.T. Grade Teacher were sanctioned by the competent authority in the Institution. The senior most teacher in the Institution, namely Surendra Prasad Tripathi, was appointed as ad-hoc Principal. Resultantly, a short-term vacancy on the post of Assistant Teacher (L.T. Grade) came into existence against which the appellant-petitioner claims to have been appointed on 05.08.1992 under the Second Order of 1981.

4. Though the appellant-petitioner claimed to have been validly appointed but his salary was not paid. Consequently, he filed a Writ Petition No.31694 of 1994, which was dismissed on 31.10.1995, observing that the procedure laid down by the Full Bench in the case of Radha Raijada vs. State of U.P. and others, 1994 UPLBEC 1551 regarding publication of vacancy in two newspapers etc. has not been followed. This order of learned Single Judge has been reversed in Special Appeal No.948 of 1995 vide judgment dated 18.08.1998. The Division Bench held that the procedural requirement made applicable in case of short-term vacancy in Radha Raijada's case (supra) was to apply prospectively and

since the appointment of appellant-petitioner was made prior to such judgment, therefore, the rigours of procedure laid down in Radha Raijada's case (supra) would not be attracted. It was thereafter that the matter was again considered and rejected by the District Inspector of Schools, Allahabad (hereinafter referred to as 'Inspector') vide his order dated 17.11.1998. Appellant-petitioner then filed Writ Petition No.40140 of 1998 challenging the order dated 17.11.1998, which was allowed relying upon the previous adjudication made in the special appeal. The authorities, however, again reiterated their stand while rejecting the claim of appellant's appointment, which came to be challenged by the appellant-petitioner in Writ-A No.5050 of 2001.

5. Writ Petition No.5050 of 2001 was entertained and an interim protection was granted. The appellant-petitioner continued to work under the interim order and also received salary. We are informed that he has attained the age of superannuation on 31.03.2020. The writ petition, however, came to be dismissed by the learned Single Judge vide impugned judgment and order 31.10.2018, wherein the facts relating to appointment and creation of vacancy etc. have been elaborately noticed. In para 17 of the judgment learned Single Judge has crystallized following three issues that required examination in the writ petition:-

"(1) Whether ban imposed by Government Order dated 29.06.1991 could be extended to short term vacancies?

(2) Whether ad hoc appointment of petitioner was validly made by following relevant Removal of Difficulties Order i.e. 'Second Order'?

(3) Whether vacancy in question could have been treated to be a substantive vacancy or short term vacancy? "

6. So far as the issue no.1 is concerned, learned Single Judge has categorically held that the ban imposed vide Government Order dated 29.06.1991 could not have been extended to short-term vacancy. The first issue, therefore, stands adjudicated in favour of the appellant-petitioner. The other two issues have been dealt with in para 19 of the judgment. Clause 2 of the Second Order of 1981 is relied upon which is quoted hereinafter:-

"2. Procedure for filling up short-term vacancies.-(1) If short-term vacancy in the post of a teacher caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise, shall be filled by the Management of the Institution by promotion of the permanent senior-most teacher of the institution, in the next lower grade. The Management shall immediately inform the District Inspector of Schools of such promotion along with the particulars of the teacher so promoted.

(2) Where any vacancy referred to in Clause (1) cannot be filled by promotion, due to non-availability of a teacher in the next lower grade in the institution, possessing the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in Clause (3).

(3) (i) The management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the Manager of the Institution along with the particulars given in Appendix "B" to this Order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal

of Difficulties) Order, 1981, issued with Notification No. Ma-1993/XV-7(79)-1981, dated July 31, 1981, hereinafter to be referred to as the First Removal of Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the Head of Institution.

(ii) The names and particulars of the candidate selected and also of other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of receipt of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure, to communicate his decision within seven days of the receipt of papers by him from the Manager, the Management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager.

Explanation-For the purpose of this Paragraph-

(i) the expression "senior-most teacher" means the teacher having longest continuous service in the institution in the Lecturer's grade or the Trained prabhatgraduate (L.T.) grade or Trained under-graduate (C.T.) grade or J.T.C. or B.T.C. grade as the case may be;

(ii) in relation to institution imparting instructions to women, the expression "District Inspector of Schools' shall mean the Regional Inspectress of Girls' Schools;

(iii) short-term vacancy which is not substantive and is of a limited duration." (emphasis added) ”

7. Learned Single Judge after referring to the series of judgments delivered by this Court has ultimately opined in para 33 that since appointment letter to the appellant-petitioner was issued on the date of selection itself i.e. 05.08.1992 and he was actually joined on the next day i.e. 06.08.1992, therefore, there was no compliance of the procedure laid down in Clause 2(3)(ii) of the Second Order of 1981. Learned Single Judge has noticed that the appointment was not approved by the educational authority and occasion had not arisen even for deemed approval of short-term appointment of the appellant-petitioner.

8. Learned counsel for the appellant-petitioner has invited our attention to the previous judgment delivered in the case of appellant-petitioner reported in 1998 (3) UPLBEC 1722, wherein import of non-approval to appointment against short-term vacancy was examined. In para 15 and 16 of the judgment the Division Bench observed as under:-

“15. The next question that falls for consideration is whether the appointment of the petitioner-appellant could still stand invalidated on the ground that it was made without prior approval of the District Inspector of Schools. Sri Yatindra Singh placed reliance on a Division Bench decision of this Court in A. K. Pathshala v. Smt. M. D. Agnihotri, 1971 All LJ 983, wherein it was held, on construction of Section 16F (1) of the U. P. Intermediate Education Act, 1921, that appointment without prior approval by the Competent Authority would, in the eye of

law, be no appointment. The ratio of the said decision as held by a subsequent Division Bench in Lalit Mohan Misra v. District Inspector of Schools. 1979 All LJ 1025, is that a "person gets the status of a teacher when requisite formality is completed." The relevant observations are as under :

"Without approval the person does not get the status of a teacher even though the approval is to be followed by formal letter but in the absence of formal letter the person gets the status of a teacher after approval to the appointment is given by the District Inspector of Schools. The appointment of a person as a teacher becomes effective only from the date approval is given and even if a person is allowed to work before that the same has no recognition under the U. P. Intermediate Education Act."

16. Paragraph 2 (3) (iv) of the Second Removal of Difficulties Order is not phrased in a prohibitory language as was the language used in Section 16F (1) of the U. P. Intermediate Education Act, 1921. The words 'prior approval' have been used in sub-clause (ii) of paragraph 2 (3) of the Second Removal of Difficulties Order and a conjoint reading of sub-clauses (it), (Hi) and (iv) of clause (3) of paragraph 2. no doubt, leads to an inescapable conclusion that the appointment would be issued under the signature of the Manager only on the approval having been communicated by the District Inspector of Schools within seven days of the receipt of the papers or where the approval is deemed to have been accorded as visualised by sub-clause (Hi) of clause (3) of paragraph 2 of the Second Removal of Difficulties Order. However, appointment, if made prior to approval or deemed approval, would become effective from the date of approval or deemed approval as held by the Division Bench of this Court in Lalit Mohan Misra (supra). There is nothing on the record to connote that prerequisite conditions attracting deemed approval were not satisfied in the instant case. The learned single Judge has also not addressed himself to this facet of the matter and the Judgment under appeal on this score too cannot be sustained."

9. The Division Bench has noticed the language employed in Clause 2(3)(ii)&(iii) of the Second Order of 1981 as per which selection on a short-term vacancy could be made on the basis of quality point marks specified in the appendix to the Second Order of 1981. As per Clause 2(3)(ii), the names and particulars of selected candidates and other candidates alongwith quality point marks allotted to them shall be forwarded by the Manager to the Inspector, who shall communicate his decision within seven days as per Clause 2(3)(iii) and in the event no decision is intimated by the Inspector, within seven days of the receipt of particulars by him, the approval shall be deemed to have been granted.

10. In the facts of the present case, the papers relating to selection proceedings alongwith quality point marks and other details were sent by the Manager to the Inspector on 12.08.1992 in terms of Clause 2(3)(ii) of the Second Order of 1981. It is also admitted that within a period of seven days or even after expiry of seven days no decision was intimated to the management regarding appointment of appellant-petitioner. It is therefore to be seen as to whether the appointment made even before expiry of seven days period could be treated as legal or not.

11. In the previous round of litigation *inter se* between the parties the Division

Bench of this Court had relied upon the judgment of this Court in A. K. Pathshala vs. Smt. M.D. Agnihotri, 1971 Alld.LJ 983, which recognized the principle that appointment of a teacher would become effective only from the date approval is given to it. In law any working prior to the date of approval or deemed approval cannot be counted or relied upon. In the facts of the present case, papers relating to selection had been sent to the Inspector for his approval on 12.08.1992 and since for a period of one week no decision was intimated as such the approval would be deemed to have been given in law to the selection for appointment on the expiry of one week. It is only with the deemed approval granted to the appellant's appointment that legality would be attached to the appointment offered to him.

12. The mere fact that appointment letter was issued even before deemed approval was accorded to the appellant-petitioner would not mean that appointment offered to the appellant-petitioner would become invalid. In the previous round of litigation, inter-se between the parties, this Court had relied upon the judgment of this Court in Lalit Mohan Misra vs. D.I.O.S., 1979 All. 1075, which held the approval to be the date when recognition is granted to the teacher. This Court also held that appointment made prior to approval or deemed approval would become effective only from the date of approval. A finding was also returned that deemed approval had occurred. Similar view has also been taken by the Division Bench of this Court in Pramod Kumar Pandey vs. D.I.O.S., 2019 (11) ADJ 127. In paragraph 17, this Court held as under:-

"17. In the present case, it is admitted fact that the papers relating to selection and appointments of the appellant-petitioners were sent to DIOS by the Management on 17.10.1997 for his grant of approval after having issued letters of appointment to the appellant-petitioners. It is also not in dispute that the DIOS did not bestow his consideration on these papers within statutory specified period of seven days. As such the appointment of appellant-petitioners stood approved by deemed fiction of law and in view of the law settled by this court in above authoritative pronouncements (Lalit Mohan Misra and Another (supra), and Abhay Pal Singh (supra)]."

13. In that view that matter, we find that the learned Single Judge is not justified in dismissing the writ petition only on the ground that appointment was offered to the appellant-petitioner even before deemed approval could be granted to such appointment. The appointment of appellant-petitioner made on 05.081992 become effective only from the date of deemed approval i.e. upon expiry of one week from 12.08.1992. The authorities, therefore, were not justified in non-suiting the appointment of appellant-petitioner for such reason.

14. Consequently, this appeal succeeds and is allowed. Judgment and order dated 31.10.2018, passed by learned Single Judge in Writ-A No.5050 of 2001, is hereby set aside. Respondents shall treat the appointment of appellant-petitioner to be validly made in terms of Clause 2(3)(ii)&(iii) of the Second Order of 1981 upon expiry of seven days period from the date when particulars of selected candidates alongwith quality point marks were sent to the Inspector i.e. 12.08.1992, treating it to be a case of deemed approval. The respondents shall also accord consideration

to the appellant's case for regularization in accordance with the applicable provisions of the Act of 1982, within a period of two months from the date of presentation of a certified copy of this order. Since the appellant-petitioner has superannuated on 31.03.2020, his claim for superannuation benefits as per his entitlement shall be dealt with, in accordance with law, within a further period of six weeks, thereafter.

(2024) 3 ILRA 458
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2024
BEFORE
THE HON'BLE PRAKASH PADIA, J.

Writ A No. 1191 of 2024

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

Counsel for the Petitioner:
Sri Anand Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Government Servant (Disciplinary and Appeal) Rules, 1999 – Rules 7, 8 & 9 – Termination – Disciplinary enquiry – Charged employee denied the charges, but neither the documents relied upon by the inquiry Officer was supplied nor the list of the witnesses was given to the petitioner – No show cause notice was issued – Effect – Held, if the charged employee denies the charges levelled against him, the Inquiry Officer appointed by the Disciplinary Authority, shall proceed to call the witnesses proposed in the chargesheet and record their oral evidence in presence of the charged employee and shall give an opportunity to the charged employee to cross-examine such witnesses – Held further, the Inquiry Officer is in the position of an independent adjudicator and acting in a quasi-judicial authority with a duty enjoined upon him that even in the absence of the delinquent, he is to see whether the unrebutted evidence is sufficient to hold that the charges are proved – The procedure prescribed under Rule-7 has not been followed by the Inquiry Officer. (Para 4, 8, 12 and 18)

Writ petition allowed. (E-1)

List of cases cited :-

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

2. Ministry of Finance & anr.Vs S.B. Ramesh; AIR 1998 SC 853

3. Radhey Kant Khare Vs U.P. Cooperative Sugar Factories Federation Ltd.; 2003 (1) AWC 704

4. Kaptan Singh Vs St. of U.P. & anr.; 2014 0 SCC (All) 868

5. Writ A No. 71261 of 2005; Brijesh Kumar Tripathi Vs St. of U.P. & ors. decided on 21.11.2005

6. Writ A No. 3786 of 2022; St. of U.P. & ors. Vs St. Public Service Tribunal & ors. decided on 25.3.2022

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Anand Tiwari, learned counsel for petitioner and learned Standing Counsel for the respondent-State.

2. The petitioner has preferred the present writ petition inter-alia with the following prayer:-

"Issue a writ, order or direction in the nature of certiorari quashing the impugned termination order dated 30.12.2023 passed by the respondent no. 3.

Issue a writ, order or direction in the nature of mandamus commanding the authority concern to pay the subsistence allowances to the petitioner for his suspension period i.e. 14.10.2022 to 30.12.2023."

3. Facts in brief as contained in the writ petition are that the petitioner was initially appointed as a 'Dresser' in Animal Husbandary Department on 28.07.2004 and subsequently, promoted on the post of Pashudhan Prasar Adhikari' on 3.1.2017. After 18 years of service, one stranger made a compliant against the petitioner with regard to the qualification and certificates of High School submitted by the petitioner at the time of his joining. On the basis of the alleged compliant, a preliminary inquiry was initiated against the petitioner. The petitioner was suspended on 14.10.2022 and the charge-sheet has been served on 03.4.2023 upon the petitioner. The petitioner was also served second charge sheet on 05.08.2023 and thereafter the petitioner was terminated from services on 30.12.2023 by the respondent No.3/Additional Director II, Animal Husbandry Department Meerut Mandal Meerut.

4. Learned counsel for the petitioner submitted that only on the basis of the preliminary inquiry, the service of the permanent Government Employee cannot be terminated and while terminating the services of the petitioner, the procedure prescribed under U.P. Government Servant (Disciplinary and Appeal) Rules, 1999 (hereinafter referred as "Rules 1999") were not followed. It is argued that no oral evidence has been taken produced and the petitioner has neither given any opportunity to cross examine the witness nor he was permitted to produce his defence, although an ex-parte enquiry was initiated, the Inquiry Officer is duty bound to record the evidence and follow all the procedure prescribed under the Rules. It is argued that the documents relied upon by the inquiry Officer was never supplied to the petitioner nor the list of the witnesses has been given to the petitioner. It is argued that no show cause notice has been issued to the petitioner. It is argued that the respondents are duty bound to follow the provisions of Rules, 3, 7, 8 and 9 of Rules, 1999 in exercise of powers conferred by the provisions of Article 309 of the Constitution of India. It is argued that the aforesaid order is arbitrary and passed in violation of the principles of natural justice and Rules, 1999, and prays that the same be quashed and the petitioner is entitled for subsistence allowance during the suspension period, i.e., 14.10.2022 to 30.12.2023.

5. On the other hand learned Standing counsel argued that a complete procedure as prescribed under the Rules, 1999 was complied with by the respondents before passing the order of termination, hence the same does not call for any interference by this Court.

6. When a query raised by this Court that while passing the impugned order, the procedure prescribed under Rule 7(iv) and 7(x) of the Rules, 1999 has been complied by the authorities or not. it is argued by learned Standing counsel that the procedure prescribed in the aforesaid rules were not followed by the authorities but the order was passed after taking legal opinion from the District Government counsel.

7. In order to examine the issue as to whether the procedure prescribed under the Rules for holding departmental inquiry in

respect of imposition of major penalty have been followed or not, it is necessary to reproduce Rules 7,8 and 9 of the Rules, 1999, which read as follows:

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

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

(ii)

(iii)

(iv)

(v)

(vi)

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

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

(viii) The Inquiry Officer may summon any witness to given evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witness and Production of Documents) Act, 1976.

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

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

(xi)

(xii)

8. Submission of inquiry report.--When the inquiry is complete, the Inquiry Officer shall submit its inquiry report to the Disciplinary Authority along with all the record of the inquiry. The Inquiry Report shall contain a sufficient record of brief facts, the evidence and statement of the findings on each charge and the reasons thereof. The Inquiry Officer shall not make any recommendation about the penalty.

9. Action on Inquiry Report.-- (1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation tot he charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2)

(3)

(4) If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require

him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned speaking order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

8. From the aforesaid rules, it is apparently clear that if the charged employee denies the charges levelled against him, the Inquiry Officer appointed by the Disciplinary Authority, shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged employee and shall give an opportunity to the charged employee to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence, which the charged employee desired in his written statement to be produced in support of his case. Rule-7 further contemplates that the Inquiry officer may examine any witness to give evidence or require any person to produce documents before him in accordance with the Rules, 1999. The procedure as detailed in the aforesaid Rules is in conformity with the requirement of principles of natural justice and is therefore, necessary to be adhered to in letter and in spirit.

9. From perusal of the above it transpires that complete procedure has been prescribed under the aforesaid Rules, the manner in which the inquiry could be conducted. From the perusal of the order impugned it is clear that no such procedure whatsoever has been followed by the respondent authority. It also reveals that the decision has been taken against the petitioner only after making illegal opinion.

10. The Hon'ble Supreme Court again in the case of ***State of U.P. and others Vs. Saroj Kumar Sinha*** reported in ***(2010) 2 SCC 772*** has held that the Inquiry Officer has been held to be in the position of an independent adjudicator and acting in a quasi-judicial authority with a duty enjoined upon him that even in the absence of the delinquent, he is to see whether the unrebutted evidence is sufficient to hold that the charges are proved. It was also observed that in a case where no oral evidence was examined and the documents have not been proved, the charges could not be held to have been proved against the delinquent employee.

11. The Hon'ble Supreme Court in case of ***Ministry of Finance and Another vs. S.B. Ramesh,*** reported in ***AIR 1998 Supreme Court 853***, has held that even in ex-parte disciplinary proceedings, wherein the employee is not participating in the departmental Inquiry, it is necessary for the Inquiry Officer to fix a date for recording evidence in support of the charges and intimation of the date so fixed must be communicated to the employee concerned so that the employee concerned may cross-examine the witnesses. It has further been clarified that no documents can be received in evidence unless proved by some competent person, who has come-forward in evidence, un-proved documents cannot be relied upon for brining home the charges against the said employee.

12. The Inquiry Officer has been held to be in the position of an independent adjudicator and acting in a quasi-judicial authority with a duty enjoined upon him

that even in the absence of the delinquent, he is to see whether the unrebutted evidence is sufficient to hold that the charges are proved. It was also observed that in a case where no oral evidence was examined and the documents have not been proved, the charges could not be held to have been proved against the delinquent employee.

13. A Division Bench of this Court in the case of ***Radhey Kant Khare vs. U.P. Cooperative Sugar Factories Federation Ltd. reported in 2003 (1) AWC 704,*** has held that after a charge sheet is given to the employee, an oral inquiry is must whether the employee requests for it or not. Further, it is mandatory to give a notice to him indicating the date, time and place of the enquiry, the principle being that charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same.

14. The Division Bench of this Court in the case of **Kaptan Singh Vs. State of U.P. and another reported in 2014 0 SCC (All) 868** held that Rules of 1999 also require the Inquiry Officer to hold an enquiry into the charges except where the delinquent admits the charges (Rule 7vi), in such an eventuality, he can submit a report straight away. As per Sub Rule (iv) and (x) of Rule 7 if the delinquent does not file his written statement or does not appear, the Investigating officer shall proceed ex parte. Where he files the written statement and denies the charges, as in the instant case, it shall proceed as per Rule 7(vii) and the following sub rules. The relevant paragraphs of the judgement is reproduced hereinbelow:-

12. The Rules of 1999 also require the Inquiry Officer to hold an enquiry into the charges except where the delinquent admits the charges (Rule 7vi), in such an eventuality, he can submit a report straight away. AS per Sub Rule (iv) and (x) of Rule 7 if the delinquent does not file his written statement or does not appear, the Investigating officer shall proceed ex parte. Where he files the written statement and denies the charges, as in the instant case, it shall proceed as per Rule 7(vii) and the following sub rules.

13. The reference to ?documentary evidence? in Rule 7(iii) and (v) clearly indicates that the same have to be examined, as aforesaid, on the date to be fixed for enquiry, whether in the presence of the delinquent or in absentia (ex parte). This requirement though not express is implicit in the aforesaid rules, as is the requirement of holding an oral enquiry,as it is a sine qua non for providing reasonable opportunity to defend and is part of the principles of natural justice under Article 311 and 14 of the Constitution. Reference may be made in this regard to the judgments of the Apex Court in State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank, 2009 2S 570, State of U.P. v. T.P. Lal Srivastava, 1996 10 SCC 742, and The Imperial Tobacco Company of India Ltd. v. Its Workmen, AIR 1962 SC 1348, and the judgements of this Court in R.K. Singh v. Director/Appointing Authority, Govind Ballabh Pant Social Science Institute, Jnunsi, Allahabad and another, 2001 2 UPLBEC 1282 and Subhash Chandra Sharma v. U.P. Co-operative Spinning Mills and others, (2001) 2 EC 1475. The aforesaid requirement of law has not been followed in the instant case.

14. Rule 10 deals with the procedure for imposing minor penalty. Rule 8 and 9 deals with the submission of the

enquiry report and action to be taken based thereon.

15. In spite of the aforesaid rules we find tht in the instant case, a major punishment has been imposed without following due procedure under Rule 7.

15. Similar view has already been taken by the coordiante Bench of this Court in case of ***Brijesh Kumar Tripathi Versus State of U.P. And others, passed in Civil Misc. Writ Petition No (Writ-A) No. 71261 of 2005*** on 21.11.2005 as well as by the Division Bench of this Court in case of ***State of U.P. Through Secretary Revenue and 4 Others vs. State Public Service Tribunal and 4 Others,*** passed in ***Writ-A No. 3786 of 2022*** on 25.3.2022.

16. Heard learned counsel for the parties and perused the record.

17. It is well settled law that during enquiry proceeding the principle of natural justice must be followed i.e. the documents relied upon be provided to the charged employee, opportunity to adduce the evidence be provided, statement of witnesses for establishing the charges be recorded and opportunity to cross examine the witnesses be provided, whereas in the present case no such procedure has been followed. The petitioner has not been given opportunity to adduce the evidence and cross examine the witnesses and no witnesses has been examined by the enquiry officer in support of the charges levelled against the petitioner.

18. In this view of the matter, this Court is satisfied that the procedure prescribed under Rule-7 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999, has not been followed by the Inquiry Officer. Further, the enquiry is not made in accordance with the law laid down by the Hon'ble Supreme Court in the case of Ministry of Finance and another (Supra)

19. Thus, in view of the aforesaid fact, the impugned order dated 30.12.2023 passed by respondent no.3- Additional Director-II, Animal Husbandry Department, Meerut Mandal, Meerut, is set aside.

20. The writ petition is allowed. No order as to costs

21. The concerned respondent authority is at liberty to pass afresh order after giving notice and opportunity of hearing to the petitioner after following the provisions as provided under the Rules, 1999.

(2024) 3 ILRA 463
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 1509 of 2022

Sangeeta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gulrez Khan, Sri Javed Husain Khan, Sri Pramod Kumar Shukla

Counsel for the Respondents:
C.S.C., Sri Rakesh Pathak, Sri Saurabh Srivastava

A. Service Law – Intermediate Education Act, 1921 – Ch. II, Reg. 3(1) – Seniority – U.P. Hindi Sansthan Employees Service Rules No. 1983 – Rule 3 and 5 – Both

contesting parties were appointed on the same date and taken joining on the same date also – Inter-se seniority – Determination – Applicability of Hindi Sansthan Rule – Time of joining – Relevancy – Held, Rule 3 and 5 of Rules, 1983 as applicable to U.P. Hindi Sansthan relates to recruitment and appointment and has nothing to do with seniority – Once statutory rule provide date of substantive appointment to be guiding factor, it mean that date and not the joining time. The rule *qua* substantive appointment would, therefore, include both forenoon and afternoon joining – The petitioner, being senior in age, is held senior to 5th respondent in view of provision as contained under Reg. 3(1) (a) and (b). (Para 13, 15 and 16)

Writ petition allowed. (E-1)

List of cases cited :-

1. Commercial Tax Officer, Rajasthan Vs Binai Cements Limited & anr.; (2014) 8 SCC 319

2. Suresh Dubey Vs District Inspector of Schools & ors.; (2004) 2 UPLBEC 1876

3. Banolat Mohapatra Vs St. of Orissa & ors.; (1999) 4 SCC 618

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

1. Petitioner who is working as Assistant Teacher in attached primary section of an intermediate college, namely, Mangatram Kanya Higher Secondary School, Patla, district Ghaziabad, is aggrieved by decision of the District Inspector of Schools dated 30.12.2016 holding respondent no. 5, namely, Ms. Anupama Tyagi as a senior to the petitioner. Both Assistant Teachers were appointed with approval order issued by the District Inspector of Schools, Ghaziabad on 30.12.2016. Since petitioner and 5th respondent were simultaneously appointed in the institution and their substantive appointment is with effect from the same date, an issue arose as to the *inter se* seniority.

2. Petitioner is while claiming his seniority on the basis of her date of birth recorded as 5th June, 1981, the 5th respondent claims seniority on the basis of her joining in the forenoon of 30.12.2016. It is admitted to both the parties that petitioner joined in the afternoon of 30.12.2016 whereas 5th respondent joined in the forenoon of 30.12.2016. Upon the matter being remitted under the order of this Court dated 21.6.2021 passed in Writ A No. 4244 of 2021, the Regional Joint Director of Education proceeded to decide seniority taking as an admitted position that both the petitioners were appointed on the same date and the petitioner was senior in age to the respondent no. 5. The Regional Joint Director of Education found that rules applicable to U.P. Hindi Sansthan, namely, U.P. Hindi Sansthan Employees Service Rules No. 1983 to be applicable as according to the order of the Regional Joint Director of Education, the relevant regulations contained under Rule 3(1)(b) of Chapter II of Intermediate Education Act, 1921 do not contemplate a situation where two teachers join the same date but had different point of time that is forenoon and afternoon.

3. Learned counsel for the petitioner has argued that law is well settled that special law will override the general law if any. He has placed reliance upon the judgment of the Supreme Court in the case of **Commercial Tax Officer, Rajasthan v. Binai Cements Limited and Another (2014) 8 SCC 319** and accordingly submits that Intermediate Education Act, 1921 being especially enacted for governing service conditions like seniority etc. and

other incidental matters relating to teacher and employees of a recognized and aided institution under the Act, and the regulations provide for determination of seniority, the Regional Joint Director of Education was not justified in borrowing Hindi Sansthan Employees Service Rules, 1983 in determining intere se seniority. He submits that 1921 Act is a special Act whereas general rule of seniority is applicable to various other institutions. He submits that even 1983 rules of Hindi Sansthan have been especially framed for employees of Hindi Sansthan and unless and until adopted under the Act, 1921, they cannot be applied directly or even on principles.

4. *Per contra*, it is argued by learned counsel appearing for the 5th respondents that since Intermediate Education Act, 1921 does not contemplate a situation of dispute of seniority between two teachers in the event one has joined in forenoon and the other joined in afternoon, it could have been taken out of general provisions and for this purpose he has taken the Court to the relevant part i.e paragraph 5 (the finding part) of the order dated 21.12.2021 passed by Regional Joint Director of Education.

5. Having heard learned counsel for the parties and having perused the records, three admitted position emerge out :

i) both petitioner and 5th respondent were appointed on the same date with approval of the District Inspector of Schools on 30.12.2016 which is their date of substantive appointment;

ii) petitioner and 5th respondents joined on the same date in the institution, however, 5th respondent in the forenoon and petitioner joined in the afternoon;

iii) both the petitioner and 5th respondent agree that their service conditions are governed under the Intermediate Education Act, 1921 and regulations framed thereunder.

6. In view of admitted above factual position, now I proceed to examine relevant regulations of the Intermediate Education Act, 1921. Regulation 3(1) (as amended on date) of Chapter II of Intermediate Education Act, 1921 deals with seniority) and same is reproduced as under:

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

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

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

(bb) Whether two or more teachers working in a grade are promoted to the next higher grade on the same date, their seniority inter se shall be determined on the basis of the length of their service to be reckoned from the date of their substantive appointment in the grade from which they are promoted:

Provided that if such length of service is equal, seniority shall be determined on the basis of age.

(c) A teacher in a higher grade shall be deemed to be senior to a teacher in the lower grade irrespective of the length of service."

7. A bare reading of the aforesaid provisions makes it absolutely clear that seniority is determined grade-wise, on the basis of substantive appointment in the grade concerned and then in the event two teachers or more teachers are appointed on the same date, seniority shall be determined on the basis of age. Sub-Regulation (a) and (b) of Regulations 3(1) are attracted to the controversy in hand and I do not see any classification of teachers by the seniority rule on the basis of joining time, instead, what is relevant is date of substantive appointment.

8. One of the arguments was advanced by learned counsel appearing for 5th respondent that she received salary for the day she joined because she had joined in the forenoon whereas petitioner did not get salary for the day as she joined in the afternoon of the same date, but I do not see any classification there to be in the relevant rules of the seniority. Payment of salary is not the criterion if otherwise teacher has been working on temporary basis and getting salary. Such temporary period could have been taken into consideration for the purposes of determination of seniority may be the date of substantive appointment as subsequent one .Thus argument advanced by respondents, therefore, is highly misplaced in view of sub regulation (b) of the Regulation 3(1) of Chapter II of Intermediate Education Act, 1921.

9. *Inter se* seniority amongst promotee teachers is also provided on the basis of length of service to be reckoned again from the date of their substantive appointment or vacancies in the grade from which they have been promoted and these teachers being promoted on the same date shall have benefit of their seniority from the date of substantive appointment in the lower grade. Regulation also provides that teacher in higher grade shall be entitled to seniority over the teacher of lower grade. Subregulation (d) further provides that teacher who has been placed under suspension if is reinstated on his original post in the grade, his seniority shall not be affected, meaning thereby where a teacher has been getting salary even upon his suspension being revoked and he stands reinstated, his seniority will also stand protected.

One must take example of cases of selection by State Public Service Commission, where seniority is batch-wise and not dependent upon joining. Still further payment of salary cannot be nor is under the regulations a criterion to determine seniority.

10. The argument advanced by learned counsel for 5th respondent that she did get salary and petitioner did not get salary of the day of joining and so she is seniority is not tenable.

11. In **Suresh Dubey v. District Inspector of Schools and Others (2004) 2 UPLBEC 1876**, this Court has already relied upon the judgment of the Court in the Bahadur Singh Gaur v. D. I.O.S., Kanpur and Others 1995 All LJ 1292, in holding it is date of substantive appointment which is relevant date and approval would be the date of substantive appointment. The joining since is dependent upon mood and discretion of the Committee of Management and discretion that by itself cannot be a ground to place a person above the seniority to the person who has been given joining late by the Committee of Management vide paragraph 5 of the judgment, the Court has held thus:

"In Bahadur Singh Gaur v. D.I.O.S., Kanpur and Others 1995 All LJ

1292, where earlier two judgments were referred and relied upon and similar view was reiterated indicating that the approval was given by the D.I.O.S. determining seniority, issuance of appointment letter or joining date by the claimant teacher and the approval date of the appointment to the substantive post is to be taken seniority if the approval date is the same then the seniority is to be determined on the basis of age irrespective of the fact that particular teacher was allowed and started working as lecturer before joining such persons whose date of birth approved on substantive post is elder in age. The relevant paragraphs 4,8,9,10,11 and 15 are reproduced below:

"4. There is no dispute that the seniority shall be determined on basis of the grant of approval of the selection by the District Inspector of Schools. The limited question remains to be decided as to whether a teacher who is issued appointment letter subsequently and joined later on and another teacher who is permitted to function on the date of approval even without issuing any appointment letter, will be treated senior to the person who Joins the institution later on. It is relevant to refer to Clause (b) of Sub-section (1) of Section 16F of U.P. Intermediate Education Act (prior to the amendment in the year 1975) which reads as under :

"16F. (1) Subject to the provisions hereinafter specified, no person shall be appointed as a Principal, Headmaster or the teacher in a recognised institution unless he:

(a) possesses the prescribed qualifications or has been exempted under Sub-section (1) of Section 16E.

(b) h a s been recommended by selection committee constituted under Sub-section (2) or (3), as the case may be of the said section and approved, in the case of Principal or Headmaster by the Regional Deputy Director, Education, and in the case of a teacher by the Inspector....."

8. The date of birth of the petitioner is 1.1.1937 and date of birth of respondent No. 3 is 26.9.1945. Admitted, the petitioner is senior to respondent No. 3. The relevant date is the date of approval of appointment by the District Inspector of Schools. The date of Joining is not the determining factor for deciding the seniority unless it is shown that the candidate did not join the institution within the time prescribed for joining as given in the appointment letter. The committee of management under Regulation 16 is bound to issue appointment letter within two weeks of the receipt of approval to selected candidates for appointment.

9. In case the date of joining is relevant date it will be on the discretion of the committee of management to issue an appointment letter to some candidate earlier and to some other candidate later on with the result, to whom the appointment letter has been issued earlier will start functioning and the other may join later on and will become junior to the other candidate though the date of selection and the date of approval is the same. So far as the time prescribed under Regulation 16 is concerned, the candidate who is living in nearest place may come and join the institution earlier but the candidate who is living at distant place may not come and join the institution immediately.

10. Learned counsel for the respondent urged that he has started functioning on 14th August, 1973, i.e., the date on which approval was granted and, therefore, he was entitled to function from the said date even though the letter of appointment was issued to him

subsequently, i.e., on 22nd August, 1973, as the same was ministerial act. It may be that the appointment letter was issued subsequently and the candidate before issuance of the appointment letter himself presents before the committee of management on coming to know that the approval has been granted and the committee of management permits him to function from the date, the approval has been granted but it will not deprive the right of another candidate merely because the other candidate was not Issued appointment letter or joined subsequently within the prescribed time. The mere fact that respondent No. 3 joined the institution on 22nd August, 1973, will not confer any right of seniority against the petitioner.

11. In Prabhu Narain Singh v. Deputy Director of Education, Varanasi 1977 ALR 391, it has been held that a person does not acquire the status of a teacher unless the approval of his appointment is granted by the District Inspector of Schools and the mere fact that he was working in the institution will not confer the status of a teacher.

15. In view of the discussions made above, the Writ Petition No. 318 of 1993 is hereby allowed. The order passed by the District Inspector of Schools dated 30th October, 1992, is quashed.

(emphasis added)

12. Now coming to the argument raised by learned counsel for 5th respondent, since rules were silent, therefore, Regional Joint Director of Education was justified in applying the principle of U.P. Hindi Sansthan Employees Service Rules, 1983, I find that, what has been given in the rules has been completely misinterpreted by Regional Joint Director of Education. It says that vide Rule 5 of 1983 Rules of the said rules provides in the event there is no other rule prescribed for otherwise than service of employees would start from the date they submit their joining. In the first instance to appreciate the relevant paragraph 5 is reproduced hereinbelow:

"5. इण्टरमीडिएट शिक्षा अधिनियम-1921 (यथा संशोधित) के भाग-2 अध्याय-2 के विनियिम- 3(1) ख के अनुसार किसी श्रेणी में अध्यापको की ज्येष्ठता उनकी मौलिक नियुक्ति के आधार पर अवधारित की जायेगी। यदि एक ही दिनांक को दो या दो से अधिक अध्यापक इस प्रकार नियुक्ति किये गये थे, तो ज्येष्ठता आयु के आधार पर अवधारित की जायेगी। किन्तु सन्दर्भगत प्रकरण उक्त प्रक्रिया से भिन्न प्रकार का है। श्रीमती संगीता रानी एवं श्रीमती अनुपमा त्यागी द्वारा एक ही तिथि को कार्यभार ग्रहण किया गया है किन्तु श्रीमती अनुपमा त्यागी द्वारा पूर्वाहन्न में कार्यभार ग्रहण किया गया है एवं श्रीमती संगीता रानी द्वारा अपरान्ह में कार्यभार ग्रहण किया गया है, जिसके कारण श्रीमती अनुपमा त्यागी का वेतन दिनांक 06.01.2017 से आहरित हुआ एवं श्रीमती संगीता रानी का वेतन दिनांक 07.01.2017 से आहरित हुआ। उ० प्र० हिन्दी संस्थान कर्मचारी सेवा नियमावली 1983 के अध्याय 3 भर्ती एवं नियुक्ति की धारा 5 में यह प्रक्रिया विहित की गई है कि यदि नियमों में कोई अन्य प्राविधान न हो तो संस्थान के कर्मचारियों की सेवाये उस दिन से आरम्भ होगी जिस दिन वह कार्यभार ग्रहण करेगा। यदि वह अपरान्ह में सेवा प्रारम्भ करता है तो उसकी सेवाये अगले दिन के पूर्वान्ह से आरम्भ होगी। इस प्रकार श्रीमती अनुपमा त्यागी की अनुदानित सेवा दिनांक 06.01.2017 से मान्य की जायेगी, जबकि श्रीमती संगीता रानी की सेवा दिनांक 07.01.2017 से मान्य होगी तथा सेवावधि की गणना वेतन भुगतान की तिथि से किया जाना उचित होगा। इस प्रकार श्रीमती अनुपमा त्यागी श्रीमती संगीता रानी से वरिष्ठ होगी।"

13. From a bare reading of the aforesaid paragraph, I find Rule 3 and 5 of 1983 rules as applicable to U.P. Hindi Sansthan relates to recruitment and appointment and has nothing to do with seniority. All that it prescribes is that person who shall be taken to have joined the date, he resumes his duties . This is not the issue in the present case. Here it is not from joining which is relevant but it is the

substantive date of substantive appointment, which is relevant. The second argument, therefore, advanced by learned counsel appearing for the 5th respondent is rejected.

14. The controversy *qua* forenoon and afternoon joining was dealt with by the Supreme court in the case of **Banolat Mohapatra v. State of Orissa and Others (1999) 4 SCC 618.** In the said case issue had arisen for seniority claim for the post of lecturer in a college, the appellant therein claimed before the Supreme Court that both he and respondent no. 4 joined the institution on the same day while appellant joined in the forenoon and respondent no. 4 joined in the afternoon and further letter of appointment to the appellant was sent earlier than respondent no. 4. The Supreme Court rejected the argument and held that these issues of seniority will not depend upon the joining time in the forenoon and afternoon or that who got appointment order earlier. The Court while examining the records found that appellant was placing reliance upon as annexure A dated 15.12.1979 which showed appellant was appointed against first post of Lecturer, Economic whereas respondent no. 4 was appointed against second post but in the counter affidavit, the copy of resolution that was filed which showed that appellant was appointed against second post and respondent no. 4 was against first post of lecturer. The Supreme Court further examined that original records were produced before the High Court and High Court found that Minister of Education accepted the resolution of Governing Body holding that appellant was shown senior to respondent no. 4 was post of lectures, the Court therefore found no reason to found ratio of judgment of High Court in holding fourth respondent senior to appellant. Vide paragraphs 5 and 6 the Court held thus:

"5.It has been urged that though both the appellant and Respondent 4 joined on the same day but the appellant joined in the forenoon and Respondent 4 in the afternoon and further the letter of appointment to the appellant was sent earlier. We are of the opinion that these are not at all relevant for the purpose of examining the question of seniority.

6.The appellant placed reliance on a copy of the resolution of the Governing Body dated 15-12-1979 vide Annexure A to the petition. In the said resolution the name of the appellant had been shown against the first post in Economics in the College and the name of Respondent 4 against the second post. In the counter filed on behalf of the College namely Respondents 3 and 4, a copy of the resolution has been annexed as Annexure 2 and from the said resolution we find that the appellant was shown against the second post and Respondent 4 against the first post of Lecturer. As resolutions of the Governing Body are kept by the College and the above resolution has been duly produced by the College, it has to be accepted and not the copy of the resolution annexed by the appellant. We find from the judgment of the High Court in OJC No. 867 of 1990 that the Court called for the relevant file and on perusing the record it was found that the Minister of Education accepted the resolution of the Governing Body holding that Respondent 4 was senior to the appellant. The Court also noted that the enquiry report of the Director, which was available on record, also indicated the same position. The Court also perused the resolution of the Governing Body and came to the finding that the Governing Body also decided the seniority as claimed by

Respondent 4. In view of the above finding of the High Court we are not at all inclined to accept the submission made on behalf of the appellant that as per the resolution of the Governing Body the appellant was shown senior to Respondent 4."

(emphasis added)

15. Coming to the judgment relied upon by learned counsel for the petitioner, I find it to settled law that special law would override the general and so when special provisions are there, no principle of general law even can be renowned. Once statutory rule provide date of substantive appointment to be guiding factor, it mean that date and not the joining time. The rule qua substantive appointment would, therefore, include both forenoon and afternoon joining. Vide paragraph 33,34,35 and 36 Supreme Court in the case of Commercial Tax Officer, Rajasthan. (supra) has observed thus:

33. We are mindful of the principle that the Court should examine every word of a statute in its context and must use context in its widest sense. We are also in acquaintance with observations of this Court inReserve Bank of India v. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1 where Chinnappa Reddy, J. noting the importance of the context in which every word is used in the matter of interpretation of statutes held thus:

"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute- maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

34. It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law should they operate in the same field on same subject. (Vepa P. Sarathi, Interpretation of Statutes, 5th Ed., Eastern Book Company; N. S. Bindra's Interpretation of Statutes, 8th Ed., The Law Book Company; Craies on Statute Law, S.G.G.Edkar, 7th Ed., Sweet & Maxwell; Justice G.P. Singh, Principles of Statutory Interpretation, 13th Ed., LexisNexis; Craies on Legislation, Daniel Greenberg, 9th Ed., Thomson Sweet & Maxwell, Maxwell on Interpretation of Statutes, 12th Ed., Lexis Nexis)

35. Generally, the principle has found vast application in cases of there

being two statutes: general or specific with the latter treating the common subject matter more specifically or minutely than the former. Corpus Juris Secundum, 82 C.J.S. Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonized, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy. (Edmond v. U.S., 520 U.S. 651, Warden, Lewisburg Penitentiary v. Marrero).

36. The maximgeneralia specialibus non derogant is dealt with in Volume 44 (1) of the 4th ed. of Halsbury's Laws of England at paragraph 1300 as follows:

"The principle descends clearly fromdecisionsof theHouse of LordsinSeward v. Owner of "TheVera Cruz", (1884) 10 App Cas 59and the Privy Council inBarker v Edger,[1898] AC 748 and has been affirmed and put into effect on many occasions....If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of apurelygeneral character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent insubstance, is capable of reasonable andsensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general. If, however, it appears from a consideration of the general enactment in the light of admissible circumstances that Parliament's true intention was to establish thereby a rule of universal application, then the special provision must give way to the general."

16. In view of above, the order passed by the Regional Joint Director of Education dated 21.12.2021 is hereby quashed. Petitioner and 5th respondent having given substantive appointment on 30.12.2016 and they having joined on the same day as they were issued appointment order, it will be taken that they have been substantively appointed together on 30th December, 2016 and the petitioner being senior in age is held senior to 5th respondent in view of provision as contained under Regulation 3(1) (a) and (b) of the Chapter III of Intermediate Education Act, 1921. The Committee of Management shall accordingly pass consequential orders regarding *inter se* seniority between petitioner and 5th respondent for all purposes.

17. Thus writ petition is accordingly allowed with no order as to cost.

(2024) 3 ILRA 471
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.03.2024
BEFORE
THE HON'BLE MANISH KUMAR, J.

Writ A No. 2075 of 2024

Dr. Bhawana ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vimalesh Kumar Singh, Shivang Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law – Finance Hand Book – Part III, Ch. XI A, Rule 146 A (2) – UP Fundamental Rules – Rule 84 – Study leave – Petitioner's application was rejected as he has less than five years of service and he is on probation for a period of two years from the date of her joining – Validity challenged – Held, whole Chapter XI A deals with study leave and it is to be read conjointly and not separately – Chapter XI-A clearly leads to the conclusion that restriction of 5 years completed service would be applicable to the initial study leave as well. Otherwise, it would mean that if initial leave granted and requires extension for any reason then there has to be a gap of certain period before completing of 5 years service for extra leave. This would not be intention of the provision nor it seems to be practicable. (Para 12 and 14)

Writ petition dismissed. (E-1)

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

1. Heard.

2. Present petition has been preferred for quashing of the impugned order dated 30.01.2024 passed by the respondent no. 2-Director Ayurvedic Services, U.P. , Lucknow whereby the application for grant of study leave for a period of 12 months for pursuing P.G. Course has been rejected and with a further prayer to direct the respondents to grant the petitioner study leave of 12 months in accordance with the provisions laid down in Chapter XI A of the Financial Hand Book.

3. Learned counsel for the petitioner has submitted that petitioner was selected and appointed vide appointment letter dated 01.09.2023 on the post of Medical Officer, Community Health Center (Ayurvedic and Unani), Ayush Department, Govt of U.P..

4. It is further submitted that at the time of appointment of the petitioner, she was in the midst of her P.G. Course and to complete the same, she had moved an application for grant of study leave as provided under Part III of Financial Hand Book Volume II Part II to III.

5. The said application of the petitioner has been rejected by the respondent no. 2 by placing reliance on Rule 146 A (2) on the ground that the petitioner has less than five years of service and as the petitioner is on probation for a period of two years from the date of her joining.

6. It is further contended that the application of the petitioner has been rejected by the respondent no. 2 by wrongly placing reliance on the provision which is not applicable as far as it is related to the grant of extra leave. The case of the petitioner is covered under Rule 146 A (3) which deals with study leave and the said provision does not provide any such restriction that a Government Servant of less than five years of services is not entitled for the study leave.

7. On the other hand, learned Standing Counsel has submitted that the petitioner since the date of appointment/joining is on two years probation period during which the leave cannot be granted and there is no illegality in the impugned order passed by the respondent no. 2.

8. After hearing learned counsel for the parties and going through the record of the case, the position which emerges out in the present case is that under Part III, Chapter XI A comes and these are ancillary Rules made by the Governor while exercising its power under Rule 84 of the U.P. Fundamental Rules. For convenience Rule 84 is quoted hereinbelow:-

"84. Leave may be granted to Government servants, on such terms as the Governor may by rule or order prescribe, to enable them to study scientific, technical or similar problems or to undergo special courses of instructions. Such leave is not debited against the leave account."

9. Chapter XI A of Part III of the Financial Hand Book deals with study leave. The Rule 146 A (2) provides that study leave should not be ordinarily granted to a Government Servant of less than five years of service. For convenience, the same is quoted hereinbelow:-

" 146 A (2):- Extra leave on half average pay for the purpose of study leave may be taken either in or outside India. It may be granted to Government Servant of any of the department named above by the Government Servant, provided that when a Government Servant borne permanently of the cadre of one department is serving temporarily in another department the grant of leave is subject to the condition (a) that local arrangements can be made to carry on his work in his absence, and (b) that the recommendation of the department to which he is permanently attached is obtained before leave is given. Study leave should not ordinarily be granted to Government Servant of less than five years' service or to Government Servants within three years of the date at which they have the option of retiring."

10. Rule 146 A (3) provides the period of leave which could be granted and for convenience, the same is quoted hereinbelow:-

" 146 A (3):- Study leave shall be granted with due regard to the exigencies of the public service. In no case the grant of this leave, in combination with leave other than extraordinary leave or leave on medical certificate, shall involve an absence of over 28 months from a Government Servant's regular duties, or exceed two years in the whole period of a Government Servant service; nor shall it be granted with such frequency as to remove him from contact with his regular work or to cause cadre difficulties owing to his absence on leave. A period of twelve months at one time will ordinarily be regarded as a suitable maximum, and shall not be exceeded save for exceptional reasons"

11. Reading of Rule 146 A (2) which is general provision of the Financial Hand Book is applicable upon all the Government Servant who applies for the study leave whereas Rule 146 A (3) provides for not granting any study leave by combining with any other leave. It determines the maximum period for grant of study leave. Rule 146 A (3) is restrictive in nature which puts restriction for maximum period of study leave.

12. If the submission of learned counsel for the petitioner is accepted that for study leave there is no condition that it would not be granted before 5 years of service, if that is to be accepted then it would lead to absurd result. The whole

Chapter XI A deals with study leave and it is to be read conjointly and not separately.

13. In case, the Government Servant having less than 5 years of service has been granted the study leave, suppose for a period of 12 months and the duration of the course has been extended by 6 months or one year or more, in that case if the application for extra leave is moved by a Government Servant then the competent authority cannot reject the same on the ground that the Government Servant has not completed five years of service so the extra leave could not be granted. The period of service is to be seen initially at the time of grant of study leave not at the time of granting extra leave beyond 12 months which could normally be given as per Rule 146 A (3).

14. There is no force in the submission that condition of completion of 5 years of service before grant of leave applies only for grant of extra study leave and not in a case where leave is initially applied for. The whole reading of the provision under Chapter XI-A clearly leads to the conclusion that restriction of 5 years completed service would be applicable to the initial study leave as well. Otherwise, it would mean that if initial leave granted and requires extension for any reason then there has to be a gap of certain period before completing of 5 years service for extra leave. This would not be intention of the provision nor it seems to be practicable. The restriction of 5 years completion of service would more relevant for a fresher as in the present case who has joined the service a few months back and is still on probation. It cannot be said that for grant of initial study leave condition of completion of 5 years of service would not apply but it will applicable for extra study leave. This argument does not appeal to reason. The whole Chapter XI-A has to be read harmoniously to achieve the purpose of the provisions.

15. In view of the facts, circumstances and discussion made hereinabove and as the petitioner has completed only six months of services that too on probation her application has rightly been rejected by the respondent no. 2 by placing reliance on Rule 146 A (2) of the Chapter XI A of the Financial Hand Book Volume 2 Part 3.

16. Writ petition is devoid of merit, hence dismissed.

(2024) 3 ILRA 474
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024
BEFORE
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ A No. 3023 of 2024

Amarjeet Singh ...Petitioner
Versus
Smt. Shiv Kumar Yadav ...Respondents

Counsel for the Petitioner:
Ms. Rama Goel Bansal, Ms. Shalini Goel

Counsel for the Respondents:
C.S.C.

A. Tenancy Law – UP Regulation of Urban Premises Tenancy Act, 2021 – Ss. 4 and 21(2) – Maintainability of proceeding – Neither tenancy agreement was executed nor information regarding tenancy was given to the Rent Authority – Effect – Held, a conjoint reading of the various sub-sections of Section 4 of the Act reveals that the intention of legislature for requiring both the landlord and the tenant to inform to the Rent Authority in the form specified in the First Schedule within a

certain time frame is to treat the information as conclusive proof of the facts relating to the tenancy and matters connected with it – It does not appear to be the *sine qua non* for maintaining an application u/s 21 (2) of the Act – Where the tenancy is admitted, no such information as contemplated u/s 4 of the Act is warranted. (Para 11)
Writ petition dismissed. (E-1)

List of cases cited :-

1. SCC Revision No. 158 of 2022; Amit Gupta Vs Gulab Chandra Kanodia decided on 15.5.2023

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

1. Heard Ms. Rama Goel "Bansal" and Ms. Shalini Goel, learned counsel for the petitioner.

2. The challenge in this petition is to the order dated 29.03.2023 passed by the Rent Authority/Additional District Magistrate, Agra as also the order dated 15.12.2023 passed by the Rent Tribunal/Additional District Judge, Court No. 13, Agra whereby and whereunder the preliminary objections of the tenant/petitioner about the maintainability of the proceedings under Section 21 (2) have been rejected and time for filing written statement has been granted by the Rent Authority.

3. The issue raised in this writ petition is purely legal and the Court proceeds to decide the petition on the submissions of the learned counsel for the petitioner and the materials available on record without calling upon the respondent.

4. This Court vide order dated 27.2.2024 after hearing Ms. Shalini Goel, learned counsel for the petitioner and recording her submissions had required her to bring on record the reply filed by the landlord/respondent to the objection taken by the tenant/petitioner to the maintainability of the application under Section 21 (2) of the U.P. Act No. 16 of 2021.

5. Learned counsel for the tenant/petitioner has filed supplementary application bringing on record the objections of the landlord/respondent dated 10.2.2023.

6. From the perusal of the legal objections taken by the tenant/petitioner which have been brought on record as Annexure-7 to the petition, it is borne out that neither the applicant or the opposite party had been allotted the unique number and no digital platform was created by the State Government under the Act of 2021 and the application was thus premature, the tenancy had been terminated vide registered Notice dated 8.2.2022 and hence, only the Civil Court had jurisdiction to try the case, the jurisdiction of the Rent Authority under the Act is confined to the tenancy agreement submitted to it. The tenant/petitioner was ready to execute the Tenancy Agreement, but the opposite party deliberately and mala fide failed to supply the proforma of the Tenancy Agreement and further that the Notice dated 8.2.2022 was invalid as single notice in respect of two independent tenancies had been given.

7. The reply to the legal objections taken by the tenant/petitioner brought on record along with the supplementary affidavit submitted by the landlord/respondent reveals that request to execute the Tenancy Agreement and provide all information through the Notice dated 8.2.2022 was sought but the

tenant/petitioner failed to comply and violated the provision of Section 4 (3) of the Act and an application for eviction of the tenant/petitioner under Section 21 (2) of the Act of 2021 was maintainable.

8. From the perusal of the legal objection taken by the tenant/petitioner and the reply of the landlord/respondent, the legal position as regards whether information to the Rent Authority in the form specified in the First Schedule by the landlord is a ***sine quo non*** for maintaining an application under Section 21 (2) of the Act of 2021, is not clear.

9. A perusal of the provisions contained in Section 4 of the Act, which relates to Tenancy Agreement reveals that sub-section (1) of Section 4 commences with a non obstinate clause and as such, has an overriding effect over the other provisions under the Act. It provides that no person after the commencement of the Act of 2021 shall let or take on rent any premises except by an agreement in writing which shall be informed to the Rent Authority jointly by the landlord and tenant in the form specified in the First Schedule provided the tenancy is not residential for a period of less than 12 months in which case no such information is required to be informed to the Rent Authority. Sub-section (2) relates to a situation when both the landlord and tenant jointly fail to inform the execution of the Tenancy Agreement in which case the landlord and tenant shall separately inform the Rent Authority about execution of the Tenancy Agreement within a specified time.

10. Sub-section (3) relates to a tenancy created before the commencement of the Act. Sub-clause (a) thereof deals with a situation where an agreement in writing was entered between the landlord and tenant in which case they shall jointly present a copy thereof to the Rent Authority within three months of the commencement of the Act. Sub-clause (b) on the other hand deals with a situation where no agreement in writing was entered into between landlord and tenant in which case they shall enter into an agreement in writing with regard to that tenancy and present the case to the Rent Authority within three months of the commencement of the Act. The proviso takes into consideration a situation where the landlord or the tenant fail to present jointly a copy of the Tenancy Agreement or fail to reach agreement within specified period such landlord and tenant shall separately file the particulars about such tenancy with the Rent Authority within one month from the date of expiry of the period mentioned in Clause (b) of sub-section 3 of Section 4 in the Form specified in First Schedule. If the landlord has submitted his particulars within the time specified but the tenant fails to submit such particulars, the landlord may file an application for eviction of the tenant on that ground alone. Though the provision visualizes a situation where a tenant fails to comply with provisions of submitting particulars giving the landlord a ground to seek eviction of the tenant on the ground of default in submitting the particulars but the provision is silent about the outcome of a default at the instance of the landlord. The intention of the legislature is obvious that it would not affect the rights of the landlord to file eviction of the tenant. Sub-section 4 deals with providing the digital platform in Hindi and English enabling submission of the documents in such form and manner prescribed. The Sub-section (5) of Section 4 provides that the Rent Authority after receiving information about the execution

of Tenancy Agreement along with the documents specified in the First Schedule shall provide a Unique Identification Number to the parties. The Sub-section (6) of Section 4 provides that the terms of authorization of the Property Manager, if any, by the landlord to deal with the tenant shall be as agreed to by the landlord and tenant in the Tenancy Agreement. Sub-section (7) of Section 4 provides that the information provided under Sub-sections (1), (2) and (3) shall be conclusive proof of the facts relating to tenancy and matters connected therewith and in absence of any statement of information, the landlord may file an application for eviction on this ground alone.

11. A conjoint reading of the various sub-sections of Section 4 of the Act reveals that the intention of legislature for requiring both the landlord and the tenant to inform to the Rent Authority in the form specified in the First Schedule within a certain time frame is to treat the information as conclusive proof of the facts relating to the tenancy and matters connected with it. It does not appear to be the ***sine qua non*** for maintaining an application under Section 21 (2) of the Act. Where the tenancy is admitted, in the opinion of the Court, no such information as contemplated under Section 4 of the Act is warranted. Where the tenancy or its terms are disputed, it is always open for the parties to adduce evidence in support of their respective cases before the respective authorities.

12. Ms. Shalini Goel, learned counsel has placed reliance upon a decision of a co-ordinate Bench of this Court in the case of ***Amit Gupta versus Gulab Chandra Kanodia, SCC Revision No. 158 of 2022*** decided on 15.5.2023 to submit that the Court in Para 96 of the said decision has observed that the jurisdiction of the Rent Authority under the 2021 Act is limited to dispute relating to Tenancy Agreement submitted to it as specified in the First Schedule. If no agreement in writing as per Section 4 (3) has been submitted, then the tenant can be evicted only in one condition that is where landlord has submitted details as per First Schedule, but the tenant has failed to discharge his obligation vide proviso to Section 4 (3) of the 2021, Act. However, if the landlord also fails and so also the tenant to comply with Section 4 (3), no eviction of the tenant has been provided for. The observation is being quoted hereunder:-

"96. In earlier part of this judgment, I have already referred to scope and ambit of the provisions of the new Tenancy Act, 2021 with reference to individual sections therein and I have also discussed the tenancy agreement referrable to Section 4 of the new Act. During discussion in respect of point no. (a) above, I found, while 11 months unwritten agreement tenancy was conceived under the new Act but the remedial aspects so as to enable land lord to seek eviction of tenant had not been touched by the legislature. Section 38(2) defines jurisdiction of Rent Authority and limits it to dispute relating to tenancy agreement submitted to it as specified in the first schedule. First schedule agreements are there that create tenancy after new Tenancy Act has come into existence and also the written tenancy agreements that were in existence when the new Act came into force, provided such agreements were submitted to the Rent Authority as per Section 4(3) of the new Act. The word "tenant" though includes old tenant at the time of enforcement of the new Act vide

Section 2(j) but only for agreement in writing as per Rule 4 (3) and if there is no agreement in writing as per Rule 4(3), such tenant can be evicted only in one condition that is where land lord has submitted details as per first schedule but tenant has failed to discharge his part of obligation vide proviso to Section 4(3) of the new Tenancy Act. However, if land lord also fails and so also the tenant to comply with Section 4(3), no eviction of tenant has been provided for."

13. I have gone through the observation made by the co-ordinate Bench in the decision cited by Ms. Shalini Goel. In the case cited, the issue before the Court were:-

"(a). Whether a Small Cause Suit already instituted, since prior to coming into force of the new Tenancy Act, 2021 and so also such SCC revision arising therefrom would stand saved or the SCC suit and SCC Revision being not mentioned in the repeal and saving clause of Section 46, the proceedings of such suit and revision would stand abated; and

(b). Whether the bar created under Section 38 of the Tenancy Act is not an absolute one and so Small Cause Suit for arrears of recovery of Rent and Eviction (SCC Suit) and SCC Revision arising therefrom would still be maintainable even after the enforcement of the New Tenancy Act, 2021 qua the of tenancies not covered by tenancy agreements provided for under Tenancy Act, 2021."

14. The issued urged in this petition is as to whether information to the Rent Authority in form specified in the First Schedule by the landlord is a ***sine qua non*** for maintaining an application under Section 21 (2) of the Act. The observation made by the co-ordinate Bench reproduced hereinabove does not help the petitioner inasmuch as, it ignores the import of Section 4 (7) of the Act. The import of the Section 4 has been explained in the preceding paras of this order.

15. The present proceedings are at a stage where the preliminary objections of the tenant/petitioner about the maintainability of the proceedings under Section 21 (2) have been rejected and time for filing written statement has been granted by the Rent Authority. A challenge to it before the Rent Tribunal has failed.

16. In view of the discussion made hereinabove, the Court is not inclined to entertain the petition. It is devoid of merits and is accordingly ***dismissed***. The interim order granted earlier is discharged.

17. No order as to costs.

(2024) 3 ILRA 478
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024
BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 3436 of 2024

Smt. Meenakshi Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Singh, Sri Shailendra Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Kaushlesh Pratap Singh

A. Service Law – UP Government Servant (Disciplinary and Appeal) Rules, 1999 –

Departmental enquiry – Non-compliance of mandatory statutory provisions – On the direction issued by the High Court, the Secretary promptly laid down program to hold online Training Session in respect of conducting departmental enquiry – Error committed in the impugned order was accepted by Additional Advocate General on behalf of the St. – Effect – High Court set aside the impugned order with direction to conclude enquiry in accordance with prescribed procedure. (Para 3, 4 and 5)

Writ petition disposed of. (E-1)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. This Court has encountered with various instances where the Basic Education Officers while passing orders in departmental inquiry are not following relevant mandatory provisions of relevant Rules and present case is also a glaring example of same.

2. Instead of passing a strict order, this Court has requested Sri Ashok Mehta, Senior Advocate and Additional Advocate General and Sri Abhishek Srivastava, learned Standing Counsel for State to take instructions from Secretary, Basic Shiksha Parishad, U.P. Prayagraj to impart training to all Basic Education Officers so that such act may not be repeated and while passing orders under departmental inquiry, substantial compliance of relevant provisions may be complied with.

3. A prompt action has been taken and an order has been issued today by Secretary, Basic Shiksha Parishad, Prayagraj which is placed on record that an online training will be undertaken on 6th and 7th of this month. The order is reproduced hereinafter -:

"प्रेषक,

सचिव,
उ०प्र० बेसिक शिक्षा परिषद, प्रयागराज।

सेवा में,
जिला बेसिक शिक्षा अधिकारी, समस्त जनपद उत्तर प्रदेश।

पत्रांक बे०शि०प०/43071-151/2023-24 दिनांक 5-3-2024

विषय :- माननीय उच्च न्यायालय इलाहाबाद में योजित याचिका संख्या 3436/2024 श्रीमती मीनाक्षी मिश्रा बनाम स्टेट ऑफ यू०पी० व अन्य के में। महोदय,

उपर्युक्त विषयक प्रकरण का सन्दर्भ लें जो माननीय उच्च न्यायालय इलाहाबाद में योजित याचिका संख्या 3436/2024 श्रीमती मीनाक्षी मिश्रा बनाम स्टेट ऑफ यू०पी० व अन्य के में है।

माननीय न्यायालय द्वारा सुनवायी के समय दिये गये निर्देश के कम में दिनांक 06.03.2024 एवं 07.03.2024 को सायं 04.00 बजे से 6.00 बजे तक परिषदीय शिक्षक/शिक्षणेत्तर कर्मचारियो के विरुद्ध अनुशासनात्मक कार्यवाही किये जाने हेतु उत्तर प्रदेश बेसिक शिक्षा परिषद कर्मचारी वर्ग नियमावली 1973 एवं सपठित उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील) नियमावली 1999 का पालन किये जाने के सम्बन्ध में प्रशिक्षण सत्र वर्तमान में निर्वाचन प्रकिया एंव अन्य महत्वपूर्ण प्रशासनिक कार्य के दृष्टिगत ऑनलाइन आयोजित किया जा रहा है।

अतः आपको निर्देशित किया जा रहा है कि प्रशिक्षण सत्र में स्वयं प्रतिभाग करना सुनिश्चित करें। ऑनलाइन प्रशिक्षण हेतु लिंक आपको अलग से प्रेषित किया जा रहा है।

भवदीय
(प्रताप सिंह बघेल)
सचिव
उ०प्र० बेसिक शिक्षा परिषद, प्रयागराज।"

4. In aforesaid circumstances, Sri Mehta, learned Senior Advocate and Additional Advocate General fairly submits

that impugned order may be set aside and Basic Shiksha Adhikari concerned be directed to proceed from stage of inquiry report i.e. after serving a copy of it upon petitioner.

5. Taking note of prompt response as well as fair submission, impugned order is set aside and concerned B.S.A. is directed to provide a copy of inquiry report to petitioner and to proceed further in accordance with prescribed procedure and to conclude the inquiry expeditiously preferably within a period of six weeks from today.

6. Accordingly, writ petition is **disposed of.**

(2024) 3 ILRA 480
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2024
BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 4063 of 2020
with other cases

Shivam Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Seemant singh, Sri G.K. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Arun Kumar

A. Service Law – Constitution of India – 103rd Constitutional Amendment – UP Public Services (Reservation for Economically Weaker Sections) Act, 2020 – 10% reservation in favour of EWS – Applicability – Selection process of appointment of 69000 posts of Assistant Teachers was commenced from 16.05.2020 i.e. after 103rd Constitutional Amendment but before enactment of U.P. Act No. 10 of 2020 i.e. on 31.08.2020 – Effect – Held, as per savings clause (Section 13), provisions of U.P. Act No. 10 of 2020 would not be applicable – Since procedure for selection for 69000 posts of Assistant Teachers was commenced prior to 31.08.2020, therefore, St. of U.P. was not legally bound to provide EWS reservation in said recruitment process – It was only after enactment of said Act, the St. is under a legal obligation to provide reservation to EWS and not before it. (Para 18, 23 and 24)

Writ petition dismissed. ***(E-1)***

List of cases cited :-

1. Prashant Kumar Vs St. of U.P. & ors., 2005 (4) ESC (All) 2395

2. Writ A No. 13156 of 2020; Mahendra Pal & ors.Vs St. of U.P. & ors.decided on 13.03.2023

3. Special Appeal No. 156 of 2019; Raghvendra Pratap Singh & ors.Vs St. of U.P. decided on 06.05.2020

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Issue before this Court for consideration are -:

(i) "Whether in pursuance of 103rd Amendment in Constitution of India dated 12.01.2019, whereby provision for 10% reservation to Economically Weaker Sections (for short "EWS") and adopted by State of Uttar Pradesh through Office Memorandum dated 18.02.2019) would be applicable to a Notification dated 16.05.2020 issued by State Government in regard to selection on 69000 posts of Assistant Teachers?"

(ii) "Whether selection process would consider to be commenced when on 01.12.2018 (i.e. before Constitutional Amendment), when State Government issued a Government Order for conducting Assistant Teachers Recruitment Examination-2019 (for short "ATRE-2019"), a qualifying examination to participate in above referred selection process? and;

(iii) "What would be effect of Uttar Pradesh Public Services (Reservation for Economically Weaker Section) Act, 2020?"

2. It is case of petitioners that on 01.12.2018, the State Government issued a Government Order for conducting "ATRE-2019", which was conducted on 06.01.2019. The petitioners have participated in said examination under Unreserved (General) category and result thereof was issued on 12.05.2020, wherein all petitioners were qualified i.e. have scored more than minimum qualifying marks.

3. It is further case of petitioners that on 16.05.2020, the State Government initiated further process of selection of 69000 posts of Assistant Teachers for appointment in primary education in State of U.P. Meanwhile, in pursuance of 103rd Amendment in Constitution, petitioners have got their EWS certificate issued by competent Authority and they have represented before concerned respondents to provide 10% reservation of EWS.

4. The petitioners approached this Court in June, 2023. During pendency of their writ petition, process of selection was completed and petitioners were not selected since they were placed lower in merit.

5. Sri G.K. Singh, learned Senior Advocate assisted by S/Sri Seemant Singh, Anurag Tripathi, Irshad Ali and Rahul Kumar Mishra, learned counsel for petitioners in all writ petitions have vehemently submitted that State was under obligation to provide 10% EWS reservation in examination in question since it was held after above referred 103rd Constitutional Amendment was notified as well as subsequent to Office Memorandum dated 18.02.2019, whereby in principal EWS reservation was adopted by the State of Uttar Pradesh.

6. In order to substantiate his arguments, learned Senior Advocate for petitioners has referred a notification issued by State of U.P. dated 13.08.2019, whereby in pursuance of O.M. dated 18.02.2019, a roster system was published.

7. Learned Senior Advocate for petitioners in order to further substantiate his argument has vehemently placed reliance on a judgment passed by the Full Bench of this Court in **Prashant Kumar vs. State of U.P. and others, 2005 (4) ESC (All) 2395**, wherein following question was referred for consideration -:

"At what stage the caste of a candidate should be entered in the Schedule I of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 for him to get benefit as an OBC candidate; should it be before the notification/advertisement of the selections, or the written test, or the oral test (in case of oral test only), or the declaration of the result."

8. Above referred question was answered by the Full Bench in following terms -:

"The benefit of reservation to Other Backward Class' candidates in selection in Public Services by direct recruitment as provided by U.P. Public Service (Reservation for Scheduled Castes/Scheduled Tribes and Other Backward Class) Act, 1994, is applicable, to only those categories or castes which are notified as Other Backward Classes entered in Schedule I of the Act, upto the last date of filling up of the application form for such selections, provided there is no contrary provision in the Service Rules, the terms and conditions of recruitment, or in the advertisement."

9. Further argument of learned counsel for petitioners are summarized in written submissions and relevant being are extracted hereinbelow -:

"1. That, bare perusal of the result declared on 13.05.2019 it is clear that result of Assistant Teachers Recruitments Examination has not been declare as per the reservation schedule i.e. for S.C./S.T., OBC/General Category, rather declaration has been made that candidates has been declared as a whole without disclosing their category, who have qualified as per the percentage fix by the Government of U.P.

2. That, the advertisement begins only when the post are advertised as per District wise and that has been made only by the notification dated 16.05.2020, wherein it has also been mention that the reservation Rule will be apply as per the Act and G.O. implemented in State of U.P. on that day i.e. 16.05.2020 (Clause- 3 of Guideline issued along with G.O. dated 16.05.2019).

3. That, since the EWS reservation in U.P. has been adopted on 18.02.2019 itself, so the EWS reservation is apply in the vacancy in question."

10. Per contra, Ms. Shruti Malviya, S/Sri L.M. Singh, Manvendra Dixit, Suresh Srivastava and Ritesh Kumar Singh, learned counsel for respondents has referred following paragraphs of counter affidavit -:

"5. That, in reply to the contents of paragraph nos. 13 and 14 of the writ petition, it is stated that, pursuant to the Government Order dated 01.12.2018, process for selection on the post of 69000 vacancies of Assistant Teacher was started by initiating the Assistant Teachers Recruitment Examination 2019. At that point of time, there was no provision for granting horizontal reservation to economically weaker section, as such there was no provision for categorization of EWS candidates in the Assistant Teacher Recruitment Examination- 2019. As the process for recruitment on the vacancies of 69000 Assistant Teacher had started on 01.12.2018, the provision of providing 10% reservation to EWS candidates, was not provided when the Government Order dated 13.05.2020 and 16.05.2020 was issued. The averments to the contrary are denied.

6. That, in reply to the contents of paragraph nos. 15 and 16 of the writ petition, it is stated that when the Government Order dated 13.08.2019, providing 10% reservation to the persons belonging to EWS was issued, the process for recruitment on 69000 vacancies of Assistant Teacher had already commenced. In view of the aforesaid fact any change in the reservation Policy subsequent to the start of recruitment process could not be introduced at any intermediate stage of the proceedings. The averments to the contrary are denied.

7. That, in reply to the contents of paragraph nos. 17, 18 and 19, of the writ

petition, it is stated that in the selection of Assistant Teachers for appointment in Basic Schools run by the Parisahd, manual interference has been completely done away with, as the entire process of selection right from the submission of application form, declaration of result and allocation of Districts according to merit, is carried out through a Software developed by the National Informatics Centre. At the time of Development of the Software, inviting application for recruitment of Assistant Teacher 2019, pursuant to the Government Order dated 01.12.2018, there was no provision providing reservation in favour of candidates from EWS category. The process of selection was delayed due to unavoidable circumstances, in the meantime the Government Order dated 13.08.2019 was issued providing 10% reservation to the EWS. The Government Order dated 13.08.2019 has no retrospective effect, it could not be applied in the present selection of 69000 vacancies of Assistant Teachers. The averments to the contrary are denied.

8. That, in reply to the contents of paragraph nos. 20 and 21 of the writ petition, it is stated that the provision of providing 10% reservation to the candidates belonging to the EWS category was introduced in the State of Uttar Pradesh by the Government Order dated 13.08.2019. As the recruitment process for filling up 69000 vacancies of Assistant Teachers had already started by the Government Order dated 01.12.2018, hence the benefit of the Government Order dated 13.08.2019 could not be introduced at the intermediate stage. The averments to the contrary are denied."

11. Learned counsel for respondents have also placed reliance upon a judgment passed by the coordinate Bench of this Court in case of **Mahendra Pal and others vs. State of U.P. and others, Writ A No. 13156 of 2020 decided on 13.03.2023.**

12. In rejoinder, learned Senior Advocate for petitioners has placed reliance upon a judgment of Division Bench of this Court in case of **Raghvendra Pratap Singh and others vs. State of U.P. through Principal Secretary, Basic Education, U.P., Lucknow, Special Appeal No. 156 of 2019 decided on 06.05.2020 that ATRE-2019** examination was only a qualifying examination which could not be considered to be part of selection process and selection process was initiated only by the Notification dated 16.05.2020 i.e. subsequent to aforesaid 103rd Constitutional Amendment.

13. Learned Senior Advocate for petitioners has also submitted that law is well established that the reservation would apply from the date of issuance of the advertisement dated 16.05.2020 issued by the Secretary, U.P. Basic Education Board, Prayagraj for making recruitment of 69,000 posts of Assistant Teacher inviting online application from the eligible candidates having all the essential qualifications including the qualification of having qualified ATRE-2019 also.

14. Heard learned counsel for parties and perused record.

15. In present case, I have heard counsel for parties at length, however, they have not placed on record that State of U.P. has enacted an Act for implementation of EWS reservation by way of enactment of Uttar Pradesh Public Services (Reservation for EWS) Act, 2020 (U.P. Act No. 10 of 2020) published in Gazette on 31.08.2020. The said Act being relevant for

consideration of rival submissions is reproduced hereinafter in its entirety -:

"THE UTTAR PRADESH PUBLIC SERVICES (RESERVATION FOR ECONOMICALLY WEAKER SECTIONS) ACT, 2020

(U.P. Act No. 10 OF 2020)

[As Passed by the Uttar Pradesh Legislature]

AN

ACT

to provide for the reservation in public services and posts in favour of the persons belonging to the Economically Weaker Sections of citizens in addition to the existing reservation applicable in the State and for matters connected therewith or incidental thereto.

IT IS HEREBY enacted in the Seventy-First Year of the Republic of India as follows :-

Short title and commencement - :

1. (1) This Act may be called the Uttar Pradesh Public Services (Reservation For Economically Weaker Section) Act, 2020. (2) It shall be deemed to have come into force on February 01, 2019.

Definitions

2. In this Act unless the context otherwise requires,-

(a) "appointing authority" in relation to public services and posts means the authority empowered to make appointment to such services or posts ;

(b) "Economically Weaker Sections of citizens" means the persons belonging to Economically Weaker Sections as defined in the Office Memorandum F.No. 36039/1/2019 Estt.(Res), dated 19.01.2019 of D.O.P.T. Ministry of Personnel and Public Grievance and Pension Government of India for the time being in force.

(c) "public services and posts" means the services and posts in connection with the affairs of the State and includes services and posts-

(i) a local authority ;

(ii) a co-operative society as defined in clause (f) of section 2 of the Uttar Pradesh Co-operative Societies Act, 1965 in which not less than fifty-one percent of the share capital of the society is held by the State Government ;

(iii) a Board or a corporation or a statutory body established by or under a Central or Uttar Pradesh Act which is owned and controlled by the State Government, or a Government company as defined in section 617 of the Companies Act, 1956 in which not less than fifty-one percent of the paid up share capital is held by the State Government ;

(iv) an educational institution owned and controlled by the State Government or which receives grants in aid from the State Government, including a university established by or under a Uttar Pradesh Act, except an institution established and administered by minorities referred to in clause (1) of Article 30 of the Constitution ;

(v) in respect of which reservation was applicable by the Government orders on the date of commencement of this Act and are not covered under sub-clauses (i) to (iv) ;

(d) "Reservation" means reservation for economically Weaker Sections in vacancies of posts and services in the State of Uttar Pradesh.

(e) "year of recruitment" in relation to a vacancy means a period of twelve months commencing on the first of July of a calendar year within which the process of direct recruitment against such vacancy is initiated.

Reservation in favour of Economically Weaker Section

3. (1) In public services and posts, at the stage of direct recruitment, ten percent of vacancies to which recruitment are to be made, they shall be reserved in favour of the persons belonging to Economically Weaker Sections of citizens:

Provided that the reservation shall not apply to the category of Economically Weaker Sections of citizens specified in the Schedule to this Act:

Provided further that the candidates from out of the State of Uttar Pradesh shall not be eligible for benefits of reservation under this Act.

(2) The reservation under this section shall be in addition to the reservation provided under the Uttar Pradesh Public Services (Reservation for Schedule Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

(3) The office memorandum issued by Karmik Anubhag-2 wide no.1/2019/4/1/2002/ka-2/19T.C.II, dated 18.02.2019 shall be deemed to have been issued under this section.

(4) For applying the reservation under sub-section (1), roaster has been issued by notification O.M. No.5/2019/4/1/2002/ka-2/2019T.C.- I, dated 13th August, 2019 by the State Government which shall be continuously applied till it is exhausted.

(5) If a person belonging to Economically Weaker Sections of citizens gets selected on the basis of merit in an open competition with unreserved candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1).

(6) "Where in any particular recruitment year any vacancy earmarked under sub-section (1) for Economically Weaker Sections cannot be filled up due to non availability of a suitable candidate belonging to Economically Weaker Sections such vacancies shall not be carried forward to the next recruitment year as backlog and the said vacancy shall be filled by the eligible candidates of unreserved category."

Responsibility and powers for compliance of the Act

4. (1) The State Government may, by notified order, entrust the appointing authority or any officer or employee with the responsibility of ensuring the compliance of the provision of this Act.

(2) The State Government may, in the like manner, invest the appointing authority or officer or employee referred to in sub-section (1) with such powers or authority as may be necessary for effectively discharging the responsibility entrusted to him under sub-section (1).

Penalty

5. (1) Any appointing authority or officer or employee entrusted with the responsibility under sub-section (1) of section 4 who willfully acts in a manner intended to contravene or defeat the purpose of this Act shall, on conviction, be punishable with imprisonment which may extend to three months or with fine which may extend one thousand rupees or with both.

(2) No court shall take cognizance of an offence under this section except with the previous sanction of the State Government or an officer authorized in this behalf by the State Government by an order.

(3) An offence punishable under sub-section (1) shall be tried summarily by a Metropolitan Magistrate or a Judicial Magistrate of the first class and the provision of sub-section (1) of section 262, section 263, section 264 and section 265 of

the Code of Criminal Procedure, 1973 shall mutatis mutandis apply.

Power to call for record

6. If it comes to the notice of the State Government, that any person belonging to Economically Weaker Sections mentioned in subsection (1) of section 3 has been adversely affected on account of non compliance of the provisions of this Act or the rules made thereunder or the Government orders issued in this behalf by the appointing authority, it may call for such records and take such action as it may consider necessary.

I**ncome and Assets certificate**

7. For the purpose of reservation provided under this Act, income and assets certificate shall be issued by such authority or officer not below the rank of Tehsildar in the State and in such manner and in such form as the State Government may, by order, provide.

The office memorandum no.1/2019/4/1/2002/ka-2/ 19T.C.II, dated 18 February 2019 shall be deemed to have been issued under this section.

Removal of difficulties

8. If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by a notified order, make such provisions not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for removing the difficulty.

Protection of action taken in good faith

9. No suit, prosecution or other legal proceedings shall lie against the State Government or any person for anything which is done or intended to be done in good faith in pursuance of this Act or the rules made thereunder.

Power to make rules

10. The State Government may, by notification, make rules for carrying out the purposes of this Act.

Power to amend the Schedule

11. The State Government may, by notification amend the Schedule and upon the publication of such notification in Gazette, the Schedule shall stand amended accordingly.

Laying of Order etc.

12. Every order made under sub-sections (4) of section 3 and section 4 and 8 shall be laid as soon as may be, before each House of the State Legislature and the provisions of sub-section (1) of section 23-A of the Uttar Pradesh General Clauses Act, 1904 shall apply as they apply in respect of rules made by the State Government under any Uttar Pradesh Act.

Savings

13. The provisions of this Act shall not apply to cases in which selection process has been initiated before commencement of this Act and such cases shall be dealt with in accordance with the provisions of law and Government order as they stood before the commencement.

Explanation: For the purposes of this section the selection process shall be deemed to have been initiated where, under the relevant service rules, recruitment is to be made on the basis of -

(i) written test or interview only, the written test or the interview, as the case may be, has started, or

(ii) both written test and interview, the written test has started.

(2) The provisions of this Act shall not apply to appointment, to be made under the Uttar Pradesh Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974."

16. To decide issue involved in present case, Sections 1, 2(c), 3, 7 and 13

would be relevant which have already been emphasized hereinabove.

17. U.P. Act No. 10 of 2020 was published in Gazette on August 31, 2020. According to Section 1(2), this Act shall be deemed to have come into force on February 01, 2019. Section 13 provides savings that "the provision of this Act shall not apply to cases in which selection process has been initiated before commencement of this Act and such cases shall be dealt with in accordance with the provisions of law and Government Order as they stood before commencement. The O.M. dated 18.02.2019 and 13.08.2019 shall be deemed to have been issued under this Act.

18. In the present case, ATRE Examination (a qualifying examination) was held on 06.01.2019 i.e. prior to 103rd Constitutional Amendment. Further selection process of appointment of 69000 posts of Assistant Teachers was commenced from 16.05.2020 i.e. after 103rd Constitutional Amendment but before enactment of U.P. Act No.10 of 2020 i.e. on 31.08.2020, therefore, as per savings clause (Section 13), provisions of U.P. Act No. 10 of 2020 would not be applicable and it would be governed by provisions of law and Government Order as they stood before the commencement of U.P. Act No. 10 of 2020.

19. Now I proceed to consider effect of Office Memorandum dated 18.02.2019 issued by State of U.P. and effect that U.P. Act No. 10 of 2020 deemed to have come into force on 01.02.2019. I have carefully perused the said O.M. It notes that Social Welfare Department of State of U.P. has decided to provide 10% reservation to EWS in all State services as well as in Educational Institutions and also determine factors for granting benefits to EWS which are as follows -:

"4. The Constitution (One hundred and Third Amendment) Act, 2019 के क्रम में भारत सरकार द्वारा सरकारी सेवाओं में नियुक्ति के सम्बन्ध में आर्थिक रूप से कमजोर वर्गों के लिये की गयी आरक्षण की व्यवस्था के अनुसार ही, आर्थिक रूप से कमजोर वर्गों के ऐसे व्यक्तियों, जो अनुसूचित जाति, अनुसूचित जनजाति तथा अन्य पिछडे वर्गों के लिए आरक्षण की वर्तमान व्यवस्था से आच्छादित नहीं है तथा उत्तर प्रदेश राज्य के ही मूल निवासी है, को राज्याधीन लोग सेवाओं और पदों पर आरक्षण प्रदान करने हेतु निम्नवत् व्यवस्था/मानक निर्धारित किये जाने का निर्णय लिया गया हैः-

(क) आर्थिक रूप से कमजोर वर्गों के ऐसे व्यक्तियों जो अनुसूचित जाति, अनुसूचित दनजाति तथा अन्य पिछडे वर्गों के लिए आरक्षण की वर्तमान व्यवस्था से आच्छादित नहीं है, को उत्तर प्रदेश सरकार की लोक सेवाओं और पदों की सभी श्रेणियों में सीधी भर्ती के प्रक्रम पर 10 प्रतिशत का आरक्षण प्रदान किया जाय।

(ख) उत्तर प्रदेश सरकार की लोक सेवाओं और पदों की सभी श्रेणियों में सीधी भर्ती के प्रक्रम पर आर्थिक रूप से कमजोर वर्गों के लिये अनुमन्य किये गये 10 प्रतिशत आरक्षण का लाभ प्राप्त करने हेतु ऐसे व्यक्ति, पात्र/आर्ह होंगेः-

(i) जिनके परिवार की समस्त स्त्रोतो से प्राप्त होने वाली कुल वार्षिक आय रू०-8.00 लाख से कम होगी। समस्त स्त्रोंतो से आय में वेतन, कृषि, व्यापार, व्यवसाय आदि से प्राप्त आय सम्मिलित होंगी और यह आय आरक्षण हेतु आवेदन करने के वर्ष के पूर्व वर्ष की होंगी। इस उद्देश्य के लिये लाभ प्राप्त करने वाले व्यक्ति के परिवार में उसके/उसकी माता-पिता व 18 वर्ष से कम आयु के भाई-बहन के साथ-साथ उसका/उसकी, पति/पत्नी और 18 वर्ष से कम आयु के उसके बच्चे सम्मिलित होंगे। परन्तुः

(ii) एेसे व्यक्ति, आर्थिक रूप से कमजोर वर्ग की श्रेणी में पात्र नहीं होंगेः-

(अ) जिनके परिवार के स्वामित्व अथवा कब्जे में 05 एकड़ या इससे अधिक कृषि भूमि हो, या

(ब) 1000 वर्ग फीट या इससे अधिक क्षेत्र का आवासीय फ्लैट हो, या

(स) अधिसूचित नगर पालिकाओं में 100 वर्ग गज या अधिक क्षेत्र का आवासीय भू-खण्ड हो, या

(द) अधिसूचित नगर पालिकाओं के क्षेत्र से भिन्न क्षेत्रों में 200 वर्ग गज या अधिक क्षेत्र का आवासीय भू-खण्ड हो।

(iii) परिवार की आय और परिसम्पत्ति का प्रमाण पत्र सम्बन्धित क्षेत्र के तहसीलदार से अनिम्न अधिकारी द्वारा जारी/प्रमाणित किया जायेगा।

(iv) **उत्तर प्रदेश सरकार की लोक सेवाओं और पदों की सभी श्रेणियों में सीधी भर्ती के प्रक्रम पर आर्थिक रूप से कमजोर वर्गों के लिये नियुक्तियों में आरक्षण की व्यवस्था दिनांक 01.02.2019 या इसके उपरान्त अधिसूचित/विज्ञापित होने वाली रिक्तियों पर प्रभावी होंगी।"**

20. At this stage, it would be apposite to refer Section 7 of U.P. Act No. 10 of 2020 that -:

"For the purpose of reservation provided under this Act, income and assets certificate shall be issued by such authority or officer not below the rank of Tehsildar in the State and in such manner and in such form as the State Government may, by order, provide.

The office memorandum no.1/2019/4/1/2002/ka-2/ 19T.C.II, dated 18 February 2019 shall be deemed to have been issued under this section.".

21. Now, I have to consider scope of above referred clause 4 (IV) of O.M. dated 18.02.2019 that since selection process for recruitment of 69000 Assistant Teachers was commenced (if the argument of petitioner is deemed to be accepted) with a G.O. dated 16.05.2019 i.e. after 18.02.2019, whether State of U.P. was under a legal obligation to
provide reservation for EWS or not?

22. The above referred part of O.M. states that arrangement of reservation to EWS will be applicable on notification issued after 01.02.2019 for recruitment of State services, however, at that stage, no Act was enacted in State of U.P. and above arrangement was provided by an Office Memorandum. Later on, it was validated by way of enactment of U.P. Act No. 10 of 2020.

23. As referred above, later on U.P. Act No. 10 of 2020 was enacted on 31.08.2020 with a specific saving clause that provisions of this Act shall not apply to cases which were initiated before commencement of Act and admittedly in present case, process of selection was initiated prior to 31.08.2020 (as per stand of both parties). An Act has always more legal value in compare to any Office Memorandum, therefore in case of any ambiguity, provisions of Act No. 10 of 2020 would prevail. Section 7 of U.P. Act No. 10 of 2020 provides that O.M. dated 18.02.2019 shall be deemed to have issued under said scheme and O.M. was provided legal sanctity only after aforesaid Act was come into force and not before it and since procedure for selection for 69000 posts of Assistant Teachers was commenced prior to 31.08.2020, therefore, State of U.P. was not legally bound to provide EWS reservation in said recruitment process.

24. By validating O.M. dated 18.02.2019, the Act has validated if any reservation was provided to EWS on basis of said O.M. prior to enactment of U.P. Act No. 10 of 2020, but it could not be correct to hold that on basis of said O.M., State was bound to provide reservation to EWS in all selection process, even prior to commencement of U.P. Act No. 10 of 2020 and it was only after enactment of said Act, the State is under a legal obligation to provide reservation to EWS and not before it.

25. In aforesaid circumstances, this Court is not entering to the dispute whether ATRE Examination is a starting point of recruitment process of Assistant Teacher or

not as in view of above discussion, it does not require as well as in view of above discussion, other argument of petitioners' side has no legal basis as well as judgments cited are distinguishable on facts as well as on law.

26. The outcome of above discussion is that relief sought could not be granted, accordingly, all writ petitions are **dismissed.**

(2024) 3 ILRA 489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2024
BEFORE
THE HON'BLE DONADI RAMESH, J.

Writ A No. 4080 of 2022

Rabindra Kumar ...Petitioner
Versus
Disciplinary Authority/Assistant General Manager (O.A.D.) & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh, Sri Adarsh Singh

Counsel for the Respondents:
Sri Satish Chaturvedi, Sri Sumit Kakkar

A. Service Law – Disciplinary proceeding – Punishment – Dismissal – Allegation of impersonation – Earlier dismissal order was set aside leaving it open to authority to proceed afresh – Re-enquiry report was based on a report of handwriting expert, who was not registered as an expert – No corroboration of expert report with other material evidence could be made, though opportunity to cross examine the expert was given – No consideration was made on the issue of missing of photo, in spite of specific observation made by High Court in its earlier order – Permissibility – Held, the respondents have passed the impugned orders solely depending on the report submitted by one R. Krishna, who is handwriting expert, without verifying the other material and without establishing that the petitioner has not appeared in the examination – High Court set aside the impugned order remanding the matter to afresh enquiry. (Para 34, 35, 37, 38 and 39)

Writ petition disposed of. (E-1)

List of cases cited :-

1. Ran Vijay Singh Vs U.O.I.; 2018 (4) AWC 3581

2. Writ A No. 21096 of 2018; Vijay Pal & ors. Vs U.O.I.& ors. decided on 16.05.2023

(Delivered by Hon'ble Donadi Ramesh, J.)

1. Heard Sri Indra Raj Singh, learned counsel for the petitioner and Sri Sumit Kakkar, learned counsel for the respondents.

2. The petitioner by the instant writ petition seeks quashing of the impugned order dated 29.11.2021 and 27.01.2022 passed by respondent no. 1 and 2 (Annexure Nos. 20 and 23).

3. The petitioner having graduate degree is eligible for the post of clerical staff. Pursuant to the notification, he has submitted Online application form for selection in State Bank of India. The petitioner was issued an admit card bearing Roll No.2201047741 with Registration No.4136762 for appearing in the written examination scheduled to be held on 15.11.2009. Accordingly, the petitioner had appeared in the written examination on 15.11.2009 at Jwala Devi Vidya Mandir Post Graduate College, Anand Bag, Kanpur. The said examination was conduced in the presence of two invigilators including Bank invigilator. At

the time of examination, the invigilators have matched the physical presence of the petitioner by verification of photographs, signatures and thumb impressions and after being fully satisfied, permitted the petitioner to appear and participate in the written examination. Accordingly, the petitioner passed the aforesaid written examination and was declared successful. Thereafter, he was called for interview which was scheduled to be held on 27.04.2010. The interview Board has verified the required documents in the presence of petitioner and after full satisfaction of the Bank Officials, interview has been conducted and final results were declared on 16.12.2010 in which the petitioner was declared as selected and the petitioner joined the said post of Assistant in S.B.I., Industrial Area Branch Khalilabad, District Sant Kabir Nagar on 16.12.2010. He discharged his duties with utmost satisfaction of authorities and basing on his performance, the authorities have recommended for confirmation on the post vide order dated 21.03.2012. Accordingly, his services were confirmed vide order dated 24.03.2012.

4. Under the misconception of facts, the third respondent had issued a charge memo on 03.09.2015, which reads as under :-

PRIVATE AND CONFIDENTIAL

रवीन्द्र कुमार, सहायक

DATE 03.09.2015

भ.नि. क्र. 6599540

LETTER NO. DPS/GKP/470

द्वारा भारतीय स्टेट बैंक

आरोप-पत्र (Charge-sheet)

स्टाफ : एवाई

शाखा: इंडस्ट्रियल एरिया खलीलाबाद

वर्ष 2009 में केन्द्रीय भर्ती एवं पदोन्नति विभाग (Central Recruitment and Promotion Department), भारतीय स्टेट बैंक, कारपोरेट केंद्र मुंबई ने विभिन्न समाचार पत्रों में भारतीय स्टेट बैंक में लिपिकों की भर्ती के लिए आवेदन आमंत्रित करने हेतु विज्ञापन दिया था।

भारतीय स्टेट बैंक लिपिकों की भर्ती हेतु आपके आवेदन के आधार पर केन्द्रीय भर्ती एवं पदोन्नति विभाग ने आपको कॉल लेटर भेजा जिसमें सूचना दी गयी थी कि आप लिखित परीक्षा में सम्मिलित होने हेतु ज्वाला देवी विद्या मन्दिर पोस्ट ग्रेजुएट कालेज, आनन्द बाग, कानपुर में दिनांक 15.11.2009 (समय 9.15 AM) को उपस्थित हो ।

आप पर आरोप है कि आपने बैंक में लिपिक के रूप में नियुक्ति पाने के लिए जानबूझकर धोखाधड़ी/अनुचित तरीका अपनाया। अतः निम्नलिखित आरोपों के लिए आपके विरुद्ध अनुशासनात्मक कार्यवाही शुरू करने का निर्णय लिया गया है।

आरोप सं. *आपकी नियुक्ति के संबंध में, बैंक द्वारा दिनांक 15.11.2009 (समय: 09.15AM) को ज्वाला देवी विद्या मन्दिर पोस्ट ग्रेजुएट कॉलेज, आनन्द बाग, कानपुर में आयोजित लिखित प्रवेश परीक्षा के दारान Attendance Sheet और Call Letter पर किए गए हस्ताक्षर एवं अंगूठे के निशान तथा बैंक द्वारा दिनांक 27.04.2010 को सम्पन्न कराये गए इंटरलव्यू और दिनांक 15.12.2010 को आपकी बैंक में नियुक्ति के संदर्भ में आपके द्वारा किए गए हस्ताक्षर एवं अंगूठे के निशान तथा दिनांकित 24.04.2010 के आपके द्वारा दिये गए आत्मकथ्य एवं सत्यापन फार्म के संदर्भ में किये गये हस्ताक्षर एवं अगूठे के निशान दो अलग अलग व्यक्तियों के द्वारा किए गए। अतः आपने ऊपर वर्णित लिखित परीक्षा दिनांक 15.11.2009 में अपने स्थान पर किसी अन्य व्यक्ति (साल्वर solver) को धोखाधड़ी से सम्मिलित कराकर परीक्षा पास की।*

आरोप सं.2. *आपने धोखाधड़ी एवं अनुचित प्रक्रिया का प्रयोग बैंक में Assistant के रूप में भर्ती होने के लिए किया।*

2- आपके विरुद्ध यदि उपरोक्त आरोप प्रमाणित होते है तो यह भारतीय बैंक संघ एवं कर्मचारी संगठनों के मध्य द्विपक्षीय समझौता दिनांक 10.04.2002 के 5(एन) और 5(ओ) के अंतर्गत "घोर कदाचार" माना जाएगा एवं समझौता दिनांक 10.04.2002 के पैरा 6 के अंतर्गत दंडनीय है (The above charges, if established, would amount to "Gross Misconduct in terms of Para 5(n) and 5(o) of Memorandum of Settlement dated 10.04.2002 entered Into between IBA

and workmen unlons and punishable under para 6 of Memorandum of Settlement dated 10.04.2002).

3- अतः आपको निर्देश दिया जाता है कि इस आरोप-पत्र की प्राप्ति के 07 दिन के अंदर अपने बचाव में लिखित रूप से अपना पक्ष प्रस्तुत करें। यदि आप निर्धारित अवधि में अपना कोई बचाव-पत्र प्रस्तुत नहीं करते हैं तो यह समझा जाएगा कि इस संदर्भ में आपको कुछ नहीं कहना है और बैंक आपकी सेवा शर्तों के अनुतार आपके विरुद्ध कार्यवाही करने के लिए बाध्य होगी। यदि आप अपना जवाब प्रस्तुत करने के लिए संबद्ध अभिलेखों का अवलोकन करना चाहते है तो निर्धारित अवधि के भीतर संबन्धित क्षेत्र के क्षेत्रीय प्रबन्धक से अभिलेखों के अवलोकन हेतु निवेदन कर सकते है। कृपया ध्यान दे कि अभिलेखो के अवलोकन के समय संबद्ध अभिलेखो की छाया प्रति आपको नहीं दी जाएगी। यदि आप आवश्यक समझे तो उनमें से आवश्यक सूचनायें नोट कर सकते हैं। आरोपों से संबन्धित अभिलेखों कि सूची (अनुलग्नक -1) संलग्न है।

4. कृपया इस पत्र के दितीय प्रति पर दिनांकित पावती प्रदान करें।

अनलग्नक-1

रबीन्द्र कुमार, सहायक

भ.नि.क्र. 6599540

द्वारा भारतीय स्टेट बैंक

आरोपों से संबन्धित अभिलेखो की सूची :-

1. प्रवेश परीक्षा के संदर्भ में जारी किया गया काल लेटा ।

2. प्रवेश परीक्षा से संबन्धित attendance sheet ।

3. साक्षात्कार एवं नियुक्ति से संबन्धित कागजात ।

4. उक्त अभिलेखो के :तिरिक्त यदि आवश्यक हुआ तो बैंक आरोपी को साबित करने के लिए अन्य साक्ष्य श्री प्रस्तुत कर सकता है।

5. Against the said charge, the petitioner has submitted his explanation on 09.09.2015 whereas the respondents were not satisfied with the explanation, therefore, the respondents conducted an enquiry and based on the report of incompetent hand writing expert Sri R. Krishna, declared charges to be proved against the petitioner. Based on the said inquiry report, the third respondent without application of mind passed an order on 04.05.2016 by dismissing the petitioner from service, as against the petitioner filed an appeal before the respondent no. 4 bringing the relevant facts to the notice of the Appellate Authority with prayer to set aside the punishment order. The appeal was rejected by the fourth respondent vide order dated 12.08.2016 in routine manner.

6. Aggrieved by the above action of the respondents, the petitioner preferred writ petition being Writ-A No. 48511 of 2016 (Rabindra Kumar vs. State of U.P. and 5 others) and after exchange of counter and rejoinder affidavits, the said writ petition was disposed of vide order dated 24.04.2018 with the following direction, which reads as under :-

"Whether there was any photo mixing or not, was a matter which could have been examined by the enquiry officer at least during the course of the enquiry. Even though it may not have been possible in the invigilation /examination centre itself but nothing of the kind was done and the enquiry report was based entirely upon the report of R. Krishna, the hand writing expert who was not even a registered handwriting expert. There is nothing on record to show that the petitioner had declined that R. Krishna be produced in the enquiry to prove his report or that he has declined to cross-examine R. Krishna and that he has accepted the report of the handwriting expert. The statement of the petitioner given during the enquiry has not been filed by the respondents to show that the petitioner at any time had declined to summon Sri R. Krishna or that he had accepted the report of the handwriting expert R.Krishna. The fact of the matter remains that R. Krishna on whose report the entire enquiry report has been based and which has been accepted by the disciplinary authority and the appellate

authority was never produced in the enquiry to prove his report which was a duty cast upon the respondents holding the enquiry. The disciplinary authority and the appellate authority have also not considered these various aspects of the matter. Therefore, I find that there has been gross infraction of principles of natural justice and the petitioner has not been given reasonable and adequate opportunity to meet the report of the handwriting expert. Such an enquiry cannot be said to be a reasonable or fair enquiry. The order of the disciplinary authority as well as the appellate authority which are based on such an enquiry report are therefore, vitiated and are accordingly, set aside.

The writ petition is allowed.

However, it will be open for the respondents to proceed against the petitioner afresh after giving him an opportunity of examination and cross examination of Sri R. Krishna during the enquiry and lead whatever evidence he may want, to contradict the report of the handwriting expert Sri R. Krishna."

7. Despite the above directions, the respondents have not reinstated the petitioner into service nor paid the salaries. Hence the petitioner has pressed Contempt Application (Civil) No.3685 of 2018. This Court issued notice to the respondent on 03.08.2018. Thereafter, this Court further passed an order on 30.12.2018 regarding quantum of sentence. Based on the order of this Court, passed in the contempt application, the petitioner was reinstated at Salempur Main Branch, State Bank of India, Deoria vide order dated 30.08.2018.

8. Again respondent no. 3 by order dated 01.10.2018 placed the petitioner under suspension and appointed one Sri Ritesh Sagar as Inquiry Officer, directing the petitioner to participate in the inquiry. Thereafter, the Regional Manager S.B.I., Gorakhpur had issued letter on 05.04.2021 annexing the inquiry report dated 21.07.2021 prepared by the Inquiry Officer and Assistant General Manager. To the said inquiry report, the petitioner has submitted his objections before the Assistant General Manager, S.B.I., Gorakhur through registered post dated 12.04.2021 and without considering the objections filed by the petitioner, a tentative punishment order was issued on 13.09.2021 by asking the petitioner to appear on 20.09.2021. Again the petitioner submitted his objection on 16.10.2021 and without taking into consideration, the respondent no.1 has passed the impugned punishment order on 29.11.2021, dismissing the petitioner from service.

9. Aggrieved by the above said order, the petitioner has preferred an appeal before the second respondent by bringing the facts and also raising several grounds prayed for setting aside the tentative and final orders and reinstate the petitioner into service but without considering the grounds raised by the petitioner, the appeal has been rejected in mechanical manner.

10. Assailing the same order, the present writ petition has been filed.

11. After notice, one Sri Sunil Kumar Maharaj, Chief Manager, State Bank of India, Salempur Branch, District Deoria has filed counter affidavit on behalf of the respondents wherein he has stated that as per 11th Bipartite Settlement dated 11.11.2020, the employee who has been awarded the punishment of dismissal, compulsory discharge or removal from service by the Disciplinary Authority and subsequently where the punishment is

confirmed by the Appellate Authority, shall be given an opportunity to seek reconsideration by an authority higher than the Appellate Authority. Therefore, after rejection of the appeal by the Appellate Authority, the petitioner could have availed an alternative remedy for reconsideration before the competent authority of the Bank rather than filing the instant petition, hence the same should be dismissed on the ground of availability of an alternative remedy to the petitioner. Further, as per the Bipartite Settlement between the State Bank of India and Employees' Union as such the petitioner is a "workman" within the definition of workman as provided under the Industrial Disputes Act and the petitioner's dismissal is deemed to be an Industrial Dispute within the provisions of Section 2A of the Industrial Disputes Act, 1947. Even on this ground, the writ petition has to be dismissed.

12. The petitioner appeared in the written examination by impersonation, when the same was verified then it was found that the thumb impression of the person who appeared in the written examination on 15.11.2009 at Jwala Devi Vdya Mandir Post Graduate College, Anand Bagh, Kanpur and the person who joined the Bank on 15.12.2010, are different. Photograph available on call letter at the time of appearing for written examination was also not matching as such he was suspended and disciplinary proceedings were initiated against him. On the basis of material evidence on record, the respondents have held that the charges levelled against the petitioner have been proved and it has been found that signature and thumb impression of the person who appeared in the written examination on 15.11.2009 and the person who joined in the Bank on 15.12.2010 are different. In fact, the petitioner was given an opportunity by Inquiry Officer to cross examine the handwriting expert but he refused to do so, inasmuch as the Appellate Authority has recorded a finding that the report submitted by Sri R. Krishna, on the basis of evidence and facts, cannot be sidelined on the basis of non-government and non registered entity. Neither the inquiry conducted is vitiated nor it is illegal inasmuch as after scrutinizing the entire material on record as well as after giving full opportunity to the petitioner, the orders have been passed by the respondents. As the petitioner has played fraud upon the Bank in getting the appointment by falsification / impersonation, service of the petitioner has rightly been terminated after holding proper inquiry and after giving full opportunity to the petitioner. There is no violation of principles of natural justice or any procedure contemplated under Rules. Hence the writ petition is liable to be dismissed.

13. Based on the above pleadings, the learned counsel for the petitioner has emphasise his arguments that the respondents have issued charge sheet for extraneous considerations as the petitioner has appeared to the written examination conducted by the respondents and at the time of written examination, two invigilators are present and they have verified the petitioner and also taken photographs, thumb impressions and signature. Accordingly, on the basis of the result, the petitioner was selected and appointed and based on his performance in the duties, the petitioner has been awarded best employee awards for continuous three years.

14. Though the above charges have been framed but no proper inquiry has been

conducted by the respondents before giving punishment order. The same was taken into consideration by this Court in Writ-A No. 48511 of 2016. The said writ petition was disposed of by making a remark that there was no photograph mixing though it may not have been possible in the invisilative / examination centre itself and nothing of kind was done and the inquiry report was entirely based on the report of R. Krishna, the handwriting expert who was not even a registered handwriting expert and further it has been noted that Disciplinary Authority and Appellate Authority have also not considered the various aspects of the matter and recorded the gross infraction of principles of natural justice and accordingly the impugned orders were set aside but liberty was granted to the respondents to proceed against the petitioner afresh after giving him an opportunity of examination and cross-examination of Sri R. Krishna during the inquiry who may lead whatever evidence he wanted to produce regarding report of the handwriting expert.

15. Based on the above observations for conducting a re-inquiry the respondents have issued notice and directed the petitioner to cross-examine Sri R.Krishna. When the petitioner denied the opportunity and took specific stand that the said R. Krishna is not a registered handwriting expert nor is attached to any government pharmaceutical laboratory nor he possess any technical degree to qualify him as handwriting expert but before considering the said objection taken by the petitioner, the respondents proceeded only on the ground that this Court has given an opportunity to the petitioner to cross-examine the R. Krishna during the inquiry. When the petitioner has taken specific stand regarding incompetence of the handwriting expert, inquiry Officer has submitted his report with the following observation :

"I, therefore, is of the opinion that the inquiry has been conducted for third time (13.01.2020, 27.07.2020 and 27.01.2021) and enough opportunity have been provided to the CSE to re-examine Shi R Krishna report as per Hon'ble High Court order dated 24.04.2018. The DR and CSE appear purposely not cross verifying he Handwriting Expert report and were trying to question the degree and qualification of Sh R Krishna repeatedly. This seems to be delaying of the process of Inquiry of Inquiry. The cross-examination opportunity was given by Hon'ble High Court, which they were not ready to carry out."

16. The petitioner has submitted his reply on 12.04.2021, which reads as follows : -

"सेवा में,
सहायक महाप्रबन्धक
भारतीय स्टेट बैंक
गोरखपुर दक्षिण
प्रशासनिक कार्यालय गोरखपुर
गोरखपुर (उ०प्र०)
महोदय,

मुझे आपके द्वारा प्रेषित पत्र ***संख्या-गोरखपुर (दक्षिण) शि० एवं धो०/08*** *05.04.2021का जो कि दिनांक 09.04.2021 को प्राप्त हुआ जिसमें विभागीय जाँच अधिकारी श्री रितेष सागर का पुनः जाँच के संबंध में दिनांक 27.01.2021 की रिपोर्ट संलग्न है जिसमें मुझे पुनः निम्न निवेदन करना है कि बैंक की जाँच कार्यवाही में हम और हमारे बचाव प्रतिनिधि (DR) ने जाँच कार्यवाही में उपस्थिति R Krishna से संबंधित आरोपों के बारे में पूछ-ताछ करने के लिये कहा था। परन्तु माननीय उच्च न्यायालय के आदेश संख्या 48511/016 दिनांक 24.04.2018 के आधार पर जिसमें यह कहा गया है कि Hand Writing Exp. R Krishna किसी भी सरकारी*

फारेन्सिक लैब से जुड़े हुए नहीं हैं। Government Signature Exp. नहीं है इसलिए इनकी रिपोर्ट मान्य नहीं है इसलिये इनकी रिपोर्ट आधारहीन तथ्यहीन विश्वास योग्य नहीं है इसलिये हम लोगों ने R Krishna का Cross Examina नहीं किया है।

अगर बैंक किसी ऐसे Signature Expert को प्रस्तुत करती है जिसका रजिस्ट्रेशन किसी भी सरकारी फारेन्सिक लैब से जुड़ा हुआ हो और माननीय उच्च न्यायालय विश्वास करती है ऐसे हस्ताक्षर विशेषज्ञ को Cross Examina करने के लिये तैयार है।

यह भी कहना चाहते हैं कि जिस परीक्षा कक्ष में मेरी परीक्षा हुई थी उसके कक्ष निरीक्षक के रूप में बैंक के अधिकारी जिन्होंने हमारा फोटोग्राफ हस्ताक्षर की जाँच किया था। और हमको परीक्षा में बैठने की अनुमति दी थी उसके उपरान्त बैंक की परीक्षा दी और उत्तीर्ण होने में सफल हुए।

तद् उपरान्त हमारा साक्षात्कार (Interview) लिया गया और Interview Board के पैनल के सभी सदस्यों ने हस्ताक्षर, अंगूठे के निशान एवं फोटो मिलान करने के बाद सही पाया। और Interview Pannel के द्वारा Interview लिया गया और सफल होने के बाद मुझे भारतीय स्टेट बैंक शाखा इण्डस्ट्रियल खलीलाबाद संत कबीर नगर (08231) में 16.12.2010 को नियुक्ति दे दिया।

बैंक चाहती तो परीक्षा कक्ष के निरीक्षकों एवं साक्षात्कार करने वाले अधिकारी महोदयों को जाँच कार्यवाही में बुला कर सत्यता की जानकारी कर सकती थी परन्तु उन लोगों को जाँच कार्यवाही में न बुला कर उल्टे हमारे खिलाफ मन गढ़ंत आरोप लगाकर हमको बैंक की सेवा से 07.05.2016 को बैंक की सेवा से बर्खास्त कर दिया।

तद् उपरान्त मुझे माननीय उच्च न्यायालय की शरण लेनी पड़ी। माननीय उच्च न्यायालय हमारे ऊपर लगाये गये आरोपों को आधारहीन बताते हुए निरस्त कर दिया। और पुनः निलम्बन आदेश को निरस्त करते हुए दिनांक 01.09.2018 को मुझे ज्वाइन करने का आदेश दिया।

हाई कोर्ट के आदेश के अनुसार जिसमें यह कहा गया था कि बैंक चाहे तो Cross Examina करा सकती है बैंक ने हमारे खिलाफ पुनः जाँच कार्यवाही प्रारम्भ कर दी।

लगभग तीन चार तारीखों में जाँच कार्यवाही प्रारम्भ की गई परन्तु किसी भी जाँच कार्यवाही में परीक्षा निरीक्षकों एवं साक्षात्कार लेने वाले अधिकारियों तथा नियुक्ति देने वाले अधिकारियों को किसी भी जाँच कार्यवाही में प्रस्तुत नहीं किय गया जबकि दिनांक 30.12.2018 को हमारे बचाव प्रतिनिधि ने सम्बन्धित परीक्षा निरीक्षकों साक्षात्कार करने वाले अधिकारियों को प्रस्तुत कर पूछ-ताछ करने की आवश्यकता महसूस की थी जिसको P.O. ने इन महत्वपूर्ण साक्ष्यों को जाँच कार्यवाही में न बुलाकर स्वाभाविक न्याय की प्रक्रिया का उल्लंघन किया तथा निर्दोष कर्मचारी के हितों पर आघात किया है। उपरोक्त सभी तथ्यों एवं प्रमाणों को ध्यान में रखते हुए आधारहीन एवं बेबुनियाद आरोपों को प्रमाणित मानते हुए CSE कर्मचारी के विरुद्ध लिया गया निर्णय एक साजिश ही प्रतीत होगी।

एक जाँच कार्यवाही जो दिनाँक 30.12.2018 को की गई थी जिसमें जाँच अधिकारी ने आदेश देते हुए लिखा कि आज की जाँच की कार्यवाही सम्पन्न की जाती है। कार्यवाही से सम्बन्धित रिपोर्ट सभी पक्षों को दिनाँक 10 जनवरी 2021 तक सभी पक्षों को उपलब्ध करा दी जायेगी और न तो जाँच कार्यवाही के आधार पर कोई निर्णय लिया गया और न ही कोई आज तक किसी पक्ष को 31.12.2018 की सम्पन्न जाँच कार्यवाही की रिपोर्ट किसी भी पक्ष को इनके द्वारा नहीं उपलब्ध कराई गई परन्तु बिना कोई आरोप पत्र के (चार्जशीट) दिये पुनः कार्यवाही प्रारम्भ कर दी गई यह मेरे खिलाफ साजिश नहीं तो क्या है।

अतः आपसे प्रार्थना है कि हमारे खिलाफ आधारहीन एवं बेबुनियाद आरोपों को असत्य मानते हुए हमारे निलम्ब को निरस्त कर हमको स्वाभाविक न्याय दिलवाने की कृपा करें।

मैं आजीवन आपका आभारी रहूँगा।

P.F. No-6599540
दिनाँक-12.04.2021

भवदीय

रवीन्द्र कुमार सहा०
भारतीय स्टेट बैंक
मुख्य शाखा- सलेमपुर
जिला-देवरिया।"

17. Surprisingly without considering the specific objection taken by the petitioner, the respondents have passed the tentative punishment order on 13.09.2021 by giving an opportunity once again and the same orders have been confirmed and final order has been issued by the respondent vide order dated 29.11.2021, which reads as follows :-

"FINAL ORDER
STAFF:AWARD

DISCIPLINARY PROCEEDINGS – NON VIGILANCE-GROSS MISCONDUCT

SHRI RABINDRA KUMAR, ASSOCIATE (U/S) (PF No 6599540)

BRANCH :SALEMPUR (CODE – 01146)

PERSONIFIED HIMSELF BY SOMEONE ELSE (as solver) WHILE APPEARING IN WRITTEN EXMINATION

During the Banks written examintion process, Shri Rabindra Kumar, Associate (u/s) PF -6599540, had personified himself by someone else (as solver) while appearing in written examination held on 15.11.2009 at Jwala Devi Vidya Mandi Post Gaduate College, Anand Bagh, Kanpur and as per Forensic Expert report, the thumb impression and signature obtained during written examination do not match with the thumb impression and signature obtained at the time of interview / joining in the Bank.

Disciplinary Penalty Proceedings under "Gross Misconduct" under clause 5(n) and 5(o) of Memorandum of Settlement dated 10.04.2002 between IBA & Workmen Unions and Bank Level Settlement dated 07.04.2016 as amended / modified by Bipartite Settlement dated 11.11.2020 between IBA & Workmen Unions, were initiated against Shri Rabindra Kumar Associate PF ID 6599540 vide charge sheet dated 03.09.2015 served upon Shri Rabindra Kumar Associate, on 04.09.2015 for following lapses committed by Shri Rabindra Kumar Associate :

"i. आपकी नियुक्ति के संबंध में, बैंक द्वारा दिनांक 15.11.2009 (समयः09.15AM) को ज्वाला देवी विद्या मन्दिर पोस्ट ग्रेजुएट कालेज, आनन्द बाग, कानपुर में आयोजित लिखित प्रवेश परीक्षा के दौरान Attendance Sheet और Call Letter पर किए गए हस्ताक्षर एवं अंगूठे के निशान तथा बैंक द्वारा दिनांक 27.04.2010 को सम्पन्न कराये गए इंटरव्यू और दिनांक 15.12.2010 को आपकी बैंक में नियुक्ति के संदर्भ में आपके द्वारा किए गए हस्ताक्षर एवं अंगूठे के निशान तथा दिनांकित 24.04.2010 के आपके द्वारा दिये गए आत्मकथ्य एवं सत्यापन फार्म के संदर्भ में किये गये हस्ताक्षर एवं अंगूठे के निशान दो अलग अलग व्यक्तियों के द्वारा किए गए। अतः आपने ऊपर वर्णित लिखित परीक्षा दिनांक 15.11.2009 में अपने स्थान पर किसी अन्य व्यक्ति ('साल्वर' Solver) को धोखाधड़ी से सम्मिलित कराकर परीक्षा पास की।

ii. आपने धोखाधड़ी एवं अनुचित प्रक्रिया का प्रयोग बैंक में Assistant के रूप में भर्ती होने के लिए किया।"

2. Tentative Order dated 13.09.2021, forwarded vide Letter No. BCDM/1251 dated 13.09.2021, was served upon the CSE, Shri Rabindra Kumar, Associate, PF ID 6599540 which, he acknowledged on 16.10.2021 and also Shri Rabindra Kumar, Associate, appeared personally for personal hearing with undersigned on 23.11.2021.

I have once again considered all the papers of the above case and personal hearing with Shri Rabindra Kumar on 23.11.2021, I do not find any reason to change my tentative order. I, therefore, confirm the tentative order dated 13.09.2021 and finally decide that Shri Rabindra Kumar (PF ID 6599540), Associate (u/s), be served upon the penalty of "Be Dismissed from Bank Service without notice" under Clause 6(a) of Memorandum of Settlement dated 10.04.2002 between IBA & Workmen Unions and Bank Level Settlement dated 07.04.2016 as amended / modified by Bipartite Settlement dated 11.11.2020 between IBA & Workmen Unions.

3. A copy of the Final order is to be placed in the CSE's service file. If Shri Rabindra Kumar, Associate, desires to prefere an appeal against my Final order of date, Shri Rabindra Kumar, Associate may do so within 45 days from the date of receipt of the Final Order under the provision of Clause 14 of Memorandum of

settlement dated 10.04.2002 between IBA & Workmen Unions and Bank Level Settlement dated 07.04.2016 as amended / modified by Bipartite Settlement dated 11.11.2020 between IBA & Workmen Union."

18. As against the petitioner has filed an appeal before the second respondent wherein he has taken specific grounds that inquiry officer in his inquiry report dated 27.01.2021 has not himself examined any documents and material and without any basis as well as without recording any independent finding held charge to be proved against the petitioner herein and submitted his report solely based on the opinion of the handwriting expert Sri R. Krishna which is unsustainable. Further, Sri R.Krishna cannot be said to be a handwriting expert as he is simply B.Sc., LLB, MA (Criminology and Forensic Science) and he was not appointed an Assistant Professor, Criminology and Forensic Science in Sagar University, Madhya Pradesh.

19. The said R. Krishna has never been recognized and appointed as handwriting expert in any government forensic labs or institutions. Hence the alleged handwriting expert report is not a conclusive written and the same cannot be made as basis to dismiss the appeal.

20. It was incumbent upon the inquiry officer to call the two invigilators who were present at the time of examination and summoning the original attendance register, call letter, admit card and the documents which were prepared at the time of interview containing signatures, photographs of the appellant to compare the same in presence of the appellant which was not followed by the inquiry officer. Even it is an obligation on the part of the Bank to summon all interview board members and the original registers containing the signature and thumb impressions obtained during the interview for verification.

21. In fact, the appellant had appeared before the Inquiry Officer on 03.11.2021 before the Disciplinary Authority and pressed the facts and also requested to consider his representation dated 16.10.2021. He has also raised specific ground that the Inquiry Officer has not made any inquiry or recorded any independent findings against the charges except relying on the report of alleged handwriting expert of Sri R. Krishna and the appeal has been dismissed by the second respondent vide order dated 27.01.2022 with the following observations, which reads as follows :-

"4. I have carefully examined the ground raised by Shri Rabindra Kumar in his appeal in the light of relevant records of the case and may observations are as under :

The appellant has not brought out any new facts to rebut the allegations. In compliance to Hon'ble High Court order, ample opportunity give to him to cross examine report and certificates submitted by hand writing expert, but he refused to do so and doubt the legality of certificates and report. Therefore, Bank have take his action tantamount to the Gross Misconduct.

5. I have gone through the appeal preferred by Shri Rabindra Kumar, Associate and the related case papers in its entirety. I do not find any worthwhile grounds in the appeal that would warrant interference with the order of the Disciplinary Authority. The quantum of penalty imposed is considered equitable

and commensurate with the nature of allegations held as established. The appeal is turned down and the order is passed accordingly."

22. Learned counsel for the petitioner has submitted that on perusal of the entire inquiry report, it clearly shows that the Inquiry Officer has not conducted any independent inquiry with regard to the charges framed against the petitioner except relying on the report submitted by Sri R. Krishna in which he has stated that enough opportunity has been provided to the CSE to re-examine the Sri R.Krishna which he has refused to cross-examine the R. Krishna report and certificate has been submitted that legality of petitioner is doubtful, therefore, the Bank may take against him as it may deem fit. Based on the above inquiry report without application of mind the Disciplinary Authority has passed an order stating that after examining the matter carefully, going through the case and taking consideration of the gravity of lapses, the dismissal order was passed against the petitioner. Even the Appellate Authority has not at all considered the facts and also ground raised by the petitioner and simply extracted the entire appeal in the impugned order and dismissed appeal accordingly.

23. Learned counsel for the petitioner further submits that the Inquiry Officer, Disciplinary Authority and the Appellate Authority have not applied their mind while deciding the issue. The petitioner has taken specific objection with regard to the appointment of Sri R. Krishna as handwriting expert as he has not a qualified or government handwriting expert. However, he has not having any specific qualifications for handwriting expert. So report which was submitted cannot be taken into consideration. No specific averments or assertions made either by the Inquiry Officer or by the Disciplinary Authority in this regard. Hence, on this ground, alone the punishment order imposed by the Disciplinary Authority has to go. Further, the learned counsel emphasised his arguments that while dealing with the matter of such nature, it is incumbent upon the Inquiry Officer to call for the entire record pertaining to examination centre, interview Board's record and finally to send both documents to the forensic laboratory to get a clear report but in the instant case no such procedure has been followed by the Inquiry Officer. Further he has not taken any care to call for the record pertaining to examination centre records as well as interview Board's record.

24. Despite the petitioner has made a specific request to look into those aspects before taking into consideration of the report submitted by Sri R. Krishna, who is an ineligible person but surprisingly Inquiry Officer has submitted inquiry report solely based on the report submitted by the handwriting expert Sri R. Krishna and Disciplinary Authority has also taken into consideration of the report submitted by the Inquiry Officer and passed the impugned order.

25. Perusal of both the orders Disciplinary Authority as well as Appellate Authority, it appears that they have not even cared to refer the objections raised by the petitioner and no finding has been given to that effect. Surprisingly, the Appellate Authority also has not given any reasons except stating that record has been perused.

26. To support his contention, learned counsel for the petitioner has relied on the

decision of this Hon'ble Court in the case of ***Ran Vijay Singh v. Union of India reported in 2018 (4) AWC 3581***. particularly Paragraphs 22, 23, 24, 25, 26 and 27, which reads thus :

22. A learned Single Judge of this Court in Rajesh Kumar (supra) had examined a similar controversy, where services of a probationer was dispensed with by the Bank, on the ground that he had cleared recruitment exam on the basis of impersonation. This Court observed that handwriting expert's opinion is at best an expert opinion, which is not conclusive. Observation of the learned Single Judge is apposite for our purposes and is reproduced hereinafter:-

"Expert opinion is only an opinion and has been considered to be of a very weak nature. The decision of the bank is based on the expert opinion alone to establish the guilt of impersonation.

In Gulzar Ali Vs. Sate of Himachal Pradesh the Supreme Court observed that the observation of the High Court that there is a natural tendency on the part of an expert witness to support the view of the party who called him, could not be downgraded. Many so-called experts have been shown to be remunerated witnesses making themselves available on hire to pledge their oath in favour of the party paying them.

This Court considering large number of judgments in Tika Ram vs. Daulat Ram7 held as follows:-

"9. Evidence of an expert is only an opinion. Expert evidence is only a piece of evidence and external evidence. It has to be considered along with other pieces of evidence. Which would be the main evidence and which is the corroborative one depends upon the facts of each case. An expert's opinion is admissible to furnish the Court a scientific opinion which is likely to be outside the experience and knowledge of a Judge. This kind of testimony, however, has been considered to be of very weak nature and expert is usually required to speak, not to facts, but to opinions. It is quite often surprising to see with what facility, and to what extent, their views would be made to correspond with the wishes and interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject in one point of view, that, when conscientiously deposed, they are incapable of expressing a candid opinion."

The Court has made the observation in trial, treating handwriting expert evidence as being opinion evidence. In service jurisprudence allegation has to be proved on preponderance and not beyond reasonable doubt. But the delinquent employee has to be confronted with the evidence as it is rebuttable.

Applying the law on the facts of the case, a perusal of the report dated 5.7.2011 submitted by one R. Krishna (B.Sc., L.L.B., M.A. (Criminology & Forensic Science) Consulting Forensic Expert formerly Assistant Professor of Criminology & Forensic Science (Sagar University) rendered the following opinion which is extracted below:

On a very careful examination of the signatures, thumb impressions and photographs of the above referred person, I am of the following opinion:-

(a) The signatures made on Call Letter at the time of examination does not match with the other standard signatures of Sri Rajesh Kumar. The reasons of my opinion are in Annexure No. 1.

(b) The thumb impression on the Call Letter, which is expected to be of Right Thumb do not match with the specimen

thumb of Right Thumb of Sri Rajesh Kumar. The reasons of my opinion are given in Annexure No. 2.

(c) The photographs on the Call Letter of the person who appeared in the examination does not match with the photographs of the person who is joining the Bank. The reasons of my opinion are given in Annexure No. 3.

Opinion: On very careful examination of the above referred signatures and writing written as 'Rajesh Kumar' as in A-2, I am of the opinion, that the signature D-1 is not made by the same person, who has made the signatures and writing S-1 to S-3 and A-1 to A-3.

Reference of Photographs:

(A)= Standard photograph of Sri. Rajesh Kumar Submitted at the time of joining of the Bank.

(B)= Photograph of the Call Letter of the person who appeared in the examination.

Opinion: On very careful examination of the two above referred photographs marked (A) and (B), I am of the opinion, the photograph (A) differs with that of (B) and both the photographs are not of the same person.

The reasons of my opinion are follows:

1. .....

2.The length of face of photograph(A) is more than that of (B).

3.The width of the face of photograph (A) should have been more than that of the face of photograph (B) in the same proportion, but it is not. The width of the face of photograph(A) is lesser than of the face of the photograph (B) as marked by the red line of the photographic enlargement.

4.....

5.....

6.....

It is contended on behalf of the respondents that the principles of natural justice would not apply in the facts of the present case, as the petitioner has obtained appointment on the basis of fraud and misrepresentation and in any case, the petitioner was on probation hence, the petitioner's service could be terminated without assigning any reason.

The contention is not accepted for the simple reason that the bank instead of simply terminating the services on the ground of unsuitability or poor performance during the probation, conducted an enquiry regarding the conduct of the petitioner for impersonation, fraud and misrepresentation, and after a full fledged enquiry conducted behind his back, evidence was collected by inviting expert opinion to prove the guilt. The motive is not termination simpliciter, the foundation being as to whether the petitioner impersonated in the written examination or not and the bank has acted upon the opinion of an expert taken behind the back of the petitioner without confronting the petitioner, the findings of the handwriting expert.

The contention of learned counsel for the respondent that the fact of impersonation is not rebuttable, even after giving opportunity, the petitioner shall not be able to rebut the findings of the expert opinion, cannot be accepted for the simple reason that the expert opinion can always be questioned by the petitioner. It is not a case where the petitioner had obtained appointment by filling forged verification documents or caste certificate, but is a case of impersonation i.e. act of fraud and misrepresentation which is being sought to be proved on evidences to justify the action and suspicion of the Bank. Fraud and misrepresentation is a question of fact,

which has to be pleaded and proved after opportunity to the aggrieved party.

A perusal of the impugned order dated 13.9.2011, addressed to the petitioner, the subject is 'cancellation of appointment'. After giving background of the examination conducted, the petitioner appearing in the examination the impugned order records as follows:

Cancellation of Appointment.

"1. With reference to above, we advise that the written test for the captioned recruitment exercise was conducted on 8th, 15th and 22nd November, 2009 and you were required to appear in the written test at Bal Vidya Mandir, Station Road, Charbag, Lucknow on 8th November, 2009 at 9:15 A.M. However, you did not appear in the written test at the scheduled date, time and venue but some body else appeared in the above said test impersonating to be yourself.

2. .....

3. .....

4. Therefore you suppressed this material fact that you did not appear in the written test held on 8th November, 2009 at 9:15 A.M. On Roll No. 2601001887 allotted to you at Bal Vidya Mandir, Station Road, Charbagh, Lucknow and allowed some one else to appear in the written test in your place, as such your so called selection in Bank is void ab-initio. Accordingly, there is no service contract between you and the Bank and any engagement thereto in pursuance to the referred appointment letter is invalid and void ab-initio. However, for the record sake you are informed by this letter that your selection on the referred ground is calcelled in express terms by virtue of this letter which please note. Accordingly, your name has been struck off from the employee's roll/list of the Bank.

5. Please acknowledge receipt of this letter."

The discharge order is not order simpliciter, it in clear terms states that the foundation for termination is that the petitioner "did not appear in the written test and somebody else appeared.....impersonating to be yourself" is stigmatic and punitive and reflects upon the character/reputation of a person, it is blemish, imputation, label indicating deviation from a norm.

In the case of State of Punjab Vs. Balbir Singh8. The order of discharge mention the words "unlikely to prove an efficient police officer." Further before passing the aforesaid order of discharge it appears that Shri Balbir Singh, who was found to have consumed liquor and misbehaved with a lady constable was medically examined and thereafter discharge order was passed. The appeal, which was filed before the Deputy Inspector General of Police, was rejected and while rejecting the appeal, he referred to the aforesaid facts and stated that the discharge order was correct. Shri Balbir Singh challenged the order of discharge on the basis of the averments contained therein as well as in the order of the Deputy Inspector General of Police. The Hon'ble Apex Court upholding the aforesaid order of discharge held as under;-

"In the present case, order of termination cannot be held to be punitive in nature. The misconduct on behalf of the respondent was not the inducing factor for the termination of the respondent. The preliminary enquiry was not done with the object of finding out any misconduct on the part of the respondent, it was done only with a view to determine the suitability of the respondent within the meaning of Punjab Police Rule 12.21. The termination was not founded on the misconduct but the

misbehaviour with a lady constable and consumption of liquor in office were considered to determine the suitability of the respondent for the job, in the light of the standards of discipline expected from police personnel."

The term 'stigma' has to be understood in its plain meaning as something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm The assessment of work and performance and recording of satisfaction of the authority concerned that he is not satisfied with the work and performance regarding fitness of the employee concerned would not make the order stigmatic since it is not a blemish on the character and reputation of the person concerned but it reflects on the capacity and efficiency of the incumbent with respect to the work for which he/she was employed.

It has been held in various judgments rendered by the Supreme Court that reasons assigned in the termination order, at times may not be punitive or stigmatic, the following words/phrases mentioned in the order have been held to be not punitive.

i.)"want of application'
ii.)"lack of potential"
iii.)"found not dependable"
iv.)"under suspension"
v.)"work is unsatisfactory"
vi.)"unlikely to prove an efficient officer"

(Refer: Dipti Prakash Banerjee vs. Saytendra Nath Bose National Centre for Basic Sciences, Calcutta and others (1999) 3 SCC 60, Paras Nath Pandey vs. Director, North Central Zone, Cultural Centre, Nyay Marg, Allahabad (2009) 1 UPlBEC 274)

Considering the facts of the case, in the light of the legal principles, discussed herein above, I am of the view that the impugned order of termination is nothing but punitive and stigmatic, therefore, cannot be sustained.

In the result, the writ petition is allowed. The impugned order dated 27.8.2011 passed by Regional Manager, State Bank of India is quashed. The petitioner shall be entitled for reinstatement with all consequential benefits but with respect to arrears of salary, he will be paid 50% of the backwages for the period he remained out of employment pursuant to impugned order of termination. It goes without saying that this judgment shall not prevent to the respondents from proceedings afresh against the petitioner and pass a fresh order in accordance with law."

23. In the facts of the present case, despite allegation made in the notice dated 5.8.2015 about thumb impression, signatures and handwriting having not tallied, the respondents have confined their conclusion to the opinion of the handwriting expert. Such opinion cannot be construed as being conclusive.

24. In the present case not only the petitioners have been denied appointment but they are also debarred from appearing in any examination conducted by the Commission for three years. Such order of Commission is clearly stigmatic in nature. The order under challenge carries civil consequences also. Such order cannot be sustained merely on the strength of handwriting report, nature of which remains that of an opinion, and cannot be construed as conclusive.

25. The report of CFSL based upon handwriting expert's opinion, moreover, has not been furnished to the petitioners. Petitioners consequently had

no opportunity to controvert it. Attention of the Court has been invited to pages 252, 253, 273, 274, 333 and 334, which contain identical expressions. Report at pages 513, 594 and 554 also contain identical language. In case an opportunity was afforded to the petitioners then all such materials could have been highlighted.

26. The respondents were expected to confront the petitioners with material relied upon against them. A show cause containing such materials was required to have been issued, particularly when petitioners were being debarred from appearing in any other exam conducted by Commission for three years. The notice dated 5.8.2015 cannot be construed as a show cause notice. It only called upon the petitioners to give their specimen signatures, handwriting and thumb impression in view of Commission's opinion that they do not match. After the CFSL report was received neither the petitioners were put to any notice, nor the content of report was made known to them.

27. The opinion of handwriting expert was required to have been viewed with other materials available on record. Admittedly the petitioners had carried their identity cards, which had been verified at all stages of examination by the Commission and their officers. There cannot be a presumption that all the staffs/employees of Commission had failed to correctly identified the petitioner despite existence of identity card. The presumption that petitioners had identified themselves with reference to specified identity cards could not be lightly brushed aside. The fact that respondents had admitted thumb impressions and specimen thumb impressions with them, which have not been tallied also, is a factor to be kept in mind. There apparently was no reason for the respondents not to have verified the identity of petitioners with reference to their thumb impression, which is an evidence superior to the report of handwriting expert. The nature of expert's opinion otherwise not being conclusive, could not solely be relied upon to cancel petitioners' provisional selection, ignoring other materials, particularly when the order itself was stigmatic.

27. Further, he has relied upon the Division Bench judgement of this Court in Writ-A No. 21096 of 2018 (Vijay pal and 22 other vs. Union of India and 3 others). Paragraph 9, 22, 23, 25, 30, 33 and 34, which reads as under :-

9. The notice alleged that the petitioners had resorted to impersonation, further, it was alleged that there was mismatch in the handwriting, and/or, thumb impression of the candidates. In other words, allegation against the petitioners was that they have resorted, by securing the services of someone else, in the written test on their behalf. The allegation levelled in the two memorandums of the same date is extracted:

"I. As confirmed by the Government Examiner of Questioned Documents, Hand writing on the Application Form and that on answer sheet (OMR)/verification sheets are of different person (s). It has been established that the candidate did not appear himself in the written examination or PET examination and rather somebody else appeared in the same on his behalf, which is a case of impersonation, a malpractice and an offence.

II. As you are aware bio-metrics attendance were obtained during each phase of examination. It is to bring into your notice that your thumb impression during document verification did not match with written and PET examination. It means someone else had appeared in

written and PET examination impersonating your candidature."

22. The question that requires consideration is as to whether the respondents were justified on the available materials on record to hold petitioners guilty of impersonation, and/or, mismatch of handwriting/thumb impression on various documents.

23. In Rajesh Kumar vs. Union of India and others1, this Court observed that handwriting expert opinion is at best an opinion, which is not conclusive proof of mismatch of handwriting or impersonation. Expert opinion has been considered to be of very weak nature, which requires corroboration from other material facts pertaining to the allegation.

24. . . . . .

25. The decision of the respondent is based on the expert opinion alone to establish guilt of impersonation, and/or, mismatch of handwriting/thumb impression without affording opportunity or confronting the petitioners with the material/opinion. Had it been so, the petitioners in their defence could also have obtained an opinion of the expert to confront the Railways. The impugned order of cancellation of the candidature of the petitioners could not have been sustained on the opinion of handwriting expert.

26. . . . . .

27. . . . . .

28. . . . . .

29. . . . . .

30. The opinion of the expert was required to have been viewed and considered with other materials available on record. The learned Tribunal has discarded the theory of impersonation setup by the respondent-Railways, then in that event, mismatch of handwriting/thumb impression of the petitioners becomes unsustainable, unless supported by any other material or evidence that petitioners have not appeared in the examination or have not filled the application form in their handwriting.

31. . . . . .

32. . . . . .

33. In the circumstances, it cannot be said in absence of any other material available with the Railways, that it is a case of mismatch in handwriting/thumb impression. The inference of the Railways is based on an opinion without being supported by any other material, i.e., the petitioners had not appeared at different stages of the selection process.

34. In service jurisprudence, though Evidence Act is not applicable, the charge is not required to be proved beyond reasonable doubt, but on the principle of preponderance of probability, based on some material evidence against the petitioners. It is not a case of disciplinary proceedings, neither, it is a case set up by the Railways, that there was large scale irregularities in the examination process, only few candidates have been picked-up and their selections cancelled merely on an opinion obtained behind the back of the petitioners without confronting the petitioners with the incriminating material.

28. Learned counsel for the petitioner further submits that in the above said matters, the issue is identical to that of issue involved in the present writ petition.

29. Even in the above said matters, the respondents have not been able to establish the allegations of impersonation against the petitioner and based on the opinion of an expert, punishment order was passed against the petitioner which was set aside only on the ground that opinion of the handwriting expert was required to have been viewed and considered along with

other materials available on record. Unless it is supported by any other material or evidence, that the petitioner has not been appeared in the examination, only based on the opinion of expert, he cannot be dismissed from service as reasonable opportunity has to be given to the delinquent and accordingly, the impugned orders are contrary to procedure.

30. Per contra, learned counsel appearing on behalf of the respondents has vehemently opposed the writ petition and submitted that the petitioner cannot take such plea in the present petition as the respondents have implemented the order passed by the Hon'ble Court in Writ-A No. 48511 of 2016, wherein liberty has been granted to the respondents to proceed against the petitioner afresh after giving him an opportunity of examination and cross-examination of Sri R. Krishna during the inquiry and lead whatever evidence he may want to contradict the report of handwriting expert Sri R.Krishna. The said directions have became final and as per orders passed by this Court, respondents have given several opportunities to the petitioner to cross-examine the said R. Krishna.

31. Despite giving opportunity on several occasion i.e. 13.01.2020, 27.07.2020 and 27.01.2021, petitioner has not chosen to cross-examine Sri R. Krishna, left with no option the inquiry Officer has submitted his report. Hence, the inquiry report submitted by the inquiry officer on 27.01.2021 was in accordance with directions issued by this court in Writ-A No. 48511 of 2016. In the said circumstances, the petitioner cannot take contrary stand and raised objection with regard to the handwriting expert of Sri R. Krishna. The said ground is not available to the petitioner in view of the direction issued by this Court in the above said writ petition.

32. Further, the respondents have considered the entire documents while passing the final orders and as per the observations made in the final order, it clearly discloses that before passing the orders, the respondents have verified the entire records which includes both records pertaining to the examination centre as well as interview Board. He further submits that the Appellate Authority has considered the appeal filed by the petitioner and has taken the each and every ground for consideration and after verifying the documents, the Appellate Authority has also came to the conclusion that there are no ground raised by the petitioner, hence the same has been dismissed.

33. In view of the above, there is no ground to interfere in this matter as authorities have followed procedure contemplated under the procedure and also ample opportunity has been given to the petitioner before passing the orders, hence the writ petition may be dismissed.

34. Considering the submissions made by both the counsels and also perusal of the records, though liberty was granted to the respondents in Writ-A No. 48511 of 2016 vide order dated 24.04.2018 but the respondents could not follow observations made by this Court in the said judgement where this Court had specifically observed that whether there was any photo of missing or not, was a matter which could have been examined by the Inquiry Officer at least during the course of inquiry.

35. On perusal of the inquiry report submitted by the Inquiry Officer on

27.01.2021, it appears that this aspect was not at all considered. Further, it is observed that though it may not have been possible in the invisilative / examination centre itself but nothing of its kind was done and inquiry report was based entirely upon the report of R. Krishna, the handwriting expert who was not even a registered handwriting expert. These, observations were also not considered by the Inquiry Officer while conducting the re-inquiry. Further, it is observed that the Disciplinary Authority and the Appellate Authority have also not considered the various aspects of the matter which indicates that Disciplinary Authority and Appellate Authority also required to consider the other aspects not only the inquiry report and the report submitted by the expert while imposing penalty but in the instant case, perusal of the impugned order dated 29.11.2021 clearly shows that the Disciplinary Authority has not at all considered any other relevant material while imposing the penalty except giving the opportunity to the petitioner to cross-examine the R. Krishna who is so-called handwriting expert. Neither Disciplinary Authority nor Appellate Authority has considered the other aspects while imposing the punishment vide order dated 29.11.2021.

36. Further, as observed by the Division Bench of this Court in ***Vijay Pal and 22 others v. Union of India and 3 others (supra)*** that opinion of the expert was required to have been viewed and considered along with the other materials available on record. In the event of impersonation mismatch of handwriting / thumb impression of the petitioner became unsustainable unless supported by any other material or evidence that the petitioner had not appear in the examination or had not filled the application form.

37. Even in the instant case, the respondents have failed to corroborate the expert report along with the other material available on record and it clearly discloses that the respondents have not even chosen to verify or to substantiate that the petitioner had not participated in the examination centre except having an expert opinion that too from non-registered expert.

38. In view of the said circumstances, the respondents have passed the impugned orders solely depending on the report submitted by one R. Krishna, who is handwriting expert, without verifying the other material and without establishing that the petitioner has not appeared in the examination.

39. In view of the same, the impugned orders dated 29.11.2021 and also the Appellate Authority order dated 27.01.2022 are set aside, remanding the matter to afresh inquiry by sending all the relevant documents to the forensic laboratory and also conducting a detailed inquiry by calling all the relevant records and examining the concerned persons and take a proper action, accordingly.

40. In the result, the writ petition is **disposed of.**

(2024) 3 ILRA 506
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 6145 of 2021

Rajendra Singh ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Pandey, Sri Kapil Kumar, Sri Kuldeep Saxena, Sri Pradeep Kumar Pandey, Sri Vijit Saxena, Sri Yogendra Singh Bohra

Counsel for the Respondents:
C.S.C., Sri Pradeep Kumar Pandey

A. Service Law – UP Secondary Education Service Commission Act, 1982 – S. 33-B – Cancellation of regularisation – No notice was given – No averment of fraud or misrepresentation, except petitioner being son in law of the then Principal, was made – Effect – How far the authority had power to recall earlier order – Held, once the Regional Selection Committee had acted in the manner regularising the services of the petitioner, it was not open for the Regional Joint Director of Education to have reopened the controversy after almost 15 years on his own without even referring the matter to the Regional Selection Committee. (Para 9 and 15)

B. Service Law – UP Intermediate Education Act, 1921 – Section 16-GG (3) – Appointment – Prohibited degree of relation – Violation alleged to be occurred during appointment – Petitioner discharged 15 years services since after regiularisation – No enquiry was conducted – Effect – Held, once the regularisation of appointment has already taken place, such teacher becomes a permanent member of service and no such teacher's service can be dispensed with on the ground that there were some inherent lack of qualification at the time of initial appointment. The question could have been gone into by issuing a show cause notice holding an inquiry into the matter and so that option was open but this was not opted for – Regional Joint Director of Education was certainly not an authority as defined under Section 33-B (2) to have reopened the issue. (Para 17)

C. Service Law – Constitution of India – Article 14 – Principle of natural justice – *audi alteram partem* – No notice was given before cancelling the regularization order – Effect – Held, nobody can be condemned unheard. Such order that cannot be sustained on the touchstone of the principle of maxim of *audi alteram partem* cannot be sustained in law and authority which passes order has to assess and evaluate whether order which it is going to pass would have any adverse civil consequences upon the person against whom the order is being passed and if such civil consequences are perceivable, then such authority is liable to give at last notice to the concerned person so as to get his/her reply – High Court held the order dated 31.12.2020 bad for non compliance of principles of natural justice. (Para 10 and 12)

Writ petition allowed. (E-1)

List of cases cited :-

1. Pandurang & ors. Vs St. of Maharasthra; 1986 (4) SCC 436

2. D. Satyanarayana Rao Vs Vasudev Asrani & anr; 2001 (3) ALD 510: 2001 SCC OnLine AP 325

3. Rama Tyagi Vs Delhi Development Authority; 2000 (4) L.L.N. 1103

4. Chandra Singh Vs St. of Raj. & anr; JT 2003 (6) SC 20

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

1. Heard Sri Y.S. Bohra, learned counsel for the petitioner, Sri Pradeep Kumar Pandey, learned counsel for respondent No.4 and learned Standing Counsel for the State-respondents.

2. Petitioner before this Court is aggrieved by the order dated 31.12.2020 whereby the Regional Joint Director of Education recalled the earlier regularisation order granted to the petitioner on

12.12.1995 under Section 33-B of the UP Secondary Education Service Commission Act, 1982 (for short, "Commission Act, 1982").

3. Twin arguments have been advanced by the learned counsel for the petitioner: (a) once the regional selection Committee had accorded regularisation to the petitioner under its resolution /decision dated 12.12.1995, the Regional Joint Director of Education (I) Region Meerut himself was not authorised to recall such regularisation order and cancel the same. Thus, according to learned counsel for the petitioner, the order impugned is bad for *coram non judice*; and (b) the order had been passed recalling the order of regularisation without giving any notice much less a show cause notice to the petitioner even though the order impugned was to have adverse civil consequences.

4. It is submitted by learned counsel for the petitioner that he was initially appointed on ad-hoc basis under Section 18 of Commission Act, 1982 on 09.07.1985 on account of then incumbent Pawan Verma, Lecturer in the subject of Mathematics proceeding on leave without pay. The approval of appointment of the petitioner on ad-hoc basis was granted by the District Inspector of Schools (DIOS) on 02.09.1985. Petitioner continued as such, according to him, until the vacancy fell substantively vacant on account of resignation of said Ram Singh on 19.06.1987. Resultantly, the committee of management proceeded to continue him by means of an order dated 12.07.1987. This according to him, was a kind of fresh appointment but it was in continuation of his earlier appointment as he was initially appointed in the year 1985 filling up the place of said Ram Singh who had earlier proceeded on leave but ultimately came to resign at later point of time. The approval of appointment of petitioner to the substantive vacancy came to be granted on 16.01.1990.

5. It is argued on behalf of the petitioner that petitioner's marriage with the daughter of the then principal of the institution took place on 01.03.1987, so it was much after the initial appointment of the petitioner in the institution against a short term vacancy which later on became a substantive vacancy. It is submitted that petitioner has now attained the age of superannuation on 31st March, 2023.

6. *Per contra*, argument advanced on behalf of the State-respondents is that the appointment of petitioner made on 12.07.1987 is to be taken as a fresh appointment and admittedly on that date, petitioner had already been married to the daughter of then sitting principal of the institution. However, he could not deny the fact that petitioner had been initially appointed in the year 1985 against a short term vacancy on account of the said Lecturer Ram Singh proceeding on leave without pay. This has been so specifically stated in para 5, 6 & 8 of the counter affidavit.

7. On the legal question being raised on behalf of the petitioner, learned Standing Counsel could not dispute that decision impugned in the writ petition dated 31.12.2020 was exclusively taken by the Regional Joint Director of Education without there being any approval in that regard by the Regional Selection Committee. He also could not dispute that there is no averment in the entire counter affidavit that any notice much less a show cause notice was given to the petitioner

before the order impugned came to be passed.

8. Having heard learned counsel for the respective parties, having perused the record and the arguments advanced on behalf of respective parties, two points emerge for consideration before this Court: (i) whether the order of Regional Joint Director of Education dated 31.12.2020 is bad for want of non compliance of principles of natural justice; and (ii) whether the order passed by the Regional Joint Director of Education dated 31.12.2020 is sustainable for want of lawful authority.

9. Coming to the first point, I find that the entire order dated 31.12.2020 is couched in a language as if the petitioner mislead the authority in obtaining regularisation in the year 1995. In such circumstances, therefore, it could have been said that petitioner mislead or misrepresented the matter in connivance with the committee of management but there is no averment of fraud as such discernible except the fact that the petitioner happened to be son in law of the then sitting principal of the institution. The petitioner in this petition has filed Lagan Patrika relating to marriage with the daughter of the sitting principal of the institution and had he been given proper opportunity of hearing before the Regional Joint Director of Education, he would have led all these evidence before the authority.

10. Legal principle is well stated in law that nobody can be condemned unheard. Such order that cannot be sustained on the touchstone of the principle of maxim of audi alteram partem cannot be sustained in law and authority which passes order has to assess and evaluate whether order which it is going to pass would have any adverse civil consequences upon the person against whom the order is being passed and if such civil consequences are perceivable, then such authority is liable to give at last notice to the concerned person so as to get his/her reply. In the present case admittedly petitioner was discharging his duties as Lecturer in the subject of Mathematics with the approval of the DIOS and his services had been regularised on 12.12.1995 taking aid to section 33-B of the UP Secondary Education Services Selection Board Act, 1982. In such circumstances, the order recalling the order dated 31.12.2020, would certainly be resulting into denial of petitioner's right to draw salary and his continuance in the institution also gets prejudiced. This, as matter of fact and also in law has to be taken to have resulted in adverse civil consequences.

11. In the circumstances, therefore, the Regional Joint Director of Education was bound in law to give at least a notice to the petitioner which I do not see to be reflected from any of the recitals made in the order impugned. Counter affidavit is also silent regarding opportunity of hearing being ever afforded to the petitioner before passing the order impugned in the present petition.

12. In such circumstances, first point, (i) is decided in favor of petitioner and against the respondents and the order dated 31.12.2020 is held bad for non compliance of principles of natural justice.

13. Coming to the second point, (ii) with regard to the authority of the Regional Director of Education to pass order recalling the order cancelling the regularisation dated 12.12.1995 under his

order dated 31.12.2020, I find it more appropriate to first look into the provisions as contained under Section 33-B of the Commission Act, 1982. Section 33-B (2) of the Commission Act refers to Regional Selection Committee for the purposes of consideration of regularisation of such ad-hoc teachers working against the substantive vacancy. The relevant provision is reproduced hereinunder:

"2) (a) For each region, there shall be a Selection Committee comprising?

(i) Regional Deputy Director of Education of that region, who shall be the Chairman,

(ii) One officer holding a Group 'A' post (specified as such by the State Government from time to time) in any department other than Education department, to be nominated by the State Government,

(iii) Regional Inspectors of Girls School of that region;

Provided that the Inspector of the district shall be co-opted as a member while considering the cases for regularization of that district.

(b) The Selection Committee constituted under clauses (a) shall consider the case of every such teacher and on being satisfied about his eligibility and suitability in view of the provisions of sub-section (1) shall, subject to the provisions of sub-section (3) recommend his name to the Management for appointment under sub-section (1) in a substantive vacancy."

14. From bare reading of the aforesaid provision, it is clear that it is the Regional Joint Director of Education who shall be the Chairman and officer holding a post as specified by the State Government, of any department other than the education department was to be a nominated member of the State Government and DIOS of the concerned district shall be co-opted member to such committee. Thus, selection committee would consist of four members, three regular members to be appointed and one co-opted member.

15. In the circumstances, therefore, the regularisation dated 12.12.1995 must have been accorded to the petitioner under a decision taken by such a duly constituted Regional Selection Committee. Once the Regional Selection Committee had acted in the manner regularising the services of the petitioner, it was not open for the Regional Joint Director of Education to have reopened the controversy after almost 15 years on his own without even referring the matter to the Regional Selection Committee.

16. From the recitals made in the operative portion of the order, I do not find any whisper about any reference being even made to the Regional Selection Committee instead, all that had been was that, since petitioner fell within the category of prohibited degree of relation for the purposes of appointment under Section 16-GG(3) of the UP Intermediate Education Act, 1921, the appointment of the petitioner was held to be *void ab initio.*

17. In my considered view, once the regularisation of appointment has already taken place, such teacher becomes a permanent member of service and no such teacher's service can be dispensed with on the ground that there were some inherent lack of qualification at the time of initial appointment. The question could have been gone into by issuing a show cause notice holding an inquiry into the matter and so that option was open but this was not opted

for. Therefore, in my considered view, the Regional Joint Director of Education was certainly not an authority as defined under Section 33-B (2) to have reopened the issue and reviewed the decision taken by the Regional Selection Committee. This power is not vested with the Regional Joint Director of Education. Therefore, on the second point also, the order dated 31.12.2020 passed by the Regional Joint Director of education is held unsustainable.

18. On the principle of *coram non judice* also the order passed by the Regional Joint Director of Education cannot be sustained. A court or an authority which is not vested with the power to deal with the matter if deals with such matter, then the resultant action is liable to be held as void ab initio. In the case of ***Pandurang & ors v. State of Maharasthra; 1986 (4) SCC 436***, the Court has in quite unequivocal terms held that *"even a 'right' decision by a 'wrong' forum is no decision. It is non-existent in the eye of law. And hence a nullity."* Relying upon said judgement, Andhra Pradesh High Court in the matter ***D. Satyanarayana Rao v. Vasudev Asrani & anr; 2001 (3) ALD 510; 2001 SCC OnLine AP 325*** held that an authority or Court if does not have the jurisdiction then such order would be a nullity. It was held therein that a defect of jurisdiction, goes to the root and strikes at the very authority that passes such order. Further, in the case of ***Rama Tyagi v. Delhi Development Authority; 2000 (4) L.L.N. 1103,*** the Delhi High Court set aside the order of removal from service for the reason that authority that had passed the order, was not empowered to do so.

19. Petitioner has already retired on 31.03.2023. In the circumstances, there is no point now in remitting the matter for any decision afresh by the Regional Selection Committee. In the case of ***Chandra Singh v State of Rajasthan & anr JT 2003 (6) SC 20***, the Supreme Court thus:

"37. .....A departmental proceeding can continue so long as the employee is in service. In the event, a disciplinary proceeding is kept pending by the employer the employee cannot be made to retire. There must exist specific provision in the pension rules in terms whereof, whole or a part of the pension can be withheld or withdrawn wherefor a proceeding has to be initiated. Furthermore, no rule has also been brought to our notice providing for continuation of such proceeding despite permitting the employee concerned to retire. In absence of such a proceeding, the High Court or the State cannot contend that the departmental proceedings against the appellant Mata Deen Garg could continue."

20. It is well settled law that after a long gap of time, the old appointment orders cannot be reopened on the ground of initial lack of inherent qualification or eligibility. At least there is no such case here that petitioner was not eligible to be appointed except falling within a prohibited degree of relation and that too has been questioned by the petitioner because when initial appointment was made in the year 1985, he was not a married person.

21. I also find that petitioner has continued in employment since 1985 whereas marriage had taken place in the year 1987. In the circumstances, therefore, it cannot be said that petitioner while was given initial appointment, he was within the prohibited degree of

22. In view of the above, writ petition succeeds and is **allowed.** The order

dated 31.12.2020 passed by the Regional Joint Director of Education is hereby quashed. Consequences to follow.

23. Petitioner shall be paid entire arrears of salary. He shall also be given benefit of all retirement dues within two months' time from the date of receipt of certified copy of this order.

(2024) 3 ILRA 512
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 8845 of 2014

Vishnu Swaroop Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh, Sri D.K. Singh, Sri Sankalp Narayan

Counsel for the Respondents:
C.S.C.

A. Service Law – Constitution of India – Article 354-A – Disciplinary proceeding – Prior sanction of Governor – Proceeding was initiated before retirement and continuing after retirement – How far sanction is necessary – Held, if these proceedings were continued beyond his retirement on 21.05.2007 and culminated in the order impugned passed by the District Magistrate, Kanpur Nagar on 22.06.2011, there was no necessity to obtain the Governor's sanction under Article 351-A of the Service Regulations – Necessity would have arisen only if the proceedings have been initiated post retirement; not otherwise. (Para 17)

B. Service Law – Disciplinary proceeding – Punishment – Award of adverse entry and withholding two increments with cumulative effect – Inordinate delay was occurred in concluding the proceeding – Effect – Seriousness of charges, how play as determining factor – Held, a charge, that is profoundly serious and widely impacts clean administration in the service, must not be allowed to die or wither away with time – However, if the charge(s) is (are) not very serious in the sense that these do not inevitably attract the imposition of a major penalty if proved, or by the nature of the acts, are not widely destructive of clean administration in service, an inordinate delay that features if the order of punishment were quashed on some other grounds and the proceedings revived, may be a good ground to import the principle about giving quietus to the disciplinary proceedings – Held further, the inordinate delay in the conclusion of disciplinary proceedings in the background of the nature and gravity of charges against the petitioner and the manner in which the respondents have acted, including the manifestly illegal order imposing penalty upon the petitioner, in our opinion, would require a quietus to be now given to these proceedings, resting it in the petitioner's favour. (Para 26 and 40)

Writ petition allowed. (E-1)

List of cases cited :-

1. Gaya Prasad Yadav Vs St. of U.P. & ors.; 2022 (11) ADJ 287 (DB) (LB)

2. Dev Prakash Tewari Vs Uttar Pradesh Cooperative Institutional Service Board, Lucknow & ors.; (2014) 7 SCC 260

3. St. of U.P. & ors. Vs Harihar Bholenath; (2006) 13 SCC 460

4. Anant R. Kulkarni Vs Y.P. Education Society & ors.; (2013) 6 SCC 515

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

1. This case has got a long and chequered history, where delay in

conclusion of disciplinary proceedings against the petitioner has led to much suffering for him. But, as the course of proceedings would show, the petitioner himself is responsible in substantial measure for the delay that came about in consequence of an interim order passed by this Court, when he challenged his provisional reinstatement in service, revoking his suspension. At the centre stage of challenge in this writ petition is the order dated 22.06.2011 passed by the District Magistrate, Kanpur Nagar, awarding the petitioner the punishment of withholding two increments with cumulative effect and awarding him an adverse entry, deciding the pending disciplinary proceedings by the said order. The other order impugned is the one dated 07.06.2012, fixing for the petitioner his salary by the District Supply Officer, Kanpur Nagar. The last under challenge is the order dated 25.04.2013 passed by the District Magistrate, Kanpur Nagar.

2. The petitioner was appointed a Clerk in the office of the District Supply Officer, Kanpur. He was transferred from Kanpur Head Office to Akbarpur, situate in Kanpur Dehat in the year 1981. He was again transferred from Akbarpur to Kanpur in the year 1982 by an order of 9th December, 1992 passed by the District Supply Officer. The petitioner was transferred from Kanpur Nagar to Farrukhabad. He was placed under suspension pending inquiry and *vide* order dated 16.12.1983 passed by the District Magistrate, Farrukhabad. A charge-sheet was served upon the petitioner after a lapse of a year and a half on 19.06.1985. The petitioner submitted his reply to the charge-sheet aforesaid on 22.06.1987.

3. Some five years later, the suspension order dated 16.12.1983 was revoked by the District Magistrate, Farrukhabad *vide* order dated 27.05.1990 and the petitioner reinstated on a provisional basis. The District Magistrate, Farrukhabad by a memo dated 14.05.1991 issued a notice to the petitioner asking him to show cause why his services may not be terminated. The petitioner submitted his reply to the show cause on 24.06.1991. It is averred that after suspension from service on 16.12.1985, followed by the order dated 22.05.1985, disciplinary proceedings against the petitioner lingered on, which adversely affected the petitioner's right to be considered for promotion. It is also averred that no inquiry was undertaken, though the petitioner had submitted his reply to the charge-sheet way back on 22.06.1987, as already said.

4. It appears that inquiry into the charge-sheet dated 22.05.1985 was not at all undertaken and without concluding it, the petitioner was issued with the show cause notice dated 14.12.1991, already spoken of, where the District Magistrate asked him to show cause why his services may not be terminated. The basis of the show cause notice was a different charge altogether, that was not part of the charge-sheet dated 22.05.1985, as the petitioner asserts. In the circumstances, the petitioner instituted Civil Misc. Writ Petition No.22002 of 1991 before this Court, seeking to quash the pending disciplinary proceedings, presumably on the ground of inordinate delay. A further relief was sought by way of a *mandamus* commanding the respondents to transfer the petitioner from Kanpur to Farrukhabad and pay him his due salary for the period of suspension. In the said writ petition, an order was passed on 02.08.1991, directing the State to file a return within four weeks, and *vide* interim order, it was pro*vide*d that departmental

proceedings against the petitioner may continue, but final orders shall not be pronounced until further orders of this Court.

5. The interim order dated 02.08.1991 was vacated *vide* order dated 09.04.2004. It appears that the order dated 09.04.2004 was not communicated to the respondents, and, therefore, no final orders were made in the pending disciplinary proceedings. Civil Misc. Writ Petition No.22002 of 1991 came up for hearing before this Court on 25.04.2007. By a judgment and order of that date, the writ petition was allowed on the ground of inordinate delay in concluding the inquiry, but limited to the relief of quashing the order of suspension. The petitioner made a further application, being Civil Misc. Modification Application No.162640 of 2007 before the learned Judge, who had allowed Civil Misc. Writ Petition No.22002 of 1991, seeking modification of the judgment and order dated 25.04.2007 to the extent that the pending disciplinary proceedings may also be quashed. This application was rejected by the learned Judge *vide* order dated 01.09.2007. Both the orders dated 25.04.2007 and 01.09.2007 were served by the petitioner upon the respondents through an application dated 13.09.2007.

6. There is slew of allegations in the writ petition that these orders were not complied with and a contempt application, bearing No.4360 of 2007 against Alok Kumar, the then District Magistrate and another contemnor was also filed. What the petitioner appears to say that the two orders passed in Civil Misc. Writ Petition No.22002 of 1991 were not complied with, is that he was not given his consequential benefits, like increments and bonus, that was paid to other employees like him consequent upon his order of suspension being quashed. Also, the petitioner's grievance was that he was not considered for promotion like his juniors, who were considered and promoted during this period. The contempt application was dismissed with a remark that in case the petitioner has any grievance, it would be open to him to seek its redressal before the appropriate forum. It is noteworthy that while all this was happening, the petitioner attained the age of superannuation and retired from service on 31.05.2007. The complexion of the relief that the petitioner could secure, therefore, changed. The petitioner also says that apart from being denied his promotional avenues, pensionery benefits, gratuity, group insurance, bonus, due increment while in service and arrears on that account were never paid to the petitioner merely on the ground that he had suffered a suspension while in service. The petitioner in this case asserts the right that consequent upon quashing of the order of suspension, he is entitled to all those benefits that were his but for the suspension.

7. The respondents addressed two letters dated 16.10.2008 followed by another dated 10th August, 2009, requiring the petitioner to fill up his pension papers, and furnish necessary documents. Both the letters were replied to by the petitioner saying that he had fulfilled all the required formalities, duly applied and furnished all documents. The District Supply Officer, who had issued the last letter dated 10th August, 2009, was also informed to the above effect by the petitioner *vide* his letter dated 16.08.2009.

8. Since, the pensionery benefits worked out for the petitioner were far below his entitlement, he filed Writ-A

No.44729 of 2009 before this Court, seeking a direction to the respondents to pay him all his due service benefits, including pensionery benefits, appropriately revised, adding thereto increments and extending the benefits of pay revisions. The said writ petition was decided by this Court by a short order relegating the petitioner to the respondents, who were directed to consider the petitioner's case and pass appropriate orders in terms of the following order passed on 07.01.2013 in Writ-A No.44729 of 2009:

"The petitioner had filed the present writ petition praying for writ of *mandamus* commanding the respondents to pay and grant promotional benefit, pensionary benefit, gratuity, insurance, bonus, increment including arrears. During the pendency of the writ petition the relief claimed by the petitioner has been granted to a large extent.

The learned counsel for the petitioner, however contended that the calculation has wrongly been made, namely, that the calculation has been made on the basic salary whereas the calculation should have been made on the basis of basic salary revised from time to time.

In this regard, the petitioner may make an appropriate representation before the authority concerned. If such a representation is made, the authority concerned will consider and decide the matter by a reasoned and speaking order within three months from the date of production of a certified copy of this order.

The writ petition is disposed of."

9. A certified copy of the aforesaid order was served by the petitioner upon the respondents along with a calculation charge of his due emoluments, which persons junior to him have received. The order was served along with representation dated 24.01.2023 in order to effectuate the order of this Court dated 07.01.2013 passed in the writ petition last mentioned. Nothing was communicated to the petitioner, and, therefore, he sought information under the Right to Information Act. It was thereupon that he received copies of two orders, one dated 07.06.2012 passed by the District Supply Officer, Kanpur Nagar and another dated 25.04.2013 passed by the District Magistrate, Kanpur Nagar. The order of the District Supply Officer fixes the petitioner's pension and other emoluments, much below entitlement as the petitioner says. The other order, that is to say, the one passed by the District Magistrate on 25.04.2013, where it is noticeable that there is reference to another order passed by the District Magistrate, bearing No.2247 dated 22.06.2011, deciding the disciplinary proceedings, punishing the petitioner by withholding two increments with cumulative effect and awarding an adverse entry. This order for some reason had not been challenged by the petitioner, which in fact is the substantive order, deciding the disciplinary proceedings. It was challenged by making an amendment application after the remarks of this Court carried in the order dated 28.11.2017 passed in the present writ petition.

10. Now, therefore, what is under challenge is the order of the District Magistrate dated 22.06.2011 deciding the disciplinary proceedings and punishing the petitioner as aforesaid. The order of the District Supply Officer dated 07.06.2012 working out the petitioner's emoluments and post retiral benefits in terms of the District Magistrate's order of June, 2011 and the order dated 25.04.2013 passed by the District Magistrate, deciding the petitioner's representation and declining it

in compliance with this Court's order dated 07.01.2013 passed in Writ-A No.44729 of 2009.

11. Heard Mr. Sankalp Narayan, Advocate holding brief of Mr. D.K. Singh, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing for the State.

12. It is argued by Mr. Sankalp Narayan, learned Counsel for the petitioner that no punishment could have been inflicted upon the petitioner after his retirement, without invoking Article 351-A of the Civil Service Regulations (for short, 'the Service Regulations'), which exclusively empowers the Governor to pass appropriate orders sanctioning proceedings against a retired employee and the imposition of punishment. It is submitted that the petitioner retired from service on 31.05.2007, but the order of punishment impugned was passed by the District Magistrate on 22.06.2011, without obtaining the Governor's sanction under Article 351-A. Reliance in support of his contention is placed by the learned Counsel for the petitioner upon a Bench decision of this Court in **Gaya Prasad Yadav v. State of U.P. and others, 2022 (11) ADJ 287 (DB) (LB)**; an unreported decision of the learned Single Judge in Sharda Prasad Verma v. State of U.P. and others, Writ-A No.9826 of 2013, decided on 03.04.2023 and the authority of the Supreme Court in **Dev Prakash Tewari v. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others, (2014) 7 SCC 260.**

13. Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel has refuted the submissions advanced by the learned Counsel for the petitioner. He submits that the petitioner is a government servant and it is common ground that the Service Regulations, including Article 351-A apply to him. The learned Additional Chief Standing Counsel submits that there is no embargo upon the government to continue inquiry proceedings initiated against an employee before his retirement, after he retires from service. No sanction by the Governor is required in such a case.

14. I have keenly considered the aforesaid submission and found that there is no cavil that the petitioner is a government servant, to whom the Service Regulations apply. Article 351-A of the Service Regulations pro*vide*s:

"351–A The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused. Pecuniary loss to government by misconduct or Negligence, during his service, including service rendered on re-employment after retirement;

Pro*vide*d that—

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment—

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the

Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a), and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Explanation—For the purposes of this article—

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

NOTE—As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

15. Apparently, there is embargo on the power of the Disciplinary Authority from initiating departmental proceeding against an officer, who has retired from service, except with the sanction of the Governor. This is the clear mandate of clause (I) of proviso (a) to Article 351-A of the Service Regulations. The embargo is upon institution of proceedings after an officer's retirement from service without the Governor's sanction. There is absolutely no prohibition on the continuance of departmental proceedings that have already been instituted while the Officer was in service and before his retirement or during re-employment. The question fell for consideration of the Supreme Court in **State of U.P. and others v. Harihar Bholenath, (2006) 13 SCC 460. In Harihar Bholenath** *(supra)*, it was observed by their Lordships:

"12. It is not in dispute that the respondent was placed under suspension before he reached his age of superannuation. A departmental proceeding was not only initiated against him, but an enquiry officer was also appointed. The order of suspension, however, remained stayed by a judicial order. But the same paled into insignificance once the employee reached the age of superannuation. By reason of the same, however, the legal fiction created in regard to the point of time when the enquiry proceeding would be deemed to have commenced was not effaced.

13. Thus, only because the enquiry proceeding was actually started after superannuation of the respondent, the same would not mean that the enquiry proceeding had not been initiated. The right to initiate proceedings which would include a right to continue the proceedings was with the Governor. Sanction of the Governor is required to be obtained when proceedings are initiated by an authority other than the Governor.

14. The proceedings for recovery of the amount from a government servant can be passed in the event he is held to be guilty of grave misconduct or caused

pecuniary loss to the Government by his misconduct or negligence during his service. Some procedural safeguards, however, have been laid down in terms of proviso appended thereto, including the requirement to obtain an order of sanction of the Governor. Such order of sanction, however, would not be necessary if the departmental proceedings have been initiated while the delinquent was on duty. Proviso appended to Regulation 351-A merely controls the main proceedings. The same would apply in the exigencies of the situation envisaged therein, namely, even (sic when) the proceedings were initiated after retirement and not prior thereto."

16. This principle was followed in a Bench decision of this Court in **Gaya Prasad Yadav** *(supra)*, where it was held:

"18. It is, thus, clear that after retirement, withholding or withdrawing a pension and ordering the recovery from pension is permissible to be caused only by the Governor e. the State Government in terms of the Rules of Business, not only in case such employee is found causing pecuniary loss to the Government by his misconduct or negligence but also in a cases when the employee concerned is found guilty of grave misconduct.

19. The provision of first proviso appended to Article 351-A of the CSR clearly prohibits Institution of departmental proceedings except with the sanction of Governor if such proceedings were not instituted while the employee was on duty either before retirement or during re-employment. Thus, Article 351-A of CSR puts a prohibition of nitiating the departmental proceedings in a case of retired government servant, however, such proceedings are permissible to be instituted with the sanction of Governor, that too, in respect of an event which took place not more than four years before institution of such proceedings. The provision further pro*vide*s that departmental enquiry in such an event shall be conducted by such authority and at such place as the Governor may direct and in accordance with the procedure applicable.

20. Accordingly, we are of the considered opinion that in the instant case, since the departmental proceedings were already instituted against the appellant-petitioner prior to his retirement on attaining the age of superannuation, no sanction under Article 351- A of the CSR was required to be taken from the Governor. This view is fully supported by the judgment of Hon'ble Supreme Court in the case of Harihar Bholenath *(supra)*. To this extent we do not find any error in the judgment of learned Single Judge which is under appeal herein."

17. In the present case, disciplinary proceedings were initiated way back on 16.12.1983, when the petitioner was placed under suspension. A charge-sheet was issued to him on 19.06.1985. Therefore, if these proceedings were continued beyond his retirement on 21.05.2007 and culminated in the order impugned passed by the District Magistrate, Kanpur Nagar on 22.06.2011, there was no necessity to obtain the Governor's sanction under Article 351-A of the Service Regulations. That necessity would have arisen only if the proceedings have been initiated post retirement; not otherwise.

18. In this view of the matter, the first submission advanced by the learned Counsel for the petitioner cannot be accepted.

19. The next submission, that is canvassed by the learned Counsel for the

petitioner, is that in the absence of a specific Rules, authorizing infliction of punishment after retirement, no punishment can be imposed. Reliance in support of this proposition is placed by the learned Counsel on **Dev Prakash Tewari** *(supra)* and upon the authority of the Supreme Court in **Anant R. Kulkarni v. Y.P. Education Society and others, (2013) 6 SCC 515.** The principle in both these authorities, relevant to the submission, turns on the fact if in the establishment where the employee serves, there are any Rules authorizing continuance of disciplinary proceedings against a retired employee. In **Dev Prakash Tewari**, it was held by the Supreme Court:

"5. We have carefully considered the rival submissions. The facts are not in dispute. The High Court while quashing the earlier disciplinary proceedings on the ground of violation of principles of natural justice in its order dated 10-1-2006 *[D.P. Tewari v. U.P. Coop. Institutional Service Board, Writ Petition (S/B) No. 4328 of 1988, order dated 10-1-2006 (All)]* granted liberty to initiate the fresh inquiry in accordance with the Regulations. The appellant who was reinstated in service on 26-4-2006 and fresh disciplinary proceeding was initiated on 7-7-2006 and while that was pending, the appellant attained the age of superannuation and retired on 31-3-2009. There is no provision in the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975, for initiation or continuation of disciplinary proceeding after retirement of the appellant nor is there any provision stating that in case misconduct is established a deduction could be made from his retiral benefits."

(emphasis by Court)

20. **Dev Prakash Tewari** was a case, which turned on the provisions of the **Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975** and the said Regulations did not pro*vide* for initiation or continuance of disciplinary proceedings after retirement of an employee. The Regulations aforesaid also did not pro*vide* for deduction from the employee's post retiral benefits, in case the misconduct was established after his retirement. It is in those circumstances that their Lordships held that proceedings after the employee's retirement could not be continued in the absence of a provision in the Rules authorizing that course of action. In the present case, the relevant Services Rules applicable are Service the Service Regulations. It has already been held that Article 351-A of the Service Regulations does not at all forbid the continuance of disciplinary proceedings commenced before retirement of an employ, post retirement. It does not require any sanction by the Governor. Therefore, the contention of the learned Counsel for the petitioner on this score deserves to be rejected.

21. The next submission that has been pressed in aid by the learned Counsel for the petitioner is that on account of the inordinate and explained delay, that has occurred in concluding the disciplinary proceedings, the impugned order deserves to be quashed. It is pointed out that proceedings against the petitioner commenced with his suspension from service *vide* order dated 16.12.1983 and concluded with the impugned order dated 22.06.2011 passed by the District Magistrate, Kanpur Nagar, that was passed four years after his retirement on 31.05.2007 in the interregnum. There is absolutely no reason, according to the learned Counsel for the petitioner, why these proceedings should have lingered on for son long. He submits that this kind of

an inordinate and oppressive delay is prejudice in itself and a good ground to quash the impugned order passed much after the petitioner's retirement from service.

22. On the other hand, Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel, has refuted the above submission and says that the delay in conclusion of the disciplinary proceedings has been contributed much to by the petitioner himself. In support of this submission of his, Mr. Tripathi points out that the departmental proceedings remained withheld under interim orders passed by this Court on 02.08.1991 on the petitioner's behest in Civil Misc. Writ Petition No.22002 of 1991 until 09.04.2004, when the said order was vacated at an interlocutory stage of the said petition and before judgment. The learned Additional Chief Standing Counsel, therefore, submits that the petitioner has contributed a period of time little shy of 14 years to the delay that has been occasioned in the conclusion of the disciplinary proceedings.

23. This Court has carefully considered this most vital submission advanced by learned Counsel for the parties.

24. The delay in the conclusion of disciplinary proceedings is regarded with considerable reservation as a ground to quash a charge-sheet or pending disciplinary proceedings. The principles in that regard, with some modification, will apply to a plea, where an order made at the conclusion of disciplinary proceedings, inflicting penalty, is assailed. This question arose for consideration before the Supreme Court in **Anant R. Kulkarni** *(supra)*, where it was observed:

"Enquiry at belated stage

14. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is dehors the limits of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show-cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by the court. The same principle is applicable in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question must be carefully examined taking into consideration the gravity/magnitude of the charges involved therein. The court has to consider the seriousness and magnitude of the charges and while doing so the court must weigh all the facts, both for and against the delinquent officers and come to the conclusion which is just and proper considering the circumstances involved. The essence of the matter is that the court must take into consideration all relevant facts, and balance and weigh the same, so as to determine, if it is in fact in the interest of clean and honest administration that the said proceedings are allowed to be terminated only on the ground of delay in their conclusion. (*Vide* State of U.P. v. Brahm Datt Sharma [(1987) 2 SCC 179 : (1987) 3 ATC 319 : AIR 1987 SC 943] , State of M.P. v. Bani Singh [1990 Supp SCC 738 : 1991 SCC (L&S) 638 : (1991) 16 ATC 514 : AIR 1990 SC 1308] , State of Punjab v. Chaman Lal Goyal [(1995) 2 SCC 570 : 1995 SCC (L&S) 541 : (1995) 29 ATC 546] , State of A.P. v. N. Radhakishan [(1998) 4 SCC 154 : 1998 SCC (L&S) 1044 : AIR 1998 SC 1833] , M.V. Bijlani v. Union of India [(2006) 5

SCC 88 : 2006 SCC (L&S) 919 : AIR 2006 SC 3475] , Union of India v. Kunisetty Satyanarayana [(2006) 12 SCC 28 : (2007) 2 SCC (L&S) 304 : AIR 2007 SC 906] , Ministry of Defence v. Prabhash Chandra Mirdha [(2012) 11 SCC 565 : (2013) 1 SCC (L&S) 121 : AIR 2012 SC 2250] and LIC v. A. Masilamani [(2013) 6 SCC 530 : JT (2012) 11 SC 533] .)"

25. For one, the principle appears to have been laid down in the context of plea seeking premature termination of disciplinary proceedings on the ground of delay. There would be some inherent lack of wisdom to quash proceedings on the ground of delay after they have reached a terminus, where the conclusions and the result with whatever delay is already there. Perhaps, the only exception in a situation after the Disciplinary Authority has passed final orders even with an inordinate delay, would be if the order of the Disciplinary Authority is found otherwise vitiated, requiring a remand, and, a *fortiori* a further continuance of ancient proceedings.

26. This Court is mindful of the fact that in applying any principle that has the effect of preventing disciplinary proceedings to reach their logical terminus, must always be informed by the consideration of the seriousness of charges involved in the matter. A charge, that is profoundly serious and widely impacts clean administration in the service, must not be allowed to die or wither away with time. However, if the charge(s) is (are) not very serious in the sense that these do not inevitably attract the imposition of a major penalty if proved, or by the nature of the acts, are not widely destructive of clean administration in service, an inordinate delay that features if the order of punishment were quashed on some other grounds and the proceedings revived, may be a good ground to import the principle about giving quietus to the disciplinary proceedings.

27. Here, what has to be noticed is that the petitioner was suspended pending inquiry on 16.12.1983 and the charge-sheet issued to him a year and a half later on 19.06.1985. This charge-sheet carried three charges, to which allusion would be made shortly. A fourth charge was added to the existing charge-sheet dated 22.05.1985 by the Disciplinary Authority, the District Magistrate, Farrukhabad by an endorsement dated 09.12.1985. While these proceedings were pending, the petitioner was served with a most illegal order by the District Magistrate, Farrukhabad dated 14th May, 1991.

28. It was a show cause notice, which takes note of the fact that disciplinary proceedings are pending against the petitioner after his suspension from service *vide* order dated 16.12.1983 and his provisional reinstatement done on 27.05.1990. The show cause notice dated 14th May, 1991 says that there has been no improvement in his work and conduct and the petitioner does not take interest in government work, but obstructs the public distribution system, which is against the Service Rules. He was, therefore, required to show cause why his services be not terminated. This show cause was not based on the report of an inquiry into the charge, but dehors those proceedings. It carried vague allegations. This show cause notice dated 14th May, 1991, issued by the District Magistrate, Farrukhabad, was ex facie the most illegal thing to do.

29. The District Magistrate could not apparently proceed to terminate the

services of a permanent employee by merely issuing him a show cause notice, without holding disciplinary proceedings, that independent of this show cause notice were already pending on the said date. After all, the show cause notice was not traceable to the District Magistrate's authority to dismiss or remove the petitioner under Clause (b) of the Second Proviso to Article 311 (2) of the Constitution, or any Service Rule similarly empowering the Disciplinary Authority to dispense with an inquiry after recording reasons in writing that it was not reasonably practicable to hold such inquiry. This show cause notice was a great diversion and a contributor delay in the already highly delayed course of the pending disciplinary proceedings, that were then in progress on the basis of the charge-sheet dated 22.05.1985. This show cause notice apparently led the petitioner to challenge the departmental proceedings pending against him, seeking these to be quashed, besides the issue of a *mandamus* directing the respondents to transfer him from Kanpur to Farrukhabad by means of a writ petition, being Civil Misc. Writ Petition No.22002 of 1991. He also added by amendment some relief to the said petition, seeking promotion and the grant of annual increments, besides other service benefits like seniority etc.

30. This Court, perhaps noticing the show cause notice issued to the petitioner, passed an interim order dated 02.08.1991, while issuing notice, directing that the departmental proceedings against the petitioner may continue, but final orders shall not be made until further orders. Apparently, there was no interference with the show cause notice and the pending disciplinary proceedings were not interdicted either by this Court. All that was done was that the respondents were forbidden from passing final orders in the disciplinary proceedings. The inquiry could nevertheless be held and everything done, but the recording of final orders disposing of the disciplinary matter.

31. A perusal of the record shows that an inquiry of whatever kind into the charges against the petitioner was held and the inquiry report submitted to the Disciplinary Authority on 02.05.1997, but no orders could be made thereon, considering of course the interim order, that was passed on 02.08.1991. The interim order aforesaid was vacated on 09.04.2004. After the interim order was vacated, given the fact that an inquiry report dated 02.05.1997 had already been submitted to the Disciplinary Authority, the disciplinary proceedings were not carried forward to their logical conclusion and decided until the petitioner's retirement from service upon attaining the age of superannuation on 31.05.2007. There is absolutely no reason shown why these proceedings were not disposed of after this Court vacated the interim order dated 09.04.2004 and before the petitioner's retirement on 31.05.2007. The proceedings instead continued after the petitioner's retirement until 22.06.2011, when the impugned order of that date was passed by the District Magistrate, Kanpur Nagar, punishing the petitioner on three of the four charges found proved with imposition of the major penalty of permanent withholding of two increments together with the award of an adverse entry.

32. The calendar of events from the petitioner's suspension from service pending inquiry on 16.12.1983 to the final orders, disposing of the disciplinary proceedings, passed by the District Magistrate dated 22.06.2011, would show

that it took in all a period of 28 years for the respondents to conclude the proceedings. In this period of time, if one were to examine the first lap of these proceedings, where nothing prevented the respondents from deciding them, it would appear that from 16.12.1983 to 02.08.1991, there was no interim order forbidding the respondents from concluding the proceedings. Post suspension, the charge-sheet was issued on 19.06.1985, as already said, after a year and a half of the petitioner's suspension. The petitioner submitted his reply to the charge-sheet on 22.06.1987, which seems to be a rather delayed act on the petitioner's part. But, given the fact that the petitioner's reply was there before the respondents to the charges by June of 1987, a **defisce** understanding what took them all this while in not going ahead in concluding the disciplinary proceedings, until the District Magistrate committed the misadventure of issuing a show cause notice to the petitioner dated 14th May, 1991, asking him to show cause for reasons mentioned there why his services may not be terminated dehors the pending disciplinary proceedings, as already noticed.

33. No doubt, after this Court passed the order dated 02.08.1991, the respondents could not proceed to decide the disciplinary proceedings until that order was vacated on 09.04.2004, but again, as already noticed, nothing prevented them from concluding the inquiry and keeping matters at a stage that just awaited recording of final orders. We have already said that final orders could be passed immediately after the interim order dated 02.08.1991 was vacated on 09.04.2004. This never happened and all the rest of the culpable delay that was caused by the respondents' laxity has been noticed for every detail of it. The petitioner retired on 31.05.2007 and the disciplinary proceedings were concluded by the District Magistrate's order dated 22.06.2011. What took the District Magistrate all this time between 09.04.2004 when the interim order was vacated and 22.06.2011 when he passed final orders, is inexplicable. It is just irresponsible delay on the respondents' part, particularly, the District Magistrate; nothing else.

34. This Court must say that the course of disciplinary proceedings in the present case, which includes the misconceived show cause notice issued by the District Magistrate on 14.05.1991 exhibits extreme lethargy on the respondents' part in responding to their duties. The officials of the State in discharging their public functions have to act with a missionary zeal, but the present case shows just the opposite of it. It discloses a typical official non-concern about the duties and responsibilities, with which officers concerned at the relevant time, were charged. It shows nonchalance to say the least.

35. This Court must also remark that the time schedule of disciplinary proceedings in any case, including the present one is something that rests in the hands of the establishment. If an employee does not cooperate with the proceedings, the establishment always have the liberty to proceed ex parte in accordance with law. Of course, they have to prove the charges by e*vide*nce and not hold them proved by default. Nothing of that kind was done in this case for the two long spells from 16.12.1983 to 02.08.1991 and from 09.04.2004 until culmination of proceedings on 22.06.2011. This Court, therefore, has no hesitation in holding that the proceedings in this case were indeed

unduly delayed beyond permissible limits, causing gross prejudice to the petitioner. Still, that is not a ground in itself to quash the order of punishment that has ultimately come to be made. If one looks to the impugned order dated 22.06.2011 passed by the District Magistrate, Kanpur Nagar, there is no cavil there that the Inquiry Officer, out of the four charges, has held Charge No.2 proved and Charges Nos.1 and 4 partly proved. Charge No.3 has been held not proved for want of e*vide*nce.

36. A reading of the impugned order dated 22.06.2011 passed by the District Magistrate shows it to be ex facie illegal and vitiated. It betrays utter lack of application of mind and does nothing more than to refer to the various events during the course of proceedings. There is no meaningful consideration of the three charges, the petitioner's defence, the findings of the Inquiry Officer recorded in his inquiry report dated 02.05.1997 and reasons for the District Magistrate's conclusions, howsoever brief to agree with the Inquiry Officer on the three charges found proved and partly proved. At the end of a reference to the proceedings, there is a cryptic remark that the charges are serious, followed by an abrupt conclusion to punish the petitioner, imposing upon him the penalty of withholding two increments with cumulative effect etc. It is also noteworthy to mention that though in the impugned order, there is a reference to the inquiry report dated 02.05.1997, a copy of this report has not appeared on the record along with the respondents' return. There is not even the slightest discussion in the impugned order about the findings of the Inquiry Officer carried in his report, the e*vide*nce considered by him to reach his conclusions, and if at all the petitioner was given opportunity to show cause against those findings. This kind of an utterly opaque decision making without the slightest reason indicated for the conclusions reached, cannot qualify for a valid order made in disciplinary proceedings, adversely affecting the petitioner's right. For the said reason, the impugned order dated 22.06.2011 passed by the District Magistrate, Kanpur Nagar cannot be sustained and has to be quashed.

37. It is at this stage that the question arises: Should this Court permit the respondents to resume the proceedings against the petitioner, a retired man, who has been subjected to the most prolix departmental proceedings throughout his career, not for a commensurate fault on his part? It is here that the gravity of the charges against the petitioner would become relevant. For if the charges found proved are grave, the mere factum of inordinate delay in concluding the departmental proceedings, may ultimately be outweighed by larger public interest. It, therefore, becomes imperative to see what were precisely the charges that were found proved against the petitioner. This takes us to the charge-sheet dated 22.05.1985 issued by the District Magistrate, Farrukhabad. This charge-sheet is in two parts. The charge-sheet that was issued on 22.05.1985 carried three charges. To this, a fourth was added by the District Magistrate, Farrukhabad by his note dated 19.06.1985. The charges against the petitioner, the three originally framed and the fourth added on 19.06.1985, read:

"1- आयुक्त इलाहाबाद मण्डल, इलाहाबाद के आदेश सं० 216 (Sic) 40.84.81 दिनांक 16.10.82 द्वारा जनपद कानपुर नगर से आपका स्थानान्तरण इस जनपद फर्रूखाबाद में श्री सुरेश कुमार पाठक पूर्ति लिपि के स्थान पर हुआ था। तद्नुसार आपको जिला पूर्ति कार्यालय कानपुर नगर ने दिनांक 9.12.82

को कार्यमुक्त करते हुए निर्देशित किया कि आप अपने नवनियुक्ति स्थान पर कार्यभार ग्रहण करें। परन्तु आपने उपरोक्त आदेशों का अनुपालन न करके स्वेच्छा से अनुपस्थित हो गये और अपने नियुक्ति स्थान जिला पूर्ति कार्यालय फर्रूखाबाद में कार्यभार ग्रहण नही किया, बल्कि दिनांक10.12.82 से 16.12.82 तक का अवकाश प्रार्थना पत्र जिला पूर्ति अधिकारी कानपुर नगर। को प्रेषित कर दिये जबकि उनके द्वारा आपको कार्यमुक्त किया जा चुका था। इस संबन्ध जि० पू० अ० कानपुर। नगर। ने अपने पत्रांक 8380-डी। जि० पू० अ०। सा० पु०। 82 दिनांक 9.12.82 व पुनः पत्रांक सं० 4101 दिनांक 4.5.83 जिनकी प्रतिलिपि आपको पृष्ठांकित हैं, द्वारा नवनियुक्ति स्थान पर कार्यभार ग्रहण हेतु निर्देशित किया। दिनांक 16.12.82 के उपरान्त आपने न तो कोई अवकाश प्रार्थना पत्र प्रेषित किया और न कोई सूचना दी, और आदेशों का पालन न करके आप जानबूझकर अपनी इच्छानुसार अनुपस्थित हो गये तथा 26.4.84 तक निरन्तर अनुपस्थित रहे हैं और महत्वपूर्ण आवश्यकीय राजकीय कार्य में व्यवधान उत्पन्न किया। आपका यह आचरण आदेशों की पूर्ण अवहेलना व घोर अनुशासनहीनता की द्योतक है, जिसके आप पूर्ण दोषी हैं।

2- जिला पूर्ति कार्यालय, कानपुर नगर से जिला पूर्ति कार्यालय फर्रूखाबाद को हुए अपने स्थानान्तरण को निरस्त कराने हेतु आपने अपनी पत्नी श्रीमती लता शर्मा के माध्यम से दिनांक 7.1.83 एवं 9.3.83 को अनाधिकृत संस्तुति करा कर आयुक्त खाद्य तथा रसद विभाग उ०प्र० जवाहर भवन लखनऊ को प्रत्यावेदन प्रेषित कराया तथा अनावश्यक दबाव डलवाया है, जो सरकारी कर्मचारी नियमावली के नियम 27 का पूर्ण उलघंन है, जिसके आप पूर्ण दोषी हैं।

3- वर्ष 1979 मे आप जिला पूर्ति कार्यालय कानपुर। नगर। में सीमेन्ट अनुभाग में कार्यरत थे तथा आपने निम्नांकित फर्जी परमिट निर्गत कर सीमेन्ट का दुरूपयोग किया, जिसकी जांच क्षेत्रीय खाद्य अधिकारी कानपुर। नगर। मुख्यालय व फूड़सैल निरीक्षक द्वारा की गई, जांच के फलस्वरूप आप पर फर्जी परमिट बनाने व सीमेन्ट ब्लैक किये जाने का आरोप हैः

4- आयुक्त इलाहाबाद मंडल इलाहाबाद के आदेश दिनांक 16.10.82 के द्वारा आपका स्थानान्तरण कानपुर नगर से फर्रूखाबाद जनपद मे किया गया था। आदेशानुसार इस जनपद में आपके द्वारा योगदान प्रस्तुत न करने के कारण तथा आदेशों का अनुपालन न करने के विषय में आपको निलम्बित कर कार्यालय के पत्रांक3136/ अनु० (Sic) दिनांक 22.5.85 द्वारा आरोप पत्र प्रेषित किया गया जिसे आपने दिनांक 19.6.85 को प्राप्त किया है। सहायक आयुक्त (Sic) इलाहाबाद ने सुचित किया है कि आप विभिन्न बातों के माध्यम से कानपुर नगर मे ही स्थानान्तरण/अटैचमेन्ट किये जाने का प्रयास कर रहे जो सरकारी कर्मचारी आचरण संहिता के विरूद्ध के कार्य है। अतः आपके विरूद्ध अपने स्थानान्तरण/ अटैचमेन्ट के विषय मे अनुचित दबाव डालने का भी आरोप लगाया जाता है आपको आदेश दिया जाता है कि इस पत्र की प्राप्ति के 15 दिन के अन्दर प्राप्ति आरोप पत्र दिनांक 22.5.85 व उपरोक्त आरोप पत्र का उत्तर प्रेषित करें उत्तर न देने पर यह समझा जायेगा कि आपको इस विषय मे कुछ नही कहना है तथा आपके विरूद्ध एक तरफा कार्यवाही की जायेगी।"

38. The first charge as aforesaid relates to the petitioner's act in not joining the station of transfer at Farrukhabad upon being transferred from Kanpur Nagar *vide* order dated 16.10.1982. The petitioner has been charged with unauthorized absence from duty for a period of about 16 months from 06.09.1982 to 26.04.1984. The second charge is about the petitioner canvassing his case through his wife for the cancellation of his transfer with the Commissioner, Food and Civil Supplies, Lucknow, that is said to be in violation of Rule 27 of the relevant Service Rules. The third charge is about the issue of forged permits relating to cement and selling cement in the black market. The fourth charge is based on facts that after his transfer from Kanpur Nagar to Farrukhabad in compliance with an order of the Commissioner, Allahabad Division, Allahabad dated 16.10.1982, there was information from the Assistant Commissioner, Food and Civil Supplies that the petitioner was making efforts to ensure his transfer back to Kanpur Nagar or his attachment there, which amounts to exertion of undue influence upon officials in violation of the relevant Service Rules.

39. A reading of these charges would show that while the third charge about forging permits relating to cement and selling cement in the black-market is most serious of them all. It has not been proved

at all for want of e*vide*nce. The first and the fourth charges have been found partly proved. The first is somewhat serious, being a case about unauthorized absence for a long period of time, but considering that much of the absence could be adjusted against leave, if any due, or otherwise held to be leave without pay. There is not much of public interest relevant involved in the said charge under the peculiar facts obtaining in this case. These peculiar facts include the inordinate delay in disposing of the disciplinary proceedings. Also, since the first charge has been found partly proved and a copy of the inquiry report has not been placed before the Court before the Court, it is not known how much of the case of unauthorized absence has in fact been found proved by the Inquiry Officer. This feature of the extent of proof of the charge has also not at all been discussed by the Disciplinary Authority in the order impugned, which we have already held to be utterly cryptic.

40. So far as the second and the fourth charges are concerned, these are about the petitioner canvassing his case to secure his transfer back to Kanpur Nagar. This kind of a charge may make the employee an undisciplined hand, but the charges in essence are not very serious. It can invite a frown and some punishment, but certainly not major penalty. Also, out of these two Charges Nos.2 and 4, relating to unauthorized canvassing for a transfer back to Kanpur Nagar, Charge No.2 has been found proved while the fourth has been found partly proved. It is not known how much of it, has been found proved for reason that neither the inquiry report has been placed before the Court by the respondents nor the findings in the said report discussed by the Disciplinary Authority in the order impugned dated 22.06.2011. This then being the profile about the gravity of the charges found proved against the petitioner, in the considered opinion of this Court, it would not at all be condign to the misconduct alleged against him, to throw open the matter again before the respondents to pass orders afresh in the disciplinary proceedings. The inordinate delay in the conclusion of disciplinary proceedings in the background of the nature and gravity of charges against the petitioner and the manner in which the respondents have acted, including the manifestly illegal order imposing penalty upon the petitioner, in our opinion, would require a quietus to be now given to these proceedings, resting it in the petitioner's favour.

41. So far as the two other impugned orders are concerned, that is to say, the order dated 07.06.2012 passed by the District Supply Officer, Kanpur Nagar fixing the petitioner's salary and post retiral benefits and the further order passed by the District Magistrate, Kanpur Nagar dated 25.04.2013 are concerned, the same would have to be quashed because these have been made in consequence of the impugned order dated 22.06.2011, imposing penalty upon the petitioner. Of course, it will be open to the District Magistrate, Kanpur Nagar and the District Supply Officer, Kanpur Nagar to determine the petitioner's salary and post retiral benefits afresh after purging their earlier determination of the effect of the order dated 22.06.2011, ordering withholding of the two increments and the adverse entry.

42. In the result, this writ petition succeeds and is **allowed**. The impugned orders dated 22.06.2011 and 25.04.2013 passed by the District Magistrate, Kanpur Nagar and the order dated 07.06.2012

passed by the District Supply Officer, Kanpur Nagar are hereby **quashed.** The District Magistrate, Kanpur Nagar and the District Supply Officer, Kanpur Nagar are ordered to revise and redetermine the petitioner's emoluments during the period of his service as also his post retiral benefits, free from the effect of the impugned order dated 22.06.2011, since quashed by this judgment.

43. There shall be no order as to costs.

(2024) 3 ILRA 527
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 9524 of 2020

Dipesh Yadav ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shivendu Ojha, Sri S.R.K. Ojha, Sri Niyodit Tripathi, Sri Radha Kant Ojha (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Bhupendra Nath Singh, ,Sri Prabhakar Awasthi, Sri Pramendra Pratap Singh, Sri Manoj Kumar Singh

A. Service Law – Post of Assistant Professor – Qualification – Rejection of candidature – Ground of not securing second division marks in the concern subject was taken – Though the petitioner has secured 45% marks, but the Rajasthan University does not provide Second Division at that percentage of marks – Rejection challenged – Held, the prescribed qualification cannot be held to be arbitrary and if the employer asks for a relevant degree in a particular division then a candidate must possess that. The candidate cannot question the eligibility conditions led in the advertisement only because his university prescribes Second Division at a higher percentage marks than other universities. (Para 10 and 12)

B. Interpretation of statute – Meaningful interpretation – Use of word 'or' – Disjunctive word, how far can be read as conjunctive – Held, rule of interpretation is to find a provision meaningful and sensible and whatever leads to absurdity is to be shunned – Normal rule is that a disjunctive word cannot be read conjunctively as it may lead to an extreme interpretation to give meaning to a sentence or provision contrary to or in access of what rule making authority or legislature might have intended. However, at times if disjunctive word is read as conjunctive, it would make a provision more meaningful and will lead to understand real import of the provision. (Para 14)

Writ petition dismissed. (E-1)

List of cases cited :-

1. Writ A No. 97 of 2015; Shailendra Kumar Bharati Vs St. of U.P. & ors. decided on 12.01.2015

2. Writ A No. 70918 of 2009; Sushil Kumar Gupta Vs St. of U.P. & ors. decided on 23.12.2009

3. Writ A No. 26287 of 2018; Vinay Kumar Vs St. of U.P. & ors. decided on 12.12.2018

4. Mersey Docks & Harbour Board Vs Henderson; LR (1888) 13 AC 603

5. Indore Development Authority Vs Manoharlal & ors.; 2020 (8) SCC 129

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

1. Heard Sri R.K. Ojha, learned Senior Advocate assisted by Sri Nityodit Tripathi, learned counsel for the petitioner, Sri Manoj Kumar Singh, learned Advocate

appearing for the UP Higher Education Service Commission, Sri Prabhakar Awasthi, learned counsel appearing for 5th respondent and learned Standing Counsel for the State-respondents.

2. By means of this petition filed under Article 226 of the Constitution, petitioner has prayed for quashing of order by which his candidature came to be cancelled holding him not eligible for appointment as Assistant Professor in a postgraduate college for he having not secured Second Division marks in the relevant subject in which he has an undergraduate degree.

3. Basic argument advanced by learned Senior Counsel for the petitioner is that earlier qualification was degree in the relevant subject with 50% marks which subsequently came to be amended as degree in the relevant subject or degree in Second Division.

4. Two fold arguments have been advanced: **firstly**, the word 'or' being disjunctive, it means there should be undergraduate degree in the relevant subject or degree with second division marks as per the earlier rule and, therefore, it could either be a case of having a degree of relevant subject or having a degree with second division marks; and **secondly**, the Second Division marks which is required now to be obtained by a candidate which would be considered as per the marks that are generally to be assigned to form a Second Division degree upon a general standard scale which is 45.5% by some universities.

5. Sri Ojha, however, admits that as far as Rajasthan University is concerned, it does not provide a Second Division below to 48% marks and on that count, the petitioner would not be having Second Division degree as he has degree from that university.

6. *Per contra*, it is argued by learned counsel for respondent- UP Higher Education Service Commission as well as learned Standing Counsel that even by amendment, the Rules stand on the same footing with an adjustment on the second division which would have lower side marks than fifty percent (50%), but a candidate is to have necessarily a Second Division degree and that too in the relevant subject.

7. In support of the above argument, it is submitted that the word 'or' is to be read as 'and' in conjunction to two preceding and succeeding words as it will give an effective meaning to what the rule making authority had intended and, therefore, applying the rule of interpretation, it is argued that if the word 'or' is read as 'and' then the candidate should have a degree in the relevant subject with second division marks.

8. It is further argued on behalf of Commission as also the State respondents that a candidate is required to produce a Second Division degree in the relevant subject and, therefore, it hardly matters whether there is 50% or 48% marks and if the University does not confer upon a candidate with a second division degree, such a candidate would definitely not be eligible for appointment as Assistant Professor as he was not possessing the requisite qualification.

9. Having heard learned counsel for the respective parties and having perused the records, I find that advertisement issued

by the UP Higher Education Service Commission very categorically prescribed the essential qualification for a candidate to have Second Division degree in the relevant subject. The relevant clause of advertisement 6.1.4 is reproduced hereunder:

*शासन के पत्रांक 1129/सत्तर-1-2013-15(14)/32/टी.सी./दिनांक 04 दिसंबर, 2013 द्वार उत्तम शैक्षिक अभिलेख को "सुसंगत स्नातक उपाधि या उपाधियों में न्युनतम द्वितीय श्रेणी प्राप्तांक" निर्धारित किया गया है।

10. The word and expression '?????? ??????' means that a candidate of-course should be graduate in the relevant subject in which the post is required to be filled and then he should be having a Second Division degree. Petitioner though of-course has secured 45% marks, but the Rajasthan University from where he has obtained degree does not provide Second Division at that percentage of marks. Merely because some other universities prescribe for 45.5% or above as Second Division, in my considered view, it will not make any difference.

11. This aspect has previously traveled to this Court and the Division Bench in ***Shailendra Kumar Bharati vs. State of UP & ors in Writ-A No.97 of 2015***, dated 12.01.2015 dismissed the writ petition wherein similar plea was taken as is raised in this petition. The relevant part of the judgment dated 12.01.2015 is reproduced hereinunder:

"We have considered the submissions advanced by the learned counsel for the parties. The advertisement issued by the Commission specifically requires that candidates should have obtained a second division at the Graduate level.The petitioner admittedly passed the Graduation examination with a third division. The petitioner cannot be permitted to contend that since some of the Universities grant a second division on obtaining 45% marks, the University from where the petitioner did his graduation should also grant a second division to the petitioner. It is for each University to decide this academic matter relating to grant of a division in the examination conducted by it. Likewise, the petitioner cannot also be permitted to contend that a relaxation of 5% marks should be given to him because he belongs to Scheduled Castes candidate, as the Rules/Regulations do not provide for grant of such a benefit."

12. The prescribed qualification cannot be held to be arbitrary and if the employer asks for a relevant degree in a particular division then a candidate must possess that. The candidate cannot question the eligibility conditions led in the advertisement only because his university prescribes Second Division at a higher percentage marks than other universities. This issue is open for the petitioner to raise with the university as discrimination can be attributable to the statute of that university. The Commission cannot be held to be responsible in any manner for laying down such conditions, nor such conditions appear to be arbitrary and discriminatory. Earlier, 50% marks for teaching post prescribed for, was even held to be not bad by this Court in ***Writ-A No.70918 of 2009 (Sushil Kumar Gupta vs. State of UP & ors) decided on 23.12.2009.*** Similarly, the advertisement came to be challenged before this Court in the case of **Vinay Kumar vs. State of UP & ors in Writ-A No.26287 of 2018, dated 12.12.201**8, wherein the Co-ordinate Bench of this Court followed the

judgment of ***Shailendra Kumar Bharati*** *(supra)* and dismissed the petition vide order dated 12.12.2018.

14. Even otherwise, rule of interpretation is to find a provision meaningful and sensible and whatever leads to absurdity is to be shunned. Normal rule is that a disjunctive word cannot be read conjunctively as it may lead to an extreme interpretation to give meaning to a sentence or provision contrary to or in access of what rule making authority or legislature might have intended. However, at times if disjunctive word is read as conjunctive, it would make a provision more meaningful and will lead to understand real import of the provision. Lord Halsbury L.C. observed in ***Mersey Docks & Harbour Board vs. Henderson; LR (1888) 13 AC 603*** that the reading of 'or' as 'and' is not to be resorted to *"unless some other part of the same statue or the clear intention of it requires that to be done."* Thus, there has to be reasons genuine to use a disjunctive word as conjunctive to have meaningful interpretation. Here in the case in hand the disjunctive word 'or' if not used as conjunctive word 'and', no meaningful purpose is going to be served. A candidate if is said to possess a degree in concerned subject/discipline or a degree in Second Division, it would mean either to have degree in the concerned subject or discipline or otherwise any degree with second division marks. This, interpretation if accepted it will make first part of possession to have degree in relevant subject absolutely irrelevant as one would be then required to have second division degree in any subject. This is neither the intention behind the condition, nor the purpose. The authority could have provided that a candidate should have second Division Degree and relevant subject degree as preferential qualification or vise versa. Thus, in my considered view here the disjunctive 'or' is to read as conjunctive word 'and' it makes not only sense but gives a meaningful interpretation to the entire provision.

15. In the case of ***Indore Development Authority v. Manoharlal & ors; 2020 (8) SCC 129***, the Constitution Bench observed that if there were two prohibitions used, the word 'or' is to be read as 'and or as 'nor'. The Court was interpreting provision as contained under Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation Act, 2013. The issue was as to interpretation of sentence 'either possession taken or compensation paid". The Court held so to bring an end to proceedings under the old Act as it would be taken to have lapsed in the event both the conditions were attained. The Court vide paragraph 352 observed thus:

"352. There is a plethora of decisions where, owing to delay of 6 months or more, this Court has repelled the challenge to the acquisition proceedings. In our opinion, Section 24 does not revive the right to challenge those proceedings which have been concluded. The legality of those judgments and orders cannot which be reopened or questioned under the guise of the provisions of Section 24(2). By reason of our reasoning in respect of that provision [which we have held But under Section 24(2) that word "or" is to be read as "and" or as "nor", even if one of the requirements has been fulfilled i.e. either possession taken or compensation paid], there is no lapse unless both conditions are fulfilled i.e compensation has not been paid nor has possession been taken; the legality of the

concluded proceedings cannot be questioned. It is only in the case where steps have not been taken by the authorities. The lapse or higher compensation is provided under Section 24(2) and its proviso under the 2013 Act."

16. Thus, in view of the exposition of law and rule of interpretation, I do not find any merit in the submissions of learned Senior Advocate, Mr. R.K. Ojha. Writ petition lacks merit and is, accordingly, dismissed.

17. There will be no order as to cost.

(2024) 3 ILRA 531
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 11122 of 2023

Dinesh Kumar Ojha ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prashant Kanha, Sri Nikhil Kumar

Counsel for the Respondents:
C.S.C., Sri Satyam Singh, Sri Baibhav Tripathi

A. Service Law – Disciplinary proceeding – Removal from service – Earlier proceeding was quashed by the High Court giving liberty to proceed afresh – Even during fresh proceeding, no charge-sheet was served – There was no postal remark of refusal – No time was fixed to conclude inquiry – No evidence was led by establishment – Effect – Held, the proceeding are again held to have been done *ex parte* – Assuming that the petitioner was served with the charge-sheet and he did not participate in the inquiry, it did not mean that the respondents could just hold the charges proved by looking into the charge-sheet and the papers filed with it – At the said inquiry, the establishment have to prove the charges by leading their evidence, both documentary and oral. Witnesses have to be examined – Held further, the Inquiry Officer far from adherence to the salutary principle, where the Inquiry Officer, sitting like an impartial arbiter, would have before him evidence both documentary and oral led to prove the charges by the establishment has done nothing of the kind. (Para 34, 35, 36 and 45)

Writ petition allowed. (E-1)

List of cases cited :-

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

2. Roop Singh Negi Vs Punjab National Bank & ors.; (2009) 2 SCC 570

3. St. of U.P. & anr.Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

4. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

5. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

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

1. This writ petition is directed against an order of removal from service dated 30.05.2023 passed against the petitioner by the Managing Director, U.P. State Handloom Corporation Limited, Kanpur Nagar.

2. It would be profitable to refer to facts giving rise to this writ petition. The petitioner was appointed to the post a Salesman in the year 1994 by an order

passed by the Managing Director, U.P. State Handloom Corporation Limited, Kanpur Nagar (for short, 'the Corporation'). The petitioner says that he has been working ever since and until orders depriving him of his employment were passed. The petitioner says that he has had an unblemished career with no complaint, punishment or adverse entry awarded to him. Prior to the present proceedings, he was never subjected to any disciplinary proceedings. About the Corporation, the petitioner says that it was established in the year 1973 by the State Government as a Government Company registered under Section 67 of the Companies Act, 1956. The State Government has a share holding to the extent of 77.42% with the balance 22.58% being owned by the Central Government. Thus, the Corporation is fully owned and controlled by the two Governments. The Chairman, the Managing Director and the entire Board of Directors are appointed by the State Government.

3. According to the petitioner, because of poor management by officials of the State Government, the financial condition of the Corporation became pitiable, as the petitioner has chosen to describe it. The Corporation is not in a position to pay salary to its employees, who were, therefore, frequently transferred from one place to another without any rhyme or reason. It is pointed out that raising this issue, a writ petition being Writ Petition No.3442(S/S) of 1999, U.P. Rajya Hathkargha Nigam Ltd. Kshetriya Karamchari Sangathan and others v. State of U.P. and others, was filed before the Lucknow Bench of this Court, where an interim order dated 06.08.1999 was passed to the effect that if salary to the members of the petitioner association is not paid, they will not be able to leave their place of posting, which would be in violation of Article 21 of the Constitution. The said petition is represented to be still pending before the Lucknow Bench, where further orders dated 07.01.2013, 12.03.2013 and 22.04.2013 have been passed.

4. The petitioner says that because of the poor financial condition of the Corporation, a state of anarchy became order of the day with the Managing Director of the Corporation asking employees to work in the field in order to raise revenues to pay off rent for the building occupied by the Sale Centres of the Corporation. The income from the sale of handloom goods, because of poor quality, fell drastically, leading to effacement of revenues. Several salesmen could not garner resources to pay off rent of the buildings, where Sale Centres of the Corporation were functioning.

5. The Managing Director placed the petitioner under suspension, as the petitioner says, on bogus, false and vague allegations that the petitioner could not make payment of rent for the Sale Centre premises and did not comply with the directions of the Head Office. A charge-sheet was issued to him on 06.02.2013 with a direction to submit a reply within 21 days. The petitioner put in his reply dated 12.08.2013, denying the charges. The Managing Director of the Corporation without considering the petitioner's reply in the proper perspective, concluded the proceedings initiated against the petitioner and revoked his order of suspension, reinstating him in service with a warning. This order was passed on 11.09.2013, which attached the petitioner with the office of the Corporation at the Lindsey Street, Kolkata. The petitioner says that

prior to the order dated 11.09.2013, he was posted at the Sale Centre, Jamshedpur in the State of Jharkhand and all his family were residing with him there. The petitioner's children were reading at Jamshedpur.

6. It is also averred that the petitioner is a permanent resident of Village and Post Pandeypur, P.S. Bairia, District Ballia, which is in the vicinity of Jamshedpur. Prior to his suspension from service, the petitioner's salary was Rs.5,612/-. However, during the period of suspension, he was not paid his subsistence allowance. The Managing Director of the Corporation did not pay the petitioner's salary for preceding 24 months, antedating his suspension on 25th January, 2012, due to which the petitioner and his family were on the verge of starvation. It was not possible for him to make his ends meet.

7. It is the petitioner's case that without paying him salary and subsistence allowance for a period, as long as two years or more, to ask him to go over and serve at the Corporation's office at Kolkata, was totally illegal and in violation of Article 21 of the Constitution. It is the petitioner's case that the order dated 11.09.2013 was passed without any opportunity of hearing or issuing him with any charge-sheet. The order was also castigated as bad in law because prior to the said order, for two years and more, he was neither paid his salary nor the subsistence allowance. The petitioner, in the circumstances, made a number of representations immediately after reinstatement in service and moved an application dated 28.10.2013 before the Managing Director requesting that out of the twenty-four months' unpaid salary, at least ten months' salary be paid, so that he may submit his joining report at the station of transfer, to wit, Kolkata. When the said application evinced no action, the petitioner made another application on 10th November, 2013 to the same effect, but the latter application also led to no result. This was followed by two other applications dated 25.11.2013 and 24.12.2013.

8. Aggrieved by the order punishing the petitioner dated 11.09.2013 and the Corporation's inaction, the petitioner filed Writ-A No.15589 of 2014, seeking the following material reliefs:

(a) issue a writ, order or direction in the nature of certiorari calling for the record of the case and quashing the impugned order dated 11.09.2013 passed by the respondent No.2.

(b) issue a writ, order of direction in the nature of mandamus commanding the respondent No.2 to make payment of entire arrears of salary to the petitioner along with 10% simple interest."

9. The petition was entertained and the learned Standing Counsel directed to seek instructions from the respondents by an order of this Court dated 12.03.2014. No sooner was the writ petition last mentioned filed by the petitioner and instructions called, the Managing Director of the Corporation, as a measure of reprisal, directed a notice to be served upon the petitioner, asking him to show cause within 15 days, why his services may not be terminated. When Writ-A No.15589 of 2014 next came up before this Court on 24.03.2014, an interim order was passed to the effect that the petitioner would join at the station of transfer within three weeks and further that in view of the undertaking given on behalf of the Managing Director, the arrears of salary due to the petitioner

would be paid within two weeks of his joining the station of transfer.

10. In compliance with the order dated 11.09.2013 passed by the Managing Director and the interim order dated 24.03.2014 passed by this Court, the petitioner went over to submit his joining report to the In-charge of the Corporation's office, Lindsey Street, Kolkata. Reaching there on 31.03.2014, the petitioner was surprised to find that the building, where the office of the Corporation earlier existed, there was a showroom of another establishment by the name 'M-Fie'. At the specified address, neither the showroom of the Corporation was in existence nor any employee of theirs present. There was not even a board installed at the gate of the showroom, showing it to be the Corporation's establishment.

11. It is asserted in Paragraph No.28 of the writ petition, amongst other things, that the building where earlier the showroom of the Corporation was running at Kolkata, was handed over by the officials of the Corporation to private persons in some kind of a Public Private Partnership. There is annexed on record copy of a communication dated 31.03.2014, sent by the petitioner through fax to the Managing Director of the Corporation, indicating that in the premises, where the showroom of the Corporation used to be located at the Lindsey Street, Kolkata, there was no showroom in existence. Instead, another showroom belonging to 'M-Fie' was running there. Accordingly, the petitioner said that he was informing the Managing Director of the said fact and returning from Kolkata.

12. The petitioner then made another application dated 31.03.2014 to the Managing Director of the Corporation for further directions, but nothing was done. The petitioner submitted still another application dated 07.04.2014, requesting the Managing Director to issue appropriate directions to the petitioner to join. The Managing Director instead of issuing any directions for the petitioner to join or pay his salary, removed him from service *vide* an order dated 12.05.2014.

13. This Court notices that in Paragraph No.32 of the writ petition, there is an averment to the effect that the Managing Director has incorrectly recorded in his order dated 12.05.2014 that the petitioner did not contact the In-charge Marketing, Kolkata, Mohd. Sayeed Ansari or any competent officer in the Head Office. It is said that the petitioner in his letters dated 31.03.2014 and 07.04.2014 categorically stated that no officer of the Corporation was in existence at the Lindsey Street, Kolkata. Under these circumstances, there was no question of contacting any official of the Corporation. Nevertheless, it is averred that the Managing Director in order to cover his own misdeeds, removed the petitioner from service. It is averred in Paragraph No.33 of the writ petition that the petitioner along with the letter dated 31.03.2014 sent photographs of the building, located at the Lindsey Street, Kolkata that used to house the Corporation's showroom. The photographs show that the site is now occupied by the showroom of an apparel store by the name 'Hyphon'.

14. It is averred in Paragraph No.35 of the writ petition that regarding the illegal possession and transfer to private parties of several showrooms of the Corporation, complaints were filed to the higher officials in the matter. The Managing Director by his

memo dated 23.07.2013 sought an explanation of Mr. R.N. Gupta, Senior Manager (Production). A copy of the said letter is annexed as Annexure No.16 to the writ petition. The Managing Director is also said to have directed the Assistant Manager (Marketing) to conduct an inquiry regarding showrooms of the Corporation being illegally occupied by private persons. The Assistant Manager (Marketing) by his report dated 26.08.2013 informed the status of showrooms of the Corporation saying there that certain officials of the Corporation in collusion with private persons have illegally handed over possession of the Corporation's showrooms to third parties. The Managing Director concurred with the report and directed initiation of legal proceedings. A copy of the report dated 26.08.2013 submitted by the Assistant Manager (Marketing), addressed to the Managing Director, is on record as Annexure No.17 to the writ petition.

15. It was in the background of these facts, according to the petitioner, that he could not join his station of posting at Kolkata, where there was no office in existence. Nevertheless, the petitioner was removed from service by the Managing Director, as already said, by the order dated 12.05.2014. The petitioner challenged this order, moving an amendment application in Writ-A No.15589 of 2014, which was allowed and the petitioner permitted to amend the writ petition. The Corporation was granted time to file a counter affidavit, but none was filed.

16. This Court by an order dated 11.04.2023 held that the order dated 12.05.2014, removing the petitioner from service, was one passed without serving any charge-sheet or holding an inquiry. It was, accordingly, set aside, leaving it open to the respondents to hold an inquiry afresh in accordance with law against the petitioner and pass appropriate orders. There is a remark in the order of this Court dated 11.04.2023 to the effect that in case an inquiry is held, the petitioner will fully cooperate with the same, without causing any unnecessary delay. The petitioner, together with an application dated 25.04.2023, served a certified copy of the order dated 11.04.2023 passed in the writ petition last mentioned in the office of the Managing Director of the Corporation, personally.

17. The copy of the application was marked by the Managing Director to the In-charge Manager Inquiry. It is the petitioner's case that nothing happened, in consequence. The petitioner then received a notice dated 19.05.2023 on 22.05.2023, requiring him to submit his reply by 26.05.2023 to the inquiry report submitted by the Inquiry Officer. It is the petitioner's case that he is residing at Jamshedpur, Jharkhand. But, in the notice dated 19.05.2023, three addresses of the petitioner are mentioned. The petitioner further on says that out of the three addresses mentioned, he lives at the second of these. It is also the petitioner's specific case that from the tenor of the notice dated 19.05.2023, it is evident that the Managing Director of the Corporation was predetermined to remove the petitioner from service, and, as such, without the provision of a reasonable opportunity, notice to show cause was issued.

18. According to the petitioner, he has furnished his reply dated 26.05.2023 to the show cause notice dated 19.05.2023 with a prayer that the inquiry report may be set aside and a copy of the charge-sheet

provided to him with a month's time to answer it. The petitioner has also averred in Paragraph No.42 that he said in his reply dated 26.05.2023 that he wants to personally examine Mohd. Sayeed Ansari, and, as such, opportunity of a personal hearing may be extended to him. The Managing Director by his memo dated 12.06.2023 rejected the petitioner's reply dated 26.05.2023, holding that the petitioner was not cooperating with the inquiry, despite the orders passed by this Court. It is on the foot of the aforesaid allegations that the Managing Director passed the order impugned dated 30.05.2023, as the petitioner says, in utter violation of principles of natural justice, removing the petitioner from service. The petitioner has pleaded in Paragraph No.44 of the writ petition that he was earlier removed from service without conducting an inquiry and the said order was quashed by this Court by our order dated 11.04.2023, passed in Writ-A No.15589 of 2014.

19. The petitioner received the notice dated 19.05.2023 on 22.05.2023, asking him to show cause, along with a copy of the inquiry report. The petitioner furnished his reply by means of his representation dated 26.05.2023, which was received in the office of the Managing Director on 03.06.2023. However, prior to receipt of the petitioner's reply, the Managing Director passed his order dated 30.05.2023, removing the petitioner from service. It is the petitioner's case that the entire proceedings have been carried out in undue haste, arbitrarily and unfairly, all in violation of principles of natural justice.

20. In Paragraph Nos.46 and 47 of the writ petition, it is averred:

"46. That, in the present case, as per the impugned order it appears that the inquiry has been initiated on 20.04.2023 but no Charge-Sheet was served upon the petitioner no opportunity to rebut the allegations made in the Charge-Sheet were provided to the petitioner and it is incorrectly stated in the impugned order that the petitioner did not receive the Charge-Sheet. It appears that the Charge-Sheet was sent at the wrong address of the petitioner, as the petitioner received the notice dated 19.05.2023 and the impugned order dated 30.05.2023 but why the petitioner could not receive the Charge-Sheet and alleged communication made by the respondent no.3 because the respondent no.2 was determined to remove the petitioner from service and that is why Charge-Sheet and other communication made by the respondent no.3 were on wrong address.

47. That, it is surprising that on the same address the petitioner received the notice dated 19.05.2023 and the impugned order dated 30.05.2023 passed by respondent No.2 but the copy of Charge-Sheet or any communication with the Inquiry Officer was never received by the petitioner. In fact, the petitioner inquired from the concerned post office that any postal letter was returned by the postman on the ground of non-availability of the petitioner the postman after inspecting the records stated that no postal letter in the name of the petitioner was ever returned by him."

21. It is the petitioner's further case in Paragraph No.52 of the writ petition that no charge-sheet was served upon him and no notice for a personal hearing was issued to the petitioner by the Inquiry Officer. No date, time and place was fixed by the

Inquiry Officer asking the petitioner to appear for personal hearing.

22. The petitioner also says that in consequence of the order dated 11.04.2023 passed by this Court, where the order of removal from service earlier passed dated 12.05.2014 was quashed, there was a direction in terms: 'Consequences to follow.' It was, therefore, imperative for the Managing Director of the Corporation to reinstate the petitioner in the first instance and pay all his arrears of salary. That, however, was not done. He was neither paid salary nor subsistence allowance for the period that he remained under suspension pending proceedings that led to the earlier order of removal. It is next pleaded on behalf of the petitioner that the only charge now levelled against the petitioner is that he did not join the place of posting. The petitioner says that despite the petitioner properly and satisfactorily explaining the reason for not so joining, the petitioner was punished with a major penalty again.

23. It is averred in Paragraph No.58 of the writ petition that if the petitioner did not participate in the inquiry, the Inquiry Officer was under an obligation to require the establishment to examine the record available before them, but they did not do so. Both the Inquiry Officer and the Disciplinary Authority have recorded perverse finding based on non-existing materials. In Paragraph Nos.61 and 62 of the writ petition, it is averred:

"61. That, from the own documents of the respondent corporation, it is clear that no showroom of U.P. State Handloom Corporation Ltd. is in existence at Lindsey Street Kolkata, even then the petitioner was attached with a non-existent showroom only to prepare a background to remove the petitioner from his service.

62. That, entire exercise of transfer and attachment of the petitioner without payment of arrears of salary suffers from vice of malafide and the impugned order is totally malafide, illegal, arbitrary and colourable exercise of power."

24. The petitioner has also averred in Paragraph No.68 of the writ petition that the entire inquiry was done ex parte and at no stage, the petitioner was invited to participate, as no charge-sheet was ever served upon the petitioner and no Inquiry Officer appointed. The punishment has been castigated as shockingly disproportionate. The impugned order is also alleged to be *mala fide.*

25. A counter affidavit on behalf of respondent No.3 and a personal affidavit on behalf of respondent No.3, that is to say, the Inquiry Officer, Suhaib Anwar Ansari, Manager Production of the Corporation, have been filed.

26. Heard Mr. Nikhil Kumar, learned Counsel for the petitioner, Mr. Baibhav Tripathi, learned Counsel appearing on behalf of respondent Nos.2 and 3 and Mr. Akhilesh Kumar Tripathi, learned Standing Counsel appearing for respondent No.1.

27. Upon hearing learned Counsel for the parties, this Court must say that there are many things about the validity of proceedings against the petitioner that could be gone into and decided. But, considering that there is a serious procedural lapse going to the root of the matter, this Court is not minded to examine the many other issues involved. It is noticed that the petitioner had earlier faced disciplinary proceedings, based on a

charge-sheet dated 06.02.2013, which culminated in an order of removal from service dated 12.05.2014, since quashed by this Court vide order dated 11.04.2023 passed in Writ-A No.15589 of 2014. Liberty was given to the respondents to proceed afresh against the petitioner, giving him due opportunity. The ground to quash the earlier order was non-holding of an inquiry into the charges. Liberty was, therefore, given to the respondents to proceed afresh in accordance with law. Of course, the petitioner was directed to cooperate with the inquiry. If one were to look at the charge-sheet dated 06.02.2013, it was one on a completely different set of charges than those that are the subject matter of the present proceedings. The charge-sheet dated 06.02.2013 issued by the Managing Director of the Corporation carried three charges, which read:

"आरोप सं. 1- यह कि मुख्यालय के पत्रांक संख्या 1082-84 दिनांक 26.05.2010, पत्रांक 2702-3 दिनांक 27.08.2010 एवं पत्र संख्या 4980-83/ नजारत दिनांक 18.01.2011 के माध्यम से बिक्री केन्द्र के अवशेष किराये के भुगतान हेतु आपको निर्देशित किया गया, किन्तु आप द्वारा मुख्यालय के आदेशों की अवहेलना करते हुए बिक्री केन्द्र का किराया मकान मालिक को भुगतान नही किया गया जिससे निगम पर वाद की स्थिति उत्पन्न हो गयी जिसके लिए आप दोषी है।

अस्तु निगम के आदेशों की अवहेलना करने, स्वैच्छाचारी ढंग से कार्य करने हेतु आरोपित।

आरोप सं0-2 - यह कि मुख्यालय के आदेशांक 2895-2901/ स्था0 -2 / 11-12 दिनांक 19.09.2011 द्वारा आपका स्थानान्तरण बिक्री केन्द्र जमशेदपर से बिक्री केन्द्र हल्दिया किया गया किन्तु आप द्वारा नये तैनाती स्थल पर योगदान नही किया गया जो कि आपकी अनुशासनहीनता का द्योतक है और जिसके आप दोषी है।

अस्तु निगम के आदेशों की अवेहलना करने मनमाने ढंग से कार्य करने एवं निगम सेवा नियमावली के विरुद्ध आचरण करने हेतु आरोपित।

आरोप सं0-3- यह कि मुख्यालय के पत्रांक 4071-79 दिनांक 25.01.2012 द्वारा सेवा से निलम्बित करते हुए बिक्री केन्द्र के एक अन्य कार्मिक श्री मनीलाल बिक्रेता को प्रभार हस्तानान्तरण हेतु आपको आदेशित किया गया था जिसके अनुक्रम में प्रभारी परिक्षेत्र कोलकाता द्वारा भी पत्रांक 404-06 दिनांक 13.02.2012 के माध्यम से प्रभार हस्तान्तरण हेतु निर्देशित किया गया किन्तु आप द्वारा जानबूझ कर प्रभार हस्तान्तरण न कर अवकाश पर चले गये जिसके लिए आप पूर्ण रूप से दोषी हैं।

अस्तु बिक्री केन्द्र का किराया भुगतान न करने, स्वेच्छाचारी ढंग से कार्य करने, अनावश्यक विधिक वाद उत्पन्न करने, निगम का पक्ष कमज़ोर करने तथा प्रभार स्थानान्तरण न करने हेतु आरोपित।"

28. The order of termination from service dated 12.05.2014 since quashed by this Court vide order dated 11.04.2023, passed in the writ petition above referred, was founded on the three charges, above indicated. This Court while quashing the order of termination on ground that the no inquiry was held, granted liberty to proceed afresh. Normally, this means that the respondents would have liberty to proceed on the basis of the same charge-sheet, that was subject matter of earlier proceedings. Here, something else happened. After the order of this Court dated 11.04.2023 was passed, a fresh charge-sheet dated 20.04.2023 was issued to the petitioner, a copy of which is annexed as part of Annexure No. CA-3 to the counter affidavit filed by respondent Nos.2 and 3. This charge-sheet carries two charges, that are entirely distinct and different from the charges carried in the charge-sheet dated 06.02.2013, on the basis of which the earlier order of removal from service dated 12.05.2014 was passed. The charge-sheet dated 20.04.2023, about which the respondents say now that they attempted to serve a copy by dispatching it to three different addresses of the petitioner available with them, relates to charges for things that happened in the year 2013.

29. The charge-sheet dated 06.02.2013, on which the earlier proceedings, of whatever kind, since quashed, were held related to the years 2010, 2011 and 2012. Thus, both the charge-sheets relate to acts of omission and commission attributed to the petitioner, more or less contemporaneous in time. Since by the order of this Court dated 11.04.2023 passed in Writ-A No.15589 of 2014, the respondents were given liberty to proceed afresh after quashing the order of removal from service, the logical consequence would be that fresh proceedings taken, would rest on the same charges as the one culminating in the earlier order of removal. Nevertheless, the respondents have proceeded on the basis of a fresh charge-sheet, carrying completely different charges, detailed in the charge-sheet dated 20.04.2023.

30. There is no prohibition in doing that, but perhaps it would not be a continuation of the earlier proceedings, founded on the original charge-sheet. This may be regarded as fresh proceedings with the earlier proceedings either given or kept back by the respondents in their pocket to be utilized at some subsequent point of time. If the respondents do not wish to proceed with the charges afresh carried in the charge-sheet dated 06.02.2013, there is nothing in the order dated 11.04.2023, that would govern the fresh inquiry that was undertaken. The reason is that it is on a completely different set of charges carried in a different charge-sheet, the respondents have now proceeded.

31. This Court thinks that if the respondents intended to proceed on the basis of a fresh charge-sheet and not the one they were given liberty to proceed with afresh, they either ought to have issued both charge-sheets to the petitioner afresh or put in him to that notice, or combined the charges into a single charge-sheet. It would indeed be an abuse of process of disciplinary proceedings, in circumstances such as these, and not as a universal rule to issue successive and different charge-sheets to the petitioner, forcing him to face multiple inquiries while all the charges could be determined at the same inquiry, whether carried in a single charge-sheet or two charge-sheets, dealt with together. Since, the respondents have not chosen to proceed afresh with the charge-sheet dated 06.02.2013, a liberty given to them by this Court by our order dated 11.04.2023 passed in Writ-A No.15589 of 2014, it must be held that the respondents have given up those charges and brought fresh ones carried in the charge-sheet dated 20.04.2023.

32. This case has its own distinct features making it one that may not fit the standard mould. The pleadings of parties and the evidence on record reflect that the Corporation is not in a very sound state of financial health. There is some case and evidence to show that there is difficulty in paying off rent for the Sale Centres housed in rented buildings. The attention of this Court in this connection has been drawn to a letter dated 23.07.2013, addressed by the Managing Director of the Corporation to its Senior Manager (Production). The letter shows that there was some kind of a scheme for sharing the premises of Sale Centres with other partners, taking a part of the premises to carry on business. This was perhaps to raise revenue for the rent payable to the landlords of the premises. This letter further shows that one of the Sale Centres at Kolkata was shared with a partner M/s. Priya Gopal Bishoji Marketing Pvt. Ltd., Kolkata. For the purpose, the

Senior Manager (Production) of the Corporation at Kanpur issued a letter dated 19.08.2010 to the Officer In-charge at Kolkata to transfer two counters on the backside of the Centre to the partner. It transpires that the partner in order to unauthorizedly occupy the premises of the Sale Centre got it renovated, without annexing any sketch or lay out plan. It is this kind of evidence which shows that the Corporation has been gasping for finances to run its Centres and pay off its employees. It is in the backdrop of this state of affairs that the charges against the petitioner have to be viewed.

33. There are some further facts, which are relevant. It has already been noticed that the petitioner has not been paid twenty-four months of his salary prior to his suspension dated 25.01.2012 and no subsistence allowance for the period of suspension. After this Court allowed the petitioner's earlier writ petition and quashed the order of termination from service, the petitioner was again not paid salary. The justification now offered not to pay salary appears to be that he did not join the Kolkata office, and it is for this reason that a different charge-sheet has been issued to him, accusing him of completely different charges than those on which he was earlier removed from service.

34. In these circumstances, if the petitioner has said that he was not served with the charge-sheet dated 20.04.2023, it is possible to infer that he was not. There is no postal remark to show that in fact he refused to accept any of the registered covers carrying the charge-sheet. The impugned order 30.05.2023, again removing the petitioner from service, was passed with unsavory haste, the charge-sheet being one dated 20.04.2023. The justification for this haste is that this Court had directed fresh inquiry to be held. There was no such direction, but only an option given to the respondents. There was no time fixed to conclude the inquiry, as may have impelled the respondents to hurriedly infer service upon the petitioner. In any case, the charge-sheet being one that was different from that, that was the subject matter of proceedings leading to the earlier order of removal dated 12.05.2014, directions of whatever kind carried in the orders of this Court dated 11.04.2023 did not apply to proceedings now initiated based on a different charge-sheet. This Court is not satisfied on the state of affairs that the petitioner was indeed served with the charge-sheet. The proceedings, therefore, are again held to have been done *ex parte.*

35. Assuming that the petitioner was served with the charge-sheet and he did not participate in the inquiry, it did not mean that the respondents could just hold the charges proved by looking into the charge-sheet and the papers filed with it. If an employee does not appear to answer the charges against him, it is imperative for the Inquiry Officer, holding a domestic inquiry, which may lead to the imposition of a major penalty, to convene a formal inquiry. At the said inquiry, the establishment have to prove the charges by leading their evidence, both documentary and oral. Witnesses have to be examined. The mere fact that the delinquent employee is ex parte would not absolve the establishment of their responsibility to prove the charges by leading evidence before the Inquiry Officer through a Presenting Officer. Rule 64 of the Service Rules applicable to the Corporation, quoted in Paragraph No.64 of the writ petition, specifically supports the said salutary procedure.

36. A reading of the inquiry report dated 19.05.2023 submitted in this case by Suhaib Anwar Ansari, respondent No.3, shows that he just quoted the charge and noted the fact that the petitioner though attempted to be served, intimating him of the date, did not file a reply. It is then recorded that this Court had ordered the petitioner to cooperate with the inquiry, which he was disobeying. The findings, that are then recorded, are based on idle record in the Inquiry Officer's hands, that is nothing more than the charge-sheet. The inquiry report does not show that any Presenting Officer led evidence on behalf of the establishment, both oral and documentary, to prove the charge. The report also shows that the first charge alone has been held proved in terms of the following findings:

"मा० उच्च न्यायालय के उक्त आदेश में श्री ओझा को तैनाती स्थल पर योगदान करने हेतु मा० उच्च न्यायालय द्वारा आदेशित किया गया है, जिसके क्रम में श्री ओझा ने अपने पत्र दिनांक 07.04.2014 द्वारा यह अवगत कराया है कि वह दिनांक 31.03.2014 को बिकी केन्द्र लिण्डसे स्ट्रीट कोलकाता गये थे लेकिन वहाँ न तो बिक्री केन्द्र है और न कोई स्टाफ है, मैं अपना योगदान कहाँ और किसको दूँ। श्री दिनेश कुमार ओझा द्वारा अपने नियंत्रक अधिकारी, श्री मो० सईद अंसारी, प्रभारी विपणन परिक्षेत्र, कोलकाता को भी कोई सूचना नहीं दी गई न ही नियंत्रक अधिकारी के माध्यम से कोई अवकाश आदि का आवेदन ही मुख्यालय अग्रसारित कराया गया। इससे स्पष्ट है कि श्री ओझा द्वारा अनुशासनहीनता तथा प्रबन्ध निदेशक के आदेशों की अवहेलना की गई।"

37. The crux of the findings is that the petitioner did not report at the Sales Centre located at Lindsey Street, Kolkata, and as he says not finding it there, he did not contact his Controlling Officer, Mohd. Sayeed Ansari, In-charge Distribution, Kolkata Region, giving him that information or submitting a leave application etc. through him. The charge of indiscipline and disobedience to the Managing Director's order has been held proved. Now, the petitioner has clearly alleged in Paragraph No.32 of the writ petition that to say that he did not contact the In-charge Marketing, Kolkata, Mr. Mohd. Sayeed Ansari, is incorrect. The petitioner in his letters dated 31.03.2014 and 07.04.2014 has said that at the Lindsey Street, Kolkata, the office of the Corporation was not in existence. There was, thus, no question of contacting any official of the Corporation.

38. It is not possible for this Court to go into the issue if in fact the Lindsey Street Sale Centre of the Corporation no longer exists or the petitioner did not find Mohd. Sayeed Ansari there to contact as he says, there being no office of the Corporation around. But, the Inquiry Officer, in order to probe the said issue and return a valid finding, had to examine not only idle papers, but witnesses as well. This is a case where in the counter affidavit filed on behalf of respondent Nos.2 and 3, it is averred in Paragraph Nos.61 and 62:

"61. That the contents of the paragraph no. 32 of the writ petition are wrong and denied, in reply it is stated that the petitioner has never contacted any officer of the Corporation he had only written letter to the officers. It is pertinent to mention here that Sri Mohd. Sayeed Ansari himself had written a letter to the Head Quarters on dated 05.11.2011 explaining about the irregularities found by him while he inspected the showroom. A copy of the letter dated 05.11.2011 is being annexed herewith and marked as **ANNEXURE NO. CA 09** to the affidavit.

62. That it is pertinent to mention here that the Inquiry Officer Sri Sohaib Anwar Ansari called through cell phone to

Sri Ansari on his number 7753977122 on dated 06.05.2023 for his statement he refused to participate in the inquiry having no option left the inquiry officer wrote a letter to Sri Mohd. Sayeed Ansari for his statement in the proceedings of the inquiry through letter dated 09.05.2023 which was return to the Corporation undelivered. A copy of the letter dated 09.05.2023 alongwith Postal Receipt and envelop are annexed herewith and marked as **ANNEURE NO. CA 10** to this affidavit."

39. The above averments show that Mohd. Sayeed Ansari, who would be the best person to show, if in fact the Lindsey Street Office was in existence when the petitioner went there to join, and, more particularly, if he was around, where he could be contacted by the petitioner, has refused to testify on behalf of the Corporation before the Inquiry Officer. The findings of the Inquiry Officer in the absence of Mohd. Sayeed Ansari's testimony, which he himself called, but was not successful in securing, would make the charge fail utterly. The finding returned by the Inquiry Officer, on the foot of which the impugned order has been passed, would be sans any material.

40. The principle that in an inquiry likely to lead to the imposition of a major penalty, it is imperative for a salutary principle that the establishment lead evidence, both documentary and oral, before the Inquiry Officer, first in order to prove the charge, is far too well settled to brook doubt. In this connection, reference may be made to the holding of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it is observed:

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

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

41. Guidance in this regard is to be found in the holding of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, where it has been held:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding.

The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

42. A Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB)**, dealing with the same issue, observed:

"14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative

Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral

evidence by producing the witnesses is necessary."

43. The same principle has been reiterated by the Division Bench of our Court in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, where it is observed:

"15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

44. In **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB),** again a Bench decision of this Court, it was held:

"14. Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others, AIR 2016 SC 2510 and Court has culled out certain principles as under:

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

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

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

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

15. The principal of law emanates from the above judgments is that initial burden is on the department to prove the charges. In case where inquiry is initiated with a view to inflict major penalty, department must prove charges by adducing evidence by holding oral inquiry.

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

45. As would be seen, the Inquiry Officer far from adherence to the salutary principle, where the Inquiry Officer, sitting like an impartial arbiter, would have before him evidence both documentary and oral led to prove the charges by the establishment has done nothing of the kind. The Inquiry Officer in this case, as already remarked, has gleaned through the charge-sheet of his own and the papers annexed to it, and returned findings that have been recorded sans any evidence whatsoever. To add to it, is the fact that the efforts made by the Inquiry Officer to secure the attendance of the witness Mohd. Sayeed Ansari, an official of their own establishment at Kolkata, have failed. This kind of a situation has perhaps arisen because of the chaos in the Corporation's organization and lack of control, arising from poor finances. In any case, this could not be a ground on which the illegality vitiating the impugned order can be ignored.

46. It goes without saying that this Court would not close the doors for holding fresh proceedings from the stage of the charge-sheet founded on the one dated 20.04.2023, and not the charge-sheet dated 06.02.2013, which the respondents have tacitly elected out of pursuing. It is also imperative in this case given the fact that the petitioner, who has not been paid his salary for two years antedating his suspension way back on 25.01.2012, is paid his arrears of salary for the period of twenty-four months, that it was in arrears prior to his suspension and subsistence allowance for the period of his suspension, before any fresh proceedings are taken. It is also imperative that the petitioner be reinstated in service forthwith and posted at a convenient station. In case fresh proceedings against the petitioner are elected to be taken by the respondents, he would be entitled to his current salary from the date of this judgment. However, in the event of fresh proceedings being taken, arrears of salary apart from that directed to be paid hereinabove, would abide by the result of fresh proceeding. In the event, no fresh proceedings are taken, the petitioner would be entitled to 50% of his entire salary due for the period of time he has remained out of employment, forthwith. These arrears would be payable in addition

to the arrears of salary for twenty-four months and the arrears of subsistence allowance directed to be paid hereinabove, unconditionally.

47. In the result, this writ petition succeeds and is **allowed in part.** The impugned order dated 30.05.2023 passed by the Managing Director of the Corporation is hereby **quashed.** A *mandamus* is issued in the terms indicated hereinabove.

48. There shall be no order as to costs.

(2024) 3 ILRA 547
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 11172 of 2023
Connected with
Writ A No. 11275 of 2023

Dinesh Kumar Singh ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
C.S.C.

A. Service Law – Post of Executive Officers – Appointment on deputation – Entitlement to continue beyond the term of appointment – How far deputation appointment confers right – Principle of legitimate expectation – Applicability – Held, the principle of legitimate expectation was held not to apply, because the right to receive foreign allowance was governed by policy decision of the President, in the absence of any right based on contract or otherwise. The legitimate expectation was held to have been displaced by policy decision – The writ petitioners in the leading writ petition, notwithstanding the fact that their's is a case of appointment on deputation, as distinguished from a transfer on deputation, have no right to continue beyond their term of appointment, which they have accepted with open eyes. (Para 25 and 39)

B. Service Law – 'Appointment on Deputation' and 'Transfer on Deputation' – Distinction – Held, an 'appointment on deputation' is essentially different from a 'transfer on deputation'. The former confers a right to hold the post as it comes after a selection in accordance with Rules. The right is limited to the tenure mentioned in the appointment and subject to its own nature about the period of time etc. However, it is certainly different from a 'transfer on deputation', where there is no right to the post or a lien held with the consequence that a deputationist may be called back by the lending employer, the parent department, or repatriated by the borrowing employer. (Para 31)

Writ petition dismissed. (E-1)

List of cases cited :-

1. Ashok Kumar Ratilal Patel Vs U.O.I.& anr.; (2012) 7 SCC 757

2. U.O.I.& anr.Vs S.N. Maity & anr.; (2015) 4 SCC 164

3. Kumari Shrilekha Vidyarthi & ors. Vs St. of U.P. & ors.; (1991) 1 SCC 212

4. National Buildings Construction Corporation Vs S. Raghunathan & ors.; (1998) 7 SCC 66

5. Kunal Nanda Vs U.O.I.& anr.; (2000) 5 SCC 362

6. Dr. O.P. Singh Vs St. of U.P. & ors.; 2002 (4) AWC 3067 (LB)

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

1. This judgment will decide the present writ petition and connected Writ-A

No.11275 of 2023. There are common questions of fact and law involved in both the writ petitions, and, therefore, the two have been heard together, with Writ-A No.11275 of 2023 being treated the leading case. The facts, therefore, will be noticed from the record of Writ-A No.11275 of 2023, where affidavits have been exchanged.

2. An advertisement was issued by the Director, Local Bodies, U.P., Lucknow dated 20th December, 2018, acting on a letter of the Government, bearing No. 3591/9-4-18-50ज/ 17टी0सी0 dated 05.11.2018, advertising posts of Assistant Commissioner/ Executive Engineer Class-1/ Deputy Secretary, Development Authority, Executive Engineer Class-2, Executive Engineer Class-3, besides Executive Officer, Nagar Panchayat, being 22, 13, 16 and 107 posts, in that order. The advertisement said that in public interest, the aforesaid posts would be filled up from amongst officials working under the Government on the basis of deputation against each of the four categories of posts. The pay-scale and the relative essential qualifications for a direct recruit were indicated. The advertisement indicated further eligibility qualifications that a government servant working in one or the other department, must possess in order to be appointed on deputation to one or the other of the posts advertised. It was also stipulated that the appointment would be valid till a regular arrangement was made or for a period of one year, whichever is earlier. The other matters mentioned in the advertisement may not be of much consequence.

3. The petitioners, who are fourteen in number in the leading writ petition, have come up with a case that each of them are holding permanent substantive posts under the Government in one department or the other, and that all of them are eligible. The petitioners, accordingly, applied in response to the advertisement for consideration of their candidature for the posts of Executive Officers, Nagar Panchayat on deputation. Each of the petitioners, being eligible, were called to interview and they faced the selection committee appointed for the purpose. Each of them were selected for appointment.

4. It is common ground that the petitioners selected for the positions of Executive Officer, Nagar Panchayat were granted appointment by means of appointment orders dated 31.01.2019, 26.02.2019 and 09.03.2019. The orders of appointment granted appointment on deputation for a period of one year till a regular arrangement was made. Pursuant to the orders of appointment, each of the petitioners joined immediately and have been working as Executive Officers, Nagar Panchayat at different places. The dates of joining of each of the petitioners are indicated in Paragraph No.17 of the writ petition, which all lie in the months of January to March, 2019. The petitioners say that subsequent to their joining on the post of Executive officer, Nagar Panchayat on deputation, they have been transferred from one place to another and served also at stations of transfer, different from the Local Body to which they were appointed or, so to speak, initially posted. The current places of posting of each of the fourteen petitioners are pleaded in Paragraph No.19 of the writ petition, but no gainful purpose would be served by enumerating all those details.

5. It is the petitioners' case that their work and conduct is satisfactory. There is

no cause for complaint to the Local Bodies concerned, wherever they have served. The case of the petitioners further is that there is large vacancy in the cadre of the Executive Officer, Nagar Panchayat in the State. It is averred in Paragraph No.21 that apart from the posts, against which officers appointed pursuant to the advertisement dated 20th December, 2018, are working on deputation, there is a vacancy of 200 posts of Executive Officers in different Nagar Panchayat of the State, which continue to be substantially vacant, and wherefor no regular selection has been held as yet. There is said to be an extreme shortage of regularly selected Executive Officers, Nagar Panchayat. Regular selection to the post of Executive Officers, Nagar Panchayat is made by the U.P. Subordinate Service Selection Commission (for short, 'the Commission'). No regularly selected candidate from the aforesaid Commission is available or appointed.

6. It is also the petitioners' case that though they were initially appointed for a period of one year, but the said period of time has been extended from time to time, in consequence of which, the petitioners have been in continuous engagement. The extension has been granted beyond the period of one year vide order dated 24th August, 2021 issued by the Additional Chief Secretary to the Government of U.P. in the Department of Local Bodies. Now, the State Government have issued a Government Order, directing the services of these Executive Officers appointed on deputation to be discontinued. The Government Order of 5th July, 2023 refers to an earlier Government Order dated 16.03.2019, which in turn purports to give effect a still older Government Order of 16th March, 1999. Acting in deference to the Government Order dated 05.07.2023, the Director, Local Bodies has issued a consequential order dated 07.07.2023. There is another order passed by the State Government on 9th July, 2023, directing that the charge of the vacant post of the Executive Officers, Nagar Panchayat, including those held by the petitioners on deputation, shall be given as additional charge to the Executive Officers of different Nagar Panchayat. The effect of the Government Order dated 05.07.2023 and that of the Director, Local Bodies dated 07.07.2023, is that the petitioners' appointment on deputation in the Nagar Panchayat would come to an end and the petitioners would go back to their respective parent Departments.

7. Aggrieved by the order dated 05.07.2023 passed by the Government and the order dated 07.07.2023 passed by the Director, Local Bodies, putting an end to the appointment on deputation for the petitioners on positions of the Executive Officers, Nagar Panchayat, this writ petition has been instituted under Article 226 of the Constitution.

8. A supplementary affidavit has been filed on behalf of the petitioners. A counter affidavit has been filed on behalf of the Uttar Pradesh Nagar Palika Adhishashi Adhikari Seva Sangh through its General Secretary, Kunwar Gaurav Singh. The affidavit has been filed by one Chaitanya Kumar Tiwari, the Executive Officer, Nagar Panchayat, Handia, District Prayagraj. This association has not been formally impleaded as a party-respondent to the petition, but heard nevertheless under Chapter XXII Rule 5-A of the Allahabad High Court Rules, 1952, as the decision in this petition is likely to affect the interest of other members of the association.

9. A counter affidavit has been filed on behalf of the State Government,

respondent No.1, which is a personal affidavit of the Principal Secretary, Urban Development, Government of U.P., Lucknow.

10. Heard Mr. Ashok Khare, learned Senior Advocate assisted by Mr. Siddharth Khare, learned Counsel for the petitioners and Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel appearing on behalf of the State. Mr. S.K. Singh, Advocate, appearing for the non-parties, has been heard under Chapter XXII Rule 5-A of Rules of the Court, 1952.

11. In the connected writ petition, Mr. Ashok Khare, learned Senior Advocate assisted by Mr. Siddharth Khare, learned Counsel has been heard on behalf of the petitioners and Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel for the State.

12. Mr. Ashok Khare, learned Senior Advocate has argued that the State Government and the Director, Local Bodies have, in passing the orders impugned dated 05.07.2023 and 07.07.2023, committed a manifest illegality, inasmuch as they have not borne in mind the seminal distinction between a 'transfer on deputation' and an 'appointment on deputation'. Whilst a transfer on deputation does not confer any right on the deputationist to continue on the post, an appointment on deputation does confer some rights. It is argued that a transfer on deputation is no recruitment to the post where the deputationist is working. But, an appointment on deputation, by contrast, is indeed a recruitment to the post. Therefore, according to Mr. Khare, an appointment on deputation cannot be disturbed at the sweet will of the employer. The rights of an appointee on deputation have to be judged in accordance with the terms of appointment and the ancillary rights arising therefrom, including equities. In support of this distinction, in the nature of appointment by way of deputation and a mere transfer on deputation, Mr. Khare has placed reliance upon the decision of the Supreme Court in **Ashok Kumar Ratilal Patel v. Union of India and another, (2012) 7 SCC 757 and Union of** India and another v. **S.N. Maity** and another, (2015) 4 SCC 164.

13. Elaborating his submissions, the learned Senior Advocate argues that the petitioners' appointments are tenure appointment, where each of them were entitled to continue until a regularly selected candidate. He has invited the Court's attention to the appointment orders dated 31.01.2019, 26.02.2019 and 09.03.2019, which say that the appointment would continue till permanent arrangement is made or for one year, whichever is earlier. It is urged that this nature of the tenure demonstrates the intention of the Appointing Authority, which is to the effect as indicated hereinabove. In support of this submission, the learned Senior Advocate has called attention to Paragaph Nos.4 and 15 of the report in **S.N. Maity** *(supra)*, which read:

"4. The High Court after posing the questions took note of the fact that the Union of India had issued an advertisement in Employment News dated 20-10-2001/26-10-2001 calling for applications from eligible candidates for appointment to the post of Cgpdtm and the Ministry had proposed to fill up the post by transfer on deputation, including short-term contract. The first respondent, being eligible, applied through his parent department i.e. Central Mining Research Institute, Dhanbad and his selection was made by the Union Public

Service Commission (for short "UPSC") which held interview on 4-6-2002 and finding him suitable, recommended his name for appointment. The competent authority approved the appointment of the first respondent, the petitioner before the High Court, for the post of Cgpdtm in the pay scale of Rs 18,400-500-22,400 on deputation basis for a period of five years or until further orders, whichever was earlier from the date of assumption of the charge of the post. The said order was communicated vide Letter No. 8/52/2001-PP&C (Vol. II) dated 23-6-2003 issued by the Deputy Secretary to the Government of India, Department of Industrial Policy and Promotion. Thereafter, a letter of appointment dated 11-8-2003 was issued to the first respondent in the name of the President, appointing him on deputation basis for a period of five years or until further orders, whichever was earlier.

15. The controversy that has emerged in the instant case is to be decided on the touchstone of the aforesaid principles of law. We have already opined that it is not a case of simple transfer. It is not a situation where one can say that it is a transfer on deputation as against an equivalent post from one cadre to another or one department to another. It is not a deputation from a government department to a government corporation or one Government to the other. There is no cavil over the fact that the post falls in a different category and the first respondent had gone through the whole gamut of selection. On a studied scrutiny, the notification of appointment makes it absolutely clear that it is a tenure posting and the fixed tenure is five years unless it is curtailed. But, a pregnant one, this curtailment cannot be done in an arbitrary or capricious manner. There has to have some rationale. Merely because the words "until further orders" are used, it would not confer allowance on the employer to act with caprice."

14. It is next submitted by the learned Senior Advocate appearing for the petitioner that there does not exist any reason to issue the order dated 05.07.2023 cancelling appointment of all the deputationists on the post of Executive Officers, Nagar Panchayat. This action is without reason and in violation of Article 14 of the Constitution. It is argued that the State Government could not have removed without cause all the Executive Officers appointed on deputation by one stroke of pen, without consideration of individual cases, the circumstances in each Nagar Panchayat and the individual performance. In support of this contention of his, Mr. Ashok Khare has placed reliance upon the decision of the Supreme Court in **Kumari Shrilekha Vidyarthi and others v. State of U.P. and others, (1991) 1 SCC 212.** In this regard, attention has been drawn by the learned Senior Advocate to Paragraph No.12 of the counter affidavit, which claims, according to him, unfettered rights in the State Government to remove all the deputation appointees at will and by fiat.

15. The next submission advanced by the learned Senior Advocate is that the impugned order dated 07.07.2023 issued by the Director, Local Bodies, Lucknow has not been passed upon an individual application of mind to each case and the exercise of his discretion, but is one made on the dictate and command of the State Government. It is urged that an order, where the Authority, possessed of jurisdiction to pass it, does not do so in the exercise of its own discretion, but on the dictate and command of a superior or another, renders the order non est. Reliance in this connection is placed by the learned

Senior Advocate on the decision of the Supreme Court in **Anirudhsinhji Karansinhji Jadeja and another v. State of Gujarat, (1995) 5 SCC 302.** Learned Senior Counsel has drawn the attention of this Court to **Anirudhsinhji Karansinhji Jadeja** *(supra)*, where it is observed:

"11. ..... This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20-A(1) was not exercised by the DSP at all.

12. Reference may be made in this connection to *Commr. of Police v. Gordhandas Bhanji* [1951 SCC 1088 : 1952 SCR 135 : AIR 1952 SC 16] , in which the action of Commissioner of Police in cancelling the permission granted to the respondent for construction of cinema in Greater Bombay at the behest of the State Government was not upheld, as the rules concerned had conferred this power on the Commissioner, because of which it was stated that the Commissioner was bound to bear his own independent and unfettered judgment and decide the matter for himself, instead of forwarding an order which another authority had purported to pass.

13. It has been stated by Wade and Forsyth in *Administrative Law*, 7th Edn. at pp. 358-59 under the heading "Surrender, Abdication, Dictation" and sub-heading "Power in the wrong hands" as below:

"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them….

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise…."

14. The present was thus a clear case of exercise of power on the basis of external dictation. That the dictation came on the prayer of the DSP will not make any difference to the principle. The DSP did not exercise the jurisdiction vested in him by the statute and did not grant approval to the recording of information under TADA in exercise of his discretion."

16. In the connected writ petition, Mr. Khare has submitted that an additional feature on facts that requires consideration is that the petitioner in that case was appointed on deputation pursuant to the order of appointment dated 12.07.2022 on 28.07.2022 and has been removed by the orders impugned, short of completing a year of service on the deputation appointment.

17. Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel and Mr. S.K. Singh, learned Counsel appearing on behalf of the parties heard under Chapter XXII Rule 5-A of the Rules of Court, are

unanimous in refuting the submissions of Mr. Khare. It is argued by them that deputation, whether by transfer or appointment, does not confer any right upon the deputationist. It does not give rise even to a legitimate expectation in favour of the appointee. It is next submitted that in any case, so far as the petitioners of Writ-A No.11275 of 2023 are concerned, they have completed three years of their tenure on deputation, which is the usual period for a deputation appointment in accordance with the Government Order dated 16.03.1999. It can be extended up to five years with the concurrence of the Finance Department, but that does not confer a right upon the deputation appointee to ask for a tenure for the maximum permissible of five years. Learned Counsel for the respondents have placed reliance upon the decision of the Supreme Court in **National Buildings Construction Corporation v. S. Raghunathan and others, (1998) 7 SCC 66 and Kunal Nanda v. Union of India and another, (2000) 5 SCC 362**. They have further placed reliance upon a Bench decision of this Court in **Dr. O.P. Singh v. State of U.P. and others, 2002 (4) AWC 3067 (LB)**, where **S. Raghunathan** *(supra)* and **Kunal Nanda** *(supra)* were followed to hold about the right of a deputationist to continue on deputation:

"24. Applying the above principles, we are of the view that it is the prerogative of an employer to call back its employee from deputation or to post any other officer of higher rank in his place. Petitioner can have legitimate expectation where he has permanent lien but he has no right or lien on the deputation post even if he has been sent to the borrowing department for a specific period. We are further of view that the period of deputation can be curtailed by the employer at any point of time on administrative ground or in public interest. The policy pointed out by the petitioner is equivalent to the policy of transfer which does provide for minimum stay of a Government, employee on a particular station for three years but the State Government or for that matter, the authority competent, may transfer the employee prior to three years period on administrative ground or in administrative exigencies. Policies are merely guidelines and have no statutory force of law."

18. We have considered the submissions advanced on behalf of both sides by learned Counsel for the parties.

19. The question that falls for determination in this case is: Whether the deputation appointment in the petitioners' favour confers some kind of a right upon them, which cannot be curtailed by the orders impugned, relieving them of their position as Executive Officers, Nagar Panchayat and asking them to join their substantive posts in the parent department?

20. All the law relating to deputation, which says that the deputationist has no right to the post, bears no lien on it and can be required by the lending or the borrowing employers to go back to his parent department, is said to have no application here, because there is a seminal distinction between a 'transfer on deputation' and an 'appointment on deputation'. There is no cavil about the legal position, where a deputationist is sent by the lending department or the employer to the borrowing employer, as a purely temporary arrangement, on deputation, which has been described as transfer on deputation.

21. In **Kunal Nanda**, the issue arose in the context of a claim for permanent

absorption in the Central Bureau of Investigation by an Assistant Sub-Inspector of Police belonging to the CRPF, who had been sent there on deputation, apparently a transfer to the borrowing employer, without any kind of selection in accordance with Rules by the borrowing department. The facts in **Kunal Nanda** may best be described in the words of their Lordships:

"2. ..... The appellant, a member of CRPF and serving as an Assistant Sub-Inspector in the said parent Department w.e.f. 1-1-1987, joined the service of CBI on deputation in the same capacity as ASI on 1-8-1991. He continued to work as ASI on the deputation terms for the initial period, which came to be extended from time to time with the mutual consent of the lending and borrowing Department. In the year 1994, no doubt, the borrowing Department expressed an inclination for permanent absorption in CBI and sought for the concurrence of CRPF to which, it appears, the lending Department also conveyed its clearance.

3. It may be noticed at this stage that while on such deputation in CBI, the appellant was also appointed as Sub-Inspector on 1-6-1995 and in his parent Department also he was promoted as such. There are no specific statutory rules as such governing the question of absorption of a deputationist. On the other hand, the said subject is governed by departmental instructions and circular orders as per which the qualification and experience of the officers to be selected should be comparable to those prescribed for direct recruits to such posts where direct recruitment has also been prescribed as one of the methods of the appointment in the Recruitment Rules. In consonance with such procedure, the appellant was asked to undertake a written test. He made a formal application disclosing his credentials and on the basis of his performance in the written test, the record relating to the last five years' ACRs (Part I — Personal Data) for the period 1993-94 to 1997-98 in which the appellant mentioned about his basic educational qualification as BA and his performance in the interview, the Screening Committee constituted for the purpose recommended the absorption of the appellant in CBI as Sub-Inspector. But when the appellant was asked to produce the documents in original in support of his educational qualifications etc., the appellant started explaining that for a person of his standing in service the basic educational qualification of passing the senior secondary examination is enough and passing of the degree examination, may not be insisted upon. This was not only contrary to his earlier representation that he was a graduate but the Screening Committee's recommendation for absorption in CBI was also on the basis that the appellant was a graduate, as disclosed by him. This seems to have been taken also as proof of his doubtful integrity in furnishing wrong information about his educational qualification to be graduation to somehow gain absorption. Since, in terms of the relevant Rules the total period of deputation in the rank of ASI/SI including that of deputation in any other cadre/cadre post cannot be for more than five years, the appellant was repatriated to his parent Department and also relieved with effect from 31-1-1999 (AN) with a direction to report for duty to the parent Department. ....."

22. The appellant in **Kunal Nanda**, having concurrently failed in his challenge to the order of repatriation before the Central Administrative Tribunal and the High Court, appealed by special leave to

their Lordships of the Supreme Court. Negativing the deputationist's claim, it was held:

"6. On the legal submissions also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation. The reference to the decision reported in *Rameshwar Prasad v. M.D., U.P. Rajkiya Nirman Nigam Ltd.* [(1999) 8 SCC 381 : 2000 SCC (L&S) 60] is inappropriate since the consideration therein was in the light of the statutory Rules for absorption and the scope of those Rules. The claim that he need not be a graduate for absorption and being a service candidate, on completing service of 10 years he is exempt from the requirement of possessing a degree needs mention, only to be rejected. The stand of the respondent Department that the absorption of a deputationist being one against the direct quota, the possession of basic educational qualification prescribed for direct recruitment i.e. a degree is a must and essential and that there could be no comparison of the claim of such a person with one to be dealt with on promotion of a candidate who is already in service in that Department is well merited and deserves to be sustained and we see no infirmity whatsoever in the said claim."

23. No doubt, the decision in **Kunal Nanda** is about the right of a deputationist to be absorbed in the service of the borrowing department and the essence of that decision turns on the principle that a deputationist does not have a right to absorption in the borrowing department's service, unless his right is founded on a 'statutory Rule, Regulation or Order having the force of law', to borrow the words of their Lordships. But, this principle is about the right to seek absorption in the borrowing department's service, which is not involved here at all. Behind the holding in **Kunal Nanda** is also the underlying principle spoken of by their Lordships in clear words, that there is no right of the deputationist to continue in the service of the borrowing employer and he can be repatriated to his parent department at the instance of either of them. This principle, in turn, is apparently founded on the premise that a deputation arising in whatever manner and of whatever nature, to wit, a 'transfer on deputation' or an 'appointment on deputation', is after all not the conferment of a substantive right to hold a post or a lien as it is called.

24. **S. Raghunathan** was a case where the deputationists were Executive Engineers (Civil), employed with the Central Public Works Department, whose services had been placed at the disposal of the National Buildings Construction Corporation, New Delhi (for short, 'the NBCC') for appointment as Resident Engineer (Civil) on projects of the NBCC in Iraq for a period of two years initially, in public interest, as per terms and conditions of appointment shown in the office order appointing them issued by the NBCC. It was a case, no doubt, of a 'transfer on deputation', but never involved the rights of the deputationists to continue in service of

the borrowing employer or a question of lien. The question involved was about the entitlement of the deputationists to a component of their pay, called 'foreign allowance', which, by the terms of their appointment, they were entitled to receive at the rate of 125% of their Basic Pay. The basic pay had been revised in terms of the Fourth Pay Commission, which the deputationists were held entitled to. However, the foreign allowance was paid at the rate of 125% (pre-revised) and not on the revised basic pay as per recommendations of the Fourth Pay Commission. The deputationists had claimed a revision of the foreign allowance in the revised basic pay as per the Fourth Pay Commission and invoked the principle of legitimate expectation to support their claim.

25. This claim of the deputationists, founded as it was on the doctrine of legitimate expectation, was repelled relying on Fundamental Rule 51, by holding foreign allowance not a component of the salary, but something akin to deputation (duty allowance), which was in the nature of a residuary perquisite. Sub-Rule (2) of Rule 51 of the Fundamental Rules was held to invest the Government with a discretion to pay the government servant on deputation in a foreign country such compensatory allowance as thought fit by the President. The payment of foreign allowance as well as its quantum was found to be left to the absolute discretion of the President, as it was not one of the conditions of agreement of deputation. The principle of legitimate expectation was held not to apply, because the right to receive foreign allowance was governed by policy decision of the President, in the absence of any right based on contract or otherwise. The legitimate expectation was held to have been displaced by policy decision.

26. The policy decision was noted to be based on an objective assessment of the prevailing circumstances, including the financial stringency forthcoming in Iraq. Also, the right based on a legitimate expectation was rejected in **S. Raghunathan** by their Lordships, because there were no pleadings in the writ petition to support that right. The policy decision was held not to suffer from any kind of arbitrariness. The decision in **S. Raghunathan**, though rendered in the context of a claim by a deputationist, but does not lay down any principle governing the right of a deputationist, whether transferred on deputation or appointed on deputation, to hold the post for a particular period of time. The principle of legitimate expectation has, no doubt, been expounded copiously by their Lordships, but again, in the context of the deputationists' right to receive the foreign allowance at the specified rate of their revised salary. It is not in the context of their right to hold the post on deputation. This decision, therefore, may not have much bearing on the point, except about the principle of legitimate expectation generally expounded there.

27. The Bench decision of this Court in **Dr. O.P. Singh** *(supra)* says it to be a case where members of the Agricultural Services, as it is described in the report, including the petitioner, were sent on deputation to different departments. The petitioner was sent on deputation as the Chief General Manager (Marketing) to the U.P. State Agro Industrial Corporation Limited. The facts show that the arrangement was purely interim or temporary. The petitioner was sent on deputation as aforesaid by an order dated 22nd June, 2001 and he took charge on the 26th June, 2001. By an order of the 29th June, 2002, the State Government posted

another officer as the Chief General Manager (Marketing), U.P. State Agro Industrial Corporation Ltd., apparently ousting the petitioner in that case. In **Dr. O.P. Singh**, the ousted deputationist challenged his repatriation on ground that though initially the deputation was temporary and no terms and conditions were framed, but on 25th May, 2002, the terms and conditions of his deputation with the Corporation had come to be settled. One of the conditions framed was that the petitioner, who was described as a person engaged in something called 'outer services' and working on deputation on the position of the Chief General Manager (Marketing), would have a term of three years.

28. By the order of 29th June, 2002, the deputationist being repatriated to his parent department and another deputationist being brought in to substitute him, it was argued that without amending, altering or cancelling the order dated 25th May, 2002, carrying the terms and conditions of the petitioner's deputation, the order dated 29th June, 2002 was illegal and arbitrary. It was also urged that there was nothing against the petitioner in that case, who had been successfully working on his deputation. It was in the context of the aforesaid facts that their Lordships of the Division Bench, after noticing the decisions of the Supreme Court in **S. Raghunathan** as well as **Kunal Nanda**, observed:

"19. It is important to mention at this place that the learned standing counsel appearing for the State Government produced before us an order, a perusal whereof Indicates that State Government on 23rd January, 2002 took a policy decision of filling the posts in different corporations including the post of Chief General Manager (Marketing) in U. P. State Agro Industrial Corporation by an officer of the rank of Additional Director Agriculture, as such, the contention of the learned counsel for the petitioner that without upgrading the post, an officer of the rank of Additional Director Agriculture has been posted instead of posting Deputy Director Agriculture as Chief General Manager (Marketing) is not correct and has no force.

24. Applying the above principles, we are of the view that it is the prerogative of an employer to call back its employee from deputation or to post any other officer of higher rank in his place. Petitioner can have legitimate expectation where he has permanent lien but he has no right or lien on the deputation post even if he has been sent to the borrowing department for a specific period. We are further of view that the period of deputation can be curtailed by the employer at any point of time on administrative ground or in public interest. The policy pointed out by the petitioner is equivalent to the policy of transfer which does provide for minimum stay of a Government, employee on a particular station for three years but the State Government or for that matter, the authority competent, may transfer the employee prior to three years period on administrative ground or in administrative exigencies. Policies are merely guidelines and have no statutory force of law."

29. Mr. Khare, however, seeks to distinguish these decisions by submitting that a case of 'appointment on deputation' is materially different from a 'transfer on deputation', which we have already noted to this end. The facts in **S.N. Maity** leading to the appeal by special leave may best be recounted in the words of their Lordships:

"2. Shorn of the unnecessary details, the facts which are requisite to be

stated are that the first respondent was working as a Scientist E-II in Central Mining Research Institute (Council of Scientific and Industrial Research). On 29-7-2003, he was appointed on deputation to the post of Controller General of Patents, Designs and Trade Marks (for short "Cgpdtm"). After serving there for one year, by Order F No. 8/52/2001-PP&C dated 31-8-2004, he was repatriated to his parent department. The said order was challenged before the Tribunal contending, inter alia, that he could not have been prematurely repatriated to his parent department and there had been a violation of the principle of audi alteram partem. The said stand of the first respondent was contested by the authorities of the Union of India proponing, inter alia, that he had no right to continue in the post as he was on deputation. Be it stated, some reliefs were claimed with regard to the TA bills and salary for certain period. The Tribunal accepted the stance put forth by the Union of India and dismissed the original application. However, as far as payment regarding TA and salary for certain period is concerned, the Tribunal directed that the same should be decided by the respondents after due verification in accordance with law.

3. Being dissatisfied with the aforesaid decision of the Tribunal, the first respondent invoked the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India. The High Court posed two questions, namely, whether Order F No. 8/52/2001-PP&C dated 31-8-2004 issued by Under-Secretary to the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion repatriating the petitioner to his parent department was illegal?; and whether the petitioner had the right to continue as the Controller General of Patents, Designs and Trade Marks?

4. The High Court after posing the questions took note of the fact that the Union of India had issued an advertisement in Employment News dated 20-10-2001/26-10-2001 calling for applications from eligible candidates for appointment to the post of Cgpdtm and the Ministry had proposed to fill up the post by transfer on deputation, including short-term contract. The first respondent, being eligible, applied through his parent department i.e. Central Mining Research Institute, Dhanbad and his selection was made by the Union Public Service Commission (for short "UPSC") which held interview on 4-6-2002 and finding him suitable, recommended his name for appointment. The competent authority approved the appointment of the first respondent, the petitioner before the High Court, for the post of Cgpdtm in the pay scale of Rs 18,400-500-22,400 on deputation basis for a period of five years or until further orders, whichever was earlier from the date of assumption of the charge of the post. The said order was communicated vide Letter No. 8/52/2001-PP&C (Vol. II) dated 23-6-2003 issued by the Deputy Secretary to the Government of India, Department of Industrial Policy and Promotion. Thereafter, a letter of appointment dated 11-8-2003 was issued to the first respondent in the name of the President, appointing him on deputation basis for a period of five years or until further orders, whichever was earlier.

5. In pursuance of the aforesaid order of appointment, the first respondent joined the said post and continued to function, but after eleven months, the Under-Secretary to the Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, issued Order F No. 8/52/2001-

PP&C dated 31-8-2004 repatriating him to his parent department. The High Court, taking note of the factual backdrop, and the nature of the appointment of the first respondent, came to hold that his appointment was not a case of simpliciter deputation; that the employer did not have the prerogative to get him repatriated to his parent department as the controversy fundamentally related to appointment and the source of appointment i.e. deputation on transfer; that the principles inhered under Articles 14 and 16 were violated, for the authorities did not disclose the ground for which such appointment had been disturbed by repatriating him to the parent department; that in the absence of any reasonable or valid ground, the order was bound to be treated as arbitrary thereby inviting the frown of Article 14 of the Constitution of India; and that the Under-Secretary to the Government of India could not have passed the order of repatriation as the order of appointment was issued by the President of India. Being of this view, the High Court set aside the impugned order of repatriation and directed the writ petitioner to be reinstated in the post of Cgpdtm on similar terms and conditions with all consequential benefits."

30. We have already noticed the holding in this context in Paragraph No.15 of the report in **S.N. Maity**. The Court made a distinction between a 'transfer on deputation' on the one hand and an 'appointment on deputation' on the other. The hallmark of an appointment on deputation appears to be that it comes to the deputationist after going through a selection process for the deputation post, and if that is the nature of deputation, it is an appointment. It has also been laid down that if the appointment on deputation is made for a fixed tenure, a curtailment of it cannot be done in an arbitrary exercise of power. The curtailment must be informed by some rationale. The term in **S.N. Maity** was five years or until further orders. It was held that the words 'until orders' did not empower the employer to prematurely curtail the deputationist's term by a capricious act. Their Lordships then went on to look into the order of repatriation, which did not say for a reason, by as much as a word, why the deputationist was repatriated. Nevertheless, the deputationist's tenure in that case, which was for five years or until further orders, was prematurely curtailed at the end of eleven months. The High Court quashed the order and their Lordships approved of it in principle, upholding the distinction between a 'transfer on deputation' and an 'appointment on deputation'.

31. It is quite another matter that in **S.N. Maity** by time the appeal came up, the deputationist had already been repatriated and a long period of time had elapsed. Bearing that fact in mind and some principles noticed in that regard, the direction to reinstate was substituted by a direction to pay the entire salary to Maity, to which he was entitled serving on the deputation post for the entire period of five years minus the period that he had worked and drawn salary. That feature has no bearing on the principle here. It, therefore, has to be accepted for a principle that an appointment on deputation is essentially different from a transfer on deputation. The former confers a right to hold the post as it comes after a selection in accordance with Rules. The right is limited to the tenure mentioned in the appointment and subject to its own nature about the period of time etc. However, it is certainly different from a 'transfer on deputation', where there is no right to the post or a lien held with the

consequence that a deputationist may be called back by the lending employer, the parent department, or repatriated by the borrowing employer. There is no concept of that kind in the context of an appointment on deputation. There is a right, which the employee may enforce, if infringed. The same distinction has been laid down by the Supreme Court between an 'appointment on deputation' on one hand and a 'transfer on deputation' on the other in **Ashok Kumar Ratilal Patel** *(supra)*.

32. Now, it is to be seen if the right that the petitioners in this case have acquired has indeed been infringed. There is hardly an issue on facts that each of the petitioners here were selected in accordance with rules for the post of an Executive Officer, Nagar Panchayat after the issue of an advertisement. They applied for the post, because they were eligible by virtue of being government servants, possessed of qualifications mentioned in the advertisement. They faced the selection committee for the purpose and were selected. Subsequently, the petitioners in the leading writ petition were appointed through appointment-cum-posting orders dated 31.01.2019, 26.02.2019 and 09.03.2019. The terms of appointment are carried in the orders dated 31.01.2019 and 26.02.2019. The relevant parts of these orders read:

"The order dated 31st January, 2019

उत्तर प्रदेश पालिका (केन्द्रीयित) सेवा (छब्बीसवां) संशोधन नियमावली-2016 के नियम-6 (स्तम्भ-2) में उल्लिखित व्यवस्था एवं शासन के पत्र संख्या - 781एम/ नौ-4-17-50ज/ 2017 टी.सी. दिनांक 28.12.2017 द्वारा दिये गये निर्देश के क्रम में न0पा0प0 में रिक्त अधिशासी अधिकारी (नगर पंचायत) के पद पर राज्य सरकार के अधीन कार्य करने वाले समान वेतनमान/ अधिक वेतनमान तथा समान अर्हता के निम्नलिखित अधिकारियों को उनके सम्मुख अंकित नगर पंचायतों में अधिशासी अधिकारी (नगर पंचायत) के पद पर पूर्णकालिक व्यवस्था होने या एक वर्ष के लिए (जो पहले हो), शासन के पत्र संख्या- 163/ 9-1-19-284सा/ 18 दिनांक: 25 जनवरी, 2019 द्वारा दिये गये निर्देशों के क्रम में एतद्द्वारा प्रतिनियुक्ति पर उनके सम्मुख निकाय में तैनात किया जाता हैः-

The order dated 26th February, 2019

उ0प्र0 पालिका (केन्द्रीयित) सेवा (छब्बीसवां) संशोधन नियमावली-2016 के नियम-6 (स्तम्भ -2) में उल्लिखित व्यवस्था एवं शासन के पत्र संख्या- 3951/ नौ-4-18-50ज/ 2017 टी0सी0 दिनांक 05.11.2018 द्वारा दिये गये निर्देश के क्रम में नगर पालिका परिषद् श्रेणी- 1, 2, 3 व नगर पंचायत में रिक्त अधिशासी अधिकारी के पद पर राज्य सरकार के अधीन कार्य करने समान वेतनमान/ अधिक वेतनमान तथा समान अर्हता के निम्नलिखित अधिकारियों/ कर्मचारियों को उनके सम्मुख अंकित नगर पालिका परिषदों / नगर पंचायतों में अधिशासी अधिकारी के पद पर पूर्णकालिक व्यवस्था होने तक शासन के पत्र संख्या - 629/ नौ-4-19-50ज/ 2017 टी0सी0 दिनांक: 22.02.2019 द्वारा दिये गये निर्देशों के क्रम में एतद्द्वारा प्रतिनियुक्ति पर अस्थायी रूप से उनके सम्मुख निकाय में तैनात किया जाता है-"

(emphasis by Court)

33. A perusal of the terms of appointment as carried in the orders dated 31.01.2019 and 26.02.2019 would show that the appointments to the post of Executive Officers in various Nagar Palika Parishad and the Nagar Panchayat, in this case Nagar Panchayat alone, were made as protem appointments on deputation till such time that regular arrangement, which is to be understood as regular appointments, were made to the vacant posts. A perusal of the advertisement would show vide Note-2 that the appointment on deputation would be made for a period of one year or until regular arrangement was made, whichever be earlier.

34. The petitioners' case is that though the appointment was one made

initially for a period of one year, the period of appointment has been extended and remained a constant engagement. Reference in this connection has been made to a Government Order dated 24th August, 2021, to which allusion has already been made, which extends the period for the petitioners on deputation by one year or until regularly selected candidates are posted. The petitioners say that there is a very large number of vacancies in the cadre of Executive Officers, Nagar Panchayat and no substantive appointments have been made. Instead, the State Government have issued the impugned Government Order dated 05.07.2023, directing cancellation of these deputation appointments relying on older Government Orders of 16th March, 1999 and 16th March, 2019, which limit deputation to a period of three years and in special circumstances, make it five years. The submission is that the Government Order dated 16th March, 1999, which is the raison d'être for the Government to pass the impugned order dated 05.07.2023, cancelling the deputation appointments, is concerned with transfers on deputation and not appointments on deputation done in accordance with Rules after following the procedure prescribed. It is, therefore, submitted that the Government Order dated 05.07.2023 proceeds on manifestly illegal ground and a basis for the decision, that is not really attracted here. The basis for the decision carried in the impugned Government Order dated 05.07.2023 is, therefore, extraneous and irrelevant.

35. The other submission is that the impugned order dated 07.07.2023 passed by the Director of Local Bodies, already noticed, is that it is illegal, because he is the competent Authority to take a decision in the matter, but has chosen to act on the dictate and command of the Government. The last limb of the submission, again already noticed, is that the Government has taken a decision to remove all the Executive Officers appointed on deputation in accordance with Rules by one stroke of pen and have fallen foul of the principle in **Shrilekha Vidyarthi** *(supra)*, which eschews such a course of action holding it an arbitrary exercise of power.

36. A perusal of the counter affidavit filed on behalf of the State shows that the stand of the State, on the other hand, is that at the time the petitioners were selected, pursuant to the advertisement dated 20.12.2018, to fill up the posts of Executive Officers of various categories as an arrangement to manage the shortage of hands, a letter of requisition dated 05.11.2018 was issued to the Commission to select candidates for posts of these Executive Officers. The Commission have recommended 107 names by a letter dated 16.01.2023. It is the respondents' case that of these 107 recommendees, all 107 have been appointed. Out of those appointed, 85 have joined services as Executive Officers, Nagar Panchayat.

37. There is another requisition letter dated 01.01.2020 to the Commission, requiring them to select for another 97 posts and still another dated 24.07.2021 for the filling up 27 posts. A total of 107 posts of Executive Officers, Nagar Panchayat are said to be in the process of selection and appointment. It is the Government's stand that bearing in mind the appointments already made and those to be shortly made, the appointments on deputation have been brought to an end and the officers repatriated, because their appointments were effective until time that regular appointments were made or the period specified.

38. Considering the matter on all possible vantage, the respondents are not right in saying that the principle of the normal deputation period for three years, as laid down in the Government Order dated 16.03.1999 being over, the petitioners would, in any case, have to be repatriated. They are also not right in saying that permitting a deputationist to continue up to five years, requires the approval of the Finance Department. These principles regarding the upper limit of the tenure of three years and the maximum of five years with the Finance Department's approval, appear to govern cases of 'transfer on deputation'; not 'appointments on deputation' made in accordance with Rules. Nevertheless, the advertisement relating to the post of Executive Officers, against which the petitioners applied, selected and appointed, shows that it is unequivocal about the terms and the tenure. It is a protem arrangement till regular selections and appointments are made. The term is one year or until a regular appointment is made, whichever is earlier.

39. The fact that it has been extended does not confer any kind of a right on the appointee on deputation to function beyond the term or the contingency of a regular arrangement being made. In this case, both contingencies have fallen. In the case of all the writ petitioners in the leading writ petition, they have served for more than a year on extended terms and the extended terms too have ended with efflux of time. Also, regular arrangements have been made with the selection of Executive Officers, Nagar Panchayat by the Commission. Hundred and seven Executive Officers have already been appointed, out of whom, 85 have joined. The appointments of others are said to be underway. In these circumstances, the writ petitioners in the leading writ petition, notwithstanding the fact that their's is a case of appointment on deputation, as distinguished from a transfer on deputation, have no right to continue beyond their term of appointment, which they have accepted with open eyes. They have, in any case, no right to continue in either contingency, both of which have fallen bringing to end their respective appointments.

40. So far as the writ petitioner of Writ-A No.11172 of 2023 is concerned, it was particularly emphasized by the learned Senior Counsel that the petitioner has not completed one year in office as an Executive Officer, since he joined much later after he had to enforce his rights through a writ petition before this Court and also contempt action. The petitioner in the connected writ petition aforesaid actually joined on 12.07.2022 and his services on deputation came to an end on 05.07.2023 in terms of the State Government's order to the Director, Local Bodies.

41. It cannot be lost sight of that the term of the appointment in this case also was one year or till regular arrangement was made. This fact is evident from a perusal of a memo dated 8th March, 2018 issued by the Director, Local Bodies to advertise the posts for deputation appointment. Thus, regular appointments, that have now been undertaken, would make the second contingency fall, curtailing the deputation appointment in its term. Also, in any event, now the term of one year is over, and, for the said reason, no relief on account of the curtailment of the petitioner's term, a few days before one year, can be a realistic basis to grant the relief of reinstatement. In the above conspectus of facts, the principle about the

distinction between an 'appointment on deputation' and a 'transfer on deputation' laid down in **Ashok Kumar Ratilal Patel and S.N. Maity** would not come to the petitioners' aid.

42. There is still the other submission by the learned Senior Counsel to be answered, common in both matters, and that is, that the order dated 07.07.2023, determining the petitioners' deputation appointment has been passed on the dictate and command of the State Government. The repatriation, no doubt, has been directed on the command of the State Government carried in the Government Order dated 05.07.2023. There is no serious dispute raised that the competent Authority to order repatriation is the Director of Local Bodies and not the Government. The principle, therefore, in **Anirudhsinhji Karansinhji Jadeja** certainly applies and would have vitiated the order passed by the Director, but for the fact, that on an overall conspectus of the petitioners' rights and the manner and for the reasons that these have been determined, repatriating them, quashing the orders of the Director, would not make any material difference to the petitioners' right to relief. The reason again is that the term of appointment for each of the petitioners, that is limited to one year or until a regularly selected candidate joins, is a self-determining term with the passage of time. There is no quarrel about the fact that the petitioners' term of one year, last extended in each case, has expired. Also, regular arrangements have either been already made or in the process. Since this is the undisputed position, quashing the order dated 07.07.2023 passed by the Director, Local Bodies, would not entitle the petitioners to be reinstated in service or to any other relief, whatsoever. It is for the said reasons that there is no force in the contention of the learned Senior Counsel for the petitioners on this premise.

43. This takes us to the last limb of the submission advanced by Mr. Khare that the impugned order passed by the State Government is a 'one stroke action' of terminating all appointments on deputation for these Executive Officers on deputation, bringing in arbitrariness. The submission, as already noticed, is founded on the principle that individual cases ought to have been appraised and not a general direction, setting at naught all appointments on deputation made. In this connection, Mr. Khare has drawn the Court's attention to the following observations of the Supreme Court in **Shrilekha Vidyarthi:**

"33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in Dwarkadas Marfatia case [(1989) 3 SCC 293] to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with

another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, L.J., in Council of Civil Service Unions v. Minister for the Civil Service [(1984) 3 All ER 935] the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

34. In our opinion, the wide sweep of Article 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government Counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointees, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Article 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U.P., for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case.

35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that ‘be you ever so high, the laws are above you’. This is what men in power must remember, always.

43. Non-application of the mind to individual cases before issuing a general circular terminating all such appointments throughout the State of U.P. is itself eloquent of the arbitrariness writ large on the face of the circular. It is obvious that issuance of the impugned circular was not governed by any rule but by the whim or fancy of someone totally unaware of the

requirements of rule of law, neatly spelled out in the case of John Wilkes [(1984) 3 All ER 935] more than two centuries back and quoted with approval by this Court almost a quarter century earlier in Jaisinghani case [(1967) 2 SCR 703, 718-19 : AIR 1967 SC 1427 : (1967) 65 ITR 34] . We have considered it necessary to re-emphasize this aspect and reiterate what has been said so often by this Court only because we find that some persons entrusted with the task of governance appear to be unaware of the fact that the exercise of discretion they have must be governed by rule, not by humour, whim, caprice or fancy or personal predilections. It also disturbs us to find that the Legal Remembrancer's Department of the State of U.P. which has the duty to correctly advise the State Government in such matters, overlooked the obvious and failed to discharge its bounden duty of correctly advising the State Government in matters of law. We would like to believe that the impugned circular was issued for want of proper legal advice in this behalf instead of any ulterior motive suggested by the petitioners/appellants."

44. **Shrilekha Vidyarthi** was a case that had emerged out of very different and unusual facts. By a circular letter dated 06.02.1990 issued by the Legal Remembrancer to the Government of Uttar Pradesh, the Government terminated, by a general order, the appointments of all Government Counsel (Civil/ Criminal and Revenue) in all the districts of the State w.e.f. 28th February, 1990 and directed the preparation of fresh panels of names for appointment in place of the incumbents. This was done irrespective of the fact if the incumbents had their term left to serve. There was no individual evaluation of cases. Apparently, the decision impugned in **Shrilekha Vidyarthi** came in the exercise of sudden and arbitrary exercise of power to determine the tenure of all State Counsel working in the districts by one stroke of pen, as it was described. The observations, to which Mr. Khare has drawn our attention, came in the background of that extraordinary situation of abuse of authority. Here, that is not remotely the case, as noticed much in detail. The appointment of the petitioners was, to begin with, an arrangement for such time that regular appointments were made to the posts of Executive Officers of the Nagar Panchayat. The appointments were limited to a year or until regular arrangements were made. If the Government have taken a decision upon regular selections being made not to continue with the appointments on deputation, which, in any case, would require an extension after every year, the same cannot be said to be in the teeth of the principle eschewing arbitrariness, as laid down in **Shrilekha Vidyarthi.** The submission, therefore, on that score is rejected.

45. In the result, this Court does not find any force in the writ petitions, both of which fail and are **dismissed.**

46. There shall be no order as to costs.

(2024) 3 ILRA 565
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 11461 of 2019

C/M, Handia Post Graduate College, Prayagraj ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Sri Satyendra Nath Srivastava, Sri K.R. Singh

Counsel for the Respondents:
C.S.C.

U.P. Higher Education – Appointment to Class III & IV posts – Ban imposed by G.O. dated 15.03.2012 – Lifting vide G.O. dated 11.07.2013 – Scope.
Once ban stood lifted on 11.07.2013, no restriction remained operative on filling vacancies arising thereafter – Director's stand that ban continued for vacancies occurring after 11.07.2013 is misconceived – Lifting of ban is absolute, without any rider. (Paras 8–11, 14)

Appointment – Approval by Director of Higher Education – Refusal on ground of ban – Validity.Committee of Management was permitted on 07.01.2016 to proceed with selection for two posts of Junior Clerk and one post of Lab Assistant – Despite such conscious permission, Director disapproved selection of one Junior Clerk and Lab Assistant citing ban – Held, order unsustainable in law. (Paras 6, 8, 13, 15)

Ban on recruitment – Nature.
Ban orders are temporary executive measures, not absolute or perpetual – Once lifted, they cannot override statutory rules governing recruitment – To construe otherwise would permit executive fiat to supersede statutory scheme. (Para 14)

Held :Order dated 05.11.2018 insofar as it disapproves appointments of Arvind Kumar Singh (Junior Clerk) and Vineet Kumar Yadav (Lab Assistant) quashed – Director directed to accord necessary approval after verification of records within two weeks. (Paras 13, 15, 17)

Writ Petition Allowed.

CASE LAW DISCUSSED-

1. Committee of Management, Mahatma Gandhi Shanti Smarak Degree College, Ghazipur Vs St. of U.P. & ors. (Writ - A No. 26271 of 2018, decided on 09.01.2019)

2. Vipin Vs St. of U.P. & ors., 2013 (7) ADJ 274

3. St. of U.P. Vs Committee of Management, Mahatma Gandhi Shanti Smarak Degree College (Special Appeal No. 198 of 2020 and connected appeals) – dismissed.

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

1. Heard Sri K.R. Singh, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State respondents.

2. By means of this petition, petitioner has questioned the order passed by the Director of Higher Education, Prayagraj dated 5th November, 2018, whereby, against one post of Junior Clerk, the selection of Krishna Yadav has been approved, whereas the selection of Arvind Kumar Singh on the another post of Junior Clerk and Sri Vineet Kumar Yadav on the post of Lab Assistant has been disapproved.

3. It is submitted by learned counsel for the petitioner that the reasons assigned in the order is unsustainable as the particular ban imposed in the year 2012 on the appointments against class III and class IV positions of such institutions came to be lifted on 11th July, 2013.

4. It is submitted that merely because the ban has come to be lifted on 11th July, 2013, does not mean that the post which had fallen vacant after 11th July, 2013, the managements were denuded of their power to make selections and appointments.

5. In support of his argument learned counsel for the petitioner has relied upon the judgment of a coordinate Bench of this Court in the case of **Committee of Management of Mahatma Gandhi**

Shanti Smarak Degree College, Ghazipur and another v. State of U.P. and others (Writ ? A No.- 26271 of 2018) decided on 9th January, 2019. He submits that both the Government orders dated 11th July, 2013 and 15th March, 2012 were taken into consideration and the Court ultimately came to conclude that such approach of the authorities in taking as if there was still a ban in respect of the vacancy falling after 11th July, 2013 was incorrect. The Court in that case has set aside the order and Director was directed to pass order afresh in the light of the observations made in the judgment.

6. He further submits that it is after the lifting of the ban on 11th July, 2013 a conscious decision was taken by the authority in granting permission to the Committee of Management on 7th January, 2016 to proceed ahead with the selection of candidates upon the two posts of Junior Clerk and one post of Lab Assistant and, therefore, it cannot be said that the Committee of Management was not having the power or authority to make selection and appointment.

7. Learned Additional Chief Standing Counsel though sought to argue in support of the decision impugned in this case but could not dispute that a conscious decision had been taken to accord permission to fill up vacancy. He submits that in order to clear confusion on facts Director may be directed to reconsider the matter in the light of the judgment passed by this Court.

8. Having heard learned counsel for the respective parties and having perused the record, what I find is that the permission to make selection upon the post in question (two posts of Junior Clerk and one post of Lab Assistant) was consciously taken by Joint Director of Higher Education for Director of Higher Education on 7th January, 2016 much after the ban was lifted. The authority was fully conscious about one post of Junior Clerk and one post of Lab Assistant that had fallen vacant after the ban got lifted, nonetheless the Director proceeded to disapprove the selection of one post of Junior Clerk and one post of Lab Assistant on the ground of ban.

9. I have gone through the judgment of a coordinate Bench of this Court and I find that in paragraph 5 of the judgment this very legal plea specifically taken by learned Standing Counsel was considered. Paragraph 5 of the judgment is reproduced hereunder:

"5. Learned Standing Counsel has obtain instructions, according to which the State Government vide Government Order dated 11.7.2013 has lifted the ban only in respect of posts which had fallen vacant till 11.7.2013, and that the vacancy, in the present case, since has arisen after 11.7.2013, therefore, ban imposed earlier vide order dated 15.3.2012 would continue to remain invoked."

10. Now after referring to both the Government orders in paragraph 6 & 7 of the judgment, learned Judge arrived at ratio in paragraph 9 that this view of lifting ban and make 11th July, 2013 as a cut off date, not to permit the selection and appointment upon the vacancy fallen thereafter was absolutely misplaced one.

11. It is held that the said Government order was general in nature and its applicability upon the institutions had stood lifted with the Government order dated 11th July, 2013. The Court concluded that

lifting of ban was absolute ban and there was no rider whatsoever to draw an inference that the Government decided not to permit filling up the vacancies that were to fall vacant after 11th July, 2013. Paragraph 9 of the judgment is reproduced hereunder:

"9. There is absolutely no justification for any such distinction to be drawn based upon the date specified i.e. 11.7.2013. Such a categorization/ classification can not be construed as a reasonable classification inasmuch as it would have no intelligible differentia or object which is sought to be achieved. The same Government Order dated 15.3.2012was pressed as being the ground for denial of permission for filling up vacancies in Intermediate institution also. The Government Order on 15.3.2012, was also followed by subsequent Government Order dated 23.5.2013. After taking note of both the Government Orders, this Court in Vipin Vs. State of U.P. and others, 2013 (7) ADJ 274, has been pleased to hold that ban would not be available for the purposes of denying institution to fill up the post itself. No specific provision has otherwise been shown to the Court under the applicable statutory scheme which could have been invoked for the purposes of issuance of Government Order dated 15.3.2012. The said Government Order, otherwise, is general in nature and its applicability upon the institutions of higher leaving stands lifted under the Government Order dated 11.7.2013. In that view of the matter, the order passed by the Director of Education dated 4.9.2018 cannot be sustained and is accordingly quashed."

12. Again, I further find that against the judgment of the coordinate Bench of this Court cited above, the State of Uttar Pradesh unsuccessfully preferred a appeal being Special Appeal No.- 198 of 2020 and other connected special appeals, in which Division Bench also considered all these aspects of the matter and finally affirmed the decision taken by learned Single Judge. Vide paragraphs 12, 13 and 14 of the judgment of special appeal, the Court held thus:

"12. It is otherwise an admitted fact that no ban on the appointment of teachers was imposed. If that is so then how an Institution can run without Class III and Class IV staff is another issue to be debated but we are deliberately not touching this issue as the order dated 15.03.2012 is not under Section 66A of the Act of 1973.

13. Taking aforesaid into consideration, we supply additional reasons to cause interference the order dated 04.09.2018.

14. In view of above, we don't find any reason to cause interference the judgment dated 09.01.2019 and accordingly direction given in the operative para of the judgment would be carried by the respondents within a month if it has not been carried till date."

13. In view of the above legal proposition, I do not find any justification to sustain the order dated 5th November, 2018 insofar as it denies approval to the selection of one Arvind Kumar Singh and Vineet Kumar Yadav on the post of Junior Clerk and Lab Assistant respectively.

14. Besides the above, a ban on recruitment process is never absolute and has certain exception which order putting a ban itself may provide. Every ban is imposed for a certain period taking into consideration certain facts and

circumstances. It cannot be for all time to come when recruitment process is governed by statutory rules. An executive order to impose ban is also to be subject to certain conditions and for a certain period otherwise, the Act and statutory rules would get superseded by executive acts/ fiats at its whims. Once such a ban is lifted, it should, therefore, be taken to have been lifted absolutely.

15. The order dated 5th November, 2018, accordingly, to that extent is hereby quashed.

16. The writ petition is allowed.

17. The Director of Higher Education, U.P., Prayagraj is directed to accord necessary approval after verification of the records in the selection procedure place before him and if otherwise there is no legal impediment, within a period of two weeks from the date of production of certified copy of this order.

(2024) 3 ILRA 569
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2023
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 11855 of 2023

Arvind Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hridaya Narain Singh, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Ms. Manisha Chaturvedi, Smt. Chandra Kala Chaturvedi

U.P. Secondary Education Services Selection Board Act, 1982 – Section 33-G(1) & (8) – Regularisation – Appointment against short-term vacancy – Payment of salary under Court's interim order – Effect.
Regional Selection Committee rejected claim for regularisation holding petitioner ineligible as he was drawing salary only under Court's order – Held, misconceived – Section 33-G(8) to be read conjunctively: both conditions i.e. invalid appointment *and* salary only under Court's order must exist – If appointment otherwise validly made under Removal of Difficulties Order/Section 18, claim for regularisation cannot be denied merely because salary was released pursuant to Court's interim order. (Paras 8, 16, 19)
Appointment – Validity – Evidence of short-term vacancy.

Promotion of incumbent (Saryu Yadav) as Head Master in 1996 created short-term vacancy – Petitioner appointed in 1997 with due procedure – District Inspector of Schools later confirmed his working and ordered salary – Continuous discharge of duties and assignment of examination duties from 1999 onwards establish valid appointment – Plea of management denying vacancy unsustainable. (Paras 2–4, 9, 14–15)
Regularisation – Equitable considerations.

Service of more than two decades cannot be nullified only on ground of technicalities – Supreme Court in *Radhey Shyam Yadav Vs St. of U.P.*, AIR 2024 SC 260 held beneficiaries of management's irregularities cannot be penalised absent their complicity – Same principle applied. (Paras 20–21)

Held : Orders dated 25.04.2023 (Joint Director of Education) and 14.07.2023 (DIOS, Azamgarh) quashed – Matter remitted for fresh decision in light of Court's observations – To be completed within 30 days. (Paras 22–23)

Writ Petition Allowed.

CASE LAW DISCUSSED-

1. Pramod Kumar Vs St. of U.P. & ors. (Writ - A No. 1981 of 2021)

2. Mohinder Singh Gill Vs Chief Election Commissioner, New Delhi, (1978) 1 SCC 405

3. Radhey Shyam Yadav Vs St. of U.P., AIR 2024 SC 260 (SLP (C) Nos. 3877–3878, decided on 03.01.2024)

4. Chief Engineer, M.S.E.B. Vs Suresh Raghunath Bhokare, (2005) 10 SCC 465

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri H.N.Singh, learned counsel for the petitioner, Ms. Manisha Chaturvedi, learned counsel for the Committee of Management and learned Standing Counsel for the State respondents.

2. The petitioner before this Court is working as Assistant Teacher in LT Grade in a recognized and aided institution being run and managed by 6th respondent and claims that he has been working ever since he submitted his joining in the institution on 5.12.1997 pursuant to his initial appointment on 3.12.1997 taking recourse to provisions as contained under Second Removal of Difficulties Order, 1981 and read with Section 18 of the U.P. Secondary Education Service Commission Act, 1982. He claims to have been appointed against short term vacancy on account of one Saryu Yadav, the then Assistant Teacher in LT Grade upon getting promoted as head master in the institution in October, 1996.

3. He also claims to have possessed requisite qualification to be appointed as Assistant Teacher in LT Grade as per provision Appendix-A of the Intermediate Education Act, 1921, and therefore, Committee of Management rightly proceeded to adopt resolution accepting recommendation of the selection committee offering him appointment. The papers, according to the petitioner were forwarded by the Committee of Management on 8.12.1997 to the District Inspector of schools but the District Inspector of Schools refused to accord approval to the appointment of the petitioner and so also consequently he was not paid salary. It was when despite several representations made by him, no heed was paid by the District Inspector of Schools, petitioner approached the Lucknow bench of this Court by filing writ petition (SS) No. 4740 of 2009, in which a detail interim order was passed on 30th October, 2010 with the rider that in the event petitioner has been working upon being appointed against short-term vacancy and discharging duties as such then it will be equitable to pay him salary, accordingly he is entitled to salary.

4. The order dated 10th May, 2002 negating the claim of the salary of the petitioner was stayed, of-course the Court also ordered that in the event selected candidate joined the institution, automatically petitioner's appointment against post in question would come to end. After the interim order was passed as above by this Court on 30th August, 2010, the District Inspector of Schools, it appears enquired from the Principal of the institution regarding appointment and working of the petitioner as Assistant Teacher in LT Grade on *ad hoc* basis and upon furnishing of requisite information and documents by the then Principal of the institution that District Inspector of Schools proceeded to pass order for payment of salary. Thus petitioner has been drawing salary.

5. In the meanwhile, petitioner also filed writ petition being Service Single No. 13361 of 2001 seeking consideration of his claim for regularization in view of Section

33-G of the Act No. 5 of 1982 while disposing of the said petition under the order dated 27.7.2021, the Court also disposed of earlier petition of the petitioner being no. 47040 of 2009 on 27.7.2021 with a direction that petitioner would be continued in employment and shall be paid salary in terms of an interim order passed earlier by this Court on 30th August, 2010 till such time a final decision is taken by respondents in the matter of regularization as directed by this Court in the other writ petition no. 13361 of 2001.

6. It is in this above view of the matter that claim for regularization come to be decided by the Regional Selection Committee under the order impugned after hearing all the respective parties including Committee of Management and in its final resolution adopted by the Committee it negated the claim of the petitioner for regularization holding him not eligible as such for regularization not falling within the criterion laid down under Section 33-G(8) of Act No. 5 of 1982 as he was only getting salary under the orders of the High Court. It is this order which is under challenge before this Court.

7. In view of decision taken by Regional Selection Committee, the District Inspector of Schools came to pass consequential order on 14.7.2023. The Committee of Management though is an appointing authority but has not passed any order dispensing with services of petitioner as a consequence to the decision taken by the Regional Selection Committee as well as District Inspector of Schools. Thus, these two orders of Regional Selection Committee as well as District Inspector of Schools are under challenge before this Court.

8. The basic ground of attack is that Regional Selection Committee is not justified in returning a finding that petitioner was not entitled to regularization only for the reason that petitioner was getting salary under the orders of this Court whereas twin conditions as forwarded under Clause 8 of sub-section 33 G of invalid appointment coupled with payment of salary have to be fulfilled. In absence of finding qua appointment of the petitioner against short-term vacancy, Regional Level Selection Committee was not justified in passing such order.

9. It is also argued on behalf of the petitioner that petitioner falls in zone of consideration for regularization in view of Section 33G(1) of U.P. Act No. 5 of 1982. Besides above, it is argued on behalf of the petitioner that interim order was passed by this Court in Writ Petition SS No. 4740 of 2009 was not blanket stay order as it was subject to condition that petitioner had been appointed and had also been working and since District Inspector of Schools certified that petitioner was duly appointed and discharging his duties as Assistant Teacher in LT Grade in the institution, the payment of salary came to be made. Still further, it is submitted by learned counsel appearing for the petitioner, petitioner was continuously assigned duty of invigilator in board examinations regarding which several documents have been brought on record by means of rejoinder affidavit as annexure 4 from the period running from 1999 onwards.

10. Learned Standing Counsel has sought to justify the order for the reasons assigned therein and has submitted that the case of the petitioner would stand covered as held by Regional Selection Committee under Section 33-G (8).

11. Ms. Chaturvedi, learned counsel appearing for the Committee of

Management has seriously contested the matter and submitted that neither there was any short term vacancy of Assistant Teacher in LT Grade available in the institution on the date petitioner claims to have been appointed nor, petitioner ever discharged his duties as such prior to the year 2010 when the District Inspector of Schools passed order for payment of salary. It is argued by learned counsel for the Committee of Management that if the teacher had not been lawfully appointed for want of requisite vacancy on the date of selection and appointment and he was discharging his duties as such, merely because petitioner produced the document on the date between cutt-of date prescribed as under Section 33 G (1) such teacher would not be entitled to payment of salary. It is next argued that District Inspector of Schools had, therefore, was not offering approval to the appointment of the petitioner and it was under interim order of the Court dated 30.08.2010 that District Inspector was compelled to pass order for payment of salary to the petitioner.

12. It is argued on behalf of the Committee of Management that it is just because petitioner has been getting salary on account of orders passed by this Court and consequential order by the education authority, this would not validate otherwise invalid appointment of the petitioner.

13. Yet another plea taken by learned counsel for the Committee of Management is that on the date of selection of appointment of petitioner, there was no Committee of Management with Anoop Singh, Manager of the Institution, and therefore, entire selection proceeding was at farce. According to her, it is all cooked up story set up by the petitioner and otherwise there is no such document available on record. Thus, she justifies the order passed by the Regional Selection Committee. However, she submits that regarding invalid appointment of the petitioner Manager had submitted a number of documents, which though has been referred to but not deliberated and discussed by Regional Selection Committee, and therefore, this lacuna was on the part of the Regional Selection Committee, otherwise findings would have been more in support of the management than what has come in the order impugned.

14. Meeting the argument of learned counsel appearing for the Committee of Management Mr. Khare has submitted that very specific pleading has come to be raised in Writ Petition vide paragraph 7,8 and 9 that it is on account of promotion of Saryu Yadav, the then Assistant Teacher as head master that a short term vacancy arose in October, 1996 in LT grade which Manager proceeded to fill up. He submits that paragraph 7,8 and 9 of writ petition has been very casually replied to in paragraph 13 of the counter affidavit. There is no specific denial according to him of the *factum* of promotion of Saryu Yadav as according to him the document that has been brought on record by way of attendance register as annexure 4 to the counter affidavit by Manager itself shows that Saryu Yadav was working in 2004-05 and onwards also as Head Master until he retired. He submits that when the Manager made a deposition regarding retirement of Saryu Yadav in the year 2010, he deliberately avoided refer to the post of head master and simply stated that he retired as Assistant Teacher. Besides above, he submits that nowhere in the entire counter affidavit, it has come to be referred as to why appointment otherwise would be bad except the averments that there was no

effective Committee of Management on the date of selection and appointment.

15. To this above point, Mr. Khare has drawn attention of this Court to the attested signatures of Anoop Singh on 20th May, 1996 prior to appointment of the petitioner . He further submits that present Manager has taken over in the year 2017, and therefore, he cannot have any personal knowledge of the events that have taken place in the year 1997. Regarding existence of short-term vacancy, procedure was duly followed and selection was held. It is also argued by learned counsel for the petitioner that 33-G(8) as sought to be not interpreted by learned counsel for the Committee of Management is not not tenable because provision requires both conditions illegal appointment and then payment of salary under the order of a Court to be part to attract the provision. He has placed reliance upon the order of this Court in **Pramod Kumar v. State of U.P. and Others in Writ A 1981 of 2021,**

16. Having heard learned counsel for the respective parties and having perused the records, I find merit in the submission so advanced by learned counsel for the petitioner that merely because there was payment of of salary under the order of the Court, the claim for regularisation of the petitioner cannot be rejected treating his appointment to be invalid. Every appointment has to be decided on its own facts and is to be seen where minimum required procedure was followed or not under the relevant rules while making selection and appointment of the candidate against short-term/substantive appointment as the case may be. It so happens that many times authority do not pass orders for approval or even after approval for payment of salary. In such circumstances, therefore, such candidates are left with no other option but to have taken justice of the court of law and in the event, the Court entertain the petition and passes interim order, this mean a *prima facie* case made out for payment of salary in the eyes of the Court. Now while considering the claim for regularization since such candidates are obtaining payment of salary within their claim cannot be rejected salary on this ground. Each case is required to be tested on its own merits where order of court or no order if the appointment is valid in law then regularisation cannot be refused, however, where the approval is in the teeth of the Court then authority can take plea that regularisation will be subject to the final order that may be passed in the writ petition.

17. In **Pramod Kumar's case (supra) relied upon by the counsel for the petitioner, the Court has observed thus:**

A plain reading of Section 33-G of the U.P. Secondary Education (Services Selection Board) Act, 1982 makes it clear that the benefit of regularization to a Teacher other than the Principal or Head Master can be extended subject to the said candidate fulfilling the conditions as specified in Section 33-G (1) of the said provision. A plain reading whereof shows that no such condition exists to the effect that on account of non-payment of the salary for a particular period, the consideration of regularization can be denied to a person.

The submission of the learned Standing Counsel that the initial appointment of the petitioner was an improper exercise of power cannot be accepted as the same is not the basis for denying the benefit of consideration for

regularization to the petitioner in the order impugned dated 25.1.2020. It is well settled that the reasoning cannot be supplemented by means of a counter affidavit or by means of argument and the validity of the order is to be seen only on the basis of the reasoning contained in the order impugned before the Court concerned. See Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi; (1978) 1 SCC 405.

That being the case, the order dated 25.1.2020 is quashed with further direction to consider the case of the petitioner for regularization afresh under Section 33-G of the U.P. Secondary Education (Services Selection Board) Act, 1982 and in the light of the judgment of this Court dated 14.9.2018 passed in Writ Petition No. 13181 of 1997. The said exercise shall be completed within a period of four months from the date of filing of a copy of this order before the Regional Level Committee.

Considering the fact that I have allowed the Writ-A No. 8234 of 2020 and have set aside the order impugned therein being the order dated 25.1.2020, accordingly the Writ-A No. 1981 of 2021 also deserves to be allowed as the sole reason for passing the termination order dated 6.1.2021 is the rejection of the claim of the petitioner for regularization vide order dated 25.1.2020.

Accordingly, the Writ-A No. 1981 of 2021 is also allowed. The order dated 6.1.2021 is set aside.

18. Now coming to the provisions contained under Section 33G (8) decision relied upon in Pramod Kumar's case (supra) conditions are required to be fulfilled and payment under the interim order/ final order of the Court. The relevant provisions as contained under Section 33-G 8 are reproduced hereunder:

33-G (8) Ad hoc teachers, who have not been appointed either in accordance with the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 or in accordance with Section 18 of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 and are otherwise getting salary only on the basis of Interim/Final orders of the court shall not be entitled for regularisation.

19. From the bare reading of the aforesaid provisions, it is clearly stipulated that one should be validly appointed and should be getting salary under the orders of the Court and now, therefore, if the candidate has been validly appointed and yet approval was not granted and has been therefore getting salary under the orders of this Court, claim for regularisation cannot be rejected, The word 'and' is to be read as conjunctive word 'and' here and not for disjunctive word 'or' because two negative conditions are to be read together to have purposive interpretation of sentence and impart of the provision.

20. In a very recent judgment of Supreme Court in the case of **Radhey Shyam Yadav v. State of U.P. in Special Leave Petition (Civil) Nos. 3877-3878, AIR, 2024 SC 260** decided on 03.01.2024 Supreme Court has observed that for any unfair practise at the end of the officials of Board, a selecting body as in this case would be Committee of Management of the institution where incumbent has been discharging duties for more than two and half decades, beneficiaries cannot be penalized as such candidates were selected from open market and thus they were entitled to all service benefits like salary etc. and if department was of the view that it was all because of mischief of the

officials of Board, it would be open for them to take action against them for recovery. Vide paragraphs 22 and 23 Supreme Court has held thus:

"22. Assuming the case of the State to be true and taking it at its highest, the factual position would come to this, namely, that while the State sanctioned two vacancies, the school went ahead and recruited three. The State has no proof of commission of any malpractice by the appellants. The State approved their appointments, and the approval order till date has not been cancelled. The appointments have not been terminated. No action has been taken against the school and the school continues to receive the aid.

23. Chief Engineer, M.S.E.B. and Another vs. Suresh Raghunath Bhokare, (2005) 10 SCC 465 is a case which, on facts, has a striking resemblance to the case at hand. The respondent therein had been recommended by the department and was selected as line-helper in the appellant-Board. On the ground that the recommendation was allegedly made fraudulently, the respondent was dismissed from service. The complaint preferred by the respondent had been dismissed by the Labour Court. The Industrial Court reversing the findings of the Labour Court, quashed the termination of the respondent therein and directed reinstatement. Writ Petition filed by the appellant therein was dismissed by the High Court. This Court, while observing that in the absence of any overt act being attributed to the respondent, held that it could not be inferred that the respondent had a role in sending fraudulent list, solely on the basis of the presumption that he got the job. Para 5 of the judgment which is crucial for the decision of the present case is extracted herein below:-

5. The entire basis of the dismissal of the appellant depends upon the factum of the alleged misrepresentation attributed to the respondent. The Industrial Court in its impugned order has noticed the fact that the respondent was appointed in April 1994 pursuant to the selection procedure followed by the competent authority and that he was selected by the panel of Selection Committee consisting of 6 members which included the very same Social Welfare Officer who had sent the proposal including the name of the respondent for appointment. It also noticed the fact that the selection in question was made after an oral interview and the required test as also the medical examination. The Industrial Court also noticed the fact that the appointment of the respondent was confirmed after one-year period and thereafter the respondent has been working without any complaint. The said Industrial Court also noticed the fact that the termination of the respondent was based on a show- cause notice issued on 5-7-1999 which was replied to by the respondent on 17-7-1999 and the termination was made in a summary procedure permissible under Rule 90(b) of the Service Regulations. The Industrial Court after perusing the pleadings and the notice issued to the respondent came to the conclusion that the alleged misrepresentation which is now said to be a fraud was not specifically pleaded or proved. In the show-cause notice, no basis was laid to show what is the nature of fraud that was being attributed to the appellant. ***No particulars of the alleged fraud were given and the said pleadings did not even contain any allegation as to how the appellant was responsible for sending the so-called fraudulent proposal or what role he had to play in such proposal being sent. It also noticed from the evidence of Mr***

Waghmare, Social Welfare Officer who sent the proposal before the Labour Court that he did not utter a single word as to whether the said supplementary list was ever called for by the department concerned or not. Thus applying the basic principle of rule of evidence which requires a party alleging fraud to give particulars of the fraud and having found no such particulars, the Industrial Court came to the conclusion that the respondent could not be held guilty of fraud. The said finding of the Industrial Court has been accepted by the High Court*. Mr. Bhasme though contended that the fraud in question was played in collusion with the Social Welfare Officer and 2 other employees of the Board and action against the said 2 employees of the Board has been taken, but by that itself we are unable to accept the argument of Mr. Bhasme that there is material to support the contention of the Board that the appellant had also contributed to making the misrepresentation at the time of applying for the job with the Board.* ***In the absence of any such particulars being mentioned in the show- cause notice or at the trial, attributing some overt act to the respondent, we do not think the Board can infer that the respondent had a role to play in sending a fraudulent list solely on the basis of the presumption that since the respondent got a job by the said proposal, the said list is a fraudulent one.*** *It was the duty of the Board to have specifically produced the material to prove that the respondent himself had the knowledge of such a fraud and he knowingly or in collusion with other officials indulged in this fraud. Since there is no such material on record, on the facts of the instant case, the Industrial Court and the High Court have come to the right conclusion that the alleged fraud has not been established by the appellants, hence, this is not a fit case in which interference is called for. This appeal, therefore, fails and the same is dismissed."*

(emphasis supplied)

21. In view of above the only exception in matters of such appointment is where incumbent himself is found guilty or part of conspiracy as may be alleged by the department in getting selection and appointment however, where it is all done by management and beneficiary of selection has not been responsible, such harsh action should not be taken after more than ten years of regular service.

22. In view of above, writ petition succeeds and is allowed. The order dated 25.4.2023 passed by Joint Director of Education (Secondary Education) Azamgarh Region, Azamgarh as well as order dated 14.7.2023 passed by District Inspector of Schools, Azamgarh are hereby quashed. Respondents are directed to pass order afresh in the light of observations made hereinabove. Appropriate order shall be passed within thirty days from the date of certified copy of this order.

23. Thus this petition stands allowed in above terms with no order as to cost.

(2024) 3 ILRA 576
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2024
BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

Writ A No. 11877 of 2011

Noor Ahmad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gulab Chandra

Counsel for the Respondents:
C.S.C.

Service Law – U.P. Police – Disciplinary proceedings – Judicial review – Scope. Constable found in police uniform in drunken St. at public place – Medical examination immediately conducted – Report certifying intoxication proved in enquiry – Full opportunity afforded to petitioner but he failed to participate – Held, no procedural defect or violation of natural justice – In writ jurisdiction, Court cannot re-appreciate evidence or interfere with findings of fact where enquiry conducted in accordance with law. (Paras 22–23)

Service Law – Discipline in Police Force – Consumption of alcohol while in uniform – Gravity of misconduct – Punishment of dismissal.
Being a member of disciplined force, consumption of liquor in uniform at public place tarnishes image of department – Such act constitutes gross misconduct – Punishment of dismissal neither disproportionate nor shocks conscience – Judicial review limited only to decision-making process, not to adequacy or proportionality of punishment. (Paras 14–15, 19–20, 23)

Laches – Delay in challenging disciplinary orders.
Dismissal order dated 10.08.1989; appeal rejected on 24.12.1994; revision rejected on 25.04.1997; claim petition filed after six years dismissed for delay; writ petition filed in 2011 with laches of more than 7 years – Explanation offered not convincing – Held, petitioner guilty of gross delay and laches, disentitling him to discretionary relief under Article 226. (Paras 3–7, 22)

Held : No infirmity in disciplinary proceedings – Dismissal order justified – Petition devoid of merit – Dismissed. (Para 23)
Writ Petition Dismissed.

CASE LAW DISCUSSED-

1. Mahipal Vs St. of U.P. & ors., 2018 (4) ADJ 258

2. Satya Prakash Singh Vs St. of U.P. & ors. (Writ - A No. 61116 of 2011)

3. Samar Bahadur Singh Vs St. of U.P. & ors., (2011) 9 SCC 94

4. U.O.I. Vs P. Gunasekaran, (2015) 2 SCC 610

5. U.O.I. & ors. Vs Constable Sunil Kumar, AIR 2023 SC 554

6. Ex CT/GD Om Prakash Vs U.O.I. & ors., W.P.(C) No.1883 of 2010 (Delhi High Court)

7. Ex-Constable/Dvr Mukesh Kumar Raigar Vs U.O.I. & ors., 2023 SCC OnLine SC 27

8. Deputy General Manager (Appellate Authority) Vs Ajai Kumar Srivastava, (2021) 2 SCC 612

9. Indian Oil Corporation Ltd. Vs Ajit Kumar Singh, AIR 2023 SC 2388

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Shri Gulab Chandra, learned counsel for the petitioner and Shri Krishna Kumar Singh, learned Standing Counsel for the State-respondents.

2. By means of the present writ petition, the petitioner is seeking quashing of the order dated 10.08.1989 passed by Senior Superintendent of Police, Meerut as well as the order dated 24.12.1994 passed by the Deputy Inspector General of Police and the order dated 25.04.1997 passed by the Inspector General of Police and the order dated 22.10.2003 passed by the Tribunal in Claim Petition No.709 of 2003.

3. Stamp reporter has reported laches of 7 years and 29 days in filing present

petition on the date of reporting on 18.02.2011.

4. To explain the delay learned counsel for the petitioner has drawn our attention to paragraph nos. 2 and 14 to 37. The grounds for explaining the laches of 7 years and 29 days is that after decision of the Tribunal dated 22.10.2003, petitioner reached Allahabad on 01.01.2004 where some imposter met him at Allahabad Railway Station and took him to Advocate Shri Suresh Swaroop Saxena, who ultimately promised to file a petition and take all relevant papers along with expenses and get his signature on Vakalatnama and some other watermark papers on 01.01.2004 and Shri Suresh Swaroop Saxena also gave his landline number. The petitioner thereafter waited for six months. Thereafter on 04.08.2004 he was informed that a counter affidavit was called for. Subsequently, on 06.12.2004 it was informed that no counter affidavit was filed. Thereafter, the petitioner came to Allahabad on 08.07.2005 for filing rejoinder affidavit and expenses were also given. It is stated that the petitioner was in continuous touch with Shri Saxena and he always assured him that he need not to worry about the case and the case would come on his turn for hearing. Thereafter after waiting long time on 18.12.2010 he tried to contact with Shri Saxena, then some lady in the house of Shri Saxena took the phone and said that Shri Saxena is no more. Thereafter, petitioner came to Allahabad on 20.12.2010 and contacted the family of Shri Saxena and tried to find out records of his case, but the same cannot be found. Thereafter, he contacted the present counsel, who made enquiries and found that no such petition was filed in the name of the petitioner, namely, Noor Mohammad either in the Allahabad High Court or in the Lucknow Bench of the Allahabad. The petitioner, therefore, engaged the present counsel and handed over all the relevant papers after obtaining fresh certified copy of the order dated 22.10.2003 and thereafter the present petition was filed by Shri Gulab Chandra, learned counsel.

5. Submission of the learned counsel for the petitioner is that there is no deliberate delay on the part of the petitioner and such huge delay is liable to be condoned.

6. Although, the explanation so submitted seems to be faultless, however, we are not impressed as the petitioner, who was working as Constable in civil police was dismissed from service is undisputedly a literate person and in case the alleged petition was filed by the earlier counsel, he neither tried to take copy of the petition, nor copy of the counter affidavit or copy of the rejoinder affidavit filed in such petition for long seven years. Further, he not even cared to ask the number of the writ petition allegedly filed at his instance from the counsel for all such long more than 7 years, therefore, we are not convinced with the explanation so submitted.

7. We have also noticed that Claim Petition no.709 of 2003 filed by the petitioner before the Tribunal was also not within one year of limitation as against the order dated 25.04.1997 the claim petition was filed after six years on 13.08.2003.

8. However, in view of the fact that present petition is pending for the last 13 years and affidavits have also been exchanged, we proceed to consider the case on merits.

9. Submission of the learned counsel for the petitioner is that charge against the

petitioner was that on 05.12.1986 he was found lying in police uniform in a drunken state at Hapur Bus Stand and was taken to the police station and thereafter his medical examination was conducted. As per medical report, he was in a drunken state. Thereafter, a preliminary enquiry was conducted; witnesses were examined and in the preliminary enquiry the charges were found to be proved that he was found lying in a drunken state in police uniform at Hapur Bus Stand and he tarnished the image of the Police Department, therefore, inquiry was directed to be conducted.

10. It is submitted that in the regular inquiry, the petitioner filed an application dated 14.11.1998 for examining the doctor concerned, who alleged to have issued the medical certificate, but his application was not considered. Thereafter, the petitioner moved another application dated 28.11.1988 before the Senior Superintendent of Police, Meerut for deputing another Presiding Officer but this application was also not considered. Submission of the learned counsel for the petitioner is that Enquiry Officer has not afforded proper opportunity of hearing to the petitioner, nor he appreciated the explanation submitted by him; he also did not record any cogent finding of facts and submitted final enquiry report dated 05.06.1989 before Disciplinary Authority. On the aforesaid report, a show cause notice was issued to him on 19.06.1989, to which petitioner submitted his explanation on 19.07.1989 through Reserve Inspector (R.I.) but the said explanation was ignored. Thereafter, the Senior Superintendent of Police without giving any notice for oral evidence, dismissed the petitioner from service by the impugned order dated 10.08.1989, which is in contravention of Service Rules. Against the said order dated 10.08.1989, the petitioner preferred an appeal before the Deputy Inspector General of Police, which was rejected in a most mechanical manner without application of mind on 24.12.1994. Thereafter, the petitioner preferred a Revision before the Inspector General of Police, which was rejected on 25.04.1997. Thereafter, the petitioner approached the Tribunal by filing Claim Petition No.709 of 2003, which was rejected by the Tribunal vide order dated 22.10.2003 on the ground of latches.

11. Further submission of the learned counsel for the petitioner is that prescribed procedure has not been followed in the proceedings against the petitioner and the petitioner has been illegally dismissed from service. He submits that the alleged misconduct does not warrant any major penalty under the provision of U.P. Police Subordinate Officer (Punishment and Appeals) Rules, 1991. Submission, therefore, is that the impugned orders are liable to be quashed.

12. Per contra, learned Standing Counsel for the State-Respondent submitted that due procedure as applicable for conducting enquiry was conducted and the petitioner was afforded full opportunity of hearing and it is a case of gross misconduct where the petitioner was found lying at Hapur Bus Stand in a drunken state in police uniform. The petitioner being a Constable is a member of disciplined force has committed gross misconduct and has rightly been dismissed from service. Learned Standing Counsel further submitted that there are huge laches in approaching the Tribunal, therefore, Tribunal has rightly dismissed the Claim Petition filed by the petitioner being time barred and orders of Disciplinary Authority are also in accordance with law warranting

no interference. Submission, therefore, is that the writ petition is liable to be dismissed.

13. We have considered the rival submissions and perused the records.

14. Before proceeding further it would be appropriate to take note of the law as settled by Hon'ble Apex Court in respect of judicial review in disciplinary proceedings particularly in a case where member of disciplined force was found intoxicated. One of us (Vivek Kumar Birla, J.) has considered the law in almost identical facts of the case in **Mahipal vs. State of U.P. and Others, 2018 (4) ADJ 258** relating to U.P. Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991, where the petitioner was found to have consumed liquor; his medical examination was conducted and thereafter, he was dismissed from service. Paragraph 10 whereof is quoted as under:-

"10. I have considered identical submissions in another matter being Writ-A No. 61116 of 2011 (Satya Prakash Singh vs. State of UP and others). Relevant paragraphs whereof are quoted as under:

"The submission of the learned counsel for the petitioner is that the petitioner was not medically examined and his blood and urine test was not carried out to ascertain that he had taken liquor or not. He submits that the punishment of dismissal from service is excessive. He further submits that there was no eye witness of the incident.

A perusal of record clearly indicates that a finding of fact has been recorded that an incident had taken place and the petitioner had indulged in scuffle, while he was under intoxication. All these findings of fact cannot be looked into under Article 226 of the Constitution of India. However, even a glance over the enquiry report clearly demonstrates that the incident that had taken place is not in dispute and the petitioner had tried to certify the question of intoxication by saying that he was under treatment of a Homoeopathic doctor and was having medicines containing alcohol and that he had consumed medicine in a little excessive quantity. The medical examination of the petitioner was carried out at the Primary Health Centre, Gangapur, Varanasi and the doctor had certified that foul smelling was coming from the petitioner and he was also injured. Dr. B.N. Shukla who was treating the petitioner and was produced by the petitioner had stated that smell of alcohol exists about 10 -15 minutes after consumption of medicines. Undisputedly, it cannot be said that such medicine was taken by the petitioner on the spot of the incident whereas he was also taken to the Primary Health Centre and in between considerable time must have expired but still foul smell was coming from the mouth of the petitioner, which according to his own witness Dr. B.N. Shukla, Homoeopath, smell should not come after 10 -15 minutes, even if the version of the petitioner is taken to be correct that he had consumed homoeopathic medicine and was smelling foul for this reason.

Under any circumstances, I do not find that the findings recorded by the enquiry officer are so perverse in nature which may warrant interference by this Court. The petitioner is a member of disciplined force and as such for such misconduct I do not find that any interference to the quantum of punishment is required by this Court. Reference may be made in this regard to a judgment rendered by the Hon'ble Apex Court in the case of Samar Bahadur Singh Vs. State of U.P. and

others 2011 (9) SCC 94 wherein a constable was found guilty of consuming liquor, the Hon'ble Apex Court refused to interfere. A reference may also be made to a judgment in the case of Union of India Vs. P. Gunasekaran 2015 (2) SCC 610. Paragraphs 19, 20 and 21 of the judgment in the case of P. Gunasekaran supra are quoted as under:

"19. The disciplinary authority, on scanning the inquiry report and having accepted it, after discussing the available and admissible evidence on the charge, and the Central Administrative Tribunal having endorsed the view of the disciplinary authority, it was not at all open to the High Court to reappreciate the evidence in exercise of its jurisdiction under Articles 226/227 of the Constitution of India.

20. Equally, it was not open to the High Court, in exercise of its jurisdiction under Article 226/227 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the court. In the instant case, the disciplinary authority has come to the conclusion that the respondent lacked integrity. No doubt, there are no measurable standards as to what is integrity in service jurisprudence but certainly there are indicators for such assessment. Integrity according to Oxford dictionary is "moral uprightness; honesty". It takes in its sweep, probity, innocence, trustfulness, openness, sincerity, blamelessness, immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, cleanness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a code of moral values.

21. The impugned conduct of the respondent working as Deputy Office Superintendent in a sensitive department of Central Excise, according to the disciplinary authority, reflected lack of integrity warranting discontinuance in service. That view has been endorsed by the Central Administrative Tribunal also. Thereafter, it is not open to the High Court to go into the proportionality of punishment or substitute the same with a lesser or different punishment. These aspects have been discussed at quite length by this Court in several decisions including B.C. Chaturvedi v. Union of India and others, 1995 (6) SCC 749, Union of India and another v. G. Ganayutham, 1997 (7) SCC 463, Om Kumar and others v. Union of India, 2001 (2) SCC 386, Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association and another, 2007 (4) SCC 669, Coal India Limited and another v. Mukul Kumar Choudhuri and others, 2009 (15) SCC 620 and the recent one in Chennai Metropolitan Water Supply (supra)."

Relevant paragraphs 5, 6 and 8 of the judgement in Samar Bahadur Singh (supra) are quoted as under:

"5. Counsel appearing for the Appellant has submitted before us that a criminal case was also instituted for the aforesaid incident in which he was acquitted and therefore, in the departmental proceeding also which was initiated he should also have been acquitted and the same should have been allowed to be ended in his favour. He further submits that in any case it has come in evidence that the Appellant was advised to take medicine which he had taken and, therefore, there was some smell of liquor from the medicine when a medical check-up was done. Relying on the same, counsel submits that the entire charge is concocted and therefore, he is required to be held not

guilty of the charge. The next submission of the counsel appearing for the Appellant is that the punishment given to the Appellant is disproportionate to the charges levelled against him.

6. We have considered all the aforesaid submissions in the light of the records that are available with us. The medical report which is placed on record indicates that the Appellant had consumed alcohol, but he was not intoxicated. The Appellant was missing from the headquarters on 27.10.1991 from the morning and he was caught in the case registered under Section 392I.P.C. in the evening. The Appellant wishes to make a defence that he was advised to take medicine but the prescription which is placed in the departmental proceedings does not indicate that any medicine was prescribed in that prescription. The Appellant was arrested in the criminal case in connection with stealing of a bottle of foreign liquor and even during that time he had consumed alcohol prior to the incident. These facts have been brought out in the inquiry proceedings initiated against him in which the Appellant did not participate. Therefore, whatever allegations have been brought against him, have been proved by placing cogent materials on record, which go unrebutted due to his absence in the proceedings. We also find that the Appellant has been charged on the ground of negligence, dereliction of duty and consuming liquor. The aforesaid facts are found proved in the departmental proceedings.

8. Now, the issue is whether punishment awarded to the Appellant is disproportionate to the offence alleged. The Appellant belongs to a disciplinary force and the members of such a force is required to maintain discipline and to act in a befitting manner in public. Instead of that, he was found under the influence of liquor and then indulged himself in an offence. Be that as it may, we are not inclined to interfere with the satisfaction arrived at by the disciplinary authority that in the present case punishment of dismissal from service is called for. The punishment awarded, in our considered opinion, cannot be said to be shocking to our conscience and, therefore, the aforesaid punishment awarded does not call for any interference."

15. In **Union of India and Others vs. Constable Sunil Kumar, AIR 2023 SC 554** wherein the C.R.P.F. personnel was found to have consumed liquor while on government duty and threatened the senior officer. While upholding the dismissal and considering the argument that penalty of dismissal was disproportionate to wrong/misconduct committed, order of dismissal was found to be justified and it was held that such penalty of dismissal cannot be said to be disproportionate and/or strikingly disproportionately to the gravity of the wrong and under the circumstances of the case order of Division Bench interfering in the order of penalty of dismissal imposed and ordering reinstatement of the respondent. Paragraphs 6.1, 6.2, 6.3 whereof are quoted as under:-

"6.1 While holding that the penalty of dismissal can be said to be disproportionate to the gravity of the wrong, what is weighed with the Division Bench of the High Court is that as the respondent was found to be in a state of intoxication when not on duty and considering Section 10, he is deemed to have committed a less heinous offence. Whether a member of the force has committed a heinous offence or a less heinous offence as per Sections 9 and 10 of

the CRPF Act, 1949 would have bearing on inflicting the punishment as provided under Sections 9 and 10 but has no relevance on the disciplinary proceedings/departmental enquiry for the act of indiscipline and/or insubordination. In the case of Surinder Kumar (supra), it is observed that even in a case when a CRPF personnel was awarded imprisonment under Section 10(n) for an offence which though less heinous, he can be dismissed from service, if it is found to be prejudicial to good order and discipline of CRPF. Under the circumstances, the reasoning given by the High Court that as the respondent is deemed to have committed a less heinous offence, the order of penalty of dismissal can be said to be disproportionate is not required to be accepted.

6.2 Even otherwise, the Division Bench of the High Court has materially erred in interfering with the order of penalty of dismissal passed on proved charges and misconduct of indiscipline and insubordination and giving threats to the superior of dire consequences on the ground that the same is disproportionate to the gravity of the wrong. In the case of Surinder Kumar (supra) while considering the power of judicial review of the High Court in interfering with the punishment of dismissal, it is observed and held by this Court after considering the earlier decision in the case of Union of India Vs. R.K. Sharma; (2001) 9 SCC 592 that in exercise of powers of judicial review interfering with the punishment of dismissal on the ground that it was disproportionate, the punishment should not be merely disproportionate but should be strikingly disproportionate. As observed and held that only in an extreme case, where on the face of it there is perversity or irrationality, there can be judicial review under Article 226 or 227 or under Article 32 of the Constitution.

6.3 Applying the law laid down by this Court in the aforesaid decision(s) to the facts of the case on hand, it cannot be said that the punishment of dismissal can be said to be strikingly disproportionate warranting the interference of the High Court in exercise of powers under Article 226 of the Constitution of India. In the facts and circumstances of the case and on the charges and misconduct of indiscipline and insubordination proved, the CRPF being a disciplined force, the order of penalty of dismissal was justified and it cannot be said to be disproportionate and/or strikingly disproportionate to the gravity of the wrong. Under the circumstances also, the Division Bench of the High Court has committed a very serious error in interfering with the order of penalty of dismissal imposed and ordering reinstatement of the respondent."

16. Relying upon the aforesaid judgments Honourable Division Bench of the Delhi High Court in **Writ Petition C) No.1883 of 2010 (Ex CT/GD Om Prakash vs. Union of India and Others)** under similar charges upheld the punishment of dismissal observing that the member of police force is expected to be highly disciplined and cannot be permitted to do away with such like activities.

17. A reference may also be made to the judgment of Hon'ble apex Court in **Ex-Constable/Dvr Mukesh Kumar Raigar vs. Union of India and Others, 2023 SCC OnLine SC 27**. Paragraphs 12 and 13 whereof reads as under:-

"12. Again, a three-judge Bench in case of Deputy General Manager (Appellate Authority) & Ors. vs. Ajai Kumar Srivastava, circumscribing the power of judicial review by the constitutional courts held as under:

"24. It is thus settled that the power of judicial review, of the constitutional courts, is an evaluation of the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The court/tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary authority are perverse or suffer from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact.

25. xxxxxxx

26. xxxxxxx

27.xxxxxxxx

28. The constitutional court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of mala fides or perversity i.e. where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at those findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained."

13. In view of the afore-stated legal position, we are of the opinion that the Division Bench of the High Court had rightly set aside the order passed by the Single Bench, which had wrongly interfered with the order of removal passed by the respondent authorities against the petitioner. The petitioner having been found to have committed gross misconduct right at the threshold of entering into disciplined force like CISF, and the respondent authorities having passed the order of his removal from service after following due process of law and without actuated by malafides, the court is not inclined to exercise its limited jurisdiction under Article 136 of the Constitution."

18. The law regarding the scope of judicial review by the constitutional courts was again considered in the case of **Indian Oil Corporation and Ors. Vs. Ajit Kumar Singh and Anr., AIR 2023 SC 2388.** Relevant extract whereof reads as under:-

".....The views expressed by this Court on the scope of judicial review in Deputy General Manager (Appellate Authority) vs. Ajai Kumar Srivastava 1 , are extracted below:

"24. It is thus settled that the power of judicial review, of the constitutional courts, is evaluation of the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The court/tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence.

If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary authority are perverse or suffer from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact.

25-27 xx xx xx

28. The constitutional court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of mala fides or perversity i.e. where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at those findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained ."

(emphasis supplied)

19. Reference may also be made to the judgment of Hon'ble Apex Court in the case of **Union of India and Others vs. P. Gunasekaran, (2015) 2 SCC 610** wherein it was held that once the finding of fact recorded by the disciplinary authority has been affirmed by the Tribunal, it was not open to the High Court, in exercise of its jurisdiction under Article 226/227 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the Court. Paragraphs 12, 13, 20, 21 and 24 of the judgment are quoted as under:-

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge no. I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence.

The High Court can only see whether:

a. the enquiry is held by a competent authority;

b. the enquiry is held according to the procedure prescribed in that behalf;

c. there is violation of the principles of natural justice in conducting the proceedings;

d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;

(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be; (vii). go into the proportionality of punishment unless it shocks its conscience."

20. On perusal of the above quoted law it is, therefore, now well settled position that the High Court shall only look into the aspect as to whether the enquiry was conducted as per procedure; the High Court shall not reappreciated the evidence; the High Court shall not interfere with the conclusion in the enquiry, in case the same has been conducted in accordance with law; the High Court shall not go into the adequacy of the evidence; the High Court shall not go into the reliability of the evidence; the High Court shall not interfere, if there be some legal evidence on which the findings can be based; the High Court shall not correct the error of facts, however grave it may appear to be; the High Court shall not go into the proportionality of punishment unless it shocks its conscience.

21. We need not burden our judgment by making reference to other case law wherein such settled principles of law have been reiterated.

22. Now, reverting back to to the facts of the present case we may recollect that charge on the petitioner was that on 05.12.1986 at about 3:40 pm he was found lying in police uniform in a drunken state at Hapur Bus Stand near Tanga Stand. Perusal of inquiry report would clearly reflect that he was granted full opportunity of hearing by fixing dates for the purpose of submitting his reply for producing evidence and witnesses in his favour. It has also clearly come on record that when he was found in a drunken state he was immediately taken to the police station and immediately thereafter his medical examination was conducted. Dr. S.N. Sharma in his report has clearly written that he has consumed alcohol and is under deep intoxication. This report was supplied to him. The witnesses on behalf of the Department were examined. The petitioner was not present on several dates. It has further been mentioned in the enquiry report that after conclusion of the evident of the prosecution side on 29.04.1989 special messenger was sent to the resident of the delinquent employee that statement of prosecution witnesses are over and he may produce any witness or submit statement in his defence. This communication was duly served upon him, however, he did not appear before the Disciplinary Authority thereafter impugned order of dismissal from service dated 10.08.1989 was passed by the Senior Superintendent of Police, Meerut. Representation filed by the petitioner against the said order was also rejected by the Deputy Inspector General of Police on 24.12.1994. Thereafter, petitioner filed revision which was also rejected vide impugned order dated 25.04.1997 passed by the Inspector General of Police. Subsequently, the petitioner approached the State Public Services Tribunal challenging

the aforesaid orders. The Tribunal recorded that no claim petition was filed before the Tribunal within one year and there was delay of about six years in filing the claim petition, therefore, the same was dismissed on the ground of delay at the admission stage itself. So far as the present petition is concerned, the Stamp Reporter has reported laches of 7 years and 29 days in filing the present petition on the date of reporting on 18.02.2011. The explanation submitted by the petitioner has already been considered by the Court on the sole ground that the petiton was pending for last about 13 years.

23. In this background of the case we find that there was no procedural defect in conducting the enquiry; finding of facts have been recorded that the petitioner was found lying in police uniform in a drunken state at Hapur Bus Stand near Tanga Stand and Doctor has also certifying the same. The petitioner in spite of sufficient notice has not come forward during enquiry proceeding to dislodge the prosecution case. He was also given opportunity of hearing by the disciplinary authority, however, he did not come forward to show cause written or oral. We, therefore, do not find any legal infirmity in the entire procedure.

(2024) 3 ILRA 587
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2024
BEFORE
THE HON'BLE MANISH KUMAR, J.

Writ A No. 12479 of 2021

Gulab Dutt Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amarendra Pratap Singh

Counsel for the Respondents:
C.S.C.

Service Law – **Constitution of India,1950 – Article 311(2)(a) –**Dismissal on conviction in criminal case – Requirement of considering conduct.

Dismissal of petitioner, a Lekhpal, solely on ground of conviction under Sections 302 and 506(2) IPC – Disciplinary authority failed to consider *conduct* leading to conviction – Mere conviction not sufficient to impose major penalty – Order of dismissal unsustainable. (Paras 10–13)

Service Law – Retirement during pendency of writ petition – Effect on power of disciplinary authority.
Petitioner attained superannuation on 31.10.2021 – After retirement, no employer–employee relationship subsists – Disciplinary authority cannot be given liberty to reconsider punishment – Court itself to mould relief. (Paras 14, 15)

Service Law – Post retiral dues – Principle of "no work, no pay."

Petitioner entitled to all post-retiral dues with continuity of service – Salary for period between dismissal (13.08.2010) and retirement (31.10.2021) denied on principle of "no work, no pay" – Period, however, to be counted for retiral benefits. (Para 15)

Held : Dismissal, appellate and revisional orders quashed – Petitioner entitled to post-retiral benefits with continuity, but without back wages. (Paras 15–18)

Writ Petition Allowed.

Orders dated 13.10.2010, 28.02.2020 and 19.03.2021 quashed. Respondents directed to ensure payment of all post-retiral dues within two months.

CASE LAW DISCUSSED-

1. U.O.I. Vs Tulsiram Patel, AIR 1985 SC 1416

2. Divisional Personnel Officer, Southern Railway Vs T.R. Chellappan, (1976) 3 SCC 190

3. Shankar Das Vs U.O.I., 1985 (2) SCR 358

4. St. of Jharkhand Vs Jitendra Kumar Srivastava, AIR 2013 SC 3383

5. L.I.C. of India Vs Mukesh Poonamchand Shah, Civil Appeal No. 1804 of 2020

6. Shyam Narain Shukla Vs St. of U.P., 1988 (6) LCD 530

7. Ratan Singh Vs St. of U.P., (2013) 11 ADJ 352

8. Udai Pratap Singh Vs St. of U.P., 2014 (32) LCD 779

9. Shambhu Nath Yadav Vs St. of U.P., 2016 (4) ADJ 276

10. Rajesh Dwivedi Vs St. of U.P., 2018 (36) LCD 1047

11. Ram Kishan Vs St. of U.P., (2020) 1 ADJ 862

12. Murari Lal Rathore Vs St. of U.P., 2021 (6) ALJ 622

13. Vishwanath Vishwakarma Vs St. of U.P., Writ-A No. 4422 of 2015, decided on 18.09.2023 (All HC)

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

1. The present writ petition has been preferred for quashing of the impugned dismissal order dated 13.10.2010, for quashing of the appellate order dated 28.02.2020 and for quashing of the impugned revisional order dated 19.03.2021.

2. Learned counsel for the petitioner has submitted that the petitioner was initially appointed on the post of Untrained Lekhpal in the year 1980 and after passing the Lekhpal School Examination, the petitioner was appointed to the post of Lekhpal regularly in the year 1984.

3. During the service period, the petitioner has been convicted under Sections 302 and 506 (2) IPC. After the conviction, the impugned dismissal order has been passed under Article 311(2)(a) of the Constitution of India merely on the basis that the petitioner has been convicted in a criminal case.

4. It is submitted that the impugned order of dismissal has been passed by the disciplinary authority without applying its mind whereas as per the law settled by catena of judgments of the Hon'ble Supreme Court as well as this High Court that the disciplinary authority has to consider whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in grade which is not considered while dismissing the services of the petitioner. In support of his submissions, learned counsel for the petitioner has relied upon the judgments of Hon'ble Apex Court passed in the cases of ***Union of India and another vs. Tulsiram Patel : AIR 1985 SCC 1416, State of Jharkhand and others vs. Jitendra Kumar Srivastava and another*** reported in ***AIR 2013 SC 3383*** as well as the judgments of this Court in the cases of ***Shyam Narian Shukla vs. State of U.P., 1988 6 LCD 530, Ratan Singh v. State of U.P. and others, [(2013) 11 ADJ 352], Udai Pratap Singh v. State of U.P., [(2014) 32 LCD 779], Shambhu Nath Yadav vs. Stae of U.P., [2016 (4) ADJ 276], Rajesh Dwivedi vs. State of U.P., 2018 (36) LCD 1047, Ram Kishna vs. State of U.P., (2020) 1 ADJ 862, Murari Lal Rathore vs. State of U.P. : 2021 (6) ALJ 622.***

5. It is further submitted that during pendency of the present writ petition, the petitioner after attaining the age of superannuation has retired from service on 31.10.2021 and due to the dismissal order, the petitioner has not been paid any post retiral dues.

6. It is further submitted that the petitioner is entitled for the post retiral dues and in support of his submission, the learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of ***State of Jharkhand and others vs. Jitendra Kumar Srivastava and another*** reported in AIR 2013 SC 3383, the judgment of the Hon'ble Apex Court in ***Civil Appeal No.1804 of 2020 : Life Insurance Corporation of India vs. Mukesh Poonamchand Shah*** and lastly relied upon the judgment dated 18.09.2023 passed by this Court in ***Writ-A No.4422 of 2015 in the case of Vishwanath Vishwakarma vs. State of U.P. through Principal Secretary, Revenue and others*** wherein a judgment has been passed after considering all the aspects as argued and submitted before this Court and the case of the petitioner is squarely covered by the judgment of Vishwanath Vishwakarma (supra).

7. It is further submitted that appellate and revisional orders confirming the impugned order of dismissal has been passed without application of mind and against the law.

8. On the other hand, learned State counsel has submitted that the parity of the judgment dated 18.09.2023 in the case of Vishwanath Vishwakarma (supra) prayed by the petitioner is not applicable in the present case to the extent that petitioner in that writ petition was 70 years of age whereas in the present case, the petitioner is only about 63 years of age but unable to distinguish the applicability of the judgment otherwise.

9. After hearing learned counsel for the parties, going through the record and the judgments cited above by the learned counsel for the petitioner.

10. As per the law settled by the Hon'ble Apex Court and this Court relied by the learned counsel for the petitioner wherein it has been held that the disciplinary authority/competent authority are bound to consider the conduct of the petitioner, which has led to his conviction in the sessions trial. This was the condition precedent for the competent authority to acquire jurisdiction to impose punishment of removal from service. However, in the present case, the impugned order is silent and does not show consideration of conduct of the petitioner which has led to his conviction and then to decide what punishment is to be inflicted upon him, therefore, the impugned order cannot be sustained. In the matter of Rajesh Dwivedi (Supra), issue before the Court was same as in the present controversy and the petitioner in said case was convicted under Sections 147, 148 and 302 IPC. The Court after considering many judgments has taken the very same view. Relevant paragraphs of the said judgment are quoted hereinbelow:

"*10. In view of the settled proposition of law, as discussed above, a government employee cannot be dismissed, removed or reduced in rank merely on the ground that he has been convicted by a Court of law. Thus, conviction alone is not enough to punish a government employee, but it is conduct of the employee*

concerned, which had led to is conviction on the basis of which, the government employee can be punished. Hence, it is necessary for disciplinary authorities to consider the conduct of convict government servant, which had led to his conviction. In the absence of the same, the order of the punishment would be bad. Further the consideration by the disciplinary authority is required to be recorded in writing.

11. The learned Standing Counsel has argued that proviso-2 to the Article 311 of the Constitution of India provides that where a person is dismissed on the ground of conduct, which has led to his conviction on a criminal charge or where the appointing authority is satisfied that it is not reasonably practicable to hold such an enquiry, there is no requirement of the observance of the principles of natural justice. He has further argued that this provision is akin to Rule-7 of the U.P. Government Servant (Discipline & Appeal) Rules 1999 which also provides that where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge or where the disciplinary authority is satisfied, that for the reason to be recorded in writing, it is not reasonably practicable to hold an enquiry as per the Rules the order becomes final. He has also argued that an employee who has been in Jail for more than 48 hours, his services are terminated in accordance with the rules.

12. The argument of the learned Standing Counsel is patently illegal since Article 311 of the Constitution of India and also Rule-7 of the U.P. Government Servant (Discipline & Appeal) Rules, 1999 clearly provide that the authority passing the order of the major punishment, on the ground of conviction of the employee on a criminal charge, will have to record his satisfaction in writing that he is satisfied, after consideration of the conduct of the employee which has led to conviction on the ground of criminal charge, that he deserves major penalty. Further argument of the learned Standing Counsel that mere imprisonment exceeding 48 hours, an employee becomes liable for termination of his services as per the Rules is absurd. As per Rule-4(3) of the U.P. Government Servant (Discipline & Appeal) 1999, such a Government deemed to be placed under suspension w.e.f., the date of his detention.

13. Therefore, it is clear from the above decisions and the relevant provisions of law that it is incumbent upon the authorities to consider the conduct of the employee which has led to his conviction in the criminal charge before imposing any punishment. In the present case, the impugned order passed by the respondent No. 2 only states that since the petitioner has been convicted in the criminal case, he should be dismissed from service from the date of the order of conviction. The respondent No. 2 was required to examine the conduct of the petitioner which led to his conviction before imposing the major punishment upon him. The order suffers from non application of mind and shows arbitrary exercise of discretion vested in the respondent No. 2 by law."

11. Again a similar issue came up before this Court in the matter of ***Ram Kishan*** (Supra), in which an employee was convicted under Sections 302 and 134 I.P.C. and this Court after considering many judgments has taken the very same view. Relevant paragraphs of the said judgment are being quoted hereinbelow:

"12. In Shankar Das v. Union of India, 1985 (2) SCR 358, Hon'ble Supreme Court while referring to power under Clause (a) of second proviso of Article 311(2) of the

Constitution of India, has observed as under:-

"Be that power like every other power has to be exercised fairly, justly and reasonably."?

13. Proviso (a) to Article 311 of the Constitution of India, is an exception to clause (2) of Article 311, which is applicable where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. In case of Divisional Personnel Officer, Southern Railway Vs. T.R. Chellappan, 1976 (3) SCC 190 (para-21), Hon'ble Supreme Court considered Article 311(2), Proviso (a) and held that this provision confers power upon the disciplinary authority to decide whether in the facts of a particular case, what penalty, if at all, should be imposed on the delinquent employee, after taking into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features, if any, present in the case and so on and so forth. The conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry, if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction. The disciplinary authority has the undoubted power after hearing the delinquent employee and considering the circumstances of the case to inflict any major penalty on the delinquent employee without any further departmental inquiry, if the authority is of the opinion that the employee has been guilty of a serious offence involving moral turpitude and, therefore, it is not desirable or conducive in the interests of administration to retain such a person in service. In Sushil Kumar Singhal vs. Regional Manager, Punjab National Bank, 2010 (8) SCC 573 (Paras-24 and 25), Hon'ble Supreme Court explained the meaning of the words 'moral turpitude' to mean anything contrary to honesty, modesty or good morals.

14. Thus, in view of the law laid down by Hon'ble Supreme Court in the cases of Tulsiram Patel (supra), T.R. Chellapan (supra) and Shankar Das (supra), and two Division Bench judgments of this court in Shyam Narain Shukla (supra) and Sadanand Mishra (supra), it can safely be concluded that while removing the petitioner from service, the respondents were bound to consider the conduct of the petitioner, which has led to his conviction in the session trial. This was the condition precedent for the competent authority to acquire jurisdiction to impose punishment of removal from service. However, the impugned order is unfortunately silent and does not show consideration of conduct of the petitioner which has led to his conviction in the S.T. No. 178 of 2005. It was necessary for the respondents, while passing the impugned order, to consider the conduct of the petitioner leading to his conviction and then to decide what punishment is to be inflicted upon him. This has not been done by the respondent No. 2 while removing the petitioner from service. Therefore, the impugned order cannot be sustained and is hereby quashed."

12. Again one more similar issue was before this Court in the matter of ***Murari Lal Rathore*** (Supra) in which conviction was made under Section 302, 120 B and

149 IPC and petitioner was dismissed from the service on the very same ground. This Court after considering in detail has taken the very same view. Relevant paragraphs of the said judgment are being quoted hereinbelow:

"10. The order of dismissal merely records that petitioner has been convicted to imprisonment of life in S.T. No. 455 of 208 and is incarcerated in jail therefore in view of the Government Order dated 12.10.1979, the petitioner is being dismissed from service from the date of his incarceration in jail i.e. 31.10.2015.

14. The authoritative pronouncement of law by Supreme Court in Tulsi Ram Patel (supra) is consistently followed and it is by now well settled that mere conviction in a criminal case would not lead to automatic dismissal from service of the government servant. Since clause (a) to the second proviso to Article 311(2) of the Constitution of India as also first proviso to rule-7(xii) of the Rules of 1991 are exception to the normal rule of holding inquiry against the government servant and even opportunity of hearing is not required to be given to him, therefore, the disciplinary authority has to scrupulously examine the conduct of the government servant which led to his conviction before exercising such jurisdiction. The nature of guilt established as also the possible defence available to the government servant are aspects which requires consideration at the level of the disciplinary authority. In the event these aspects are omitted from consideration, the order of dismissal itself would be rendered without jurisdiction.

18. Since the conduct of the petitioner leading to his conviction has not been examined by the disciplinary authority within the laid down parameter as such the order of dismissal, as affirmed in appeal and revision cannot be sustained. Orders impugned dated 1.12.2016, 21.12.2016 and 18.3.2016 accordingly are liable to be quashed."

13. In the present case also the impugned order of dismissal has been passed only on the ground that the petitioner has been convicted in a criminal case but there is no opinion recorded by the disciplinary authority that the employee has been guilty of serious offence involving moral turpitude, therefore, it is not desirable or conducive in the interest of administration to retain such person in service.

14. As far as the parity of payment of post retiral dues as per the judgment in the case of Vishwanath Vishwakarma (supra) which was granted to the petitioner in that writ petition by this Court and refused to grant liberty to the disciplinary authority to pass a fresh order on the ground that now there is no relation of employer and employee between the petitioner and the respondents after the retirement of the petitioner cannot pass or hold any enquiry by placing reliance on the judgment in the case of ***Murari Lal Rathore*** (supra) the Court after considering this issue has also held as under:

"19. Ordinarily, when such orders are quashed a liberty ought to be granted to the disciplinary authority to pass a fresh order while considering relevant factors i.e. conduct of the employee, gravity of charges and the materials available against him etc. This course, however, would not be desirable or even permissible in the facts of the present case since the petitioner has attained the age of superannuation on 31.12.2018 and

the contract of employment has come to an end.

24. A conspectus of above observations made by the Supreme Court would clearly reveal that unless there exists an enabling provision either in the applicable service rules or any other provision of law it would not be open for the disciplinary authority to pass an order in respect of contract of service after the employee has attained the age of superannuation.

25. This Court in ***Bhagirathi Singh Vs. State of U.P. and others, 2018 (8) ADJ 538*** *has also observed as under in Para-18:-*

"18. It is settled legal position that the employer and employee relationship is dependant only upon the contract of employment. The moment, the contract comes to end as the person is retired from service on attaining certain age under the rules, the relationship comes to an end. In the event of employer of employee relationship coming to an end, the rules have to specifically provide for continuation of proceedings in the first instance and that too with the sanction of higher authorities in the second instance because it will be seen as exceptional circumstance where disciplinary authority would record that for reasons genuine and convincing the disciplinary proceedings could not be concluded and, therefore, it is required that the proceedings be continued even after retirement, but there is no such provision under the rules governing the disciplinary proceedings. In this context, learned counsel for the respondent could not point out any rule, circular or executive instructions even, which may provide for continuance of disciplinary proceedings even after the retirement of the petitioner or any other employee of the corporation. Then again, the question will be that how a punishment is to be imposed as the punishment is awarded only against an employee unless and until employer and employee relationship exists, the order of punishment upon a retired employee cannot be imposed except otherwise provided under the rules. Even in matters of recovery, it is not open for the department to deduct any amount from retiral dues in absence of any rules giving any such authorization.

26. From the above discussions, it is apparent that since the petitioner has attained the age of superannuation and no provision in law is shown which permits the disciplinary authority to examine the conduct of an employee, now, so as to pass an order of punishment, there would be no purpose in remitting back the matter to the disciplinary authority for a fresh consideration of petitioner's conduct leading to his conviction. Such a course would be legally impermissible.

27. The relief to be granted to the petitioner in such circumstances will have to be determined by this Court in view of what has been observed in para-127 of the Constitution Bench judgment in Tulsiram Patel (supra). The Court will have the jurisdiction to pass necessary order in respect of the penalty, which in its opinion would be just and proper in the circumstances of the case.

28. In the facts of the present case the petitioner has been dismissed from service on 18.03.2016 and has attained the age of superannuation on 31.12.2018. He has admittedly not worked during this period. The proceedings against the petitioner, consequent upon his conviction in an offence under Section 307 I.P.C. cannot be said to be without jurisdiction or arbitrary, on facts. The order of dismissal has been found wanting on account of non-consideration of petitioner's conduct

leading to his conviction and has been set aside, for such reasons. The petitioner would be entitled to all service and retiral benefits including continuity excluding salary between 18.3.2016 to 31.12.2018 by applying the principles of 'no work no pay'. It is however reiterated that the period between 18.3.2016 to 31.12.2018 shall be counted for payment of retiral benefits.
"

15. In the facts of the present case the petitioner has been dismissed from service on 13.08.2010 and has attained the age of superannuation on 31.10.2021. The petitioner had admittedly not worked during this period. The order of dismissal has been found wanting on account of non-consideration of petitioner's conduct leading to his conviction and has been set aside for such reasons. The petitioner shall be entitled to all the post retiral benefits including continuity excluding salary between the period from 13.08.2010 to 31.10.2021 by applying principle of "no work, no pay".

16. In view of the facts, circumstances and discussion made hereinabove, the writ petition is allowed.

17. The impugned orders dated 13.10.2010, 28.02.2020 and 19.03.2021 are quashed and set aside.

18. The respondents are directed to ensure the payment of all post retiral dues to the petitioner within a period of two months from the date a certified copy of this order is served.

(2024) 3 ILRA 594
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 12559 of 2023

Akhilesh Kumar & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Atipriya Gautam, Sri Vijay Gautam (Sr. Advocate), Sri Utkarsh Birla, Aarushi Birla

Counsel for the Respondents:
C.S.C., Sri A.K. S. Parihar

Service Law – U.P. Secondary Education Services Selection Board – TGT Recruitment 2021 – Preparation of waiting list – Adjustment against unfilled vacancies.
Once the main select list exhausted, vacancies remaining unfilled to be offered strictly on merit from the waiting list – *Open category is "open to all"* – Reserved category candidates having higher marks cannot be denied adjustment merely because the vacancy is of general category – Migration permissible from reserved to open, not vice-versa. (Paras 11–16)

Reservation – Principle of migration – Vertical reservations.
Law well-settled that reserved category candidates securing higher marks than last cut-off of general category migrate to open category – No migration from general to reserved category – Respondents' action in adjusting lower-merit general candidates over higher-merit OBC candidates held impermissible. (Paras 12–15)

Public Employment – Illegality in selection – Rectification.
No one can be appointed against rules in public employment – If a wrong has been done by misapplication of reservation principle, it must be undone – Fresh panel to be prepared from waiting list after notice to already allotted candidates. (Para 17)
Held : Notification dated 01.09.2023 whereby lower-merit general category candidates were adjusted against open vacancies quashed – Respondents directed to prepare fresh panel from waiting list in accordance with law. (Paras 16–18)

Writ Petition Disposed of with Directions.

CASE LAW DISCUSSED-

1. Indra Sawhney Vs U.O.I., 1992 Supp (3) SCC 217

2. R.K. Sabharwal Vs St. of Punjab, (1995) 2 SCC 745

3. Saurabh Yadav Vs St. of U.P., (2021) 4 SCC 542

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

1. Heard Sri Utkarsh Birla, learned counsel for the petitioners, Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri J.N Maurya, learned Chief Standing Counsel for the State-respondents and Sri A.K.S. Parihar, learned counsel appearing for the respondent-Board.

2. Petitioners before this Court have been applicants against the post of Assistant Teachers in Trained Graduate Teacher (TGT) by the UP Secondary Education Service Selection Board, Prayagraj vide advertisement No.1/2001 dated 15.03.2021.

3. The examination for selection namely the TGT Examination, 2021 was to be held in respect of 12,603 vacancies that were notified out of which 1742 vacancies were in the subject of Hindi and boys category. Out of 1742 vacancies, (Hindi Subject) 1054 were published for general category and 405 were published for OBC category (boys). Petitioners being eligible their candidature was considered. They duly participated in the selection process. However, they could not make it successful for having secured below 307.38 marks to find place in the final select list that formed panel of selected candidates in the OBC category.

4. Besides the final select list that was prepared and notified as per rules, the Selection Board also prepared a waiting list of 25% as a combined panel of waiting list candidates. This combined waiting list prepared was notified on 28.12.2021 and has been annexed as Annexure-5 to the writ petition and this document is admitted to the respondent-Board as well as State-respondents.

5. This petition came to be filed with the plea that in respect of those vacancies where the candidates of the main panel list did not turn up to join and thus having remained vacant, respondents be directed to prepare a list out of the waiting list in order of preference considering merits for the purposes of recommendations and appointments against such vacancies.

6. It transpires that during pendency of this writ petition, the respondent proceeded to prepare a panel from the waiting list for the purposes of allotment of schools qua vacancies where the candidates originally placed in the merit list did not turn up to join.

7. It is argued by learned counsel appearing for the petitioners that in the notification of panel dated 01.09.2023, a large number of candidates of open category have been recommended for the allotment of college for the purposes of appointment as Assistant Teacher (TGT) though they were below in merit to the petitioners. For example, one Mr. Atul Singh s/o Ram Hriday Singh (general cateogry) placed at Serial No.56 of the notification dated 01.09.2023 had secured 307.38 marks but is below in merit to Nisha

Devi, she being senior in age vide Rule 12 of 1978 Rules as she is at serial No.150 of the waiting list whereas Atul Singh is at Serial No.158 (both have equal marks). Again, Ms. Jyotsana Pandey who is there in the notification dated 01.09.2023 at Serial No.67 is at Serial No.209 of the waiting list, is also below to petitioner No.2, namely Nisha Devi and also petitioner no.4 namely Ms. Vandana Yadav who is at Serial No.208 of the waiting list. The other candidates below to Ms. Jyotsana Pandey who have been given allotment vide notification dated 01.09.2023, are all lower in merit in the waiting list, to the petitioners.

8. Learned counsel for the petitioners, thus, has argued that respondents are not justified in giving appointments against the vacant situations from the waiting list of those general category candidates who are lower in merit than OBC/reserved category candidates. The arguments is based on the principle that in open category, all other category candidates can get entry if they are having higher merit to a candidate of open category candidate.

9. It is argued further that the 'Samekit' means consolidated list of selectees and in that case as and when the vacancy occurs on account of non joining of the selected candidates from the main panel and if there is no other candidate available in the main panel, the waiting list candidate shall be offered appointment in the order of merit. A candidate of open category having higher marks than the reserved category candidate will of-course be given preference if the vacancy is of open category, but in the event, reserved category candidates with higher marks are available then they will be taken to be of open category to be adjusted against the vacancy of general category, if it is still vacant.

10. Countering the submission so advanced by learned counsel for the petitioners, Sri Neeraj Tripathi, learned Additional Advocate General has contended that the Board has proceeded to make recommendations to make appointment from the waiting list on the basis of category of vacancy that has remained vacant. He argued vehemently that since the vacancies were of open category, the respondents in their wisdom rightly recommended the name of only those candidates who belonged to general category. He accordingly, tried to justify that once the reservation has been applied and vacancy becomes available, then there will be no further migration from one category to another category.

11. Having heard learned counsel for the respective parties and the arguments raised across the bar, the only point that emerges out for consideration of this Court is as to whether while making adjustment against the available vacancies already notified from the waiting list, the respondents are justified in making allotment in favour of those candidates who belong to that category of which the vacancy has been assigned. In other words, once the rule of reservation has been applied then the vacancy would stand assigned and no further migration from one category to another category will be permissible.

12. In matters of rule of reservation, the law is very clear. While preparing a merit list, the selecting body has to see what is the last cut-off marks of each category in respect of vertical reservation. There is no migration from general to

reserved category but there is migration from reserved category to general category so there is only one way traffic and this is why general category is called 'open category'. In other words, on the principle that merit is to be reckoned with in public employment and the candidates having merit have to be given preference despite the categories to which they belong to. So, in such event when merit of general category is higher and a reserved category candidate is able to score higher than the last cut off of the general category then such reserved category candidate would be migrated to open category. But in the matter of reserved category if a candidate has applied as an general category candidate may be he belongs to reserved category he would be taken to be general category candidate only. So there is no migration from general to reserved category. Similarly once the post has stood assigned to a particular category of reservation then for all purposes that category would continue to belong to that reserved category even while a candidate is taken from the waiting list.

13. For instance, if a post for reserved category is assigned and post assigned to reserved category remains vacant for the reserved category person not turning up, then a candidate of that reserved category will be taken from that merit list may be lower than the candidate of a general category available in the waiting list. But in the event a post assigned to general category remain vacant for a selected candidate not turning up to join and the main panel has got exhausted then the candidate who is higher in merit, may be of reserved category would stand migrated to open category than a candidate of general candidate having lesser marks. This migration is absolutely permissible and is in tune with the principles of reservation so discussed from time to time by this Court and the Supreme Court.

14. In my above view, I find support from the judgment of Supreme Court in the case of ***Indra Sawhney Etc. Etc v. Union of India; 1992 (3) SCC (SUPP) 217***, applying test of merit on the touchstone of Article 14 of the Constitution vis-a-vis the reservation in public employment under Article 16(4) of the Constitution, the Court justified migration of reserved category candidates from their reserved category to the open category upon scoring above or matching the last cut off/merit of the open category which is otherwise also known as general category. Vide paragraph 811 of the judgment, the Court has observed *"it is well to remeber that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging, to say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."* This above principle by the Constitution Bench was further more elaborated and precisely too in the case of ***Saurabh Yadav and ors vs. State of UP & ors; 2021 (4) SCC 542***. The Court though in that case was also dealing with horizontal reservation more especially in the matter of female reservation, but supplementing the view of majority, Ravindra Bhatt, J. observed that open category is not a quota but is available to all men and women alike to vertical and horizontal reservations. The Bench referring to judgment of another Constitution Bench in case of ***R.K. Sabharwal v. State of Punjab; 1995 (2) SCC 745*** vide its paragraph 15 held thus:

15. In R.K. Sabharwal v. State of Punjab15 the Constitution Bench of this Court considered the question of appointment and promotion and roster points vis--vis reservation and held thus:

When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition.?

(emphasis added)

15. In the case in hand, it is clear that the merit list was finally prepared and the cut-off of the open category was much more than the OBC and SC/ST category and so there was no question of any migration of a reserved category candidate to open category but once merit panel got exhausted and there arose question of getting candidates from the waiting list against unfilled vacancies then in that waiting list, an open category candidate whose merit was less than the reserved category candidate could not have marched ahead of such reserved category candidate to occupy the post only on the ground that the post had fallen vacant in the open category. This upon the above principles of law discussed was absolutely impermissible. Concluding on the principles of migration from reserved category to open category and the concept

of reservation, supplementing the judgment (delivered by Justice U.U. Lalit, J. as His Lordship then was), Justice Ravindra Bhatt observed that *"reservations, both vertical and horizontal, are method of ensuring representation in public services. These are not to be seen as rigid ?slots?, where a candidate?s merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the state?s argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him."*

16. In such above view of the matter and legal proposition conceived and applied as law of reservation, since the respondents have admitted that they have adjusted the general category candidate against the vacancy that remained vacant even after the main merit panel got exhausted, despite their marks being lesser to the OBC category candidate, in my considered view, it was a wrong that needed to be rectified by offering appointment to OBC category candidate or those having higher marks than the general category candidates in the waiting list.

17. The stand taken by the selection board and the state respondents, thus, cannot be sustained in law. No one can be appointed against rules in public employment, may be interpreting it wrongly or mistakenly and if a wrong has been done it must be undone. Accordingly, respondents are directed to prepare panel afresh in the light of law discussed above and the observations made to make adjustments of waiting list candidates against available vacancies that got wrongly allotted vide notification dated 01.09.2023. The respondents shall be issuing notices to the candidates who have been notified for the purposes of allotment on 01.09.2023, if already joined inviting their objections and thereafter fresh panel shall be prepared from the waiting list. The notification dated 01.09.2023 shall abide by the fresh notification.

18. This petition stands ***disposed of*** in above terms.

(2024) 3 ILRA 599
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 12827 of 2023

Smt. Kamar Jahan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Singh, Sri Abhishekh S. Mishra

Counsel for the Respondents:
C.S.C., Sri S.K. Srivastava

Service Law – U.P. Nagar Palika Non-Centralized Services Retirement Benefit Regulation, 1984 – Regulation 7(1) – Family Pension – Employee died in harness after 9 years, 10 months, 7 days service – Whether shortfall of 1 month 23 days disentitles widow.
Held: Article 468, U.P. Civil Service Regulations mandates rounding of fractions of three months and above to a completed half year – Thus, deceased's service period to be reckoned as 10 years – Family entitled to consideration for pension under Note (1) to Regulation 7(1), even prior to 2016 amendment. (Paras 14–17)

Pension – Circular dated 18.04.2016 – Nature.

Circular clarifying Article 468 is declaratory, not constitutive – It only affirms existing law, not prospective in operation – Authorities erred in denying benefit on ground that husband died before 2016 amendment/circular. (Paras 16–17)

Public Authority – Duty to exercise discretion.

Once 10 years' qualifying service reckoned under Article 468, Pension Sanctioning Authority bound to consider widow's case under Note (1) to Regulation 7(1) of unamended 1984 Regulations – Discretion must be exercised on objective parameters. (Paras 7, 17)

Held : Writ petition allowed – Mandamus issued to Commissioner, Varanasi Division, to consider and sanction petitioner's family pension under Note (1) to Regulation 7(1) of 1984 Regulations (unamended) within one month. (Para 18)

Writ Petition Allowed – Mandamus Issued.

CASE LAW DISCUSSED-

1. Karta Ram Vs St. of U.P. & ors., 2016 (3) AWC 3076 (LB)

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

1. This writ petition has been instituted by the petitioner praying that a *mandamus* be issued commanding the respondents to grant family pension to her along with arrears with effect from 09.11.2012, besides due interest.

2. The facts of the case are that the petitioner's husband, the late Mustafa, was appointed a *Safai Karmchari* on 31.12.2002 with the Nagar Panchayat, Machhlishahr, District Jaunpur. He was a compassionate appointee and died in harness. He rendered good services to the Nagar Panchayat. The petitioner's husband died on 08.11.2012, leaving behind him his widow, three sons and a daughter as his heirs and legal representatives.

3. It is the petitioner's case that the deceased employee's heirs and legal representatives are his dependent family members. The death-cum-retirement benefits payable were paid to the petitioner in installments which include gratuity and dues on account of leave encashment. It is pleaded that gratuity paid was a sum of Rs. 38,800/- and leave encashment a sum of Rs. 1,47,000/-. The petitioner says that the family pension, however, was not paid to her and when she asked for it, the same was denied verbally by the respondents saying that the petitioner's husband had not put in qualifying service to earn a retirement pension for himself and *a fortiori*, family pension for the family after his demise. It is the petitioner's case that the service conditions of the petitioner who was a class IV employee are governed by the U.P. Nagar Palika Non-Centralized Services Retirement Benefit Regulation, 1984 (for short, 'the Regulation of 1984').

4. Learned Counsel for the petitioner has drawn the attention of the Court to the Circular dated 18.04.2016, which says that in compliance with the order dated 28.01.2016 passed by the Lucknow Bench of this Court in Writ Petition No. 1685 (S/S) of 2016, the benefit of Article 468 of the U.P. Civil Service Regulations is to be extended to employees for the purpose of reckoning their qualifying service. It is mentioned in the said circular that in calculating the length of service, fractions of a half year equal to three months and above shall be treated as a completed half year and reckoned as qualifying service.

5. It is submitted by the learned Counsel for the petitioner that under Regulation 7(1) of the Regulations of 1984, an employee, who has completed 20 years qualifying service before retirement or has completed 20 years of such service and dies while in service, would entitle his family to

family pension. It is further pointed out that *vide* Note (1) appended to Regulation 7(1) of the aforesaid Regulations, the Pension Sanctioning Authority may, in exceptional circumstances in his discretion, award family pension to the family of an official, who dies before completing 20 years qualifying service, but after completing not less than ten years.

6. It is argued by the learned Counsel for the petitioner that applying the provisions of Article 468 of the U.P. Civil Service Regulations, which have been adopted uniformly for application in all cases of reckoning 10 years qualifying service for purposes of pension in all departments of the Government and Offices, the petitioner would be entitled to reckon the deceased's services of 9 years, 10 months and 7 days as a completed half year, and, therefore, 10 years.

7. The further submission advanced by the learned Counsel for the petitioner is that once the deceased's service is regarded as 10 years, the Pension Sanctioning Authority, under Regulation 7(1) of the Regulations of 1984 in accordance with Note (1), must exercise his discretion reasonably on objective parameters.

8. In the personal affidavit filed on behalf of the Commissioner, Varanasi Division, Varanasi, which is being treated as a counter affidavit, the stand taken is that the U.P. Nagar Palika Centralized Service Retirement Benefit (5th Amendment) Regulations came into force in the year 2016 and the petitioner cannot claim benefit of the amendment made to the Regulations of 1984 by the 5th Amendment, inasmuch as the petitioner's husband, the deceased employee here, died on 08.11.2012 much before the enforcement of the amended Regulations. It is urged that the petitioner's rights would be governed by the pre-amended Regulations of 1984, that is to say, without reference to the 5th Amendment, 2016.

9. It is pleaded that under Regulations 7(1) of the Regulations of 1984, the Pension Sanctioning Authority is entitled to sanction in exceptional circumstances, in his discretion, pension upon completion of a minimum service of 10 years, in a case where the employee died before completing 20 years. It is said in paragraph no. 5 of the Commissioner's affidavit that since the total length of service of the petitioner's husband was less than 10 years at the time of his demise, family pension cannot be sanctioned for him. It is averred in paragraph no. 6 of the affidavit filed on behalf of the Commissioner that by notification dated 16.12.2016 issued by the Department of Urban Development, Regulations 6 and 7 of the Regulations of 1984 were amended and under the Amended Regulation vide Note (1) to paragraph 7(1), provision is made to extend the benefit of family pension after completion of less than 10 years service in case of a deceased employee, but that would not apply to the petitioner's case because her husband died prior to notification of the Amended Regulations on 16.12.2016. In paragraph no. 1(2) of the notification through which the amendment to the Regulations have been enforced, it is stipulated that the amendment would come into force with effect from the date of its publication in the gazette. It is urged that the notification was published in gazette on 16.12.2016, and, therefore, the amended Regulations of 2016 would not apply to the petitioner, whose husband died way back on 08.11.2012. In paragraph no. 7 of the affidavit filed by the Commissioner, it is

said that the Circular dated 18.04.2016 issued by the Government regarding Article 468 of the U.P. Civil Service Regulations, which provides for reckoning of fractions of half a year equal to three months and above to be a completed half year for the purpose of qualifying service, would also not apply to the petitioner's case since the clarification about Article 468 was issued by the Government on 18.04.2016, whereas the petitioner's husband died on 08.11.2012.

10. There is, a further personal affidavit filed on behalf of the Deputy Director, Local Fund Audit Department, Varanasi Division, Varanasi. The Deputy Director has taken the same stand as the Divisional Commissioner. The Commissioner is the competent Pension Sanctioning Authority.

11. Mr. S.K. Srivastava, learned Counsel for the Nagar Panchayat, Machhlishahr, District Jaunpur, who are arrayed as respondent nos. 3 and 4, has waived opportunity to file a counter affidavit on behalf of the said respondents. Thus, the petitioner's case as against respondent nos. 3 and 4 is unrebutted.

12. Upon hearing the learned Counsel for the parties, this Court finds that it would be apposite to quote verbatim the provisions of Regulation 7(1) of the Regulations of 1984, including the amendments brought about by the amended Regulations of 2016 with effect from 16.12.2016. Regulation 7(1) pre and post amendment reads:

"विनियम-7का संशोधन	5- उक्त विनियमावली में, विनियम-7 में, नीचे स्तम्भ-1 में दिये गये उपविनियम (1) के स्थान पर स्तम्भ-2 में दिया गया उपविनियम रख दिया जायेगा, अर्थात

स्तम्भ-1 **विद्यमान उपविनियम**	**स्तम्भ-2** **एतद्द्वारा प्रतिस्थापित उपविनियम**
7(1) ऐसे पदधारी के, जिसकी चाहे सेवानिवृत्त के पश्चात या कम से कम बीस वर्ष की अर्हकारी सेवा पूरी करने के पश्चात सेवा में रहते हुए मृत्यु हो जाय, परिवार को दस वर्ष की अवधि के लिए पारिवारिक पेंशन दी जा सकती है, जिसकी धनराशि उपविनियम(2) में विनिर्दिष्ट धनराशि से अधिक न होगी। टिप्पणीः- (1) पेंशन- स्वीकृति प्राधिकारी, आपवादिक परिस्थितियों में, स्वविवेकानुसार किसी ऐसे पदधारी के परिवार को, जिनकी मृत्यु बीस वर्ष की अर्हकारी सेवा पूरी करने के पूर्व किन्तु कम से कम दस वर्ष की अर्हकारी सेवा पूरी करने के पश्चात हो जाय, पारिवारिक पेंशन दिये जाने पर विचार कर सकता है। (2) ऐसे मामलोंं में, जहां अर्हकारी सेवा विहित न्यूनतम से कम हो, वहां इस कमी को माफ नहीं किया जाना चाहिए	7(1) पारिवारिक पेंशन ऐसे पदधारियों के परिवारों को अनुमन्य होगी, जिनकी मृत्यु सेवाकाल में अथवा सेवानिवृत्ति के पश्चात हुयी हो, बशर्ते कि मृतक पदधारी इस विनियमावली के अधीन प्रतिकार, अशक्त, सेवानिवृत्ति या अधिवर्षिता पेंशन प्राप्त कर रहा हो अथवा प्राप्त किये जाने का हकदार था। ऐसे पदधारकों के परिवार भी जिनकी इस विनियमावली के अधीन पेंशन का हकदार होने के पूर्व सेवाकाल में मृत्यु हो गयी हो, पारिवारिक पेंशन के हकदार होंगे, बशर्ते कि मृतक पदधारण की नियुक्ति नियमानुसार की गयी हो।

13. This Court must notice at once that the stand taken by the Divisional Commissioner in paragraph no. 6 of the personal affidavit that his discretion to extend the benefit of family pension, upon the deceased employee completing 10 years service but less than 20 years, has been brought in through the 5th Amendment to the Regulations of 1984 with effect from 16.12.2016, which would not apply to the petitioner's case her husband having died before the date of this amendment is not at all tenable. The reason is that a perusal of the Regulation 7(1) of the Regulations of

1984 in its pre-amended form would show that discretion to sanction family pension after 10 years of qualifying service, but before completion of 20 years is a provision that is there vide Note (1) to Regulation 7(1); post amendment, a different provision has been introduced and the petitioner does not seek benefit thereof at all.

14. The only issue is that the petitioner's husband never completed ten years service and died shy by a month and 23 days of completing ten years service. The issue therefore is, if the petitioner's husband's services rendered for a period of 9 years, 10 months and 7 days can be regarded as 10 years, squaring of the fraction to a unit. In this regard, reference may be made to the provisions of Article 468 of the U.P. Civil Service Regulations that find place in Chapter IX relating to 'Amount of Pensions'. Article 468 of the U.P. Civil Service Regulations reads:

"468. The amount of pension that may be granted is determined by length of service. In calculating the length of qualifying service, factions of a half year equal to three month and above shall be treated as a completed one half year and reckoned as qualifying service."

15. This issue fell for consideration before a learned Single Judge of this Court in **Karta Ram vs. State of U.P. and others, 2016 (3) AWC 3076 (LB)** . In **Karta Ram** *(supra)*, it was held:

"4. The concerned authority while passing the impugned order dated 05.07.2014 has rightly stated that the services rendered on work charged basis can not be counted for the purposes of calculation of qualifying services, but has omitted to consider the provisions of Regulation 468 of the Civil Service Regulations which provides that the amount of pension that may be granted is determined by length of service. In calculating the length of qualifying service, fractions of a half year equal to three month and above shall be treated as a complete one-half year and reckoned as qualifying service.

5. In the light of the said provision, as the petitioner had put in 9 years 10 months and 5 days in service, fraction of a half year above three months is four months and 5 days, therefore, the case appears to be covered by Regulation 468 and the said period is liable to be treated as complete one-half year, which, if the facts as stated by the petitioner are correct, entitle the petitioner to ten years qualifying service for pension, but this aspect of the matter has not been considered while passing the impugned order."

16. It is acting on the aforesaid remarks of this Court that the circular dated 18.04.2016 was issued by a Secretary to the Government in the Department of Finance, addressed to all Principal Secretaries and Secretaries of various departments in the Government, besides Head of Departments and Heads of Offices in Government Establishments of the State. This circular, a copy of which is annexed as Annexure No. 4 to the writ petition and also relied upon by the Commissioner, appending it to his affidavit, is not constitutive in nature; it is declaratory. It declares the existing position of the law that has always been and does not bring about a change to the law, unlike the 5th Amendment to the Regulations of 1984, about which no issue is involved here. The 5th amendment is, no doubt, amendatory, and, therefore, constitutive. It

would apply prospectively from the date of its enforcement and that is the date of its publication. The Commissioner is absolutely wrong in thinking that the Government's circular clarifying the position of the law about how Article 468 of the Civil service Regulations would work to reckon the fraction of less than three months for the purpose of qualifying service, is prospective in nature. The said circular does not bring about any change, as already remarked.

17. This Court, particularly, notices that it is not at all the Commissioner's stand or that of the Deputy Director, Local Fund and Audit Department, Varanasi that Article 468 of Civil Service Regulations does not apply to the Nagar Panchayat Establishment. Rather, the Commissioner says that it does apply in view of the circular dated 18.04.2016, but prospectively. That position of the law, we have already held to be utterly misunderstood by the Commissioner. The result would be that in accordance with Article 468 of the Civil Service Regulation, the petitioner's husband's period of service which is just short by a month and 23 days of 10 years, would have to be reckoned as a completed one half year because it is more than three months, short of a half year. It would, therefore, have to be reckoned as 10 years. Once it is held that the petitioner has completed 10 years of service, the Commissioner is obliged to consider the petitioner's case for grant of family pension in accordance with Note (1) appended to the unamended Regulation 7(1) of the Regulations of 1984.

18. In the result, this petition **succeeds** and is **allowed**. A mandamus is issued to the Divisional Commissioner of Varanasi, ordering him to consider the petitioner's case for sanction of family pension in accordance with Note(1) to Regulation 7(1) of the Regulations of 1984 (unamended) within a month of the receipt of a copy of this judgment in accordance with law and the guidance here.

19. There shall be no order as to costs.

20. Let this order be communicated to the Commissioner, Varanasi Division, Varanasi by the Registrar (Compliance).

(2024) 3 ILRA 604
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 12847 of 2023

Rakesh Kumar Sharma ...Petitioner
Versus
U.P. Power Corporation Ltd., Luckow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Mishra

Counsel for the Respondents:
Sri K.K. Rao, Sri Abhishek Srivastava, Sri Abhishek Srivastava, Ms. Akanksha Sharma (S.C.), Sri Manish Goyal (A.A.G.)

Service Law – Disciplinary Proceedings – Procedural Fairness – Petitioner, an Office Assistant with U.P. Power Corporation, challenged his dismissal from service for possessing disproportionate assets, alleging violation of procedural fairness under the U.P. Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 – Held, the Inquiry Committee failed to conduct an oral inquiry or produce witnesses to prove the charge, relying solely on police investigation reports without independent evidence – This violated the salutary principle that the establishment must prove charges through oral

and documentary evidence in quasi-judicial proceedings, rendering the inquiry fundamentally flawed – Orders dated 04.09.2021 and 07.06.2023 quashed. (Paras 6, 31, 33, 34, 41, 42, 43, 44)

Service Law – Revisional Jurisdiction – Interference with Pending Appeal – The Chairman of the Corporation enhanced the petitioner's penalty to dismissal under Regulation 13(c) while his appeal against the Disciplinary Authority's order was pending before the Managing Director of the Distribution Corporation – Held, the Managing Director's failure to decide the appeal for 17 months or transmit it to the competent Appellate Authority (Managing Director of the Corporation) upon determining his own incompetence was arbitrary and violated procedural fairness – The Chairman's exercise of revisional powers, foreclosing the petitioner's statutory right to appeal, was unlawful – Uncommunicated order dated 08.02.2023 rejecting the appeal held arbitrary and discriminatory under Article 14. (Paras 9, 10, 20, 21, 22, 23, 27, 28)

Service Law – Burden of Proof in Disciplinary Inquiries – The Inquiry Committee's reliance on police reports without requiring the establishment to produce oral or documentary evidence before them breached the principle that the burden lies on the establishment to prove charges in disciplinary proceedings – Held, the Inquiry Committee acted as a representative of the establishment rather than an impartial quasi-judicial authority, failing to adhere to principles of natural justice as laid down in *St. of U.P. Vs Saroj Kumar Sinha* and *Roop Singh Negi Vs Punjab National Bank* – Disciplinary proceedings vitiated for lack of independent evidence and procedural fairness. (Paras 33, 34, 35, 41, 42)

Writ Petition Allowed .

Orders Dated 04.09.2021 and 07.06.2023 Quashed – Petitioner ReinSt.d with Conditions for Fresh Inquiry.

List of Cases Cited:

1. St. of Uttar Pradesh & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

2. Roop Singh Negi Vs Punjab National Bank & ors., (2009) 2 SCC 570

3. St. of U.P. & anr.Vs Kishori Lal & anr., 2018 (9) ADJ 397 (DB)

4. Smt. Karuna Jaiswal Vs St. of U.P., 2018 (9) ADJ 107 (DB)

5. St. of U.P. Vs Aditya Prasad Srivastava & anr., 2017 (2) ADJ 554 (DB)

6. Chamoli District Co-operative Bank Ltd. Vs Raghunath Singh Rana & ors., AIR 2016 SC 2510

7. Smt. Shaheen Badar Vs U.P. Power Corporation Limited & ors., Neutral Citation No. 2022:AHC:138795-DB

8. St. of U.P. & anr.Vs T.P. Lal Srivastava, 1997 (1) LLJ 831

9. Subhash Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541

10. Subhash Chandra Gupta Vs St. of U.P., 2012 (4) ADJ 4 (NOC)

11. Salahuddin Ansari Vs St. of U.P. & ors., 2008 (3) ESC 1667

12. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348

13. Uma Shankar Vs Registrar, 1992 (65) FLR 674 (All)

14. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570

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

1. Heard Mr. Manu Mishra, learned Counsel for the petitioner, Mr. Manish Goyal, learned Additional Advocate General assisted by Ms. Akanksha Sharma, learned Standing Counsel on behalf of respondent No.6 and Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent Nos.1 and 2.

2. The petitioner, Rakesh Kumar Sharma, was an Office Assistant in the employ of the Uttar Pradesh Power Corporation Limited. Long ago, he had entered service of the late Uttar Pradesh State Electricity Board, now represented by the Uttar Pradesh Power Corporation Limited (for short, 'the Corporation') and the many other Distribution Corporations that have since come up as successors of the erstwhile Board. The petitioner was posted at the Electricity Distribution Division, Kasganj from 20.10.1994 to 31.08.2017, which falls under the administrative control of the Dakshinanchal Vidyut Vitran Nigam Limited, Agra (for short, 'the Distribution Corporation'), represented by its Managing Director, besides the overall control of the Corporation.

3. A First Information Report was lodged against the petitioner on 11.04.2018 by one Satya Dev, an Executive Engineer with the Electricity Distribution Division, Kasganj, giving rise to Case Crime No.230 of 2018, under Section 7/13 (1)(e) of the Prevention of Corruption Act, 1988, Police Station Kasganj, District Kasganj. The FIR said no more than this that the information was being laid against the petitioner on the basis of a letter dated 27.03.2018 from the Additional Director General of Police (Vigilance), U.P. Power Corporation Limited, Lucknow and another letter dated 04.04.2018 from the Superintending Engineer, Electricity Distribution Division, Kasganj, directing the informant to lodge an FIR against the petitioner, then posted at the Electricity Distribution Division, Etah, for an offence of acquiring assets disproportionate to his known sources of income. A copy of the letters was annexed to the FIR, with the FIR not of itself disclosing any allegation constituting the offence. The written report, on the basis of which the check FIR was registered, virtually says nothing except to convey to the Police that the informant had been asked to get the FIR registered on the basis of letters that he had received from the Additional Director of Police and the Superintending Engineer, last mentioned.

4. It appears that a complaint was laid against the petitioner by one Ashok Kumar, alleging that the petitioner had amassed wealth beyond the known sources of his income. The complaint was addressed to the Vigilance Department of the U.P. Power Corporation and led to a preliminary inquiry report dated 05.04.2014, being submitted by the Vigilance Department to the official competent. The petitioner was never informed of this report or its contents. This was followed by a detailed inquiry report dated 29.08.2018, as the petitioner says, which was submitted to the Chairman of the Corporation. This report, according to the petitioner, said that the petitioner had amassed wealth disproportionate to his known sources of income during the period 20.05.1992 to 31.03.2010. The report said that during the relevant period of time, the petitioner's income was Rs.21,69,055/- whereas he spent a sum of Rs.33,98,427/-. Apparently, the inquiry report submitted by the Vigilance Department to the Chairman opined that the petitioner had with him Rs.12,29,372/- during the relevant period of time in excess of his known sources of income. The excess was a percentage equivalent of 56.68.

5. Pending investigation into the FIR lodged against the petitioner, he was served with a charge-sheet dated 18.07.2019 issued by the Chief Engineer (HR-cum-Disciplinary Proceedings), Distribution

Corporation, carrying a solitary charge relating to his income for the check period from 20.05.1992 to 31.03.2010, that was in excess of his known sources. The petitioner answered the charge-sheet vide his reply dated 25.09.2019 submitted to the Inquiry Committee through registered post. The petitioner says that the Inquiry Committee, making a short shrift of the matter and without following the procedure prescribed under the Uttar Pradesh Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 (for short, 'the Regulations') for the imposition of a major penalty under Regulation 7, submitted an inquiry report dated 26.07.2021.

6. It is the petitioner's case that no oral inquiry was conducted nor any witness produced on behalf of the establishment to prove the charge before the Inquiry Committee. *A fortiori*, the petitioner had no opportunity to cross-examine witnesses, who were never produced by the establishment. It is, particularly, pleaded that the Superintendent of Police (Vigilance), U.P. Power Corporation Limited, who was the author of the preliminary inquiry report and the one who had collected materials/ documents, on the foot of which the criminal prosecution as well as the departmental proceedings, subject matter of inquiry before the Departmental Inquiry Committee, was never produced as a witness by the establishment to prove the solitary charge.

7. On the basis of the inquiry report dated 26.07.2021, the petitioner was issued with a show cause notice dated 02.08.2021 under Regulation 9 of the Regulations asking him to put in his reply/ objections against the findings in the inquiry report. Upon receipt of the show cause notice, the petitioner requested a month's time to file his reply/ objections to the findings of the Inquiry Committee. The petitioner's application made for the purpose was sent by registered post on 16.08.2021. The Disciplinary Authority, however, without considering the petitioner's request last mentioned proceeded to pass the impugned order of penalty. The Disciplinary Authority, who in this case is the Chief Engineer (HR-cum-Disciplinary Proceedings) of the Distribution Corporation, proceeded to punish the petitioner by an order dated 04.09.2021, imposing the following punishments, to wit, a censure entry, secondly, withholding of five increments with cumulative effect, and, thirdly, posting on an insensitive position.

8. Aggrieved by the order of punishment, the petitioner preferred an appeal dated 18.10.2021 to the Appellate Authority, that is to say, the Managing Director of the Distribution Corporation under Regulation 11 of the Regulations. One of the grounds raised in the appeal was that Rule 7 of the Regulations had not been followed by the Inquiry Committee while holding the inquiry nor the Disciplinary Authority had gone into this issue. Faced with the non-decision of his appeal, the petitioner submitted a reminder dated 07.05.2022 addressed to the Disciplinary Authority, but in vain.

9. The petitioner says that it came as a surprise to him when more than a year and a half later from the date of the order passed by the Disciplinary Authority, punishing him as last mentioned, a show cause notice dated 10.03.2023 was served upon him under Regulation 13(c) of the Regulations by the Chairman of the Corporation, asking him to show cause against enhancement of the punishment

awarded within 15 days. The petitioner challenged the show cause notice dated 10.03.2023 before this Court by means of Writ-A No.9330 of 2023, amongst others, on ground of the Chairman's lack of jurisdiction to issue such a notice in the exercise of powers under Regulation 13(c) of the Regulations. Pending the said petition, the Chairman proceeded to pass the order impugned dated 07.06.2023, enhancing the petitioner's penalty to one of dismissal from service. In consequence, Writ-A No.9330 of 2023 was dismissed as infructuous by this Court on 3rd of July, 2023.

10. The petitioner questioned the jurisdiction of the Chairman to act and enhance the penalty while submitting his reply to the show cause notice. The jurisdiction was questioned on ground that the petitioner was a Class-III employee, who was appointed to the erstwhile U.P. State Electricity Board and the service regulations applicable to him were the U.P. Electricity Board (Office of Chief Engineer and Subordinate Office) Regulations, 1970. Under the aforesaid Regulations of 1970, it was the Managing Director of the Distribution Corporation, who could exercise powers of the kind exercised by the Chairman in relation to a Class-III employee. The legality of the Chairman's decision to issue a notice for enhancement was also challenged on the ground that the petitioner's departmental appeal against the order of punishment passed by the Disciplinary Authority was pending before the Managing Director of the Distribution Corporation, and yet, the Chairman of the Corporation assumed jurisdiction , in the exercise of his revisional powers, to punish the petitioner, foreclosing the petitioner's right to the decision of his pending appeal.

11. Apart from this, there are detailed defences raised on the merits of the charge to show on a balance of his sources of income during the relevant period of time that he could never be held guilty of possessing assets or spending money beyond his known sources of income. This Court is not minded much to go into the merits of the charge against the petitioner, which after all, in the first instance, has to be determined by the competent Authorities in the Distribution Corporation or the Corporation.

12. On 07.08.2023, when this matter came up for admission before this Court, this Court took note of the fact that the establishment had not examined any witness in support of their case, though the charge against the petitioner was serious, which could have led to the imposition of a major penalty. The Inquiry Committee had proceeded to record a finding of guilt in the absence of any witness or oral evidence being produced by the establishment. To add to it was the feature that the then Chairman of the Corporation, M. Devraj took cognizance of the matter in the exercise of his power under Regulation 13(c) of the Regulations, proceeded to issue a show cause notice to the petitioner for enhancement of the penalty imposed by the Disciplinary Authority and enhanced it to one of dismissal from service. *Prima facie*, this appeared to be very exceptionable to the Court, because in a matter where the inquiry was held by the Committee in a slipshod manner without the establishment proving the charge in accordance with the salutary principles, which require witnesses to be examined by the establishment apart from leading documentary evidence, the Chairman acted to enhance the penalty. Noticing these features, this Court on 07.08.2023 passed the following order:

"Let M. Devraj, former Chairman Uttar Pradesh Power

Corporation Limited, Shakti Bhawan, 14-Ashok Marg, Lucknow be impleaded as a party respondent during the course of the day.

M. Devraj, the then Chairman Uttar Pradesh Power Corporation Limited, Lucknow in an order passed by the Disciplinary Authority whereagainst an appeal was pending, intervened and exercised his revisional jurisdiction under Regulation 13 of the Uttar Pradesh Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 and enhanced the punishment awarded to the petitioner to one of dismissal from service. It appears upon a reading of the inquiry report submitted in the matter that though the charges against the petitioner were very serious, and, if proved, would in all likelihood lead to the imposition of a major penalty, yet the establishment did not examine any witness or lead oral evidence to prove the charges.

The Chairman, who passed the impugned order pending the appeal seeking to exercise his revisional orders prima facie seems to have scant knowledge of the law and apparently is not legally trained. He did not notice prima facie this flaw in proceedings of the inquiry, which goes to the root of the matter and proceeded to enhance the punishment after a show cause notice on the basis of an inquiry report where the establishment had to establish the charges by leading oral evidence.

Let M. Devraj, former Chairman Uttar Pradesh Power Corporation Limited, wherever he is posted currently, explain the circumstances in which he failed to notice the aforesaid gaping flaw in the proceedings before the Inquiry Officer while passing the impugned order.

Let the incumbent Chairman, Uttar Pradesh Power Corporation Limited, Shakti Bhawan, 14-Ashok Marg, Lucknow file his affidavit indicating his stand in the matter on or before 18.08.2023.

The incumbent Chairman, Uttar Pradesh Power Corporation Limited, Shakti Bhawan, 14-Ashok Marg, Lucknow shall cause notice of this petition and the order made today to be served upon M. Devraj, former Chairman, Uttar Pradesh Power Corporation Limited, Shakti Bhawan, 14-Ashok Marg, Lucknow, wherever he is currently posted.

Lay this petition as fresh on 18.08.2023.

Let this order be communicated to M. Devraj, former Chairman Uttar Pradesh Power Corporation Limited through the Chairman, Uttar Pradesh Power Corporation Limited, Shakti Bhawan, 14-Ashok Marg, Lucknow and to the Chairman, Uttar Pradesh Power Corporation Limited, Shakti Bhawan, 14-Ashok Marg, Lucknow by the Registrar (Compliance) within 24 hours."

13. By the orders passed on 07.08.2023, all that the Court wanted to know was what made the then Chairman of the Corporation, M. Devraj suddenly swoop into action and without waiting for the petitioner to avail his remedy of appeal before the competent Authority under the Regulations and without having the benefit of the Appellate Authority's opinion, proceed to enhance the punishment to one of dismissal from service. This was, particularly, thought by the Court to be *prima facie* a very exceptionable course, because the entire proceedings of the inquiry were founded on a fundamentally flawed procedure, as already pointed out. Instead of availing the opportunity of explaining himself by filing a personal affidavit, M. Devraj, former Chairman of the Corporation, now posted elsewhere, took exception to the order dated

07.08.2023, considering the *prima facie* and very tentative remarks in that order an affront to his office. Therefore, instead of filing his personal affidavit, explaining his position about the fundamentally flawed procedure noticed by this Court on a tentative opinion, he preferred a special appeal to the Division Bench against the order dated 07.08.2023. The Division Bench by its judgment and order dated 17.08.2023 declined to interfere with the order dated 07.08.2023 and remarked as follows:

"24. Once the learned single judge was seriously considering if the Revising Authority had exceeded his jurisdiction, it fell within his discretion to seek impleadment of the Revising Authority. Without forming any opinion as to that, since the matter is pending before the learned single judge, we only observe that the discretion exercised by the learned single judge does not call for interference, at this preliminary stage. What may follow, after the explanation called for is submitted, is not for us to foresee, at present. In so far as neither personal attendance has been enforced nor any harsh consequence has arisen, there is no serious injustice seen to have been caused to the Revising Authority.

27. Therefore, we find no good grounds to interfere in the discretion exercised by the learned single judge requiring the impleadment of the present respondent-appellant, in the facts noted by him. Yet, no issue has been decided and, in any case, no vital right has been adjudicated or altered, less so to the prejudice of the Revising Authority, before us.

28. Here it may be noted, even before this Court, it has not been urged, let alone admitted, that there was any inadvertent error committed by the respondent-petitioner, in appreciating the basic facts that had led to the major penalty being imposed by the Revising Authority upon a exercise of his jurisdiction, in a case where no oral evidence may have been led during the domestic enquiry proceedings.

29. Though, no conclusion is being drawn as to that, in face of the writ proceedings being pending before the learned single judge, and also since the current Chairman of the U.P. Power Corporation has expressed his desire to furnish his explanation, we observe, the interests of justice may be better served, if the present respondentappellant were to comply with the impugned order, at this stage.

30. As to the prima facie observation made by the learned single judge, though the learned Additional Advocate General would contend that the observations are premature and too harsh and therefore, not warranted, it remains a fact that all observations made, and expressions used by the learned single judge are only tentative. Perhaps they only express the deep anguish that the Court may have felt at the plight of the original petitioner who may be prima facie perceived to have suffered such a harsh consequence of enhancement of a minor punishment to a major punishment that too at the hands of the highest departmental authority, in circumstances, that prima facie appeared to indicate, a fundamental flaw in the domestic enquiry proceeding i.e., the most severe punishment of dismissal being handed down in absence of the mandatory oral enquiry, that too in exercise of suo moto jurisdiction.

31. In any case, all observations made by the learned single judge are purely tentative and not such as may have any

lasting effect. Such observations made would have life till the proceedings are concluded and/or till the explanation of the Revising Authority is considered by the learned single judge. They are not and cannot be read as strictures passed by the learned single judge as may warrant any interference at this premature stage. Being ex parte in the context of an explanation called, those are more to sensitize and make aware the Revising Authority, the consequence of the "fundamental flaw" if any.

32. We are also mindful of the fact that the learned single judge has called for an explanation to be furnished by the Revising Authority to ascertain what may have led to the exercise of that power. Neither any contempt proceeding has been drawn up nor the personal appearance of the Revising Authority has been enforced. Therefore, it remains perfectly open to it, if he so desires to make a clean breast of the situation before the learned single judge or to plead ignorance or even inability to furnish any reply on merits, as per his choice and legal advice.

33. While offering corrections, the Court always maintains the balance and proportionality required in that function – to remain within the four corners of the law, in dealing with an erring litigant or official. Thus, we have no hesitation to observe that in case the respondent-appellant were to furnish an honest explanation, whatever that be and howsoever unsustainable in law that may appear to be, the learned single judge would certainly consider the same according to the law and offer only that much correction, if required, as may be warranted, to serve the interests of justice and good administration. In the absence of any allegation of personal mala fide pleaded, it is premature to imagine any other consequence may arise.

34. The fact that the respondent-appellant may have been posted out and may no longer be able or required to go into the record of the case is not an issue that may detain us. For that purpose, the explanation appears to have been called from the Chairman of the UPPCL. As stated by Sri Abhishek Srivastav, that explanation is being furnished.

35. Issue of jurisdictional error being involved, it further appears that the learned single judge may have felt necessary to ascertain the basic facts to consider offering only that much correction, if warranted as may be necessary so that those mistakes, if found true on record, may not recur.

36. In any event, at this stage no legal injury is seen to have been caused to the Revising Authority, upon an explanation being called, during a judicial proceeding. In so far as the explanation called cannot be described as extraneous to the "fundamental flaw" noted by the learned single judge, we leave every aspect of the matter to be considered by the learned single judge. The mere inconvenience that may have arisen to the Revising Authority may never be enough to maintain this appeal, at this stage.

37. So far as the decisions relied upon by the learned Additional Advocate General are concerned, no doubt the principles are well settled in our jurisprudence. In the first place, no strictures may be passed ex parte. Second, no stricture may be offered more than that required by way of a correction or otherwise and, third no disparaging remarks or harsh language may be used, without prior notice.

38. The order of the learned single judge, though inconvenient and not

to the personal like of the Revising Authority, it neither contains any final observation nor it is a stricture made nor does it contain any conclusion reached. What the learned single judge has pointed out are his own doubts that the order passed by the respondent-appellant appears to be wholly contrary to law and impermissible as per the rule of law.

39. However, the order may be worded, it may not persuade us to entertain the present appeal. In view of the facts noted above, we observe, the views expressed by the learned single judge are only a prima facie opinion that per se are not expressed in an intemperate language as may be seen to have caused any injury to the Revising Authority.

40. Accordingly, we decline to exercise our limited jurisdiction in this matter to entertain the present appeal, at this stage. At present, we leave it to the best judgment of the learned single judge to consider the explanation to be furnished by the respondent-appellant, on its own merits and to offer a measured correction, if required, as may be enough in the facts of the present case."

14. On this issue, this Court is constrained to say that we never strictured M. Devraj, the former Chairman of the Corporation, which in any case could not have been done without due notice to him. Our order dated 07.08.2023 was one to bring to his notice what we thought tentatively were flaws in the order impugned going to the root of the matter and know from him what made him act in the manner he did. Instead of availing that opportunity, M. Devraj displayed hair trigger sensitivity and appealed to the Division Bench an order which was not of any moment. He has filed his personal affidavit after the Division Bench declined to interfere.

15. We may say at this stage that no party to a lis before this Court, whether private or official, ought to take umbrage to the orders of this Court, carrying remarks pointing out follies in their orders on a tentative basis to enable the party concerned to explain himself before judgment is passed. In the personal affidavit, that has been filed by M. Devraj, annexing a copy of the orders of the Division Bench, which he has quoted *in extenso* in his affidavit, there is a clear stance in Paragraph No.7, which says that he regards our remarks in the order dated 07.08.2023 with offence, dubbing these as *'ex parte remarks against the deponent'*. It would be of profit to quote Paragraph No.7 of the personal affidavit filed by M. Devraj, which reads:

"7. That the Hon'ble Court in the order dated 7.8.2023 has passed exparte remarks against the deponent, without even affording an opportunity of hearing to him and the deponent has had a consistently progressive and unblemished career spanning to 27 years, and therefore it is most respectfully prayed that the said remark may kindly be expunged by the Hon'ble Court."

16. As a perusal of Paragraph No.7 of the personal affidavit would show, the former Chairman of the Corporation still regards the remarks as strictures against him and prays that these be expunged. He has cited the credit of his progressive and unblemished career, spanning 27 years, to take umbrage to the remarks that he seeks to be expunged. Here, it may be again worthy of note that their Lordships of the Division Bench, while disposing of M. Devraj's appeal from our order dated 07.08.2023, made it clear that the said order, '..... *though inconvenient and not to*

the personal like of the Revising Authority, it neither contains any final observation nor it is a stricture made nor does it contain any conclusion reached'. In view of the said remarks by their Lordships of the Division Bench, M. Devraj should have felt satisfied that there are no strictures passed by us against him. Still, we are constrained to remark that he did not rest content with the clarification made by the Division Bench that there are no strictures against him. Instead, in his personal affidavit *vide* Paragraph No.7, he has asked us to expunge the strictures carried in the order dated 07.08.2023. Once, their Lordships of the Division Bench have said that there are no strictures in our order dated 07.08.2023, there is absolutely no occasion or necessity for us to expunge those remarks of non-blemish. Nevertheless, since M. Devraj has asserted that these still, to his understanding, are strictures, which must be expunged, this Court must clarify that those remarks are not at all strictures.

17. Why the remarks, which M. Devraj thinks are strictures, that ought to be expunged, are not so, we think ought to be clarified to place the record straight. The relevant remarks read:

"The Chairman, who passed the impugned order pending the appeal seeking to exercise his revisional orders prima facie seems to have scant knowledge of the law and apparently is not legally trained. He did not notice prima facie this flaw in proceedings of the inquiry, which goes to the root of the matter and proceeded to enhance the punishment after a show cause notice on the basis of an inquiry report where the establishment had to establish the charges by leading oral evidence.

Let M. Devraj, former Chairman Uttar Pradesh Power Corporation Limited, wherever he is posted currently, explain the circumstances in which he failed to notice the aforesaid gaping flaw in the proceedings before the Inquiry Officer while passing the impugned order."

18. For one, the remarks, above quoted, are all prefaced with the expression *prima facie*, which shows them to be tentative and intended to elicit the former Chairman's response to the flaws noticed. If the former Chairman thinks that the remark that *prima facie* he seems 'to have scant knowledge of law' and apparently is 'not legally trained', are strictures, we think he is mistaken. It is a fact that the former Chairman of the Corporation is an administrative officer, who is not a trained lawyer. The distinction between one who is trained in the law and one who is not, and, therefore, called a 'lay officer', is well-known to the law. If the same remark, again tentative in nature, had been made by this Court in the context of a judicial officer, it might have been regarded as a stricture, albeit still in contemplation. It is never expected that an administrative officer would have knowledge of the law or at least a profound knowledge of it. Therefore, the remark in the context of an administrative officer like M. Devraj, is only a statement of fact with no blame attached. If an administrative office in passing an order discloses legal prowess, it would stand to his credit; if he does not, it would not stand to discredit his stature in any manner. At the same time, since the Chairman of the Corporation, like many other administrative officers, has been entrusted with functions of decision making and the decisions being those that have serious adverse civil consequence on rights of individuals, say employees in the establishment, the decisions have to conform to the basic and broad

requirements of the law about procedural fairness etc. laid down by Courts. If a decision falls foul of the settled legal position, the Court has to correct it.

19. To lay this part of the matter at rest, it is clarified that since there are no strictures passed against M. Devraj *vide* order dated 07.08.2023, there is no occasion to expunge anything.

20. Now, turning to the merits of the order impugned. The first issue is if the Chairman of the Corporation should have invoked his revisional powers under Regulation 13(c) of the Regulations to enhance the penalty awarded by the Disciplinary Authority, where an appeal by the petitioner was pending before the Appellate Authority, that is to say, the Managing Director of the Distribution Corporation. The objection by the petitioner that pending his appeal before the Appellate Authority, the Revisional Authority, by interceding in the matter, has deprived him of his right of statutory appeal, has been answered by the Corporation in Paragraph No.12 of the counter affidavit. The stand taken is that the petitioner had preferred an appeal dated 18.10.2021 to the Managing Director of the Distribution Corporation, which was before an incompetent forum. The petitioner was informed vide letter 18.02.2023 that as the punishment order dated 04.09.2021 was passed after due approval of the Managing Director of the Distribution Corporation, he should prefer an appeal to the Managing Director of the Corporation, instead.

21. It is pointed out that by the letter dated 08.02.2023 issued by the Executive Engineer in the office of the Distribution Corporation, the petitioner was informed that his appeal was being rejected as the Appellate Authority was the Managing Director of the Corporation under Regulation 11(1) of the Regulations and not the Managing Director of the Distribution Corporation. The petitioner never availed this opportunity and preferred an appeal to the Managing Director of the Corporation. The case, therefore, on behalf of the Corporation, is that when the Chairman of the Corporation exercised his revisional powers under Regulation 13 of the Regulations, there was indeed no appeal pending at the petitioner's instance. The petitioner has rebutted the Corporation's case that his appeal was rejected by the Managing Director of the Distribution Corporation as he was not the competent Appellate Authority under the Regulations and an intimation dated 08.02.2023 sent to him on behalf of the Managing Director of the Corporation,pleading a specific case to the following effect, carried in Paragraph No.17 of the rejoinder affidavit:

"17. …..... It is further submitted that, the letter dated 08.02.2023 Annexed as C.A-3 and referred in the paragraph under reply was never served upon the petitioner before passage of impugned order dated 07.06.2023.

It is pertinent to mention here that appeal again order dated 07.09.2021 was preferred by the petitioner by means of appeal dated 18.10.2021 before respondent no.3 and thereafter, petitioner has moved a reminder dated 7.05.2022 before respondent no.3 praying for expeditious disposal of his pending appeal, but neither any reply to be said request was made to the petitioner nor appeal dated 18.10.2021 was decided.

Now, it is for the first time, respondent corporation is coming up with the plea, that the appeal dated 18.10.2021 was already turned down by means of letter

dated 08.02.2023, addressed to the petitioner by Superintending Engineer (Disciplinary Proceeding), DVVNL, Agra, on the ground that since the original punishment order dated 04.09.2021 was passed on the approval of respondent no.3, therefore, appeal has to be filed before next higher authority to be MD UPPCL, Lucknow.

As far as the aforesaid letter dated 08.02.2023 is concerned it is submitted that the appeal dated 18.10.2021 remained pending before respondent no.3 for almost 17 months, but neither the same was decided nor any reason for keeping the same pending was ever communicate to the petitioner despite of reminder dated 07.05.2022 and just before a month of issuance of notice dated 10.03.2023 under regulation, 13(c) of regulation 2020 by respondent no.2, the order dated 08.2.2023, vide letter No.1762, is stated to be passed addressing the petitioner, which was never served upon the petitioner by any mode known to the law, nor any documentary evidence has been filed alongwith the order or with the counter affidavit to prove service of the same upon the petitioner, therefore, the order dated 08.02.2023 cannot be considered at this stage. ….."

22. There is indeed nothing on record to show that the order dated 08.02.2023 was delivered to the petitioner or even dispatched to him. A perusal of the order dated 08.02.2023 shows that the order was sent to the petitioner's office at Etah, where he was posted. If indeed, the order dated 08.02.2023 had been served upon the petitioner, there would be some kind of a record or acknowledgment evidencing service. There is none on record. In the face of a clear stand in Paragraph No.17 of the affidavit that the order dated 08.02.2023 was never served upon the petitioner, it was for the Corporation to have come up with evidence to show that indeed it was served or at least dispatched at the correct address. That has not been done. It is, therefore, held that the order dated 08.02.2023 was never served upon the petitioner.

23. It has further been emphasized that the appeal to the Managing Director of the Distribution Corporation was preferred on 18.10.2021 and if the respondents' case were accepted that they held the appeal to be not maintainable on 08.02.2023, it took them a time period of seventeen months to do so. During all this time, neither the appeal was decided nor the reason to keep the same pending, communicated to the petitioner despite a reminder dated 07.05.2022 sent by him. The time period of seventeen months, that the Managing Director kept the appeal with him, would show that the respondents were negligent in dealing with the petitioner's appeal. Departmental remedies of appeal, revision, review etc. are provided to bring quick redress for a wrong decision regarding an employee at the subordinate level. These remedies are not meant to be traps or warps where the determination of the employee's rights may be held in limbo by inaction of the Authority concerned. If the stand of the Managing Director of the Distribution Corporation was that the appeal before him was not competent, because the order of the Disciplinary Authority had been passed with his concurrence, the fact should have been intimated to the petitioner within a few days; not even weeks. It is inexplicable and entirely unacceptable that a period of seventeen months elapsed between the petitioner preferring his appeal to the Managing Director of the Distribution Corporation and the disclosure of his stand in the letter dated 08.02.2023 addressed to the petitioner that he was not the competent

Authority and the appeal before him not maintainable. In any case, this letter has already been held never to have been communicated to the petitioner.

24. Now, there is another angle to the matter. It is not the respondents' case that the Managing Director of the Distribution Corporation was not the competent Appellate Authority under the Regulations. Certainly, the Managing Director of the Distribution Corporation was the competent Appellate Authority under Regulation 11 of the Regulations, and in the ordinary course of things, would be obliged to decide the petitioner's appeal. There was a particular feature to the case and that was that the order of the Disciplinary Authority was passed with the concurrence of the Managing Director of the Distribution Corporation. This disabled him from functioning as the Appellate Authority under the Regulation 11. If this happened, as this Court assumes it did, the Managing Director of the Corporation was in utter error in passing the uncommunicated order dated 08.02.2023, saying that given the circumstances, he was not the competent Appellate Authority and said so after lapse of a period of seventeen months, rejecting the petitioner's appeal on that ground.

25. Why this course of action is prejudicial to the petitioner and what would have been the lawful course under the circumstances for the Managing Director of the Distribution Corporation to adopt, would presently be indicated.

26. Regulation 11 of the Regulations reads:

"अपील 11 - (एक) इस विनियमावली के अधीन निदेशक मण्डल द्वारा पारित आदेश के सिवय, कार्मिक अनुशासनिक प्राधिकारी द्वारा पारित आदेश की अपील अगले उच्चतर प्राधिकारी को करने का हकदार होगा।

(दो) अपील, अपीलीय प्राधिकारी को सम्बोधित करते हुये प्रस्तुत की जायेगी। यदि कोई कार्मिक अपील करेगा तो वह उसे अपने नाम से प्रस्तुत करेगा। अपील में ऐसे समस्त तात्विक कथन और तर्क होंगे जिन पर अपीलार्थी भरोसा करता हो।

(तीन) अपील में किसी असंयमित भाषा का प्रयोग नहीं किया जायेगा। कोई अपील, जिसमें ऐसी भाषा का प्रयोग किया जाय सरसरी तौर पर खारिज की जा सकेगी।

(चार) अपील आक्षेपित आदेश की संसूचना के दिनांक से 90 दिन के भीतर प्रस्तुत की जायेगी। उक्त अवधि के पश्चात की गई कोई अपील सरसरी तौर पर खारिज कर दी जायेगी।"

27. A perusal of Regulation 11(4) of the Regulations would show that an appeal to the competent Appellate Authority is to be preferred within ninety days of communication of the order appealed against. Any appeal received after the period of limitation would be rejected. There is no provision apparently for the condonation of delay in preferring an appeal under Regulation 11. The appeal in this case was preferred on 18.10.2021 within limitation against the order dated 04.09.2021 passed by the Disciplinary Authority to the Authority competent under the Regulations to entertain the petitioner's appeal. By time, as the Corporation say in their counter affidavit, the Managing Director of the Distribution Corporation, the competent Appellate Authority, in the ordinary, came to reject the appeal on ground that his concurrence with the Disciplinary Authority in making the order impugned, rendered the appeal incompetent before him, seventeen months had gone by, and *a fortiori* the period of limitation expired for the petitioner. In these circumstances, the only lawful course to preserve the petitioner's substantive right of appeal under the Regulations was that the Appellate Authority in the ordinary, the Managing Director of the Distribution

Corporation, upon determining his incompetence, should have caused the petitioner's appeal to be transmitted to the competent Appellate Authority under Regulation 11, as he says in his uncommunicated order dated 08.02.2023. The appeal should have been transmitted by the Managing Director of the Distribution Corporation to the Managing Director of the Corporation, or whosoever was the competent Authority, in view of the peculiar facts obtaining here, to exercise appellate powers under Regulation 11. In the considered opinion of this Court, the action of the Appellate Authority in passing an order rejecting the petitioner's appeal on ground of the Authority being incompetent, in the facts here, was absolutely unlawful.

28. The standards of procedural fairness in their interplay with the Regulations would demand the aforesaid course of action to be adopted, and not the one that the Managing Director of the Distribution Corporation did through his uncommunicated order dated 08.02.2023. Hence, the uncommunicated order dated 08.02.2023 is held to be one that is arbitrary and unfair as also discriminatory. It fails to pass muster of Article 14 of the Constitution, to the extent that it rejects the petitioner's appeal, instead of transmitting it to the competent Appellate Authority. The order to that extent is held, for the said reason, illegal.

29. At this stage, Mr. Manish Goyal, learned Additional Advocate General and Mr. Abhishek Srivastava, learned Counsel in unison said that the order passed by the Chairman in revision was appealable to the next higher Authority in view of the provisions of Regulation 11 of the Regulations. Both the learned Additional Advocate General and Mr. Abhishek Srivastava called this Court's attention to a Bench decision of this Court in **Smt. Shaheen Badar v. U.P. Power Corporation Limited and others, Neutral Citation No.- 2022:AHC:138795-DB,** where it has been held:

"3. On the other hand, learned counsel for the respondents submitted that in the case in hand a group of officers including certain senior officers were involved in disciplinary proceedings, hence the matter was examined by a senior officer as it could not be examined in piecemeal at different levels as the allegations were interconnected. He further submitted that as per Regulation-11 of the 2020 Regulations, if an order is passed by any authority, the same is appealable to the next higher authority. Applying that principle, the appellant had remedy of appeal before the Board of Directors and in fact before learned Single Judge, learned counsel for the petitioner submitted that he may be given time to file appeal as the limitation had expired during pendency of the writ petition.

4. After hearing learned counsel for the parties, we do not find any merits in the present appeal as under the special circumstances, the disciplinary proceedings against a group of employee were held at higher level as certain senior officers were also involved and the punishment was inflicted by the Chairman by different orders. As per Regulation-11 of the Regulations against an order passed by a lower authority, the next higher authority is the appellate authority which in the case in hand is the Board of Directors. Hence, there is no error in the order passed by learned Single Judge relegating the appellant to avail of her alternative remedy."

30. Now, the remedy of appeal in **Smt. Shaheen Badar**, was held to lie before the Board of Directors of the Corporation, because it was the Chairman of the Corporation, who had functioned as the Disciplinary Authority. The remedy of appeal under Regulation 11 is envisaged against the order of the Disciplinary Authority, whoever it might be; no remedy of appeal under Regulation 11 is contemplated against an order passed in revision. Here, the Chairman of the Corporation has not decided the matter, sitting as the Disciplinary Authority. He has decided it as the Revisional Authority, after depriving the petitioner of his right to avail the remedy of appeal before the Appellate Authority on account of the delay and the ill-advised course of action, adopted by the Managing Director of the Distribution Corporation, that we have already pointed out. The alternative remedy of appeal, therefore, suggested by the learned Additional Advocate General and Mr. Srivastava under Regulation 11 to the Corporation Board, is not available at all.

31. Turning to the merits of the matter, the thrust of the petitioner's objection to the orders impugned is that the inquiry was held in breach of the salutary principles governing a disciplinary inquiry, which may lead to the imposition of a major penalty. This is so, according to the petitioner, because no oral inquiry was held in the sense that no witnesses were produced on behalf of the establishment to prove the charge against the petitioner with opportunity to him to cross-examine them. In Paragraph No.9 of the writ petition, it is averred:

"9. That it is worth mentioning here that no oral enquiry was conducted nor any prosecution witnesses was produced nor the petitioner was afforded opportunity any of the author of the the cross-examine material/documents relied upon during the course of enquiry nor the authority, namely, Superintendent of Police (Vigilance), U.P. Power Corporation Ltd. Lucknow, who submitted preliminary enquiry report dated 29.08.2018, on the the basis whereof, entire proceedings including the criminal proceedings was initiated against the petitioner, was not examined during the enquiry for proving the charge against the petitioner."

32. In answering the case in Paragraph No.9 of the writ petition, it is averred in Paragraph No.7 of the counter affidavit, that answers Paragraph Nos.8 and 9 of the writ petition, as follows:

"7. That the contents of paragraphs 8 and 9 of the writ petition are false and incorrect hence denied and in reply thereto it is submitted that the enquiry committee along with the chargesheet had supplied the copy of the necessary documents to the petitioner and it was also mentioned in the chargesheet that at the time of filing of his reply, the employee can also inform the enquiry committee, in writing, providing the names of witnesses whom he wants to examine or cross examine and names of all those persons also whom he wants to produce for examination or cross examination and also give brief summary of evidence to be given by the employee in his defence. Further during the departmental enquiry the petitioner was also issued a letter by the enquiry committee on 2.12.2019, fixing the date, time and place, in response to which, the petitioner had appeared before the enquiry committee on 18.12.2019 and the petitioner had also participated in the enquiry on the said date. A copy of the

letter dated 2.12.2019 and the minutes of the proceedings dated 18.12.2019 are being annexed herewith and marked as **Annexure-CA-1 & CA-2** respectively to this counter affidavit.

Further after giving due opportunity of hearing to the petitioner and on the basis of material evidence on record, the enquiry committee has submitted his report and during the course of departmental enquiry, the petitioner has not disputed about the genuineness of any of the documents provided to the petitioner during the course of enquiry nor he had shown any interest in asking the department to produce any witness for examination/cross examination, therefore, once the employee has duly participated in the departmental enquiry and has admitted the evidence on record, therefore, it cannot be said that any prejudice is caused to him in not examining any witness by the department and if we go by the plain reading of the Regulation 7 of the 2020 Regulation it only says, in Regulation 7(5) that, along with the chargesheet the copy of the documents and list of witnesses should be provided to the employee and Regulation 7(7) provides that, in case the employee refuses the charges, the enquiry committee should call the proposed witnesses to record their evidence whose names are mentioned in the chargesheet and in the present case, if names of no one are mentioned in the chargesheet then the enquiry committee cannot be said to have committed any mistake in not examining any witness. Further Regulation 7(8) provides that, an enquiry committee can ask any witness to appear before it and provide any document and Regulation 7 (9) says, the enquiry committee can ask any question to the witness to find out the true facts, therefore, from the bare perusal of the Regulations, 2020 it cannot be said that the enquiry committee has committed any error, which has caused prejudice to the petitioner, who has been given full opportunity of oral hearing along with option to examine any witness or dispute the admissibility of any documents, and once the employee has not disputed about the genuineness and admissibility of the documents, taking into consideration by the enquiry committee, it cannot be said that the enquiry was not proper."

33. Now, Paragraph No.7 of the counter affidavit does not dispute it for a fact that the establishment never produced any witness to prove the charge. What they say is that Regulation 7 of the Regulations requires witnesses to be called, if they are mentioned in the charge-sheet; not otherwise. This stand of the respondents goes against the salutary principle, governing departmental inquiries, which may result in the imposition of a major penalty. It is the burden of the establishment to prove the charge/ charges in the first instance by producing evidence, both documentary and oral, before the Inquiry Officer through their Presenting Officer, in the same manner, as a case is proved before an independent Tribunal or Court by a party, who moves the process of law. The Inquiry Officer or Committee have to distance themselves from the establishment and act as impartial arbiters in the process. It is not that the Inquiry Officer or Committee, being officers of the establishment, can regard the charges proof of themselves and then expect the delinquent to dispel the same by leading evidence. It would always be the establishment's burden to prove the charges, as already said, by leading evidence, documentary and also oral, before the Inquiry Officer through a Presenting Officer. This has admittedly not

been done in this case at all. No witness of fact was examined, even so much as the Superintendent of Police (Vigilance), who submitted the inquiry report dated 29.08.2018 to conclude from material gathered that the petitioner had assets disproportionate to his known source of income during the check period. This charge had to be proved by oral evidence of relevant witnesses, not just the Superintendent of Police (Vigilance), who would prove documents cited to show the possession of disproportionate assets by the petitioner.

34. It would be well to remember that more serious the charge and its consequences, the more strict the requirement to adhere to the standards of procedural fairness. It is perhaps for these reasons that in cases of disciplinary inquiries that may lead to the imposition of major penalties, that a salutary principle of law has been evolved, mandating proof of the charge by the establishment through production of oral evidence or witnesses apart from documents. The salutary principles regarding the holding of a disciplinary inquiry in matters, where a major penalty may be imposed, have been laid down by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it is observed:

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

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

35. To the same effect, is the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, where it has been held:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during

investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

36. A Division Bench of this Court has dealt with the same issue in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB)**, where it has been held:

"14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer

cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

37. The same principle has been reiterated by the Division Bench of our Court in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, where it has been observed:

"15. The law in this regard is very well-settled and does not need a reiteration,

however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

38. In **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB),** again a Bench decision of this Court, it was held:

"14. Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others, AIR 2016 SC 2510 and Court has culled out certain principles as under:

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

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

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

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

15. The principal of law emanates from the above judgments is that initial burden is on the department to prove the charges. In case where inquiry is initiated

with a view to inflict major penalty, department must prove charges by adducing evidence by holding oral inquiry.

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

39. The aforesaid salutary principle of the law, that holds field, does not seem to have informed the mind of any of the Authorities of the Corporation while passing the impugned order, including the Chairman. This principle has come to be laid down by the Courts, including the Supreme Court, over a period of time, extending over decades. It seems to this Court that the idea underlying the principle does not seem to be understood by administrative officers, untrained in the law.

40. This Court makes it clear that we do not mean to stricture anyone, but the constant breach of the salutary principle cannot be permitted to happen. During the period of time that this matter has been heard, in cases involving the Corporation or the various Distribution Corporations, this Court has noticed a complete go by to the requirement of producing oral evidence or witnesses in matters involving the imposition of a major penalty. Also, this Court has found, like the present case, that Inquiry Committees of the Corporation or the Distribution Corporations, even other Statutory Corporations, utterly fail to comprehend the principle about the burden of proof being on the establishment to prove the charge, in the first instance, by leading evidence. The Inquiry Committees/ the Inquiry Officer fail to distance themselves from the establishment and identify themselves with the establishment's case, regarding the charge/ charges proof of themselves. In many a case by oral hearing, what the Inquiry Officers/ Committees understand is that the delinquent is to be informed of the charges, which are regarded proof of themselves and then put to questioning in the fashion of an interrogator to persuade the Inquiry Committee or the Inquiry Officer that he is indeed not guilty of what is otherwise regarded as proved to begin with. The facts of this case also do not show a very different approach. It would be of profit to quote the findings of the Inquiry Committee, relative to the charge here, recorded in their report dated 26.07.2021. These read:

"जाँच समिति की टिप्पणी

मुख्य अभियन्ता (मा0सं0 एवं का0प्र0) के पत्रांक 12578/ प्र0नि0/ आ0/ अनु0का0/ अ0अ0-2/ सतर्कता/ आर - 92 दिनांक 12.07.2019 के साथ संलग्न कर जांच समिति को प्रेषित आरोप पत्र की दो प्रतियों को इस कार्यालय के पत्रांक 592/प्र0नि0/ द0वि0वि0नि0लि0/मु0अ0 (वा0)/ सी-325 (जाँच) दिनांक 18.07.2019 के द्वारा अधिशासी अभियन्ता विद्युत वितरण खण्ड - प्रथम, एटा को इस निर्देश के साथ प्रेषित किया कि एक प्रति श्री राकेश कुमार को हस्तगत कराते हुए द्वितीय प्रति पर उनकी पावती/ हस्ताक्षर कराकर पावती मूल रूप में लौटती डाक से जांच समिति को उपलब्ध कराना सुनिश्चित करें।

अधिशासी अभियन्ता विद्युत वितरण खण्ड एटा के पत्रांक 7373/ वि0वि0ख0/ एटा दिनांक 25.07.2019 से प्राप्त पावती के अनुसार आरोप पत्र दिनांक 25.07.2019 को श्री राकेश कुमार को प्राप्त करा दिया गया। मूल पावती पत्रावली में

अवस्थित है। श्री राकेश कुमार का उत्तरालेख जांच समिति में डायरी सं0 1000 दिनांक 25.09.2019 से अवस्थित किया गया। मुख्य अभियन्ता (मा0सं0 एवं का0प्र0) के पत्रांक 10864/ प्र0नि0/ आ0/ अनु0का0/ अ0अ0-2/ सतर्कता/ आर - 92 दिनांक 01.07.2021 के द्वारा जांच आख्या शीघ्र उपलब्ध कराने हेतु निर्देशित किया गया।

पत्रांक 1449/ प्र0नि0/ 0वि0वि0नि0लि0/ मु0अ0/ जांच समिति दिनांक 02.12.2019 के द्वारा श्री राकेश कुमार को दिनांक 18.12.2019 को सुनवाई हेतु जांच समिति के समक्ष उपस्थित होने के लिए निर्देशित किया गया। श्री राकेश कुमार दिनांक 18.12.2019 को जांच समिति के समक्ष उपस्थित हुए तथा अपना पक्ष रखा।

प्रकरण का संक्षिप्त विवरण:- पत्रावली में उपलब्ध अभिलेख/ पत्रों के अनुसार श्री अशोक कुमार, दुर्गा कॉलोनी, गली नं0- 4, कासगंज के शिकायति के अनुक्रम में पत्र संख्या 744/पी0एस0एम0डी0/ 2011 दिनांक 07.09.2011 के अनुक्रम पुलिस अधीक्षक सतर्कता, लखनऊ ने अध्यक्ष उ0प्र0पा0का0लि0 को पत्रांक संख्या एसपी(वी)-कम्प-41/2011 (9) दिनांक 09.04.2014 प्रस्तुत किया जिसमें शिकायती पत्र में आरोप निम्नवत बताया गया।

1. श्री राकेश कुमार शर्मा, वि0वि0ख0 कार्यालय कासगंज में विगत 20 वर्षो से एक ही सीट पर लिपिक के पद पर नियुक्त हैं।

2. श्री राकेश कुमार शर्मा द्वारा एस0डी0एम0 निवास कासगंज के पास लगभग 1 करोड़ रूपये लगाकर कोटी बनाई गई है। इसके अतिरिक्त 2 कोठियां वहीं पर अलग से निर्माणाधीन है।

जांच आख्या के अन्तिम दो पैराग्राफ निम्नवत है "अपचारी श्री राकेश कुमार शर्मा, कार्यालय सहायक, द्वितीय की चेक अवधि (दिनांक 20.05.1992 से 31.03.2010 तक) में कटौतियों के उपरान्त समस्त आय रू0 2124055.00 जांच से प्रमाणित पायी गयी। इसी अवधि में अपचारी द्वारा रू0 3463938.00 व्यय किया जाना प्रमाणित पाया गया है। इस प्रकार जांच से पाया गया कि आय के सापेक्ष रू0 1339883.00 अधिक व्यय किया गया है। ऐसी परिस्थिति में प्रथमदृष्ट्या श्री राकेश कुमार शर्मा, कार्यालय सहायक द्वितीय द्वारा अपनी आय से अधिक सम्पत्ति अवैध स्त्रोतों से अर्जित किया जानां जांच से पाया गया है। अतः श्री राकेश कुमार शर्मा के विरूद्ध धारा 07/13(1)(ई), भ्र0नि0अ0-1998 का अभियोग पंजीकृत कराये जाने की संस्तुति की जाती है।

श्री राकेश कुमार शर्मा, अधिशासी अभियन्ता, द0वि0वि0नि0लि0, विद्युत वितरण खण्ड कासगंज के कार्यालय में कार्यालय सहायक के रूप में दिनांक 20.10.1994 (लगभग 20 वर्ष) से तैनात हैं। इनके अन्यत्र स्थानान्तरण की संस्तुति की जाती है।"

उपरोक्त जांच आख्या 09.04.2014 पर पावर कारपोरेशन स्तर से कार्यवाही प्रचलित होने पर श्री राकेश कुमार ने मा0 उच्च न्यायालय में रिट याचिका 7971/ 2018 राकेश कुमार बनाम राज्य व अन्य दायर किया तथा मा0 न्यायालय के आदेश दिनांक 16.03.2018 की छायाप्रति अन्य अधिकारियों सहित इस सतर्कता इकाई को भी प्रेषित किया गया, जिसमें मा0 न्यायालय द्वारा पारित आदेश का मुख्य अंश निम्नवत है:-

"The writ petition is disposed of giving liberty to the petitioner to give all the additional facts materials to Superintendent and of Police (Vigilance) respondent-3, who shall consider the same and if the additional facts have any bearing then he shall modify the inquiry within a period of three months from the date of producing a certified copy of this order."

उक्त प्रकरण में जांच कर्ता श्रीमती बबिता साहू अपर पुलिस द0वि0वि0नि0लि0 ने जांच आख्या अधीक्षक, दिनांक 18.07.2018 कार्यालय अपर पुलिस महानिदेशक (सतर्कता), उ0प्र0पा0कां0लि0, शक्तिभवन, लखनऊ को उपलब्ध करायी जिसके आधार पर जांच आख्या एसपी (वी)-कैम्प-14/2011 (9) दिनांक 29.08.2018 तैयार की गई। **इस जांच में श्री राकेश कुमार के द्वारा आय के सापेक्ष व्यय रू0 1229372.00 (56.68 प्रतिशत) अधिक पाये गये।**

जांच समिति के द्वारा कार्यालय अपर पुलिस महानिदेशक, (सतर्कता), उ0प्र0पा0का0लि0, शक्ति भवन, लखनऊ के पत्रांक के पत्रांक संख्या एसपी(वी)-कम्प-41/2011(9) दिनांक 09.04.2014 एवं पत्रांक संख्या एसपी(वी)-कम्प-41/2011(9) दिनांक 29.08.2018 सहपठित श्री राकेश कुमार का उत्तरोलेख, मौखिक बयान एवं संलग्नकों, श्री राकेश कुमार के विरूद्ध पंजीकृत एफ0आई0आर0 संख्या 0230 दिनांक 11.04.2018 थाना कासगंज जनपद कासीराम नगर से संज्ञानित होकर प्रकरण का विवेचना किया गया जांच आख्या निम्नवत् है:-

प्रकरण में श्री के0पी0 यादव पुलिस अधीक्षक (सतर्कता) कार्यालय अपर पुलिस महानिदेशक (सतर्कता), उ0प्र0पा0का0लि0 शक्ति भवन, लखनऊ के पत्रांक एसीपी(वी) कैम्प-41/2011 (9) दिनांक 29.08.2018 द्वारा प्रेषित जांच आख्या का अवलोकन करने से स्पष्ट होता है कि जांच अधिकारी समस्त विन्दुओं पर गहन एवं विस्तृत जांच की गयी। सर्तकता इकाई द्वारा पूर्व में की गयी जांच में आरोपी के आय एवं व्यय के स्त्रोतों की जो धनराशि छूट गयी उसको सम्मिलित किया गया है। जांच आख्या में उल्लेख किया गया है कि राकेश कुमार व राजेश कुमार एक ही व्यक्ति होने के सम्बन्ध में कोई साक्ष्य उपलब्ध नहीं है जिसकी विस्तृत आख्या सतर्कता इकाई की उपरोक्त जांच आख्या के बिन्दु सं0 2 पर दी गयी है। श्री राकेश कुमार की माता जी श्रीमती रामबेटी पत्नी स्वः श्री नेत्रपाल शर्मा द्वारा दिनांक 30.06.88 को तहसीलदार कासगंज जिला एटा को परिवार के सदस्य एवं उनकी आय का प्रमाण पत्र निर्गत करने हेतु दिये गये आवेदन में भी इनका नाम राकेश कुमार अंकित है तथा इसी क्रम में तहसील द्वारा वारिसान प्रमाण में भी राकेश कुमार पुत्र स्वः श्री नेत्रपाल शर्मा प्रमाणित किया गया है। इसके अतिरिक्त ग्राम पंचायत अधिकारी वि0ख0 सहाकर द्वारा निर्गत नकल परिवार रजिस्टर में भी इनका नाम राकेश कुमार अंकित है। अतः राकेश कुमार की आय में राजेश कुमार की आय सम्मिलित करने हेतु कोई वैधानिक रूप से प्रमाणित साक्ष्य उपलब्ध नहीं है। श्री राकेश कुमार की माताजी द्वारा अर्जित पेंशन एवं खेती की आय को राकेश कुमार की आय में मानना/ सम्मिलित करने का कोई औचित्य नहीं है और न ही राकेश कुमार की आय में उनकी माता श्रीमती राम बेटी की आय को जोड़ने का कोई साक्ष्य है।

अतः आरोप सिद्ध होता है।"

41. A perusal of the findings of the Inquiry Committee would show that their opinion is based on nothing more than what the Additional Superintendent of Police, Babita Sahu has said in her report dated 29.08.2018 to the Additional Director General of Police (Vigilance) in the Corporation's establishment. They have appraised the charge and understood it through the eyes of the Additional Superintendent of Police, banking on the documents she considered and the statements of witnesses she recorded. Another report, that has been taken into consideration, is the one by K.P. Yadav, Superintendent of Police (Vigilance) in the office of the Additional Director General of Police (Vigilance) of the Corporation. It is a report dated 29.08.2018. The Committee have understood and found the charge proved on the basis of this report as well the earlier one by the Additional Superintendent of Police. Everything about the charge has been understood by the Committee perusing these two reports by police officials. The Committee have particularly said that reading Memo No. एसपी(वी)-कम्प-41/2011(9) dated 09.04.2014 and Memo No. एसपी(वी)-कम्प-41/2011(9) dated 29.08.2018 together with the petitioner's reply, oral statements and annexures, the FIR registered against the petitioner, their opinion follows. The opinion that follows is again based on the investigation done by the Police and what the Superintendent of Police (Vigilance) submitted in his report about the various features of the charge relating to disproportionate assets.

42. A perusal of the inquiry report leaves us in no manner of doubt that the Inquiry Committee for themselves did not require the establishment to lead any evidence before them, documentary or oral, which they themselves heard. They understood and held the charge proved based on the investigation done by the Police, reading the petitioner's reply and the statements recorded by the Police. The Inquiry Committee, therefore, hardly held any inquiry to find the petitioner guilty, adopting the salutary principle of requiring the establishment to produce evidence before the Committee, both documentary and oral, to prove the charge in the first instance.

43. In this Court's opinion, there has been a wholesome violation of procedural fairness in holding the inquiry that goes to the root of the matter and

prejudices the petitioner, visiting him with adverse civil consequences.

44. In the result, this writ petition **succeeds** and is **allowed.** The impugned order dated 07.06.2023 passed by the Chairman of the Corporation and the order dated 04.09.2021 passed by the Chief Engineer (HR-cum-Disciplinary Proceedings), Distribution Corporation are hereby quashed. The petitioner shall be reinstated in service forthwith and paid his current salary. However, considering the gravity of the charge, it will be open to the respondents, if they so elect, not only to proceed with the inquiry afresh from the stage of the charge-sheet, holding it in the manner indicated in this judgment, but also to place the petitioner under suspension pending conclusion of the disciplinary proceedings. The entitlement of the petitioner to receive his emoluments for the period of time that he has remained out of service, would abide by the result of the disciplinary proceedings finally determined. If, however, the respondents do not elect to pursue disciplinary proceedings against the petitioner, 50% of his emoluments shall be payable for the period that he has remained out of service. It is further clarified that in the event the respondents also elect to place the petitioner under suspension pending conclusion of disciplinary proceedings, he would be entitled to the payment of subsistence allowance, which shall be regularly paid, without asking him to furnish a non-alternative engagement certificate. The disciplinary proceedings, if held afresh as per liberty granted, shall be concluded expeditiously, wherein the petitioner will cooperate.

45. Costs easy.

(2024) 3 ILRA 627
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 13228 of 2014

Hassandeen ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri D.K. Singh, Sri Mohhammad Firoz Khan, Sri Rajesh Kumar Singh, Sri V.K. Singh

Counsel for the Respondents:
A.S.G.I., Sri J.P. Mishra, Sri K.C. Kaushik, Sri Piyush Misra, S.C.

Service Law – Disciplinary Proceedings – Dispensation of Inquiry – Petitioner, a Constable (General Duty) with the Central Industrial Security Force (CISF), challenged his dismissal from service under Rule 39(ii) of the CISF Rules, 2001, without holding an inquiry, on grounds of involvement in a criminal case under the NDPS Act, 1985 – Held, the Disciplinary Authority validly invoked Rule 39(ii), dispensing with inquiry, as it was not reasonably practicable due to the petitioner's alleged connection with drug mafia, creating fear among CISF members and civilians, making it unlikely for witnesses to testify – Reasons recorded in the dismissal order dated 11.04.2012 were sufficient and based on objective material, including the FIR and police investigation – No violation of procedural fairness. (Paras 14, 15, 21, 23, 24, 25, 26, 28)

Service Law – Rule 39(ii) of CISF Rules – Reasonably Practicable Standard – The Disciplinary Authority's decision to dispense with inquiry under Rule 39(ii) was challenged as arbitrary – Held, as per Tulsiram Patel and Ved Mitter Gill , the standard for dispensing with inquiry is "not reasonably practicable," not absolute impracticability – The Disciplinary Authority's subjective satisfaction, based on the

petitioner's involvement in a serious crime (theft of 558 kg opium worth Rs. 4 crores) and the terror induced by associated drug mafia, was supported by objective material and relevant considerations – The decision was not a mechanical exercise of power, distinguishing the case from Ram Bahadur Yadav . (Paras 17, 19, 20, 22, 27, 28)

Service Law – Constitutional Safeguards – Article 311(2) – The petitioner argued that the dispensation of inquiry violated Article 311(2) and the proviso to Rule 39 – Held, Rule 39(ii) mirrors clause (b) of the second proviso to Article 311(2), allowing dispensation of inquiry when not reasonably practicable, with reasons recorded in writing – The proviso to Rule 39, requiring an opportunity for representation, applies only to cases under clause (i) (conviction-based penalty), not clause (ii), and thus was inapplicable – The Disciplinary Authority's detailed reasons in the impugned order satisfied constitutional requirements. (Paras 12, 13, 14, 26)

Writ Petition Dismissed .

No Interference with Orders Dated 11.04.2012, 14.08.2012, and 03.01.2014.

List of Cases Cited:

1. U.O.I. & anr.Vs Tulsiram Patel, (1985) 3 SCC 398

2. Southern Railway Officers Association Vs U.O.I. & ors., (2009) 9 SCC 24

3. Ved Mitter Gill Vs Union Territory Administration, Chandigarh & ors., (2015) 8 SCC 86

4. U.O.I. & ors. Vs Ram Bahadur Yadav, (2022) 1 SCC 389

5. Tarsem Singh Vs St. of Punjab, (2006) 13 SCC 581

6. St. of Punjab Vs Harbhajan Singh, (2007) 15 SCC 217

7. Arjun Chaubey Vs U.O.I., (1984) 2 SCC 578

8. Moti Ram Deka Vs General Manager, N.E.F. Railways, AIR 1964 SC 600

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

1. This writ petition has been preferred by Hassandeen, once a Constable (General Duty) with the Central Industrial Security Force (for short, 'the CISF'), who has been dismissed from service by the Group Commandant, CISF Group Headquarters, Allahabad *vide* order dated 11.04.2012. This order has been affirmed in appeal by the Deputy Inspector General of Police, CISF, Allahabad vide order dated 14th August, 2012 and further upheld in revision by the Inspector General, North Sector, CISF, New Delhi on the 3rd of January, 2014 by an order of that date.

2. This is a case where the order of dismissal from service has been passed against the petitioner by the Disciplinary Authority in the exercise of powers under Rule 39 (ii) of the Central Industrial Security Force Rules, 2001 (for short, 'the Rules'), without holding an inquiry on grounds recorded in writing in the order impugned that it is not reasonably practicable to hold it.

3. The facts giving rise to this petition are:

The petitioner was selected and appointed to the CISF as a Constable (General Duty) (for short, 'Constable GD') in the year 1999. He was posted in the Fourth Battalion, Government Opium Factory, Ghazipur as Constable GD, CISF Unit, Ghazipur. During the period of his posting at the CISF Unit, Ghazipur, a First Information Report (for short, 'the FIR') came to be lodged by the Station House Officer, Police Station Jaitpura, District

Varanasi against the petitioner, besides another ten accused, giving rise to Crime No.54 of 2012, under Section 8/22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act'), Police Station Jaitpura, District Varanasi. The FIR aforesaid was lodged on 29.02.2012. The petitioner was arrested by the Police in connection with the said crime on 17.03.2012 and remanded to judicial custody. The Group Commandant, CISF Group Headquarters, Allahabad was informed of the fact by the Senior Sub-Inspector, Police Station Jaitpura, District Varanasi by his letter of 18th March, 2012. In consequence, by an order dated 18.03.2012, the petitioner was placed under suspension by the Group Commandant w.e.f. 17.03.2012. On the 11th April, 2012, the Group Commandant proceeded to dismiss the petitioner from service invoking his powers under Rule 39(ii) of the Rules, without holding an inquiry on ground that it was not reasonably practicable. The reasons to proceed on the basis that it was not reasonably practicable to hold an inquiry are carried in the impugned order of dismissal dated 11.04.2012. Allusion to these reasons shall be made during the course of this judgment.

4. The petitioner carried an appeal from the order of dismissal to the Deputy Inspector General of Police, CISF, Allahabad, the Appellate Authority, which was dismissed by an order dated 14th August, 2012. The petitioner then preferred a revision under Rule 54 of the Rules. The petitioner's revision was not decided by the Inspector General for a long period of time. The petitioner, therefore, petitioned this Court by means of Writ-A No.794 of 2014, making a grievance of the delay in the decision of his revision. This Court by an order dated 8th January, 2014 disposed of the writ petition with a direction to the Inspector General to consider the same and decide expeditiously within a period of four months from the date of production of a certified copy of the order made in the writ petition aforesaid. In consequence, the Inspector General, the Revisional Authority by his order dated 3rd January, 2014 rejected the revision as barred by time.

5. Aggrieved, this writ petition has been preferred.

6. Heard Mr. Rajesh Kumar Singh, Advocate along with Mr. Mohammad Firoz Khan, learned Counsel for the petitioner and Mr. Piyush Mishra, learned Central Government Counsel appearing on behalf of respondents.

7. It is pointed out by the learned Counsel for the petitioner that the order of dismissal from service was passed dispensing with inquiry under Rule 33 of the Rules and adopting the drastic procedure envisaged under Rule 39(ii) on ground that it was not reasonably practicable to hold inquiry because of the petitioner's involvement in Case Crime No.54 of 2012. It is argued by the learned Counsel that it was not for the Disciplinary Authority to take cognizance of the petitioner's acts of commission or omission that were subject matter of criminal investigation/ criminal trial, a proceeding entirely different from those envisaged under Rule 39(i) of the Rules. It is urged that the Disciplinary Authority could not have considered the petitioner's conduct that was subject matter of criminal investigation or trial, while exercising his powers under Rule 39(ii) of the Rules. The submission, therefore, is that powers under Section 39(ii) of the Rules were exercised

by the Disciplinary Authority on irrelevant considerations.

8. It is next pointed out that the reason recorded in the impugned order dated 11.04.2012 is the improbability of witnesses turning up to testify against the petitioner. It is submitted that this reasoning is flawed, because it is not disclosed anywhere by the respondents that any endeavour was made to secure the presence of witnesses, but found them reluctant or hesitant. It is next submitted that if the ground is the non-availability of witnesses against the delinquent on account of fear etc., the names of witnesses should have been disclosed in the impugned order, that is to say, those witnesses, who were invited by the respondents to testify against the petitioner but declined. It is urged that the inference about improbability of witnesses turning up to testify, recorded in the impugned order is baseless and without material, rendering the foundation of the impugned order shaky.

9. It is next argued that Rule 39(ii) of the Rules contemplates dispensation of inquiry strictly under circumstances mentioned in that Rule. It is urged that the power is drastic, and, therefore, resort to Rule 39(ii) of the Rules should be made alone, if requirements of the Rule are strictly satisfied. The power cannot be exercised arbitrarily to bypass the inquiry, otherwise required to be undertaken. It is also argued that the proviso to Rule 39 contemplates that an enrolled member of the CISF may be given opportunity of making a representation against the penalty proposed before it is inflicted, which in this case has been observed in breach. It is next submitted by the learned Counsel for the petitioner, enlarging a point already made, that the procedure envisaged under Rule 39 is in the nature of a proviso to the holding of a regular inquiry under Rule 32. This proviso reflects the constitutional mandate in Article 311 of the Constitution, which too makes the holding of an inquiry an imperative and dispensation remote in circumstances that make adherence to inquiry procedures, not reasonably practicable. In support of his contention, learned Counsel for the petitioner has placed strong reliance upon the decision of the Supreme Court in **Union of India and others v. Ram Bahadur Yadav, (2022) 1 SCC 389.** Allusion to the principle laid down in **Ram Bahadur Yadav** *(supra)*, and if it is in point for the petitioner, shall be made during the course of this judgment. It is, particularly, emphasized by the learned Counsel for the petitioner that in the absence of evidence to show that despite effort made, no witness was willing to come forward and testify against the petitioner, the Disciplinary Authority's subjective satisfaction is flawed.

10. Mr. Piyush Mishra, learned Counsel for the respondents, refuting the submissions advanced on behalf of the petitioner, submits that there are detailed reasons recorded in the impugned order why the Disciplinary Authority has opined that it is not practicable to hold an inquiry. It is submitted that the circumstances in which the petitioner was found involved in the criminal case, where 25 containers of opium were stolen from the opium factory, being 558 kilograms and worth Rs.4 crores, the prospects of witnesses coming forward are not there. This theft and removal of opium from the Government Opium Factory involved twelve persons, to wit, Gopal Dhare Asharam, Sheetal Jaiswal, Om Prakash Yadav, Tushar @ Babu Jaiswal, Constable Balu Nayak, S.I. Santosh Kumar, Assistant Commandant Khajan Singh,

Constable K. Satish Kumar, Constable Hassandeen, Constable M. Bhaskar, Munna @ Rohit and Kamlesh @ Tuntun Kesari. The petitioner's name figured, no doubt, in the statement of a co-accused, but on the foot of involvement of these CISF men, who were acting in concert with opium mafia and the material that was gathered in connection with arrest of the CISF Personnel, including an Assistant Commandant, the Disciplinary Authority formed a subjective satisfaction, for reasons recorded, to dispense with inquiry, finding it to be not reasonably practicable. Why it was not reasonably practicable, bearing in mind the material and circumstances, attending the petitioner's act, is given in the impugned order.

11. It is no doubt true that the normal rule to impose a major penalty is one after holding due inquiry, for which an elaborate procedure is laid down under Rule 36 of the Rules. Rule 39 carves out an exception to Rules 36 to 38. It may be apposite to point out that whereas Rule 36 lays down the elaborate procedure to hold disciplinary proceedings in case of major penalties, Rule 37 prescribes the procedure for imposing minor penalties and Rule 38 the procedure for imposition of petty punishment. Rule 39, that is in the nature of a proviso to the normal procedure for the imposition of punishment of any kind, reads:

"39. Special procedure in certain cases.– Not with standing anything contained in rules 36 to 38 -

(i) where any penalty is imposed on an enrolled member of the Force on the ground of conduct which has led to his conviction on a criminal charge; or

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

(iii) where the President is satisfied that in the interest of the security of the state, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit;

Provided that the enrolled member of the Force may be given an opportunity of making representation against the penalty proposed to be imposed before any order is made in case under clause (i)."

12. The Rules have been framed by the Central Government in the exercise of their powers under Section 22 of the Central Industrial Security Force Act, 1968 (for short, 'the Act'), which confers wide powers on the Government to make Rules for carrying out the purposes of the Act. The scheme of the Rules, which envisages an ordinary mode for the imposition of a punishment of any kind and then an extraordinary mode in certain contingencies, orchestrates what Article 311 of the Constitution provides in the matter of dismissal, removal etc. of a member of a civil service of the Union or a State, or a person holding a civil post under the Union or a State, to borrow almost the phraseology of Article 311(1). Article 311 of the Constitution reads:

"311. Dismissal, removal or reduction in rank of persons employed in Civil capacities under the Union or a State.—(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority

subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply—]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

13. A comparison of what the higher principles in the Constitution lay down in connection with removal of a civil servant of the Union or a State and the provisions of the Rules would show striking similarity. What proviso (b) to Article 311 (2) postulates, is clearly reflected in the provisions of Rule 39 of the Rules. There is one issue, which Mr. Rajesh Kumar Singh, learned Counsel for the petitioner raised, that deserves to be disposed of for a first. He submitted, relying on the proviso to Rule 39 of the Rules, that it postulates opportunity of making a representation against the proposed penalty imposed under Rule 39, which has been observed in breach by the respondents. A perusal of Rule 39 of the Rules would show that the proviso envisages provision of opportunity to make a representation against the proposed penalty before it is imposed, in case the order is made, invoking clause (i) of Rule 39 of the Rules. Clause (i) aforesaid contemplates digression from the ordinary rule of holding a departmental inquiry in case where any penalty is imposed on an enrolled member of the CISF on ground of conduct that has led to his conviction in a criminal case. The proviso to Rule 39, therefore, would have no application to the present case, where clause (ii) of Rule 39 has been invoked by the respondents to punish the petitioner. The aforesaid contention of the learned Counsel for the petitioner, therefore, has no force.

14. A perusal of the impugned order shows that clause (ii) of Rule 39 has been invoked by the Disciplinary Authority to hold that it is not reasonably practicable to hold an inquiry on the following grounds, detailed in the impugned order (translated into English from Hindi):

"(a) As would be seen from the FIR Case Crime No.54 of 2012, registered on 29.02.2012 at 17:00 hours, the case

property recovered is opium worth Rs.4 crores, estimatedly where Constable GD Hassandeen's name is also found involved. The proof comprises the FIR registered by the Police.

(b) The local drug mafia, with whom Constable GD Hassandeen is involved command such terror and influence in the area, extending large, that there is no likelihood of any witness testifying against him or assisting in the departmental proceedings.

(c) The members of the CISF have been put in so much fear that the Unit is facing such intimidating circumstances where members of the Force, avoid testifying against him.

(d) Constable GD appears to have illegal connection to the drug mafia and on account of the terror and fear of the drug mafia, it is not possible that any witness would come forward.

(e) This fact is proved from the police case that Constable GD Hassandeen is involved with those, who illegally trade in opium and to have a member on the force, who has connections with such antisocial elements, is not only fatal for the force, but also expose to extreme danger those establishments, where he is posted.

(f) Most of the witnesses in this case are civilians, to produce whom is not possible.

(g) The CISF is a Central Armed Police Force. It is an Armed Force of the Union. The CISF is posted to sensitive stations and places like Airports, Seaports, Units of the Atomic Energy Department, the Space Department, Metro Rail, Electricity, Iron Industry. The force (CISF) is detailed to internal security duty as well as election duty. The CISF requires to maintain a high decree of discipline.

(h) Gauging the circumstances, so that general administration and discipline do not break down and go out of control, leading to breach of peace, it would not be desirable to await such circumstances to come by."

15. These reasons to dispense with the holding of a departmental inquiry and proceeding under Rule 39 was a decision taken by the Disciplinary Authority under circumstances recorded in that order. Broadly put, there was a Constable of the CISF posted at the Government Opium Factory, Ghazipur, Gopal Dhare Asharam Ganpat. According to the FIR, giving rise to Case Crime No.54 of 2012, registered on 29.02.2012 at 17:00 hours at Police Station Jaitpura, District Varanasi, he was arrested during a raid by the Police in a house located under Nakhi Ghaat, near the Shailputri Temple, together with 25 containers full of 558 kilograms of raw opium, estimated to be worth Rs.4 crores. The Constable had three members of the public with him, one of whom was able to make good his escape. The Constable was arrested along with two members of the public, going by the name, Sheetal Jaiswal and Om Prakash Yadav. All of them were arrested in the said crime. The arrest of these three in the raid and recovery of opium was done under the supervision of the Circle Officer, Chetganj. During interrogation of the three men arrested as aforesaid, revealed the involvement of Constable GD Hassandeen in the crime. After Hassandeen was brought to the Police Station and investigated, it was found that the 25 containers full of 558 kilograms of raw opium, stolen from the Government Opium Factory, had Hassandeen's involvement too. He was arrested and sent to jail. Information was given by Police Station Chetganj on 18.03.2012 to the CISF.

16. It was at this stage and shortly after the petitioner was arrested and

sent to jail that on 11.04.2012, the Disciplinary Authority invoked his powers under Rule 39(ii) of the Rules, assigning reasons in writing to hold that this was a case where it was not practicable to hold an inquiry, in the exercise of powers under the said Rule, proceeded to punish the petitioner with dismissal from service. The aforesaid order was passed on ground of his involvement in the criminal case and the circumstances of arrest, from which an inference was drawn that he was involved with national and international gang of opium smugglers. These were activities found to be harmful for the CISF, besides bringing it a bad name.

17. Now, the question to be determined is as what are the parameters on which power under Rule 39(ii) of the Rules can be exercised by the Disciplinary Authority to punish an enrolled member of the CISF, without holding an inquiry. This question engaged the attention of a Constitution Bench of the Supreme Court in **Union of India and another v. Tulsiram Patel, (1985) 3 SCC 398.** The question was decided with reference to the provisions of clause (2) of Article 311, which we have already noticed hereinabove are pari materia to the Rules here. It is observed in **Tulsiram Patel** *(supra)* regarding the validity of Rules providing for exclusion of natural justice in the following terms:

"106. It is not possible to accept this submission. The opening words of Article 309 make that article expressly "Subject to the provisions of this Constitution". Rules made under the proviso to Article 309 or under Acts referable to that article must, therefore, be made subject to the provisions of the Constitution if they are to be valid. Article 310(1) which embodies the pleasure doctrine is a provision contained in the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to that article are subject to Article 310(1). By the opening words of Article 310(1) the pleasure doctrine contained therein operates "Except as expressly provided by this Constitution". Article 311 is an express provision of the Constitution. Therefore, rules made under the proviso to Article 309 or under Acts referable to Article 309 would be subject both to Article 310(1) & Article 311. This position was pointed out by Subba Rao, J., as he then was, in his separate but concurring judgment in Moti Ram Deka case [AIR 1964 SC 600 : (1964) 5 SCR 683, 734-5 : (1964) 2 LLJ 467] at p. 734, namely, that rules under Article 309 are subject to the pleasure doctrine and the pleasure doctrine is itself subject to the two limitations imposed thereon by Article 311. Thus, as pointed out in that case, any rule which contravenes clause (1) or clause (2) of Article 311 would be invalid. Where, however, the second proviso applies, the only restriction upon the exercise of the pleasure of the President or the Governor of a State is the one contained in clause (1) of Article 311. For an Act or a rule to provide that in a case where the second proviso applies any of the safeguards excluded by that proviso will be available to a government servant would amount to such Act or rule impinging upon the pleasure of the President or Governor, as the case may be, and would be void as being unconstitutional. It is, however, a well-settled rule of construction of statutes that where two interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which

saves and preserves its constitutionality should be adopted and the other rejected. Such constitutionality can be preserved by interpreting that statutory provision as directory and not mandatory. It is equally well-settled that where a statutory provision is directory, the courts cannot interfere to compel the performance or punish breach of the duty created by such provision and disobedience of such provision would not entail any invalidity — see Craies on Statute Law, Seventh Edn., at p. 229. In such a case breach of such statutory provision would not furnish any cause of action or ground of challenge to a government servant for at the very threshold, such cause of action or ground of challenge would be barred by the second proviso to Article 311(2)."

18. It is, therefore, in accord with the constitutional scheme that service rules excluding natural justice have to be reflections of clause (b) of the second proviso to Article 311(2) of the Constitution.

19. The parameters, on which the power to dispense with an inquiry under clause (b) of the second proviso to Article 311(2) of the Constitution is exercised, have been elaborately laid down by the Constitution Bench in **Tulsiram Patel**. In **Tulsiram Patel**, it has been held:

"130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere.

In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India [(1984) 2 SCC 578 : 1984 SCC (L&S) 290 : (1984) 3 SCR 302] is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter.

131. It was submitted that where a delinquent government servant so terrorizes the disciplinary authority that neither that officer nor any other officer stationed at that place is willing to hold the inquiry, some senior officer can be sent from outside to hold the inquiry. This submission itself shows that in such a case the holding of an inquiry is not reasonably practicable. It would be illogical to hold that the administrative work carried out by senior officers should be paralysed because a delinquent government servant either by himself or along with or through others makes the holding of an inquiry not reasonably practicable.

132. It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to

apply clause (b) of the second proviso because the word "inquiry" in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).

133. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

134. It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore, find a place in the final order. It would be usual to record the reason separately and then consider the question of the penalty to be imposed and pass the order imposing the penalty. It would, however, be better to record the reason in the final order in order to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances."

20. The aforesaid principles laid down by the Constitution Bench were followed by the Supreme Court in **Southern Railway Officers Association v. Union of India and others, (2009) 9 SCC 24**. These principles were further followed and elaborated in a later decision of the Supreme Court in **Ved Mitter Gill v. Union Territory Administration, Chandigarh and others, (2015) 8 SCC 86.** The facts in **Ved Mitter** Gill *(supra)* show that while Gill was posted as the Deputy Superintendent of Police, Model Jail, Burail, Chandigarh in January, 2004, four under-trials, three of whom were facing trial on the charge of assassinating a former Chief Minister of Punjab, Sri Beant Singh and another, escaped from Model Jail, Burail, Chandigarh by digging an underground tunnel. Gill was dismissed from service vide order dated 01.03.2004 by the Administrator, Union Territory of Chandigarh invoking clause (b) of the second proviso to Article 311(2). He

challenged the order of dismissal dated 01.03.2004 by preferring departmental appeals to the Administrator of the Union Territory. Those appeals were dismissed as not maintainable vide order dated 11.02.2005. Gill moved the Central Administrative Tribunal through an Original Application, challenging the orders of his dismissal from service. The Central Administrative Tribunal vide order dated 30.01.2006 dismissed the Original Application. This order was impugned before the High Court in a writ petition, that came to be dismissed by an order dated 01.05.2006. It was against the order of the High Court that Gill appealed by special leave to the Supreme Court. Before the Supreme Court, the appeal preferred by Gill was heard along with transferred cases, that were writ petitions filed in the High Court by the other officers posted in Jail, who had similarly been dismissed and their writ petitions were still pending before the High Court by time Gill moved the Supreme Court by his petition for special leave to appeal. It was in the backdrop of these facts that after noticing the principles laid down in **Tulsiram Patel**, **Tarsem Singh v. State of Punjab, (2006) 13 SCC 581, State of Punjab v. Harbhajan Singh, (2007) 15 SCC 217** and other high authority that their Lordships held:

"22. We shall now advert to the impugned order to determine, whether the three parameters laid down for the valid invocation of clause (b) to the second proviso under Article 311(2) of the Constitution of India, were made out.

23. The *first ingredient*, which is a prerequisite to the sustainable application of the above clause (b) is, that the delinquency alleged should be such as would justify any one of the three punishments, namely, dismissal, removal or reduction in rank. We have already extracted hereinabove the order dated 1-3-2004, whereby, the appellant **Ved Mitter** Gill was dismissed from service, with immediate effect. Its perusal reveals, that the punishment was based on reasons (recorded in the impugned order) divided into different compartments. The first is contained in the first paragraph, which deals with the duties and responsibilities vested with **Ved Mitter** Gill, as Deputy Superintendent, Model Jail, Burail, Chandigarh. The second component deals with the escape of four undertrials from Model Jail, Burail, Chandigarh. Three of the undertrials, who had escaped, were involved in the assassination of Shri Beant Singh, a former Chief Minister of State of Punjab. The instant paragraph also records, the factum that the said three undertrials were having links with Babbar Khalsa International, a terrorist organisation. The fourth undertrial was being tried separately, for the offence of murder. The third component of the impugned order, relates to the material taken into consideration to evaluate the lapses committed by the appellant/petitioners, as would reveal their involvement with reference to the alleged delinquency, justifying the punishment of dismissal from service.

24. We shall now advert to the factual position emerging from the above. A reference was first of all made to the duties and responsibilities assigned to the appellant **Ved Mitter** Gill. Having detailed the express duties assigned to him in paras 9 to 11 above, we have concluded therefrom, that the responsibility of all the jail inmates (safe custody of all prisoners) rested on his shoulders, and the petitioners herein, who assisted him in the same. The appellant **Ved Mitter** Gill was required to satisfy himself once in every twenty-four hours, about the safe custody of the

prisoners. He was also duty-bound to visit every barrack, ward, cell and compartment every twenty-four hours. He was to be present every morning and evening, when the prisoners were taken out of the sleeping wards or cells or other compartments, and then, restored to the same. He was to make a daily report by daybreak and by night, that all the prisoners were present, and in safe custody. He was also required to report forthwith any unusual occurrence. He was required at least once a week to inspect clothing, beddings, as well as, other articles, by thoroughly checking all places frequented by the prisoners. And to make a report, if he discovered any prohibited article, during the checking. The petitioners were associated with the appellant and assisted him in discharging his aforementioned duties. Had the appellant **Ved Mitter** Gill, and the petitioners, performed their duties diligently, there could not have been any possibility, of the escape under reference. It cannot be overlooked, that the escape was made good, by digging the escape tunnel, which measured ninety-four feet in length (with diagonal dimensions of 21″ × 21″). Six separate reasons have been expressed by the competent authority in arriving at its conclusion. We have extracted the impugned order dated 1-3-2004, in its entirety, hereinabove. It fully establishes the inferences recorded by us.

25. The determination by the competent authority, when viewed dispassionately with reference to the duties assigned to **Ved Mitter** Gill, leaves no room for any doubt, that the competent authority was justified in concluding, that the four prisoners referred to above could never have escaped, if the appellant **Ved Mitter** Gill, and the petitioners, had diligently discharged the duties assigned to them. Having so concluded, about the responsibility and blameworthiness of the appellant/petitioners, there can be no doubt that the punishment of dismissal from service, was fully justified, as their delinquency had resulted in the escape of four dreaded prisoners.

26. The *second ingredient* which needs to be met for a valid exercise of clause (b) to the second proviso under Article 311(2) of the Constitution of India, is the satisfaction of the competent authority, that it was not reasonably practicable to hold a regular departmental enquiry against the employees concerned. On the question whether it was reasonably practicable to hold an inquiry, the competent authority has recorded its conclusion in the paragraphs, preceding the one depicting the involvement of the appellant/petitioners. Amongst the reasons indicated, it has been recorded, that **Ved Mitter** Gill being a senior, permanent and non-transferable officer of Model Jail, Burail, Chandigarh, his junior jail officers, who alone would have been witnesses in such departmental proceedings, were not likely to come forward to depose against him, for fear of earning his wrath in future. The links of the escaped undertrial prisoners with the Babbar Khalsa International, a known and dreaded terrorist organisation were also clearly expressed in the impugned order, as one of the reasons, for it being impracticable, to hold an inquiry against the appellant/petitioners. It is a matter of common knowledge, and it would be proper to take judicial notice of the fact, that a large number of terrorists came to be acquitted during the period in question, on account of the fact that witnesses did not appear to depose against them on account of fear, or alternatively, the witnesses who appeared before the courts concerned for recording their

deposition, turned hostile, for the same reason.

27. The situation presented in the factual narration noticed in the impugned order clearly achieves the benchmark for the satisfaction at the hands of the competent authority that it would not have been reasonably practicable to hold a departmental proceeding against the appellant/petitioners in terms of the mandate contained under Article 311(2) of the Constitution of India.

28. The third *essential ingredient* for a valid application of clause (b) to the second proviso under Article 311(2) of the Constitution of India is that, the competent authority must record the reasons of the above satisfaction in writing. In the present case, there is no serious dispute on this issue because the reasons for the satisfaction have been recorded by the competent authority in the impugned order (dated 1-3-2004) itself.

29. For the reasons recorded above, we are satisfied, that all the parameters laid down by this Court for a valid/legal application of clause (b) to the second proviso under Article 311(2) of the Constitution of India were duly complied with."

21. Testing the petitioner's case on the parameters laid down in **Tulsiram Patel**, and, particularly, **Ved Mitter Gill**, the first issue that requires consideration is the gravity of the charge. Was the charge grave enough, if proved at a full-fledged inquiry to entail the imposition of major penalty; particularly, dismissal from service, that has been ordered in this case. The charge against the petitioner is about being party to an act facilitating theft of 558 kilograms of opium from the Government Opium Factory, worth Rs.4 crores. This act was committed in connivance with other members of the CISF and some mafiosi involved in opium smuggling, at least so far as the charge goes. This charge, if proved at the inquiry against the petitioner, an enrolled member of a disciplined force dedicated to guard high security installations and establishments of the Government, would most certainly have entailed dismissal from service. Therefore, the first requirement to the exercise of power under Rule 39(ii) of the Rules is clearly established.

22. The other issue that merits consideration is: If the power to invoke Rule 39(ii) of the Rules, dispensing with the normal procedure of holding inquiry, was a valid exercise of discretion under the said Rule? The Disciplinary Authority derives power to dispense with departmental inquiry under Rule 39(ii), if it is satisfied that it is not reasonably practicable to hold an inquiry in the manner provided under the Rules and records reasons for its satisfaction. As laid down in **Tulsiram Patel** that the words 'not reasonably practicable' do not postulate a 'total or absolute impracticability', to borrow the words of their Lordships. All that is necessary is that to the understanding of a reasonable man, the holding of an inquiry in the circumstances should appear impracticable. There is remark in **Tulsiram Patel**, which is of utmost importance on the question what can be regarded as reasonably practicable. Though some illustrations are given there, but it is said that, 'whether it was practicable to hold the inquiry or not, must be judged in the context of whether it was reasonably practicable to do so'.

23. It is further observed in **Tulsiram Patel** that *'it is not possible to enumerate the cases in which it would not be*

reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given'. One of the illustrations given is of the government servant, who by himself or through his associates, terrorizes and suborns witnesses, making them stay away from testifying against him. This, as already said, is an illustration and there are others given by their Lordships. Ultimately, it depends upon the judgment of the Disciplinary Authority, who is abreast of the situation and located close at hand to judge the issue of practicability of holding an inquiry. This is not to say that the opinion of the Disciplinary Authority on the issue is final and not subject to scrutiny of this Court. It certainly is. However, the parameters of that scrutiny are limited to a classical secondary review. The material before the Disciplinary Authority in this case would show that it was wholesome. It was recorded by the Disciplinary Authority that the petitioner has connection with the drug mafiosi, who have such widespread terror in the area that it is not likely that anyone would testify against him in the departmental inquiry.

24. There is a further reason recorded, which is more dependable than the first. It is said that members of the CISF are so fearful and intimidated under the circumstances that no member of the CISF would testify against the petitioner. Now, the recording of this reason postulates that it is based on an objective assessment about members of the CISF available in the Unit, who would know about the happenings and the prevalent conditions about the terror struck by the the petitioner and his associates amongst the drug mafiosi. This opinion, being of the Group Commandant and one about members of the CISF available on the Unit, cannot be said to be one not based on any objective material. The satisfaction, of course, has to be subjective, which cannot be questioned.

25. There is still another reason, relevant to the issue in hand, recorded. It is said in the impugned order that most of the witnesses are civilian and it is difficult to produce them before the inquiry. This again is a relevant consideration, because after all what vests the Disciplinary Authority with the power to dispense with inquiry, is that it is 'not reasonably practicable' and not, as observed in **Tulsiram Patel**, an absolute impracticability. The difficulty in securing the attendance of civilian witnesses, who are material, being witnesses of acts done by the petitioner, subject matter of inquiry, may not be reasonably practicable. This Court is, therefore, of opinion that the Disciplinary Authority, including the Appellate and the Revisional Authorities, who upheld the order in the part relating to the decision to dispense with inquiry for the impracticability of it, did so on very relevant considerations that cannot be faulted.

26. The last issue, or as their Lordships of the Supreme Court said in **Ved Mitter** Gill, ingredient for a valid application of clause (b) of the second proviso to Article 311(2) of the Constitution, which here would translate to Rule 39(ii) of the Rules, is the recording of reasons in writing by the competent Authority. Here, the reasons have been recorded very elaborately in the order itself, and, therefore, this issue also is clinched against the petitioner.

27. Before parting with the matter, this Court must consider the submission of the learned Counsel for the petitioner, based on the principle in **Ram Bahadur**

Yadav. Learned Counsel for the petitioner has drawn the attention of the Court to Paragraph Nos.14 and 17 of the report in **Ram Bahadur Yadav** to submit that the order impugned is a mechanical exercise of power to dispense with inquiry under Rule 39(ii) of the Rules, and, further, there is no objective material available, on the foot of which the Disciplinary Authority could have recorded its subjective satisfaction to dispense with the holding of inquiry. In **Ram Bahadur Yadav**, it is observed by the Supreme Court:

"14. It is a settled legal position that when Rules contemplate method and manner to adopt special procedure, it is mandatory on the part of the authorities to exercise such power by adhering to the Rule strictly. Dismissal of a regular member of Force, is a drastic measure. Rule 161, which prescribes dispensing with an inquiry and to pass order against a member of Force, cannot be invoked in a routine and mechanical manner, unless there are compelling and valid reasons. The dismissal order dated 22-10-1998 does not indicate any reason for dispensing with inquiry except stating that the respondent had colluded with the other Head Constable for theft of non-judicial stamp papers. By merely repeating the language of the Rule in the order of dismissal, will not make the order valid one, unless valid and sufficient reasons are recorded to dispense with the inquiry. When the Rule mandates recording of reasons, the very order should disclose the reasons for dispensing with the inquiry.

17. In the judgment in *Tarsem Singh v. State of Punjab [Tarsem Singh v. State of Punjab,* (2006) 13 SCC 581 : (2008) 2 SCC (L&S) 140] , this Court has categorically held that when the Authority is of the opinion that it is not reasonably practicable to hold inquiry, such finding shall be recorded on the subjective satisfaction by the authority, and same must be based on the objective criteria. In the aforesaid case, it is further held that reasons for dispensing with the inquiry must be supported by material."

28. Whatever that we have said above, may be at the cost of some repetition, points out that the impugned order in this case is one that carries wholesome reasons that weighed with the Disciplinary Authority to invoke Rule 39(ii) of the Rules and dispense with inquiry on ground of the impracticability of it. For the said reason, the principle in Paragraph No.14 of the report in **Ram Bahadur Yadav** does not come to the petitioner's rescue at all. We have also indicated that there was objective material available with the Disciplinary Authority in the form of the FIR, the circumstances of arrest of a member of the CISF along with some men from the public, engaged in smuggling activities, the material about the petitioner's involvement collected during police investigation, and above all, the disinclination of members of the CISF available on the Unit to testify against the petitioner, on the foot of which, a subjective satisfaction was formed by the Disciplinary Authority to dispense with inquiry. For this reason, the principle in Paragraph No.17 of the report in **Ram Bahadur Yadav** would also not avail the petitioner.

29. In the totality of circumstances, this Court does not find any good ground to interfere with the impugned orders in the exercise of our jurisdiction under Article 226 of the Constitution.

30. This petition fails and is **dismissed.**

31. There shall be no order as to costs.

(2024) 3 ILRA 643
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2024
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 14824 of 2023

Sumant Kumar ...Petitioner
Versus
U.P.P.C.L, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Mishra

Counsel for the Respondents:
Sri Krishna Agrawal, Sri Abhishek Srivastava

Service Law – Disciplinary Proceedings – Procedural Fairness – Petitioner, an Office Assistant-II with Paschimanchal Vidyut Vitran Nigam Limited, challenged his dismissal from service for manipulating billing data, alleging procedural lapses under the U.P. Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 – Held, the Inquiry Officer failed to require the Establishment to prove charges through oral evidence, relying solely on documentary evidence without examining witnesses – This violated the mandatory requirement under Regulation 7 and principles of natural justice, as the Establishment must prove charges by leading oral and documentary evidence in the first instance – Impugned orders dated 26.08.2020, 29.04.2021, and 13.04.2023 quashed. (Paras 16, 17, 18, 19, 20, 24, 26)

Service Law – Burden of Proof in Disciplinary Inquiries – The petitioner denied the charges and raised specific defenses, requiring the Establishment to prove allegations through evidence – Held, the Inquiry Officer's failure to act as an impartial quasi-judicial authority and the absence of oral evidence rendered the inquiry flawed – As per St. of U.P. Vs Saroj Kumar Sinha and Roop Singh Negi Vs Punjab National Bank , the Establishment bears the initial burden to prove charges, and documents alone cannot be treated as proof without formal evidence – The Corporation's admission of procedural flaws via Office Memorandum dated 14.08.2023 reinforced the violation. (Paras 17, 18, 19, 24)

Service Law – ReinSt.ment and Fresh Inquiry – The Court quashed the dismissal orders due to procedural irregularities but permitted the respondents to conduct a fresh inquiry from the charge-sheet stage – Held, the petitioner is entitled to reinSt.ment with current salary, subject to the respondents' discretion to place him under suspension pending a new inquiry – Subsistence allowance must be paid if suspended, and consequential benefits will depend on the outcome of the fresh inquiry. (Paras 26, 27)

Writ Petition Allowed in Part.

Orders Dated 26.08.2020, 29.04.2021, and 13.04.2023 Quashed – Petitioner ReinSt.d with Conditions for Fresh Inquiry.

List of Cases Cited:

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

2. Roop Singh Negi Vs Punjab National Bank & ors., (2009) 2 SCC 570

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

4. St. of U.P. & anr.Vs Kishori Lal & anr., 2018 (9) ADJ 397 (DB)

5. St. of U.P. & anr.Vs T.P. Lal Srivastava, 1997 (1) LLJ 831

6. Subhash Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541

7. Subhash Chandra Gupta Vs St. of U.P., 2012 (4) ADJ 4 (NOC)

8. Salahuddin Ansari Vs St. of U.P. & ors., 2008 (3) ESC 1667

9. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348

10. Uma Shankar Vs Registrar, 1992 (65) FLR 674 (All)

11. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570

12. St. of U.P. Vs Aditya Prasad Srivastava & anr., 2017 (2) ADJ 554 (DB)

13. Smt. Karuna Jaiswal Vs St. of U.P., 2018 (9) ADJ 107 (DB)

14. Kaptan Singh Vs St. of U.P. & anr., Neutral Citation No. 2023:AHC:147689-DB

15. Prem Narain Singh Vs St. of U.P. & anr., Neutral Citation No. 2023:AHC:152345

16. Pankaj Kumar Sharma Vs St. of U.P. & ors., Neutral Citation No. 2023:AHC:161234

17. Vinod Kumar Vs St. of U.P. & ors., Neutral Citation No. 2023:AHC:165678

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

The petitioner, an Office Assistant-II in the employ of the Paschimanchal Vidyut Vitran Nigam Limited, is aggrieved by his dismissal from service, after disciplinary proceedings taken against him and affirmation of that order in departmental appeal and revision.

2. The petitioner was an Office Assistant-II in the Office of the Superintending Engineer, Electricity Distribution Division, Amroha, Paschimanchal Vidyut Vitran Nigam Limited, 33/11, K.V. sub-station, Collectorate, Joya Road, Amroha, District Amroha. He was suspended from service pending inquiry vide order dated 15.06.2018 passed by the Superintending Engineer aforesaid. The Managing Director, Paschimanchal Vidyut Vitran Nigam Limited1 vide order dated 14.08.2018, appointed one V.K. Pandey as the Inquiry Officer to hold a departmental inquiry. The said order was served upon the petitioner. The Inquiry Officer issued a charge-sheet dated 24.08.2018 to the petitioner, carrying seven charges.

3. The petitioner submitted his reply to the charge-sheet dated 29.11.2018, traversing the charges. It is the petitioner's case that he was summoned by the Inquiry Officer for a personal hearing on 12.12.2018, but no witnesses were produced or examined on behalf of the Establishment to prove the charges, in compliance with Rule 7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999, nor any oral inquiry held. An inquiry report dated 28.06.2019 was submitted by the Inquiry Officer to the Managing Director of the Distribution Corporation. A copy of the inquiry report was served upon the petitioner along with a letter dated 18.02.2020. It was served on 29.02.2020. The petitioner showed cause by his reply dated 04.06.2020, disputing the findings of the inquiry report. The Superintending Engineer, Electricity Distribution Division, Amroha, by his order dated 14.08.2020, passed an order, adjudging a miscellaneous advance against the petitioner to the tune of ₹36,67,357.32 on account of causing loss to the Distribution Corporation. This sum of money adjudged was directed to be recovered from the petitioner, about which he says he was not given opportunity.

4. Subsequently, the Disciplinary Authority, as the petitioner says, without considering the petitioner's reply in the rightful perspective and without requiring the charges to be proved, according to the procedure prescribed by law, held the petitioner guilty and dismissed him from service vide order dated 26.08.2020. The

Disciplinary Authority was the Superintending Engineer, Paschimanchal Vidyut Vitran Nigam Limited, Electricity Distribution Division, Amroha, respondent No. 4 to the writ petition. He shall hereinafter be referred to as 'the Disciplinary Authority'.

5. Aggrieved by the order of dismissal, the petitioner preferred an appeal to the Chief Engineer of the Distribution Corporation, respondent No. 3. He shall hereinafter be referred to as 'the Appellate Authority'. The appeal was preferred vide memorandum of appeal as aforesaid, dated 22.12.2020, and amended vide memorandum dated 06.04.2021. The Appellate Authority dismissed the appeal by his order dated 29.04.2021 made in exercise of powers under Section 11 of the Uttar Pradesh Power Corporation Limited Employees (Discipline and Appeal) Regulations, 20202.

6. The unsuccessful petitioner preferred a revision to the Chairman, Uttar Pradesh Power Corporation Limited against the order of the Disciplinary Authority and the Appellate Authority dated 06.04.2021 and 29.04.2021, respectively, under Regulation 13 of the Regulations of 2020. The aforesaid revision was preferred vide memorandum of revision dated 04.06.2021. This revision was not decided by the Chairman of the Corporation, despite lapse of more than a year and a quarter.

7. The petitioner, aggrieved by the inaction, instituted **Writ - A No. 16731 of 2022, Sumant Kumar v. U.P. Power Corporation Limited and others,** seeking a direction to the Chairman of the Uttar Pradesh Power Corporation Limited3 to decide his revision. This Court vide order dated 14.11.2022 disposed of the aforesaid writ petition with a direction to the Revisional Authority to decide the petitioner's revision and pass a reasoned and speaking order, as expeditiously as possible, and within a period of three months from the date of a copy of that order was produced before the Authority.

8. The Revisional Authority, in compliance with the order dated 14.11.2022, passed in the writ petition last mentioned, proceeded to decide the petitioner's revision and rejected the same by an order dated 13.04.2023, as the petitioner says, without considering the grounds or examining the issues raised in the rightful perspective. It is the petitioner's case pleaded in the writ petition, in paragraph Nos. 9, 20, 33, 34 and 36 that the Inquiry Officer, in holding the inquiry, leading to the findings of guilt on all the seven charges, did so without requiring the Establishment to prove those charges by producing evidence in support thereof in the first instance, particularly oral evidence, that is to say, witnesses.

9. A counter affidavit has been filed on behalf of all the respondents by Mr. Abhishek Srivastava, learned Counsel. In paragraph No. 4 of the counter affidavit, there is a wholesome denial of the averments made in paragraph Nos. 11 to 47 of the writ petition in an omnibus fashion. The same paragraph then proceeds to raise specific pleas of denial or confession and avoidance in the various sub-paragraphs of Paragraph No. 4. Sub-paragraphs (vi) and (vii) are of particular importance, as these are directed at answering the allegation of the petitioner about that procedural lapse of a salutary procedure, where, according to the petitioner, the Establishment was required to produce evidence before the Inquiry Officer in support of the charges,

particularly, oral evidence, that is to say, witnesses, to prove these in the first instance. Paragraph Nos. 4 (vi) and 4 (vii) read:

vi. Further after giving due opportunity of hearing to the petitioner and on the basis of material evidence on record, the enquiry committee has submitted his report and during the course of departmental enquiry, the petitioner has not disputed about the genuineness of any of the documents provided to the petitioner during the course of enquiry nor he had shown any interest in asking the department to produce any witness for examination/cross examination, therefore, once the employee has duly participated in the departmental enquiry and has admitted the evidence on record, therefore, it cannot be said that any prejudice is caused to him in not examining any witness by the department and if we go by the plain reading of the Regulation 7 of the 2020 Regulation it only says, in Regulation 7(5) that, along with the chargesheet the copy of the documents and list of witnesses should be provided to the employee and Regulation 7(7) provides that, in case the employee refuses the charges, the enquiry committee should call the proposed witnesses to record their evidence whose names are mentioned in the chargesheet and in the present case, if names of no one are mentioned in the chargesheet then the enquiry committee cannot be said to have committed any mistake in not examining any witness. Further Regulation 7(8) provides that, an enquiry committee can ask any witness to appear before it and provide any document and Regulation 7 (9) says, the enquiry committee can ask any question- to the witness to find out the true facts, herefore, from the bare perusal of the Regulations, 2020 cannot be said that the enquiry committee has committed any error, which has caused prejudice to the petitioner, who has been given full opportunity of oral hearing along with option to examine any witness or dispute the admissibility of any documents, and once the employee has not disputed about the genuineness and admissibility of the documents, taking into consideration by the enquiry committee, it cannot be said that the enquiry was not proper.

vii. Further from perusal of the record it is evident that no witness was proposed either in the charge sheet or any witness was named by the petitioner to examine during the departmental enquiry, therefore, no witness was examined by the Corporation to prove the charges during the course of departmental enquiry in the present case. Further to remove all these anomalies an Office Memorandum dated 14.8.2023 has been issued wherein it has been directed to all the authorities of the Corporation and the DISCOMS holding enquiry that they should strictly adhere to the provisions of Rule 7 of the Regulations 2020 and during the departmental enquiry they must first examine the officers on behalf of the Corporation to prove the charges and only thereafter they should provide opportunity to the employees to either cross examine them or to produce any witness on behalf of his defense.

10. Since the learned Counsel for the petitioner has waived his right to file a rejoinder affidavit, the petition was heard and judgment reserved.

11. Heard Mr. Manu Mishra, learned Counsel for the petitioner and Mr. Abhishek Srivastava, learned Counsel appearing for the respondents.

12. A perusal of the charge-sheet shows that the charges run into technical

details of billing various consumers by altering their supply type, say, to Supply Type 20 from Supply Type 22, and, on that basis, recording the reading in the computer system in the KWH system, instead of the KVAH system, leading to a lesser bill for the consumer. The allegations mentioned, which are illustratively based on Charge No. 1, are that, later on, the petitioner, using his User ID "SUMANT" on 17.03.2016, changed the data fed in the computer to the appropriate Supply Type 22 for a particular consumer, Sujit Gupta. Still later, on 29.03.2016, the data was again changed from Supply Type 22 to Supply Type 20. Once again, on 30.06.2016, it was altered back to Supply Type 22 from Supply Type 20. All this while, bills were drawn for the consumer in the KWH system, leading to a loss of revenue to the Corporation. The charge finally imputes that it appears that the petitioner did not want the customer to be billed in Supply Type 22 under the KVAH system, and, at the same time, in the master data, wanted it shown that he was being billed in Supply Type 22 (KVAH system) and therefore, the petitioner, in an organised manner, repeatedly, just before the bill was to be issued, ensured that the supply type was changed to S.T. 20 and the consumer billed under the KWH system, but before the master data could be issued, altered it back to Supply Type 22.

13. The first charge further goes on to say that the petitioner ensured that for this customer's present meter bearing No. 785615, the reading on 28.04.2018, was entered as 4601 KWH, using his User ID "SUMANT" and before this reading, the average consumption was 920 per month, but on 12.06.2018, the reading showed 10679 KWH. If the premises of the customer were not inspected and this reading taken, in the event of the meter going faulty, the earlier readings fed into the computer system would have to be accepted. An imputation has been made on the basis of these facts that the petitioner deliberately entered short meter readings for his own gain and to cause loss of revenue to the Corporation. In support of this charge, there is a printout of the computer log and the system date-wise, when the supply type was changed, using the petitioner's user ID.

14. This Court must remark that the charge itself is a big jumble up of money transactions and reads more like a statement of imputation, regarding which, one would expect a more concise charge elsewhere. It is true that all that is required about a valid charge in disciplinary proceedings is that it must, in intelligible and clear terms, convey to the delinquent what the allegations against him are, but, at the same time, in order that the charge be intelligible, it ought to be concise, so as not to make the understanding of its terms hazy. If there are many particulars to the charge, running into minute details, the sound practice in departmental proceedings is to draw up a concise charge, not carrying all those details and supported by a separate statement of imputations. The other six charges described in the charge-sheet are far more detailed and, for instance, the second charge does not relate to just one consumer. It relates to at least five of them. It also runs into minute details and is, again, about manipulating the data in the computer to feed a negative reading relating to consumers.

15. This Court has looked into one charge not for the purpose of analysing it or pronouncing upon it, but, to fathom, by what kind of evidence, it would have to be

proved by the Establishment, given the fact that the petitioner has denied all the charges and come up with specific defences, refuting them. It is not a case where the petitioner has admitted any of the charges or the documents as a true computer output of what the petitioner fed into the computer, while being in its charge. There are rather defences, again, illustratively of the kind noted below, pleaded by the petitioner in his reply (translated into English from Hindi) :

(1) It is true that User ID "SUMANT" which was provided to me by the Executive Engineer, Vidyut Vitran Khand, Gajraula, was used in my routine billing work, but for some contingent work, the Executive Engineer, Electricity Distribution Division-I, Gajraula got my User ID "SUMANT" provided to Sri Munna Lal, Office Assistant-II/Senior Contract Clerk for the purpose of doing the left out ledgerisation work relating to electricity connections. It is to be brought to notice that the Chief Engineer of the Corporation, Moradabad Region did an inspection on 02.12.2017 in the evening hours, by inspecting the Electricity Distribution Division, Gajraula, during which, he checked the private tubewell and industrial/commercial connection contract book. In that connection, the Chief Engineer of the Corporation for the Moradabad Region, by his letter No. 21381 मुअमु क्षेत्र/वा०/निरिक्षण दिनांक 05.12.2017 issued a warning about non-ledgerisation of electricity connections to Executive Engineer. It was for the said reason that I was required to provide my user ID to Sri Munna Lal, Office Assistant-II, Contract Clerk on the oral directions of the then Executive Engineer, provided to him in the interest of the Corporation and its work.

(2) The aforesaid ledgerisation work was to be done by Sri Munna Lal, Office Assistant-II, Contract Clerk, and for that lapse, the petitioner cannot be held guilty, because the Uttar Pradesh Power Corporation Limited, by their letter No. 87 प्रसू - 01 पाकाली/2002-20-प्र०से०/2000 dated 25.02.2002 (Annexures 2, 3 and 4) defines the duties and responsibilities of employees and officers as per annexure, where the chief responsibility about ledgerisation and first bill issue rests with the Senior Contract Clerk/Accountant (Revenue)/Assistant Engineer (Revenue)/Executive Engineer.

(3) On my counter, the billing for consumers above 10 kilowatts was done, which I was doing quite well, but on account of billing agency making a mistake, billing consumers of the rural areas, according to the urban system in the HCL system, some consumers were affected. As a result, the revenues were also being affected, due to which, the Executive Engineer, Sri Gulshan Goyal, orally directed that these consumers (rural areas) be appropriately billed in the HCL system, and for the purpose, the HCL system billing company representative be provided the user ID, so that the bill is rectified at the earliest. Acting on the aforesaid orders of the Executive Engineer, the HCL Billing Company Limited representative was provided with my user ID, who rectified the bills of these consumers, wherein, any anomalies, if committed, are not my responsibility, though the anomalies arising in the bills of these consumers (upon rectification) were corrected by me within time, details whereof are furnished in answer to the subsequent charges.

16. Now, in the face of this kind of a defence, which is very detailed in answer to each charge, it was incumbent, by salutary principle for the Corporation, to have established their charges before the Inquiry Officer by leading evidence through a

Presenting Officer, both documentary and oral. It is a settled principle of salutary procedure concerning departmental proceedings, where there is likelihood of imposition of a major penalty, which, in this case, was actually imposed, that the Establishment must prove the charges before the Inquiry Officer by leading evidence in the first instance. The Inquiry Officer is not to identify himself with the Establishment, even if an officer of the same Establishment. He must act as an impartial arbiter, distancing himself from the Establishment for the purpose of holding a departmental inquiry. It is the burden of the Establishment to prove the charges that they have brought against the delinquent in the first instance, by leading both documentary and oral evidence. It is also an imperative by principles of salutary procedure that oral evidence in support of charges must be led by the Establishment. It is after the evidence is led by the Establishment that the employee is to be given the opportunity to cross-examine witnesses, who were produced on behalf of the Establishment to prove various documents, or for any other purpose. It is to be emphasized that the documents annexed to the charges are not to be treated by the Inquiry Officer as proof of themselves. These are required to be proved by the Presenting Officer through evidence led on behalf of the Establishment; else, these documents are nothing but idle papers, on the basis of which, no inference can be drawn against an employee.

17. This Court notices the fact that in paragraph No. 4 (vii) of the counter affidavit, it has been admitted for a fact that no witness was examined by the Corporation to prove the charges during the course of departmental inquiry. It is also admitted that to remove all these anomalies, an Office Memorandum dated 04.08.2023 has been issued, wherein, all the Distribution Corporations holding inquiries have been directed to adhere strictly to the provisions of Regulation 7 of the Regulations of 2020. It is also pleaded that sub-paragraph (vii) of paragraph No. 4 of the Memorandum dated 14.08.2023 directs that in the holding of such departmental inquiries, the Corporations must first examine officers on their own behalf to prove the charges, and only thereafter, they should provide opportunity to the employees to either cross-examine their witnesses or produce any witnesses in their defence. The Corporation, in the counter affidavit, virtually admit the procedural flaw in this inquiry, where, the Establishment/Corporation have not proved the charges by leading oral evidence in support of the same.

18. For the legal proposition, that it is imperative in a departmental inquiry, leading to the imposition of a major penalty for the Establishment to examine witnesses or lead oral evidence, reference may be made to the case of **State of U.P. and others v. Saroj Kumar Sinha4** where it has been held by the Supreme Court :

27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he

would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

19. To like effect is the exposition of the law in **Roop Singh Negi5** where it has been held :

14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

20. The necessary steps and the manner in which a departmental inquiry is to be conducted, have been authoritatively laid down in **State of Uttaranchal and others v. Kharak Singh6.** In **Khadak Singh** *(supra)* the following principles have been culled out :

15. From the above decisions, the following principles would emerge:

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

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

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

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all

connected materials relied on by the enquiry officer to enable him to offer his views, if any.

(emphasis by Court)

21. The salutary principle, mandating the employer to prove the charges by examining witnesses was held to be mandatory in all cases, where, a major penalty was imposed, by a Division Bench of this Court **State of U.P. and another v. Kishori Lal and another7. In Kishori Lal** *(supra*) it was observed by their Lordships of the Division Bench :

13. Similar view was taken in Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570 :

"Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order

of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11.A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges. In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer

to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

22. To like effect is the holding in three other Bench decisions of this Court, that is to say, **State of U.P. v. Aditya Prasad Srivastava and another8, Smt. Karuna Jaiswal v. State of U.P.9 and Kaptan Singh v. State of U.P. and another10.**

23. I also had occasion to consider the issue and opine to like effect in **Prem Narain Singh v. State of U.P. and another11, Pankaj Kumar Sharma v. State of U.P. and others12 and Vinod Kumar v. State of U.P. and others13.**

24. The principle is far too well settled to brook doubt that as a part of salutary procedure in holding departmental proceedings, involving imposition of a major penalty, no valid proceedings can be taken without the Establishment proving the charges by oral evidence in the first instance, that is to say, by examining witnesses, apart from leading documentary evidence. Also, the Inquiry Officer cannot function in the fashion of an ordinary departmental functionary, but must convene himself like a Inquiry Tribunal, detaching himself from his routine employment. It is then that the Establishment have to prove the charges in the manner indicated before him by their evidence in the first instance. The only exception may be those cases, where, the delinquent admits the charges or admits certain documents expressly, either by endorsement made on the face of the documents or the admission being recorded in the order-sheet of the day, duly signed by the delinquent, apart from the other functionaries holding the inquiry. There is nothing of this kind here. Rather, the nature of the charges, and more than that, the nature of the defence, would show that the Establishment bear all the burden to lead evidence in the prescribed manner to establish the charges in the first instance.

25. To all this, this Court may add the remark that the seriousness or enormity of the charge does not license the employer to jump to conclusions. The more serious the charge, the more serious the consequence for the employee that are likely to ensue, in the event of its proof, and, the more strict, therefore, would be the requirement of procedural fairness in the departmental inquiry, where, the inquiry must proceed according to salutary and settled principles of holding a fair inquiry, which requires the Establishment to discharge their burden in the first instance, by leading evidence, with due opportunity to the delinquent.

26. In the circumstances, the writ petition stands **allowed in part.** The impugned orders dated 26.08.2020, 29.04.2021 and 13.04.2023 passed by the Disciplinary Authority, the Appellate Authority and the Revisional Authority, respectively, are hereby **quashed.** A *mandamus* is issued to the respondents to reinstate the petitioner in service forthwith and pay his current salary.

27. It will, however, be open to the respondents to proceed afresh against the

petitioner from the stage of the charge-sheet, holding inquiry *de novo* in accordance with law and the guidance in this judgment. It will also be open to the respondents, if they so think fit, to place the petitioner under suspension pending inquiry, immediately after his reinstatement and conclude the inquiry expeditiously. If the respondents elect to place the petitioner under suspension, they will pay the petitioner subsistence allowance regularly, and without fail. If the respondents elect to undertake the inquiry proceedings afresh, but not place the petitioner under suspension and assign him duties at whatever station they desire, the petitioner shall be paid his current salary with effect from the date of his reinstatement. In either event, the entitlement of the petitioner to consequential benefits of arrears etc. shall abide by the outcome of the disciplinary proceedings and the orders made therein.

28. There shall be no order as to costs.

(2024) 3 ILRA 654
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024
BEFORE
THE HON'BLE MANJIVE SHUKLA, J.

Writ A No. 16068 of 2023

Kumari Nisha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Ashish Kumar (Nagvanshi)

Service Law – Compassionate Appointment – Eligibility under U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – Petitioner, a permanently disabled unmarried daughter of a deceased Head Master, challenged the rejection of her compassionate appointment application on the ground that her brother was employed in government service – Held, the District Basic Education Officer's rejection order dated 26.12.2022 was unsustainable as it incorrectly assumed financial stability of the deceased's family based on the brother's employment – The Rules of 1974, as amended in 1999, only prohibit compassionate appointment if the surviving spouse is in government service, not if another family member like a son is employed – No evidence showed the brother's earnings supported the family, especially as he resided separately, as per his affidavit. (Paras 6, 14, 15, 16, 17)

B. Service Law – Interpretation of Rules of 1974 – Financial Dependency – The District Basic Education Officer rejected the petitioner's application assuming the family was not in financial stress due to her brother's government job – Held, the amended Rule 5(1) of the Rules of 1974 does not bar compassionate appointment for dependent family members when a son is employed, as his earnings may be utilized for his own family and not the deceased's dependents – The rejection order lacked material evidence to support the finding of financial sufficiency, rendering it contrary to the Rules of 1974 and the Government Order dated 04.09.2000. (Paras 8, 9, 15, 16)

C. Service Law – Remittance for Fresh Consideration – The Court quashed the rejection order dated 26.12.2022 for being legally unsustainable – Held, the matter is remitted to the District Basic Education Officer to reconsider the petitioner's compassionate appointment application in light of the correct interpretation of the Rules of 1974, ensuring compliance with principles of fairness and the absence of prohibition against appointment when a sibling is employed – Fresh order to be passed within two months. (Para 17)

Writ Petition Allowed .

Order Dated 26.12.2022 Quashed – Matter Remitted for Fresh Consideration.

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

1. Heard learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondents No. 1 and 2 as well as Mr. Ashish Kumar Nagvanshi, learned counsel appearing for the Respondents No. 3 & 4.

2. Petitioner through this writ petition has challenged the order dated 26.12.2022 passed by the District Basic Education Officer, Gorakhpur, whereby petitioner's application for her compassionate appointment has been rejected.

3. Facts of the case, in brief, are that father of the petitioner while working on the post of Head Master at Primary School Manikapur, Block Belghat District Gorakhpur, died in harness on 07.12.2019. On the date of death of petitioner's father, there remained widow (mother of the petitioner), two unmarried sons and unmarried daughter in the family. Petitioner is permanently disabled and her disability has been quantified to the tune of 75% and further she has been completely dependent on the earnings of her father.

4. Petitioner's elder brother Mr. Deepak Kumar is a government servant in the Provincial Armed Constabulary (PAC) of U.P. and is posted at District Jaunpur. Mr. Deepak Kumar along with his family is residing at District Jaunpur.

5. Petitioner after the death of her father submitted application for her compassionate appointment and along with the said application, she also filed an affidavit given by her elder brother, wherein he has categorically stated that he is in government job but is residing separately from his parents and he has no objection if the compassionate appointment in lieu of death of his father is offered to the petitioner.

6. The District Basic Education Officer, Gorakhpur has rejected the application of the petitioner for her compassionate appointment vide order dated 26.12.2022. The ground for rejection of the petitioner's application for compassionate appointment is that the eldest son of late Indra Dev (father of the petitioner) is employed in the Provincial Armed Constabulary (PAC) of the State of U.P. and therefore, there is no financial stress with the family of late Indra Dev and further since eldest son of the deceased teacher is employed with the State Government, the compassionate appointment of the member of the family is not permissible under U.P. Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 (hereinafter referred to as "the Rules of 1974").

7. Learned counsel appearing for the petitioner has submitted that petitioner's brother in his affidavit filed before the District Basic Education Officer, Gorakhpur has categorically stated that though he is employed but is residing separately from his parents therefore, there was no material available with the District Basic Education Officer, Gorakhpur to infer that the petitioner's brother is providing sufficient financial support to the family of late Indra Dev (deceased teacher).

8. Learned counsel appearing for the petitioner has also submitted that the legislature while making amendment in the Rules of 1974 by promulgating Uttar Pradesh Recruitment of Dependants of Government Servant Dying in Harness (Fifth) Amendment Rules, 1999, was conscious of the fact that even if one son of the deceased government servant is in employment, that cannot be a reason for denying the compassionate appointment to

other son or daughter (as the case may be) as the earnings of the employed son may be utilized for his family alone and may not be available for the sustenance of the remaining family of the deceased government servant therefore, only one exception has been carved out and it has been provided that where surviving spouse of deceased government servant is in government job, compassionate appointment shall not be offered to any other family member of the deceased government servant.

9. Learned counsel appearing for the petitioner has argued that once there is no such prohibition either under the Rules of 1974 or under the Government order dated 04.09.2000 that if one son or daughter is in government job, the compassionate appointment shall not be given to other son or daughter (as the case may be) dependent on the deceased government servant therefore, apparently order dated 26.12.2022 passed by the District Basic Education Officer, Gorakhpur is against the spirit of the Rules of 1974 and the Government order dated 04.09.2000 and accordingly cannot sustain in the eyes of law.

10. Learned counsel appearing for the petitioner has also vehemently argued that once brother of the petitioner Mr. Deepak Kumar has given affidavit before the District Basic Education Officer, Gorakhpur categorically mentioning therein that he is residing separately from his parents therefore, unless there was sufficient evidence, there was no occasion for the District Basic Education Officer, Gorakhpur to reject petitioner's application for compassionate appointment on the ground that brother's income is being utilized for sustenance of the family of late Indra Dev (deceased teacher) accordingly, order dated 26.12.2022 cannot sustain in the eyes of law.

11. Per contra, Mr. Ashish Kumar Nagvanshi, learned counsel appearing for the Respondents No.3 and 4 has contended that the District Basic Education Officer, Gorakhpur has considered the entire matter and has found that on the date of death of petitioner's father, her brother was in government job and therefore, surviving family of late Indra Dev (deceased teacher) was not in financial stress and accordingly petitioner's case for compassionate appointment has been rejected vide order dated 26.12.2022.

12. Mr. Ashish Kumar (Nagvanshi), learned counsel appearing for the Respondent Nos. 3 & 4 has vehemently argued that the Rules of 1974 have been amended in the year 1999 and it has been provided that if the surviving spouse of the deceased government servant is in government job, then the other family members dependent on the deceased government servant shall not be entitled for compassionate appointment and therefore, the spirit of the Rules of 1974 and the Government order dated 04.09.2000 is apparent that if any member of the family is in government job then the family of the deceased government servant shall not be in financial stress and accordingly the other dependent family members cannot claim compassionate appointment.

13. Mr. Ashish Kumar Nagvanshi, learned counsel appearing for the Respondent Nos. 3 & 4 has thus concluded his arguments by submitting that the compassionate appointment cannot be claimed as a matter of right and in the present case, the District Basic Education

Officer, Gorakhpur has considered the entire material available on record and has recorded a finding that the surviving family of the deceased teacher is not in financial stress and thus has rejected the petitioner's case for compassionate appointment vide order dated 26.12.2022 therefore, the order dated 26.12.2022 does not call for any interference by this Court and the writ petition filed by the petitioner is liable to be dismissed.

14. I have considered the rival submissions advanced by the learned counsels appearing for the parties and I find that the District Basic Education Officer, Gorakhpur has rejected the petitioner's case for compassionate appointment on following two grounds :

(i) Petitioner's brother is in government job and therefore, she is not entitled for compassionate appointment under the Rules of 1974.

(ii) Since petitioner's brother was in government job on the date of death of her father and he was unmarried therefore, his earnings were sufficient for sustenance of the surviving family.

15. For arriving at a correct conclusion in this matter, it is necessary to have a brief look over the provisions made for compassionate appointment in the Rules of 1974. Unamended Rule 5 (1) of the Rules of 1974 reads as under :-

"5. Recruitment of a member of the family of the deceased-*(1) In case a Government servant dies in harness after the commencement of these rules, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission or which was previously within the purview of the Uttar Pradesh Public Service Commission and has later on, been placed within the purview of the Uttar Pradesh Subordinate Service Selection Commission in relaxation of the normal recruitment rules, if such person-*

(1) fulfils the educational qualifications prescribed for the post,(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

16. Later on, the aforesaid Rule 5(1) of the Rules of 1974 has been amended by U.P. Recruitment of Dependants of Government Servant Dying in Harness (Fifth) Amendment Rules, 1999 and the amended Rule 5(1) reads as under :-

"5(1) Recruitment of a member of the family of the deceased. *- (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State*

Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the recruitment as it may consider necessary for dealing with the case in a just and equitable manner."

17. This Court finds that initially Rule 5(1) of the Rules of 1974 provided for compassionate appointment to one family member dependent on the deceased government servant provided he is not in government job meaning thereby that there was only one condition where the compassionate appointment could have been refused i.e. person seeking compassionate appointment was already in government job. Later on, Rule 5(1) of the Rules of 1974 has been amended in the year 1999 and amended Rule 5(1) provides that if the surviving spouse of the deceased government servant is in government job then the other family members dependent on the deceased government servant shall not be entitled for compassionate appointment.

15. This Court further finds that the legislature while amending Rule 5(1) of the Rules of 1974 was conscious of the fact that if one son of the deceased government servant is in government job, his earnings may not be available for survival of the remaining family members of the deceased government servant for the reason that the earnings of the son are meant for survival of his own family (his wife and children) and therefore only one prohibition has been incorporated that if the surviving spouse of the deceased government servant is in government job, the other dependent family members are not entitled for compassionate appointment.

16. This court is of the view that once there is no prohibition under the Rules of 1974 and the Government order dated 04.09.2000 wherein identical provision has been made for the compassionate appointment on the death of a teacher, that if one son of the deceased teacher is in government job, the other dependent family member of the deceased teacher is not entitled for compassionate appointment, there cannot be any occasion for the District Basic Education Officer, Gorkhpur to reject petitioner’s case for compassionate appointment on the ground that her brother is in government job. Petitioner’s brother has given his affidavit, wherein he has categorically stated that though he is in government job but is residing separately from his parents, therefore, unless there was some material before the District Basic Education Officer, Gorakhpur, he could not have recorded a finding that since petitioner’s brother is in government job, his earnings are sufficient for sustenance of surviving family of the deceased teacher

accordingly, order dated 26.12.2022 is not sustainable in the eyes of law.

17. In view of the aforesaid reasons, this writ petition is **allowed.** Order dated 26.12.2022 passed by the District Basic Education Officer, Gorakhpur is quashed. Matter is remitted to Respondent No. 4 to consider the petitioner's matter afresh in the light of this order and to pass fresh order within a period of two months from the date of presentation of certified copy of this order.

(2024) 3 ILRA 659
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024
BEFORE
THE HON'BLE MANJIVE SHUKLA, J.

Writ A No. 16473 of 2023

Smt. Neetu Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Kumar Kesherwani

Counsel for the Respondents:
C.S.C., Sri Rama Nand Pandey

Service Law – Compassionate Appointment – U.P. Government Order Dated 04.09.2000 – Petitioner challenged the rejection of her compassionate appointment application following the death of her mother-in-law, an Assistant Teacher, on 28.12.2017 – Held, the District Basic Education Officer's order dated 08.09.2023 rejecting the petitioner's application was valid, as her husband's prior application for compassionate appointment on a clerical post was registered but not fulfilled due to lack of vacancies within the five-year period prescribed under Clause 5 of the Government Order dated 04.09.2000 – His refusal to opt for a Class-IV post and the expiration of the five-year period led to the automatic rejection of his claim, precluding a second application by the petitioner. (Paras 5, 15, 16, 17, 18)

Service Law – Limitation on Successive Applications for Compassionate Appointment – The petitioner's husband applied for compassionate appointment on a clerical post, which was not granted due to unavailability of vacancies, and his claim lapsed after five years as per the Government Order dated 04.09.2000 – Held, there is no provision under the Government Order for a second application by another family member after the initial claim is extinguished – The petitioner's application, filed after her husband's death on 11.04.2023, was not maintainable, as successive applications for compassionate appointment are not permissible. (Paras 16, 17, 18)

Service Law – Non-Compliance with Court Orders and Financial Stress – The petitioner argued that her husband's application was not decided despite a court order dated 23.11.2022, and her family faced financial stress – Held, the respondents' failure to comply with the court order did not alter the fact that the husband's claim lapsed after five years due to non-availability of clerical posts and his refusal to opt for a Class-IV post – Compassionate appointment is not a matter of right, and the petitioner's claim could not be treated as a continuation of her husband's application – The rejection order dated 08.09.2023 was upheld as legally sound. (Paras 6, 7, 8, 16, 18)

Writ Petition Dismissed .

Order Dated 08.09.2023 Upheld.

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

1. Heard Mr. Kamal Kumar Kesherwani, learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondents No. 1 to 3 and Mr. Rama Nand Pandey, learned counsel appearing for the Respondents No. 4 & 5.

2. Petitioner through this writ petition has assailed the order dated 08.09.2023 passed by the District Basic

Education Officer, Jhansi whereby her claim for compassionate appointment has been rejected.

3. Facts of the case, in brief, are that mother-in-law of the petitioner while working on the post of Assistant Teacher in a Primary School at Jhansi died in harness on 28.12.2017. Petitioner's husband Mr. Prashant Sharma preferred an application on 12.03.2018 for his compassionate appointment on the post of Clerk in place of his mother. Application filed by Mr. Prashant Sharma for compassionate appointment on the post of Clerk remained pending with the respondents and during pendency of the application respondents required him to opt for appointment on a Class-IV post as vacant Class-III post was not available but he did not opt for appointment on Class-IV post.

4. Since the application for compassionate appointment on the post of Clerk submitted by the petitioner's husband remained pending with the respondents, he filed Writ-A No. 19207 of 2022 (Prashant Sharma Vs. State of U.P. & Ors) which was finally disposed of by this Court vide order dated 23.11.2022 whereby direction was issued to the Secretary, U.P. Basic Education Board, Prayagraj to decide his application dated 12.03.2018. The Secretary, U.P. Basic Education Board, Prayagraj did not take any decision pursuant to order dated 23.11.2022 passed by this Court in Writ-A No. 19207 of 2022 and in the meantime petitioner's husband Mr. Prashant Sharma died on 11.04.2023. After the death of her husband, petitioner filed an application on 23.05.2023 for her compassionate appointment in lieu of the death of her mother-in-law. Since the application filed by the petitioner was not decided, she filed Writ-A No. 10348 of 2023 which was disposed of by this Court vide order dated 14.07.2023 whereby direction was issued to the District Basic Education Officer, Jhansi to consider and decide petitioner's application for compassionate appointment within a period of one month.

5. The District Basic Education Officer, in compliance of the order dated 14.07.2023 passed by this Court in Writ-A No. 10348 of 2023 has passed order on 08.09.2023, whereby application of the petitioner for her compassionate appointment has been rejected on the ground that petitioner's husband on the death of his mother filed application for his compassionate appointment on the post of Clerk and in view of the provisions made in Government order dated 04.09.2000, the said application was entered in the list of candidates seeking appointment on clerical post and since during five years due to non-availability of vacancy in the clerical cadre he could not be given appointment on clerical post, his application has been de-listed. In the order dated 08.09.2023 it has further been stated that during period of five years from the date of application of the petitioner's husband he was offered to opt for his compassionate appointment on a Class-IV post but he did not submit his option and continuously insisted for his appointment on a clerical post, therefore in view of the provisions made in the Government order dated 04.09.2000, his claim automatically came to an end after expiry of the period of five years from the date of his application and further since one application filed by petitioner's husband stood rejected and there is no provision for second application for compassionate appointment, therefore petitioner pursuant to her application cannot be provided compassionate appointment and accordingly her application stands rejected.

6. Learned counsel appearing for the petitioner has submitted that mother of the petitioner's husband died on 28.12.2017 and thereafter he filed application for compassionate appointment on 12.03.2018 but the said application was never decided by the respondents in spite of the categorical order passed by this Court on 23.11.2022 in Writ-A No. 19207 of 2022 and during the pendency of the said application petitioner's husband died therefore, petitioner's application for compassionate appointment should have been treated to be in continuity with the application filed by her husband and accordingly could not have been rejected. It has further been submitted that the provisions of the Government order dated 04.09.2000 only provide that application for compassionate appointment on the clerical post shall be entered in a list and appointment on the clerical posts will be provided on the criteria of first come first get against the available vacancies and after five years the application shall be de-listed but in no way the provisions of the Government order dated 04.09.2000 provide that the claim for compassionate appointment of a candidate shall automatically stand rejected on completion of period of five years, therefore the stand taken by the District Basic Education Officer, Jhansi in his order dated 08.09.2023 is absolutely misconceived.

7. Learned counsel appearing for the petitioner has vehemently argued that the respondents deliberately did not comply the order dated 23.11.2022 passed by this Court in Writ-A No. 19207 of 2022 and in the meantime petitioner's husband died, therefore it is apparent that the application filed by the petitioner's husband for his compassionate appointment has not been decided till date as such the application of the petitioner for her compassionate appointment should have been treated to be in continuity with the application of her husband and could not have been rejected by the District Basic Education Officer, Jhansi but in patent disregard to the order passed by this Court, petitioner's application for compassionate appointment has been rejected vide order dated 08.09.2023 on absolutely misconceived ground that the application filed by the petitioner's husband automatically stood rejected on completion of period of five years from the date of its filing.

8. Learned counsel appearing for the petitioner has also argued that petitioner's family is still under acute financial stress as after the death of her mother-in-law, her father-in-law and husband both have died and there is no one in the family who can provide financial support, therefore it is apparent that financial stress is continuing as on date accordingly, the application filed by the petitioner for her compassionate appointment should have been considered sympathetically but the District Basic Education Officer, Jhansi without considering the entire facts and circumstances of the case has straight away rejected her case vide order date 08.09.2023.

9. Learned counsel appearing for the petitioner has thus concluded his arguments by submitting that the order dated 08.09.2023 passed by the District Basic Education Officer, Jhansi cannot sustain in the eyes of law and is liable to be quashed by this Court.

10. Per contra, Mr. Rama Nand Pandey, learned counsel appearing for the Respondents No. 4 & 5 has argued that compassionate appointment to the

dependent of a deceased teacher is provided in terms of the provisions made in the Government order dated 04.09.2000, wherein under Clause 5 it has been provided that where a candidate seeks compassionate appointment on a clerical post, his application shall be registered in the list of candidates seeking compassionate appointment on clerical post and appointment shall be given on the criteria of first come first get against the available vacancies and if during the period of five years, candidate is not given appointment due to non-availability of vacancy in the clerical cadre, his name shall be deleted from the said list with a further rider that if during the said five years if any candidate submits application for compassionate appointment on a Class-IV post then his application shall be considered for appointment on a Class-IV post. The mother-in-law of the petitioner died on 28.12.2017 and petitioner's husband applied for his compassionate appointment on a clerical post which was registered in the list of the candidates but due to non-availability of vacancy in the clerical cadre he could not be given compassionate appointment on the clerical post and the time period of five years completed, therefore his application stood automatically rejected. During the said period of five years, petitioner's husband was offered to opt for compassionate appointment on a Class-IV post but he did not opt and never applied for compassionate appointment on a Class-IV post and therefore, his claim automatically stood rejected on completion of the period of five years. Once the application for compassionate appointment filed by the petitioner's husband automatically stood rejected on completion of the period of five years, there is no provision for second application for compassionate appointment by any other family member as such petitioner's application for compassionate appointment has been rejected vide order dated 08.09.2023.

11. Mr. Rama Nand Pandey, learned counsel appearing for the Respondents No. 4 & 5 has thus concluded his arguments by submitting that the order dated 08.09.2023 passed by the District Basic Education Officer, Jhansi does not suffer from any infirmity and writ petition filed by the petitioner is liable to be dismissed by this Court.

12. I have considered the rival submissions advanced by the learned counsels appearing for the parties and I find that mother-in-law of the petitioner died on 28.12.2017 and thereafter petitioner's husband filed application for his compassionate appointment on a clerical post. Since the vacant clerical post was not available, his application was registered in the list of candidates seeking compassionate appointment on clerical post. Petitioner's husband was also offered to opt for available vacant Class-IV post vide letter dated 19.07.2018 but he did not opt for appointment on Class-IV post and continued to maintain his claim for compassionate appointment on a clerical post.

13. For arriving at conclusion, it is necessary to have a brief look of the provisions made in the Clause (5) of the Government order dated 04.09.2000, which is extracted as under :-

"(5) ऐसे मृतक आश्रित जो, सम्बन्धित कर्मचारी की मृत्यु के दिनांक को मृतक आश्रित के रूप में सेवायोजन के लिये न्यूनतम शैक्षिक अर्हता इण्टरमीडिएट अथवा उससे अधिक रखते हों और बेसिक शिक्षा परिषद के अधीन अधीनस्थ स्तरों पर लिपिक के

सम्वर्ग के सबसे नीचे के पद पर सेवायोजन के लिये अन्यथा अर्ह हों, को सम्बन्धित जनपद के लिपिक के लिपिक के रिक्त पद के सापेक्ष्य संवर्ग में सबसे नीचे के पद पर सेवायोजन प्रदान किया जायेगा।

जनपद में रिक्त लिपिक के पद पर मृतक आश्रित के रूप में सेवायोजन के लिए प्राप्त समस्त आवेदन पत्रों के प्रथम आगत प्रथम प्रदत्त के आधार पर पंजीकृत किया जायेगा तथा विभाग के रिक्त होने वाले पदों के सापेक्ष्य प्रथम आगत प्रथम प्रदत्त के नियम का पालन सुनिश्चित करते हुए सेवायोजन प्रदान किया जायेगा। नियुक्ति प्राधिकारी तदनुसार मृतक आश्रित अभ्यर्थियों की सूची को प्रत्येक माह के प्रारम्भ में अपने कार्यालय के सूचना पटल पर प्रदर्शित करेंगे और प्रत्येक माह होने वाली रिक्ति के सापेक्ष्य सेवायोजित मृतक आश्रित का नाम प्रदर्शित करते हुए उक्त सूची का तदनुसार संशोधित कर अगले माह के प्रारम्भ में अद्यावधिक संशोधित सूची कार्यालय में सूचना पटल पर प्रदर्शित करते रहेंगे। तृतीय श्रेणी के रिक्त पद के सापेक्ष्य मृतक आश्रित सेवायोजन के लिए प्रत्येक अभ्यर्थी के नाम नियुक्ति प्राधिकारी के कार्यालय में पंजीकृत होने की तिथि से पांच वर्ष की अवधि पूरी होने के माह के अंतिम कार्य दिवस तक यदि प्रथम आगत प्रथम प्रदत्त के सिद्धान्त के अनुसार सेवायोजन हेतु श्रेणी तीन की रिक्ति उपलब्ध नहीं होती तो सम्बन्धित अभ्यर्थी का नाम पंजीकृत अभ्यर्थियों की सूची से निकाल दिया जायेगा किन्तु इस अवधि से पूर्व यदि श्रेणी चार के रिक्त पद/अधिसंख्य पद के सापेक्ष्य सेवायोजन हेतु अपना संशोधित आवेदन पत्र नियुक्ति प्राधिकारी के कार्यालय में पंजीकृत करा लें तो उस पर विचार किया जायेगा।

मृतक आश्रित परिवार की कठिन परिस्थितियों को दृष्टिगत रखते हुए यदि कोई अभ्यर्थी, लिपिक संवर्ग के पद की रिक्ति के सापेक्ष्य सेवायोजन में, सम्भवित विलम्ब को, दृष्टिगत रखते हुए यदि तत्काल सेवायोजन की आवश्यकता अनुभव करता हो तो नियुक्ति प्राधिकारी के लिए ऐसे अभ्यर्थियों के सम्बन्ध में चतुर्थ श्रेणी में रिक्त अधिसंख्य पदों के सापेक्ष्य मृतक आश्रित के पुनरीक्षित आवेदन पत्र प्रस्तुत करने पर सेवायोजन करने का अधिकार होगा। यहाँ यह स्पष्ट किया जाता है कि एक बार मृतक आश्रित के रूप में प्रदत्त सेवायोजन की सुविधा पर पुर्नविचार का कोई अवसर नहीं रहेगा।इ''श

14. From perusal of Clause (5) of the Government order dated 04.09.2000 it becomes crystal clear that if a candidate is claiming for compassionate appointment on a clerical post and the vacancy is not available then his application shall be registered in the list of candidates seeking compassionate appointment on clerical post and from that list appointments shall be offered against available vacant clerical posts on the criteria of first come first get and further if during the period of five years from the date of such registration candidate could not get appointment on a clerical post then his application shall be removed from the said list. In Clause (5) of the Government order dated 04.09.2000 it has further been provided that during the period of five years it shall be open for the candidate to opt for his appointment on a Class-IV post and if the said option is submitted, then his claim shall be considered for appointment against a Class-IV post.

15. This court finds that the application for compassionate appointment submitted by the petitioner's husband was received in the office of the District Basic Education Officer, Jhansi on 20.03.2018 and it was registered in the list of candidates seeking compassionate appointment on clerical post but petitioner's husband could not be offered compassionate appointment on a clerical post for want of vacancy and the period of five years completed, therefore as per provisions made in Government Order dated 04.09.2000, his name was removed from the list. This court further finds that during the period of five years petitioner's husband was offered to opt for compassionate appointment on a Class-IV post but he did not submit any such option and he continued to assert his claim for appointment on a clerical post.

16. Petitioner's husband without disclosing provisions made in Clause (5) of the Government order dated 04.09.2000 filed Writ-A No. 19207 of 2022 and this

Court vide order dated 23.11.2022 directed the Secretary, U.P. Basic Education Board, Prayagraj to consider and decide his application dated 12.03.2018 and the said order was not complied with, but the fact remains that the petitioner's husband was claiming compassionate appointment on a clerical post and due to non-availability of vacancy he could not be given compassionate appointment and on completion of the period of five years his name was removed from the list of candidates seeking compassionate appointment on clerical post. The husband of the petitioner died on 11.04.2023 and thereafter petitioner filed application for her compassionate appointment on 23.05.2023 and the said application has been rejected by the District Basic Education Officer, Jhansi vide order dated 08.09.2023 on the ground that petitioner's husband claimed his appointment on a clerical post and his application was registered in the list of candidates seeking compassionate appointment on clerical post and since during five years period he could not given appointment due to non-availability of vacancy of clerical post, his application automatically stood rejected and his name was removed from the list of candidates seeking compassionate appointment on clerical post. In the order dated 08.09.2023 the District Basic Education Officer, Jhansi has also pointed out that petitioner's husband was offered to opt for compassionate appointment on a Class-IV post but he did not submit such option and continued to claim for compassionate appointment on clerical post which stood rejected on completion of period of five years.

17. Provisions made in the Government order dated 04.09.2000 are unambiguous and there is provision that if a candidate wants compassionate appointment on a Class-IV post, then his case can be considered for the said appointment but if he is insisting for appointment on a clerical post and vacancy is not available then his application shall be registered in the list of candidates seeking compassionate appointment on clerical post and the said claim will continue to exist for a period of five years and thereafter his name shall be removed from the list meaning thereby that his application for compassionate appointment on Class-III post shall automatically stand rejected. It is also worth consideration of this Court that the compassionate appointment cannot be claimed as a matter of right and once petitioner's husband was offered to opt for compassionate appointment on a Class-IV post and he continued to insist for his claim for appointment on a clerical post which came to end on expiry of the period of five years, the second application filed by the petitioner for her compassionate appointment after the death of her husband is not maintainable as there is no provision under the Government order dated 04.09.2000 for successive applications for compassionate appointment by more than one member of the family of the deceased teacher.

18. By now it is well setted proposition of law propounded through catena of judgments of Hon'ble Supreme Court that in the matters of compassionate appointment, one cannot insist for his appointment on a particular post and therefore once petitioner's husband was offered appointment on a Class-IV post and he did not opt for that appointment, his claim for compassionate appointment ended and further in terms of Government order dated 04.09.2000 his claim for compassionate appointment on a clerical

post ended on completion of period of five years from the date of registration of his application, therefore the second application filed by the petitioner for her compassionate appointment was not at all maintainable, as such the District Basic Education Officer, Jhansi while rejecting the petitioner's application vide order dated 08.09.2023 has not committed any illegality.

19. In view of the aforesaid reasons, this writ petition lacks merit and is accordingly dismissed.

(2024) 3 ILRA 665
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2024
BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.
HON'BLE DONADI RAMESH , J.

Writ A No. 17190 of 2021

Mohammad Sabir ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar

Counsel for the Respondents:
Sri Rajnish Kumar Rai, Sri Gopal Verma

Service Law – Disciplinary Proceedings – Violation of Natural Justice – Petitioner, a Khalasi/Helper in Railways, challenged his removal from service for unauthorized absence (17.12.2007 to 02.09.2008), alleging non-compliance with Rule 9 of the Railway Servants (Disciplinary and Appeal) Rules, 1968 – Held, petitioner admitted the charge of unauthorized absence in his St.ment recorded on 15.06.2009, negating the need for further inquiry, witness examination, or cross-examination under Rule 9 – As admitted facts need not be proved, no violation of natural justice occurred – Tribunal's dismissal of the petitioner's original application upheld. (Paras 8, 17, 21, 24)

Service Law – Admission of Charges – Effect on Inquiry Procedure – Petitioner contended that the inquiry officer failed to follow Rules 9(14), 9(17), 9(22), and 9(25), including non-examination of witnesses and non-supply of the inquiry report – Held, the petitioner's admission of the charge of unauthorized absence in his St.ment dispensed with the need for further procedural steps, as per Clause 5 of the charge-sheet format – Impugned order confirmed supply of the inquiry report on 08.07.2009, which petitioner did not specifically deny – No procedural irregularity found in the inquiry process. (Paras 11, 12, 19, 21, 24)

Service Law – Proportionality of Punishment – Habitual Absenteeism – Petitioner argued that removal from service was disproportionate to the charge of unauthorized absence – Held, petitioner's habitual absenteeism (319 days in 2005, 44 days in 2006, 67 days in 2007, and 261 days in 2007-08, totaling over 600 days) justified the punishment of removal – Tribunal and disciplinary authority's findings, supported by petitioner's admission and lack of explanation, warranted no interference – Judgments cited by petitioner (*U.O.I. Vs Dinanath Shantaram Karekar*, *St. of U.P. Vs Saroj Kumar Sinha*, *Krushnakant B. Parmar*) held inapplicable due to petitioner's admission of charges. (Paras 22, 24, 25)

Writ Petition Dismissed .

No Illegality in Tribunal's Order Dated 05.04.2021.

List of Cases Cited:

1. Hardwari Lal Vs St. of U.P. & ors., decided on 27.10.1999

2. U.O.I. Vs Mohd. Ramzan Khan, (1991) 1 SCC 588

3. Ram Chander Vs U.O.I., (1986) 3 SCC 103

4. U.O.I. & ors. Vs Dinanath Shantaram Karekar & ors., (1998) 7 SCC 569

5. St. of U.P. Vs Saroj Kumar Sinha, JT 2010 (1) SC 618

6. Krushnakant B. Parmar Vs U.O.I. & anr., (2012) 3 SCC 178

(Delivered by Hon'ble Donadi Ramesh, J.)

1. Heard Sri Vinod Kumar, learned counsel for the petitioner and Sri Gopal Verma, learned counsel for the respondents.

2. Present petition has been filed aggrieved by the order of Central Administrative Tribunal Bench, Allahabad dated 05.04.2021 in Original Application No. 978 of 2010 (Mohammad Sabir Vs. U.O.I. and Others).

3. The petitioner has filed the original application assailing the order dated 1.4.2010 of the respondents herein. The petitioner while working on the post of Khalasi/Helper in Railways, the respondents have issued a memorandum of charge on 11.9.2008 proposing to initiate major penalty. Consequent on the said charge, an inquiry officer was appointed and the date 15.6.2009 was fixed for inquiry proceedings. On the said date, the petitioner appeared before the inquiry officer and the charge memo was read over to him and his statement was recorded. Thereafter, the inquiry report was submitted by the inquiry officer finding the petitioner guilty of the charges. Based on the above, the disciplinary authority have issued proceedings on 30.11.2009, imposing punishment on the petitioner of his removal from service.

4. Aggrieved by the said order, the petitioner preferred a department appeal on 9.12.2009, which was decided by the order dated 1.4.2010 recording a clear finding that the petitioner is a habitual of absenting himself unauthorizedly and he has absented himself by total number of 801 days unauthorizedly. Accordingly, the punishment was affirmed. Assailing the said orders, he preferred the original application before the Central Administrative Tribunal, Allahabad.

5. The petitioner has raised several grounds before the Tribunal mainly on the ground that Rule 9 of the Railway Servants (Disciplinary and Appeal) Rules, 1968 (hereinafter referred to as the 'Rules') have not been followed by the inquiry officer while conducting the inquiry. Though, the inquiry officer, Mr. Deena Nath Singh was appointed, but there is no mention as to who appointed Mr. Deena Nath Singh. No letter regarding appointment of inquiry officer was delivered to the petitioner. Based on the statement recorded on 15.6.2009, the inquiry officer has submitted the report on 22.6.2009, which is a non-speaking, vague and cryptic. No witness was examined during the inquiry proceedings. No documentary evidence was examined and the petitioner was not provided any opportunity to cross-examine any witness during the inquiry proceedings. Finally, the punishment order of removal from the service is harsh punishment and disproportionate to the charges leveled against the petitioner.

6. To support his contention, the petitioner has relied on the judgments rendered by the Apex Court in cases of **Hardwari Lal Vs. State of U.P. and others decided on 27.10.1999, Union of India Vs. Mohd. Ramzan Khan, 1991 (1) SCC 588 and Ram Chander Vs. Union of India, SCC 1986 (3) 103.**

7. Replying to the said averments/allegations, the respondents

have filed counter affidavit by denying that the petitioner has been given proper opportunity of hearing during the inquiry proceedings and no violation of principles of natural justice is done and the petitioner was given ample time and opportunity to give reply to the charge-sheet, but he has not given any reply. Moreover, in his statement recorded before the inquiry officer, he has admitted the fact that he has gone out of station on 16.12.2007 without informing the senior officers and he had returned to his duty on 3.9.2008. To support his contentions, he mainly relied upon the statement recorded during the inquiry proceedings. The extracts of which is given below:

"आरोप- आप दि० 17.12.07 से 02.09.08 तक अनाधिकृत रूप से अनुपस्थित रहें इससे यह स्पष्ट होता है कि आपकी रूचि रेल सेवा में नहीं है। इस प्रकार आपने रेल सेवा आचार संहिता 1966 के नियम-3 के अपनियम I, II, III के अधिनियमों का उल्लंघन किया है।

1. नाम- मो० साबिर

बयान- मैं दिनांक 16.12.07 को रेस्ट में घर गया था कि देखा कि मेरी पत्नी की तबियत बहुत खराब है। उसका उपचार 14.12.07 से डॉ० ए०के० नारायन क्लीनिक चाकन्द बाजार गया (बिहार) में चल रहा है। यह हिस्टिरिया रोग से ग्रसित थी तथा पागलों जैसा व्यवहार कर रही थी। मेरे घर में कोई पुरुष सदस्य न होने के कारण मैं उसके उपचार कराने के बाद जब वह 31.08 को ठीक हुई तो मैं 03.09.08 को ड्यूटी हेतु आया। मैं इसकी सूचना करीब अनुभाग अभियंता (लोको)/मुगलसराय के पास दिनांक 01.06.08 को रजिस्टर्ड पत्र द्वारा दिया था।"

8. Based on the above facts, the Tribunal has framed the issue whether the inquiry proceedings have been vitiated due to the reason that several provisions of Rule 9 of the Rules, 1968 were not followed by the inquiry officer as quoted by the petitioner. Considering the above facts, the Tribunal has passed the following order:

"16. The applicant He has also admitted that he had left station without taking any leave. When he was asked that he is habitual of becoming absent unauthorizedly, he admitted this fact also, but stated that due to illness of his wife, he has to be absented repeatedly. He has also admitted the fact that he did not make any effort to consult any doctor of Railway hospital for treatment of his wife. Thus, a perusal of statement of the applicant clearly shows that he himself has admitted all the charges levelled against him.

17. The basic principle of law is that "facts admitted need not to be proved", The requirement to prove or examine any documentary or oral evidence, could have arisen in case the O.A. No.330/00978/2010 Page 8 of 8 applicant had not admitted the charges levelled against him. Therefore, if he was not given any opportunity to cross examine the witnesses or witness was not produced, it will not make any difference in view of his admission.

19. In view of the above, we do not find any illegality or irregularity in the enquiry proceedings. The judgments cited by the learned counsel for applicant are not applicable in the present case, because in the present case, the applicant himself has admitted the allegations that he had left the station without any leave application and he had informed the higher officer after 7 months from that. He has also admitted that he did not consult any doctor from Railway Hospital and he often use to become absent unauthorizedly without giving any information to the higher officer. Although, he has stated that he has to do all this, because of illness of his wife."

9. Aggrieved by the abovesaid order, present writ petition has been filed.

10. Learned counsel appearing on behalf of the petitioner has contended that the Tribunal has failed to appreciate the

legal contentions raised by the applicant therein, in fact, he has specifically contended that the respondents have not followed Rule 9 (9) (c), Rule 9 (13) (2) (I), Rule 9 (14), Rule 9 (17), Rule 9 (20), Rule 9 (22) and Rule 9 (25) .

11. As per the above quoted Rules, more specifically Rule 9(14) of the Rules, 1968 provides for fixing date in inquiry after one month from the date of nomination of an assisting railway servant and Rule 9 (17) provides for examination of witness and cross-examination by delinquent employee, but in the instant case, no witnesses were examined by the inquiry officer and no opportunity was given to the petitioner to cross-examine the witness. Hence, it vitiates the procedure contemplated in the above said Rules. Further, learned counsel for the petitioner relied on Rule 9 (22). As per above said rule, an opportunity to delinquent employee to submit his defence statement after closing the inquiry proceeding, but in the instant case, no opportunity was given to the petitioner. Hence, the punishment order imposed by the respondents vide order dated 11.9.2008 and the appellate order dated 1.4.2010 vitiates the rules contemplated above.

12. More particularly, learned counsel for the petitioner has vehemently submitted that after issuing charge memo without conducting a proper inquiry and giving opportunity, the inquiry officer has called the petitioner and recorded statement on 15.6.2009 and based on the said statement, has submitted his report without supplying the same to the petitioner, which is contrary to Rule 9 (22) and Rule 9 (25). According to the said rule, show cause notice has to be issued with the inquiry report, has not followed in the instant case.

13. In support of his contention, learned counsel for the petitioner has relied on the judgment of the Apex Court passed in case of **Union of India and Others Vs. Dinanath Shantaram Karekar and Others, (1998) 7 Supreme Court Cases 569 and State of U.P. Vs. Saroj Kumar Sinha, JT 2010 (1) SC 618**. Further, he relied on the judgment of the Apex Court in case of **Krushnakant B. Parmar Vs. Union of India and another, (2012) 3 Supreme Court Cases 178.** Relevant paragraph as contained in the case of **Union of India and Others (supra),** reads as follows:

"4. So far as the service of show cause notice is concerned, it also cannot be treated to have been served. Service of this notice was sought to be effected on the respondent by publication in a newspaper without making any earlier effort to serve him personally by tendering the show cause notice either through the office peon or by registered post. There is nothing on record to indicate that the newspaper in which the show-cause notice was published was a popular newspaper which as expected to be read by the public in general or that it had wide circulation in the area or locality where the respondent lived. The show-cause notice cannot, therefore, in these circumstances, be held to have been served on the respondent. In any case, since the very initiation of the disciplinary proceedings was bad for the reason that the charge sheet was not served, all subsequent steps and stages, including the issuance of the show-cause notice would be bad."

14. Relevant paragraph as contained in the case of **State of U.P. Vs. Saroj Kumar Sinha**,, reads as follows:

21. We have noticed at some length the sequence of events and the

efforts made by the respondent to receive copies of the documents which were relevant for the preparation of his defence in the departmental inquiry. As noticed earlier all the requests made by the respondent fell on deaf ears. In such circumstances, the conclusions recorded by the High Court were fully justified.

27. Apart from the above by virtue of Article 311(2) of the Constitution of India the departmental inquiry had to be conducted in accordance with rules of natural justice. It is a basic requirement of rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceeding which may culminate in a punishment being imposed on the employee.

28. When a department enquiry is conducted against the Government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service. In the case of Shaughnessy v. United States, 345 US 206 (1953) (Jackson J), a judge of the United States Supreme Court has said "procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

15. Relevant paragraph as contained in the case of **Krushnakant B. Parmar (supra)** reads as follows:

"16. In the case of appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a Government servant. The question whether `unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant."

16. According to the above law laid down by the Apex Court, service of notice has to be effected on the petitioner, if he is not available, the same has to be published in newspaper, but in the instant case, nothing has established. Hence, as per the above judgment, the respondents have failed to issue show cause before imposing the punishment order.

17. As contended in the instant case, respondents have not supplied any documents which are based for initiation of the charges against the petitioner, which is mandatory as per rules and above mentioned judgments of the Apex Court. The respondents failed to appreciate the procedure contemplated under the rules.

Hence, requested to set aside the punishment order dated 30.11.2009 and the appellate order dated 01.04.2010.

18. Replying to the above said contentions, learned Standing Counsel has submitted that this fact has brought to the notice of the Court about the sole charge framed against the petitioner, which is as follows:

"आप दिनाँक 17.12.07 से 02.09.08 तक अनाधिकृत रूप से अनुपस्थित रहे। इससे यह स्पष्ट होता है कि आपकी रूचि रेल सेवा में नहीं है।

इस प्रकार आपने रेल सेवा आचार संहिता 1966 के नियम-3 के उपनियम I, II, एवं III के अधिनियमों का उल्लंघन किया है।"

19. The above charge has been issued to the petitioner for unauthorized absence from duties from 17.12.2007 to 02.09.2008. Based on the above charge, charge memo was issued on 11.9.2008. Despite receipt of the said charge, the petitioner has not shown any interest to submit his defense or explanation. As he failed to submit any explanation, it was incumbent on the inquiry officer to fix a date for his appearance in the inquiry. Accordingly, 15.6.2009 was the date fixed for inquiry and his statement was recorded. The relevant portion of the statement made by the petitioner in the report, reads as follows:

" मेरी पत्नी की तबीयत खराब होने के कारण मैं उसका उपचार कराना उचित समझा। घर में कोई पुरुष सदस्य न होने के कारण उनके पागलों जैसा व्यवहार के कारण मैं उन्हीं की देख-रेख में लगा रहा हूं। जिसकी समय पर सूचना भी नहीं दे पाया। मानसिक रूप में विक्षिप्त होने के कारण मैं उनको छोड़ कर नहीं जा सकता था। इसके लिए मैं अपने को दोषी नहीं मानता हूँ। जाँच चाहता हूँ। "

20. To support his contention, learned Standing Counsel has relied on Clause 4 and 5 of the Standard Form of Charge-sheet issued to the petitioner on 11.9.2008, which reads as under:

"4. Shri…..... is hereby directed to submit to the undersigned (through General Manager ……..Railway) a written statement of his defence (which should reach the said General Manager) within ten days of receipt of this Memorandum, if he does not required to inspect any documents for the preparation of this defence, and within ten days after completion of inspection of documents if he desires to inspect documents and also---

(a) to state whether he wishes to be heard in person; and

(b) to furnish the names and addresses of the Witness, if any, whom he wishes to call in support of his defence.

5. Shri……. Is informed that an inquiry will be held only in respect of those article of charge as are not admitted. He should, therefore specifically admit or deny those article of charges. "

21. On perusal of the above said clauses, it clearly indicates that written statement of his defence has to be submitted within ten days of receipt of memorandum, but in the instant case, even on perusal of the original application filed by the petitioner or contention of learned counsel for the petitioner clearly discloses that the petitioner has not submitted any explanation as contemplated in clause 4 of the charge sheet. Furthermore, clause 5 clearly stipulates that an inquiry will be held only in respect of those articles of charge are not admitted. But in the instant case, sole charge was framed against the petitioner, which is for continuously unauthorized absence from 17.12.2007 to 02.09.2008 and the said charge was admitted by the petitioner in his statement recorded on 15.6.2009. Hence, once the charge is admitted, there is no necessity to

conduct any further inquiry with regard to the admitted charges.

22. Apart from the above, on perusal of the removal order, it is evident that the petitioner has absented himself from duties for 319 days in 2005, 44 days in 2006, 67 days in 2007 and 261 days in 2007-08. It clearly discloses that the petitioner is habitual absentee from the duties. Moreover, in the impugned order clearly indicates that the inquiry report has been supplied to the petitioner on 8.7.2009 and no reply/explanation has been submitted by the petitioner. Hence, contentions of the petitioner is not supported by any material, which is vague and baseless.

23. In view of the above said facts, learned counsel for the respondents further submitted that the respondent authorities have followed due procedure as contemplated under the rules and also the format given in the articles of charges. Considering the same, the Tribunal has rightly dismissed the original application filed by the petitioner and there is no ground to interfere with the orders impugned in the writ petition. Accordingly, requested for dismissal of the same.

24. Considering the submissions made by learned counsel for the parties and perusal of the record, no doubt the petitioner has filed the original application assailing the orders dated 30.11.2009 and 1.4.2010 but there is no averment in the original application with regard to the submission of his reply to the charge memo issued on 11.9.2008 and the inquiry report has not been supplied to the petitioner without having any substantial basis and the averment in the pleadings, learned counsel for the petitioner has contented that the respondents have not followed the Rules, 1968. Bare perusal of the charge memo and the statement recorded by the inquiry officer clearly discloses that the petitioner has admitted the charge, and once, he has admitted the charge as per the standard format of charge-sheet, there is no requirement of further inquiry, but in the instant case, the fact remains that the respondents have issued charge memo to the petitioner, despite receipt of the charge memo, the petitioner has failed to submit any explanation within stipulated time. Hence, left with no option, the respondents have issued a notice for appearance on 15.6.2009 for inquiry, and accordingly, they have recorded the statement of the petitioner. On perusal of the statement recorded by the inquiry officer, it clearly discloses that he has accepted the charge and when once charge is accepted, other procedure may not be required to the followed by the authorities. Apart from that the impugned order clearly discloses that the respondents have supplied a copy of inquiry report to the petitioner on 8.7.2009, but the same was not specifically denied by the petitioner. Hence, taking the admitted fact into consideration and the case laws, which are being relied by the petitioner, would not be applicable in the instant case.

25. As the petitioner is a habitual absentee from his duties since 2007-09 and he was absent about 600 days. In view of the aforesaid circumstances, the Tribunal while taking the facts of the case and case laws into consideration, has rightly dismissed the original application filed by the petitioner.

26. Hence, we are of the considered opinion that there is no good ground to interfere with the impugned order passed by the Tribunal.

27. The writ petition lacks merit and is, accordingly, dismissed.

(2024) 3 ILRA 672
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2024
BEFORE
THE HON'BLE MANJIVE SHUKLA, J.

Writ A No. 17699 of 2023

Smt. Asha Lata Chaubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
C.S.C.

Service Law – Payment of Gratuity – Entitlement on Voluntary Retirement – Petitioner, an Assistant Teacher in a government-aided Junior High School, challenged the non-payment of gratuity upon her voluntary retirement at age 59 years, 2 months, and 10 days – Held, the petitioner's application for voluntary retirement on 29.06.2021, accepted by the District Basic Education Officer on 15.01.2022, constituted an option to retire before age 60, entitling her to gratuity under Fundamental Rule 56(e) of the Financial Handbook and Government Order dated 31.07.2001 – The requirement to submit an option for retirement at age 60 to receive gratuity does not apply when a teacher retires voluntarily before 60, as supported by judicial precedents and Government Order dated 03.02.2023. (Paras 8, 19, 20, 24, 26, 27)

Service Law – Gratuity for Teachers Dying or Retiring Before Age 60 – The respondents argued that the petitioner was not entitled to gratuity due to not opting for retirement at age 60 – Held, judgments in Noor Jahan (Writ-A No. 40568 of 2016) and Usha Rani (Writ-A No. 17399 of 2019), along with Government Order dated 03.02.2023, clarify that teachers dying before age 60 without submitting an option for retirement at 60 are entitled to gratuity – By extension, a teacher who voluntarily retires before age 60, as in the petitioner's case, cannot be denied gratuity, as her voluntary retirement application is akin to an option to retire early. (Paras 11, 21, 22, 23, 24, 25, 26)

Service Law – Directions for Payment and Interest – The Court found the denial of gratuity to the petitioner unjustified – Held, the respondents are directed to calculate and pay the petitioner's gratuity based on her length of service within two months – Additionally, the District Basic Education Officer, Varanasi, must pass a reasoned order on the admissibility of interest for delayed payment within three months – The applicability of the Payment of Gratuity Act, 1972, was left open as the petitioner's entitlement was upheld under existing St. policies. (Paras 27, 28, 29)

Writ Petition Allowed .

Respondents Directed to Pay Gratuity and Decide on Interest.

List of Cases Cited:

1. Noor Jahan Vs St. of U.P. & ors., Writ-A No. 40568 of 2016, decided on 04.01.2018

2. Usha Rani Vs St. of U.P. & ors., Writ-A No. 17399 of 2019, decided on 07.11.2019

3. Smt. Omwati Vs St. of U.P. & ors., Writ-A No. 8679 of 2018, decided on 09.03.2018

4. Smt. Brijesh Vs St. of U.P. & ors., Writ-A No. 6049 of 2019, decided on 26.04.2019

5. Smt. Mala Tripathi Vs St. of U.P. & ors., Service Single No. 6173 of 2014, decided on 05.08.2019

6. Renu Gupta Vs St. of U.P. & ors., Writ-A No. 14397 of 2019, decided on 24.10.2019

7. Smt. Nazma Khatoon Vs St. of U.P. & ors., Special Appeal (Defective) No. 430 of 2016

8. Smt. Ranjana Kakkar Vs St. of U.P. & ors., 2008 (10) ADJ 63 (DB)

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

1. Heard Sri Siddharth Khare, learned counsel appearing for the petitioner and learned Standing Counsel appearing for the Respondents No. 1 to 4.

2. Petitioner is aggrieved by non-payment of gratuity on her retirement therefore, has filed this writ petition praying therein for a direction from this court thereby commanding the respondents to pay her gratuity along with interest.

3. Brief facts of the case are that Sri Ram Janki Vidya Mandir Balika Vidyalaya, Rajapur, Varanasi (hereinafter referred to as "school") is recognized by U.P. Basic Education Board and is receiving grant-in-aid from the Government of U.P. Petitioner was appointed on the post of Assistant Teacher in the school vide appointment order dated 04.09.1989 and she joined on her post in the month of September, 1989.

4. Petitioner continued to work on her post to the utmost satisfaction of her superiors. Petitioner's date of birth is 20.01.1963. Petitioner submitted an application for voluntary retirement which was allowed by the District Basic Eduction Officer vide order dated 15.01.2022 thereby petitioner has been permitted to retire w.e.f. 31.03.2022. Pursuant to aforesaid order dated 15.01.2022, petitioner has retired from service on 31.03.2022 on completion of 59 years 2 months and 10 days of age.

5. After retirement of the petitioner, papers for payment of post-retiral dues were duly forwarded by the Manager of the Committee of Management of the school. Petitioner has been paid all of her post retiral dues except gratuity.

6. Petitioner in her writ petition has stated that she has been orally told by the Respondent No. 3 that since she has not submitted option to retire at the age of 60 years which is mandatory for payment of gratuity, she is not entitled for the payment of gratuity.

7. Learned counsel appearing for the petitioner has submitted that initially State Government has issued a Government Order on 23.11.1994 whereby it was provided that the age of retirement of a teacher working in a Junior High School is 60 years but those teachers who submit their option to retire at the age of 58 years shall be entitled for payment of gratuity. Thereafter State Government issued another Government Order on 10.06.2002 whereby it has been provided that teachers can submit option to retire at the age of 58 years, one year before the date of his retirement i.e. on 1st of July of the Academic Session in which he has to retire and further if a teacher gives option to retire at the age of 58 years, he can change his option till the date of his retirement. It has further been submitted that as per her date of birth, petitioner was to complete 60 years of age on 19.01.2023 and 62 years of age on 19.01.2025. Petitioner about two years before the date of completion of 60 years of age submitted an application on 29.06.2021 whereby she requested the District Basic Education Officer to permit her to voluntary retire from service.

8. Learned counsel appearing for the petitioner has argued that the application for voluntary retirement by the petitioner on 29.06.2021 was in-fact her option to retire from service even before completion of 60 years of service and the said application/option has been accepted by the District Basic Education Officer, Varanasi vide his order dated 15.01.2022 and once petitioner has been permitted to retire

before completion of 60 years of service, she is entitled for the payment of gratuity.

9. Learned counsel appearing for the petitioner has invited attention of this court towards provisions made in Fundamental Rule 56(e) of the Financial Handbook wherein it is provided that if a government servant retires from service, he shall be entitled for payment of pension and other retiral benefits and thus has submitted before this court that once petitioner has been permitted to retire from service, she cannot be deprived of her right to receive amount of gratuity. Learned counsel appearing for the petitioner has further invited attention of this court towards Government Order dated 31.07.2001 whereby it has been clarified that if a government servant is permitted voluntary retirement from service under Fundamental Rule 56(c) of the Financial Handbook, he will be entitled for payment of pension and other post retiral dues including gratuity as admissible under the rules.

10. Learned counsel appearing for the petitioner has argued that there is no difference in between retirement and voluntary retirement as in both the cases, employee retires from service and if after retirement under the rules, he is entitled for retiral benefits, he would also be entitled for the admissible retiral dues on his voluntary retirement.

11. Learned counsel appearing for the petitioner has further argued that so far as the case of respondents that since petitioner did not opt to retire at the age of 60 years therefore, she is not entitled for payment of gratuity, is concerned, the issue of those teachers who did not opt to retire at the age of 60 years and died prior to completion of 60 years age, has already been considered by this Court vide judgement and order dated 04.01.2018 rendered in Writ-A No. 40568 of 2016 (Noor Jahan Vs. State of U.P. and Others) and judgement and order dated 7.11.2019 rendered in Writ-A No. 17399 of 2019 (Usha Rani Vs. State of U.P. and Others) wherein it has been held that if a teacher dies before completion of 60 years of age and has not submitted option to retire at the age of 60 years, he is entitled for the payment of gratuity. State Government has also issued a Government Order on 03.02.2023 wherein it has been provided that if a teacher has died before completion of 60 years of age and has not submitted option to retire at the age of 60 years, he will be entitled for the gratuity. Learned counsel appearing for the petitioner has also argued that once the State Government itself has provided that a teacher who has not opted to retire at the age of 60 years and he dies before completion of 60 years of age, is entitled to payment of gratuity, then petitioner cannot be denied the payment of gratuity as she submitted application for voluntary retirement and therefore opted to retire before completion of 60 years of age and the said option has been duly accepted by the District Basic Education Officer, Varanasi therefore, she is a retired teacher and is entitled for payment of all the retiral dues including gratuity which are admissible to retired teachers working in the government aided Junior High Schools.

12. Learned counsel for the petitioner in alternate has also advanced argument that if at all petitioner is not entitled for payment of gratuity as admissible to retired teachers of the Junior High Schools, then petitioner's case will be covered by the provisions of Payment of Gratuity Act 1972 which mandate for payment of gratuity to an employee.

13. Learned counsel for the petitioner has thus concluded his arguments and has submitted that non-payment of gratuity to the petitioner cannot be justified and therefore, it would be appropriate that a direction be issued by this Court to the respondents to pay gratuity to the petitioner.

14. Per-contra, learned Standing Counsel appearing for the Respondents No. 1 to 4 has submitted that the State Government has issued Government Orders from time to time under which any teacher who wants to retire at the age of 60 years with gratuity was required to submit option and only thereafter he will be entitled for payment of gratuity whereas petitioner has not submitted any such option and voluntarily retired from service before completion of 60 years of age therefore, is not entitled for payment of gratuity.

15. Learned Standing Counsel appearing for the Respondents No. 1 to 4 has further argued that so far as the Government Order dated 3.02.2023 is concerned, it is confined only to those teachers who did not submit option for retiring at the age of 60 years with gratuity and have died before completion of the age of 60 years whereas petitioner has availed the benefit of voluntary retirement from service before completion of 60 years of age as such she is not entitled for payment of gratuity.

16. Learned Standing Counsel appearing for the Respondents No. 1 to 4 has thus concluded his arguments by submitting that petitioner is not entitled for payment of gratuity and the writ petition filed by the petitioner being misconceived is liable to be dismissed by this Court.

17. I have considered rival arguments advanced by the learned counsels appearing for the parties and I find that initially Government of U.P. issued a Government Order on 23.11.1994 whereby it was provided that teachers working in the Junior High Schools recognized by the U.P. Basic Education Board and receiving grant-in-aid from the Government of U.P. are to retire after attaining the age of 60 years but they can submit option to retire at the age of 58 years with gratuity. Later on the State Government issued another Government Order on 04.02.2004 whereby the age of retirement of teachers has been raised to 60 years with gratuity and 62 years without gratuity.

18. The Government of U.P. vide Government Order dated 10.06.2002 has permitted the teachers to submit the option for retirement at the age of 58 years one year before the date of retirement i.e. till 1st of July of the Academic Session in which he has to retire.

19. This court finds that petitioner has not submitted option to retire at the age of 60 years rather she submitted an application on 29.06.2021 for voluntary retirement and pursuant to said application, she has retired on 31.03.2022 i.e. on completion of age of 59 years 2 months and 10 days i.e. before the date she would have completed the age of 60 years. Fundamental Rule 56(e) of the Financial Handbook provides that if a government servant retires, he is entitled for retiral dues admissible under the rules and further State Government has also issued a Government Order dated 31.07.2001 whereby it has been provided that even in the case of voluntary retirement, government servant shall be entitled for retiral dues as per rules.

20. This court further finds that petitioner has opted for voluntary retirement and thereby retired before completion of 60 years of age therefore, in view of the provisions made in Fundamental Rule 56(e) of the Financial Handbook read with Government Order dated 31.07.2001, she is entitled for all the retiral dues including gratuity admissible to her under the rules.

21. There is only one issue in this matter which needs consideration by this Court as to whether a teacher will be entitled for payment of gratuity only if he submits his option to retire at the age of 60 years. This Court finds that the State Government though under the Government Orders has provided that a teacher has to submit his option to retire at the age of 60 years with gratuity but in the cases where the teachers died before completing 60 years of age and have not opted to retire at the age of 60 years, this Court has considered the issue in detail and has held that even if the teachers before their death have not submitted option to retire at the age of 60 years they shall be entitled for payment of gratuity.

22. In the aforesaid regard, relevant paragraphs of the judgement and order dated 4.01.2018 rendered in Writ-A No. 40568 of 2016 and the judgement and order dated 7.11.2019 rendered in Writ-A No. 17399 of 2019 are extracted as under:

Writ-A No. 40568 of 2016

"Learned counsel for the petitioner submits that the order impugned is wholly arbitrary, inasmuch as under the relevant scheme for payment of gratuity, the claim of petitioner's husband is otherwise covered, and the Government Order dated 16.9.2009 does not curtail the payment of gratuity to those employees, who have died before attaining the age of 60 years.

Sri R.B. Yadav, learned counsel for the respondent nos.3 and 4, submits that the denial of gratuity to petitioner is in accordance with the Government Order.

I have heard learned counsel for the parties, and have perused the materials brought on record.

Government Order dated 16th September, 2009 provides for revision of pension and other retiral benefits to the retired employees of the department of basic education. This Government Order grants higher benefits w.e.f. 1.1.2006. Clause 4(1) of the Government Order provides that pension would not be payable to those employees, who have not completed 10 years of qualifying service, but the employees who retire upon attaining the age of superannuation of 60 years would be entitled to gratuity and other service benefits. The Government Order does not restrict payment of gratuity to an employee, who is otherwise covered under the scheme just because he has not attained the age of 60 years. Reference to age of 60 years is due to fact that age of superannuation under the rule is otherwise 60 years. Position has otherwise been clarified by Clause 5 of the Government Order, which provides that gratuity would be payable at the age of 60 years or upon death. The respondents, therefore, were not justified in rejecting petitioner's claim for payment of gratuity, in terms of Government Order dated 16.9.2009. The impugned action, therefore, cannot be sustained. Order dated 8.7.2016 is, accordingly, quashed.

A direction is issued to the respondents to compute the amount payable to petitioner's husband towards gratuity in terms of the scheme and release the same, within a period of three months from the

date of production of certified copy of this order. The petitioner shall also be entitled to interest at the rate of 8% per annum, from the date of filing of the application till the amount is actually disbursed.

Writ petition is, accordingly, allowed. "

Writ-A No. 17399 of 2019

"Learned counsel for the petitioner submitted that daughter of petitioner was initially appointed as Assistant Teacher on 4.12.1999 and joined his services on 7.12.1999 in Primary School, Mallamai, Badaun. Unfortunately, daughter of petitioner died during the course of service on 28.8.2018. After the death of her daughter petitioner applied for terminal dues. The amount of gratuity was refused on the ground that her daughter has not filled up option for retirement at the age of 60 years. It is further submitted that as per Government Order dated 16.09.2009, petitioner's daughter is fully entitled for gratuity even in case if he has not given option for retirement at the age of 60 years, therefore, the order impugned is wholly arbitrary, inasmuch as under the relevant scheme of payment of gratuity, the claim of petitioner's daughter is covered and the Government Order dated 16.09.2009 does not curtail the payment of gratuity to those employees, who have died before attaining the age of 60 years.

In support of his contention, he has placed reliance upon several judgments of this Court as well as Lucknow Bench of this Court passed in ***Writ-A No. 40568 of 2016 (Noor Jahan vs. State of U.P. and 4 others)*** *decided on 4.1.2018,* ***Writ-A No. 8679 of 2018 (Smt. Omwati Vs. State of U.P. and 3 others)*** *decided on 9.3.2018,* ***Writ-A No. 6049 of 2019 (Smt. Brijesh vs. State of U.P. and 5 others)*** *decided on 26.04.2019 and Service Single No. 6173 of 2014* ***(Smt. Mala Tripathi vs. State of U.P. Through Prin. Secy. Secondary Edu. Lko. & Ors.)*** *decided on 5.8.2019. He next submitted that this controversy was again before this Court in* ***Writ-A No. 14397 of 2019 (Renu Gupta Vs. State of U.P. and 5 others)*** *in which the Court relying upon the aforesaid judgments allowed the writ petition vide order dated 24.10.2019.*

On the other hand, learned standing counsel as well as Sri Chandan Agarwal, learned counsel for respondent Nos. 4 to 7 submitted that denial of gratuity of petitioner's husband is in accordance with Government order, therefore, there is no illegality in the impugned order, but could not dispute the aforesaid fact.

I have considered the rival submissions raised by counsel for the parties and perused the record as well as judgments relied upon.

Similar issue was considered by this Court in the matter of ***Noor Jahan (Supra)*** *in which this Court vide order dated 04.01.2018 has clearly held that Government Order dated 16.09.2009 does not provide any bar for payment of gratuity in case petitioner's husband had not given option for retirement at the age of 60 years. Relevant paragraphs of the said judgment is quoted below:-*

"Learned counsel for the petitioner submits that the order impugned is wholly arbitrary, inasmuch as under the relevant scheme for payment of gratuity, the claim of petitioner's husband is otherwise covered, and the Government Order dated 16.9.2009 does not curtail the payment of gratuity to those employees, who have died before attaining the age of 60 years.

Sri R.B. Yadav, learned counsel for the respondent nos.3 and 4, submits that the denial of gratuity to petitioner is in accordance with the Government Order.

I have heard learned counsel for the parties, and have perused the materials brought on record.

Government Order dated 16th September, 2009 provides for revision of pension and other retiral benefits to the retired employees of the department of basic education. This Government Order grants higher benefits w.e.f. 1.1.2006. Clause 4(1) of the Government Order provides that pension would not be payable to those employees, who have not completed 10 years of qualifying service, but the employees who retire upon attaining the age of superannuation of 60 years would be entitled to gratuity and other service benefits. The Government Order does not restrict payment of gratuity to an employee, who is otherwise covered under the scheme just because he has not attained the age of 60 years. Reference to age of 60 years is due to fact that age of superannuation under the rule is otherwise 60 years. Position has otherwise been clarified by Clause 5 of the Government Order, which provides that gratuity would be payable at the age of 60 years or upon death. The respondents, therefore, were not justified in rejecting petitioner's claim for payment of gratuity, in terms of Government Order dated 16.9.2009. The impugned action, therefore, cannot be sustained. Order dated 8.7.2016 is, accordingly, quashed.

A direction is issued to the respondents to compute the amount payable to petitioner's husband towards gratuity in terms of the scheme and release the same, within a period of three months from the date of production of certified copy of this order. The petitioner shall also be entitled to interest at the rate of 8% per annum, from the date of filing of the application till the amount is actually disbursed.

Writ petition is, accordingly, allowed."

In the matter of ***Smt. Omwati (Supra),*** *Court had dealt for payment of interest upon delayed payment of gratuity and held that petitioner is entitled for interest. Relevant paragraph of the said judgment is quoted below:-*

"The only other issue that survives for consideration is whether, the petitioner is entitled to payment of interest on the delayed payment of gratuity.

This aspect has been dealt with by Division Bench of this Court in Special Appeal (Defective) No.430 of 2016, Smt. Nazma Khatoon Vs. State of U.P. and others where a learned Single Judge had rejected the prayer for interest on delayed payment of gratuity. However, the Division Bench opined that interest is a necessary corollary to the retention of money by another person. It is neither compensatory nor penal in nature. It was so held, upon an earlier Division Bench decision in Smt. Ranjana Kakkar W/O Late Prof. Amarnath Kakkar Vs. State of Uttar pradesh and others, 2008(10) ADJ 63 (DB).

The Division Bench in Smt. Nazma Khatoon (supra) went on to award 8% interest on the gratuity payable.

Counsel for the petitioner has also relied upon the Government order No.SA-3-1901/10-2002-971/80 dated 30.10.2002, which provides for payment of interest on delay in payment of gratuity and post retiral benefits beyond a period of 3 months from the date they are payable.

Under the circumstances, this Court considers it appropriate to award the same rate of interest on the delayed payment as has been awarded by the Division Bench in Smt. Nazma Khatoon(supra), the rate being 8%.

For the reasons given above, this writ petition is allowed. The impugned

order passed by the District Inspector of Schools, Sambhal dated 01.01.2018 is hereby set aside. The respondents are directed to calculate the gratuity payable to the petitioner along with 8% interest thereon by a speaking order and to ensure payment of the said amount to the petitioner within a period of six weeks from the date, a certified copy of this order is filed before him."

Following the decision rendered in the judgment of ***Noor Jahan (Supra)*** *as well as* ***Smt. Omwati (Supra),*** *matter of* ***Smt. Brijesh (Supra)*** *for payment of gratuity was allowed by this Court by quashing the impugned orders by which gratuity was denied.*

Similar controversy was also decided by Lucknow Bench of this Court vide order dated 5.8.2019 passed in the matter of ***Smt. Mala Tripathi (Supra)*** *in which Court has taken a similar view and held that if husband of petitioner died before attaining the age of 60 years and has not given option for retirement at the age of 60 years, gratuity cannot be denied only on this ground. Relevant paragraph of the said judgment is quoted below:-*

"Heard learned counsel for the contesting parties and perused the records.

From perusal of the records, it clearly comes out that the petitioner's husband died in harness on 26.08.2012 while working as Assistant Teacher in an aided and recognized institution. It is also admitted that the family pension has been paid to the petitioner. The only dispute revolves around the payment of gratuity to the petitioner. The ground taken by the respondents of the petitioner's husband not having opted for retiring at the age of 60 years which thus entails non-payment of gratuity to her at the very out set does not stand to legal scrutiny inasmuch as it is an admitted case by the respondents also that the petitioner's husband died in harness on 26.08.2012 despite his actual date of superannuation being November 2019. Thus, an employee is only expected to submit an option prior to his retirement and not decades prior to his retirement. However, this aspect of the matter has not been considered by the respondents and even the letter of the Institution dated 19.03.2014, a copy of which has been filed as Annexure-3 to the petition, does not address the aforesaid issue.

Accordingly, keeping in view the aforesaid discussions, the order dated 19.03.2014 (Annexure-3 to the petition) cannot be said to be valid in the eyes of law. As such, the writ petition deserves to be partly allowed and is hereby partly allowed. A writ of certiorari is issued quashing the order dated 19.03.2014. A writ of mandamus is issued directing the respondents to consider the case of the petitioner for payment of gratuity in accordance with law and relevant rules within a period of three months from the date of receipt of a certified copy of this order."

Facts of the case and dispute involved in the present case is squarely covered by the pronouncements made by this Court which are referred herein above, therefore, under such facts and circumstances, impugned order dated 30.7.2019 passed by respondent No. 7- Block Education Officer Block Kadarchauk, Distruict Badaun is hereby quashed.

Respondents are directed to compute the amount payable to the petitioner's husband towards gratuity in terms of the scheme and release the same, maximum within a period of three months from the date of production of certified copy of this order. The petitioner shall also be entitled to interest at the rate of 8% per

annum, from the date of filing of the application till the amount is actually disbursed.

Writ petition is, accordingly, allowed.

No order as to costs."

23. After the aforesaid judgements of this Court, State Government itself has issued a Government Order on 03.02.2023 whereby it has been provided that if a teacher has not submitted his option to retire at the age of 60 years and he dies before completion of 60 years of age, he is entitled for payment of gratuity.

24. Once a teacher who has not submitted option to retire at the age of 60 years with gratuity and dies before completion of 60 years of age has been held to be entitled for payment of gratuity, there cannot be any reason to deny the payment of gratuity to a teacher who submits option to retire before completion of 60 years of age and said option is duly accepted by the competent authority.

25. The State Government itself has provided that if a teacher has not opted to retire at the age of 60 years with gratuity and demits the office due to his death before completing 60 years of age, he is entitled for payment of gratuity meaning thereby that those teachers who retire before completion of 60 years of age cannot be denied the benefit of gratuity only because they have not submitted option to retire at the age of 60 years.

26. It is also worth consideration of this court that petitioner's application for voluntary retirement is in-fact an option given by her to retire from service before completion of 60 years of age and once the State Government by way of Government Order dated 03.02.2023 has provided that the teachers who demit the office due to death without submitting option to retire at the age of 60 years are entitled for payment of gratuity then the petitioner's case stands at a better footing as she has in-fact opted to retire before completion of 60 years of age, therefore, she cannot be denied the gratuity.

27. In view of the aforesaid reasons, this writ petition is **allowed**. Respondents No. 3 and 4 are directed to calculate the gratuity payable to the petitioner on the basis of her length of service and to pay calculated amount to the petitioner within a period of two months from the date of service of certified copy of this order.

28. The District Basic Eduction Officer, Varanasi is also directed to pass reasoned and speaking order regarding admissibility of interest over the delayed payment of gratuity to the petitioner within a period of three months from the date of service of certified copy of this order.

29. So far as applicability of the provisions of Payment of Gratuity Act, 1972 in the case of petitioner is concerned, since this court has held that petitioner is entitled for payment of gratuity in terms of existing policy of State Government, the said issue is left open to be decided at appropriate point of time.

(2024) 3 ILRA 680
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 18332 of 2023

Dr. Bhaktiputra Rohtam ...Petitioner

Versus

Banaras Hindu University & Ors.

...Respondents

Counsel for the Petitioner:

Sri Priyansh, Sri Sanjeev Singh (Sr. Advocate)

Counsel for the Respondents:

Sri Dhananjay Awasthi, Sri Hem Pratap Singh, Sri Rahul Jain

Service Law – Career Advancement Scheme (CAS) Promotion – Notional Promotion Post-Retirement – Petitioner, an Associate Professor at Banaras Hindu University, sought promotion to Professor under the CAS as per UGC Regulations, 2018, claiming eligibility from 04.11.2021 – Held, the University's failure to process the petitioner's application due to the absence of an Executive Council was unjustified, as the Vice Chancellor could have exercised powers under Section 7-C(5) of the Banaras Hindu University Act, 1915 – The CAS promotion process is primarily based on seniority and assessment of self-appraisal, not a competitive selection, entitling the petitioner to notional promotion from the date of eligibility (04.11.2021) with consequential benefits for pension and retirement dues, subject to screening by a Screening-cum-Evaluation Committee. (Paras 6, 12, 19, 22, 23, 25, 29, 46)

Service Law – Re-Employment of Superannuated Teachers – UGC Regulations Vs Guidelines – Petitioner sought re-employment as a teacher post-retirement under Regulation 2.1 of UGC Regulations, 2018, which permits re-employment of Assistant Professors, Associate Professors, and Professors – Held, the UGC Regulations, 2018, prevail over the 2008 UGC Model Guidelines, which limited re-employment to Professors only, as guidelines lack statutory backing and cannot override regulations approved by Parliament – The proviso to Regulation 2.1 applies only to procedural aspects not covered by the regulations, and the petitioner, as an Associate Professor, is eligible for re-employment if vacancies exist. (Paras 7, 9, 30, 31, 35, 36, 38, 45, 46)

Service Law – Vice Chancellor's Powers and University's Lapse – The University cited the absence of an Executive Council since November 2020 as the reason for not processing the petitioner's CAS promotion – Held, the Vice Chancellor had the authority under Section 7-C(5) of the Banaras Hindu University Act, 1915, to act in emergencies, including constituting a Screening-cum-Evaluation Committee, and the failure to do so was a procedural lapse that cannot penalize the petitioner – The rejection orders dated 22.05.2023 and 09.10.2023 were quashed, with directions to evaluate the petitioner's promotion and re-employment claims. (Paras 8, 20, 22, 27, 46)

Writ Petition Allowed.

Orders Dated 22.05.2023 and 09.10.2023 Quashed – Directions Issued for Notional Promotion and Re-Employment.

List of Cases Cited:

1. U.O.I. & anr .Vs Manpreet Singh Poonam & ors., 2022 LiveLaw (SC) 254

2. St. of Uttar Pradesh & ors. Vs Roshan Singh & ors., (2006) 13 SCC 661

3. Bangali Prasad Sharma Vs St., Writ Petition No. 13240 (SS) of 1990, decided on 03.08.1995 (Allahabad High Court, Lucknow Bench)

4. Ali M.K. Vs St. of Kerala, (2003) 11 SCC 632

5. Prakash & ors. Vs Phulvati & ors., (2016) 2 SCC 36

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

1. Heard Sri Sanjeev Singh, learned Senior Advocate assisted by Sri Priyansh, learned counsel for the petitioner, Sri Rahul Jain, learned counsel appearing for the University Grants Commission and Sri Hem Pratap Singh, learned counsel for the respondent- University.

2. Petitioner has approached this Court for two reliefs: (I) Promotion under the Career Advancement Scheme (hereinafter referred as 'CAS') from the date he became entitled; and (II) for re-employment as a teacher in the department as per Regulation 2.1 of the University Grants Commission Regulations, 2018 (for short, 'U.G.C. Regulations, 2018') notified on 18th July, 2018.

3. Briefly stated facts of the case are that the petitioner while working as Associate Professor in the faculty of Sanskrit Vidya Dharm Vigyan, Banaras Hindu University, Varanasi, became entitled to be considered for promotion as Professor in the University on 04.11.2021 under CAS of University Grants Commission (for short 'U.G.C.') vide Regulation 6.3 of U.G.C. Regulations, 2018.

4. Accordingly, for first relief, petitioner moved an application before the Vice Chancellor for consideration of his candidature for promotion under the CAS on 04.11.2021 itself which got admittedly received in the Selection and Assessment Cell of the B.H.U. University on 05.01.2022. However, nothing further happened in the matter and petitioner's application for promotion under the CAS remained pending. Since the petitioner's claim was not being considered for promotion, he made representation and ultimately retired from the faculty of the University upon attaining age of superannuation on 31.12.2022.

5. After retirement, petitioner applied for re-employment i.e. his second relief, as per the provisions contained under the Regulation 2.1 of U.G.C. Regulations, 2018 but when his application for re-employment was also not given any consideration, he filed a writ petition before this Court being Writ-A No.11409 of 2023 in which a direction was issued to the Vice Chancellor to dispose of matter of his claim that he would raise in his representation. Petitioner, accordingly, made a representation on 11.08.2023 which came to be ultimately rejected by the Vice Chancellor of the University vide his order dated 09.10.2023, now impugned in the present petition.

6. Regarding promotion under the CAS, the argument advanced is that petitioner's claim to be promoted as Professor got matured on 04.11.2021 and, therefore, applying the procedure prescribed for under Regulation 6.3 of the U.G.C. Regulations, 2018, petitioner's claim ought to have been considered. He submits that the University failed to accord due consideration to the claim of the petitioner. It was University's fault for which petitioner cannot be penalised and accordingly, cannot be made to suffer.

7. In support of his second relief for re-employment as Teacher in the University, he heavily relied upon Regulation 2.1 of Regulations, 2018 to contend that be it Assistant Professor or Associate Professor or Professor, a teacher of any of these categories was entitled to be re-employed provided there existed vacancy in the department. He, thus, submits that Vice Chancellor manifestly erred in rejecting the claim of the petitioner on both counts.

8. Sri Hem Pratap Singh, learned Advocate appearing for the University, on the contrary, argues that there being no executive council functioning in the University since November, 2020, claim of

the petitioner even after being matured to be considered for promotion as Professor, could not be given consideration as every such appointment and promotion was required to be approved by the executive council in the first instance before consequential effective order was passed by the Vice Chancellor. He submitted that executive council of the University was a statutory body and vested with all such powers, in absence of which, and there being no order by the competent government authorising Vice Chancellor to pass orders or to act on behalf of the executive council, prior to the year 2023, the Vice Chancellor was justified in not issuing any order promoting the petitioner. He further submitted that petitioner having retired, now could not be benefited as no more promotional avenue was available to adjust a retired teacher. He submitted that the teacher to be considered for promotion under CAS of the U.G.C. Regulations had to be a sitting member of the faculty and there was no provision to give any notional promotion to a retired teacher under CAS. He further submitted that under the CAS, there was no sanctioned substantive vacancy as such and the post and designation was *co terminus*. In support of his above argument, Sri H.P. Singh took the Court to relevant provisions of Banaras Hindu University Act, 1915 which vide Section 10 provided powers to be exercised by the executive council. Section 10 is reproduced as under:-

10. Executive Council.—(1) The Executive Council shall, subject to the control of the Visitor, be the executive body of the University and shall have charge of the management and administration of the revenue and property of the University and the conduct of all administrative affairs of the University not otherwise provided for.

(2) Subject to the provisions of this Act, the Executive Council shall exercise such other powers and perform such other duties as may be conferred or imposed on it by the Statutes or the Ordinances.

9. On the point of second relief, Sri H.P. Singh argued that Regulation 2.1 carried a proviso also according to which, re-employment of a teacher was required to be strictly in accordance with the guidelines prescribed by the U.G.C. from time to time. He submitted that as per the U.G.C. guidelines, only a professor could be re-employed as a teacher. In this regard, he took the Court to the Model Guidelines of U.G.C. for re-employment of superannuated teachers on 15.02.2008 annexed as Annexure-CA-2 to the counter affidavit in which vide Clause 3 of the guidelines of U.G.C., it was the Professor who is only entitled for re-employment. Clause 3 of the U.G.C. guidelines runs as under:

"3. Eligible Category:

The category of superannuated teachers eligible for re-employment shall be:

a) Professor only, in the case of Universities; and,

b) Professors, Readers and Lecturers (Selection Grade) only, in the case of Colleges."

10. Sri Purunendu Kumar, learned Advocate appearing for U.G.C. adopted the arguments of Sri H.P. Singh relating to the two reliefs claimed for by the petitioner. He also relied upon the U.G.C. guidelines of 2015 and the U.G.C. Regulations, 2018. However, upon a pointed query being made, he could not explain as to what was the source of power available under the U.G.C. Act to frame guidelines, inasmuch

as, he could no show any provision from where it could be inferred that U.G.C. Guidelines would prevail even after the U.G.C. regulations had been framed and enforced.

11. Having heard learned counsel for the respective parties, their arguments raised across the bar and having perused the records, the Court finds two points to be arising in the case for consideration on the legal pleas as advanced on behalf of the rival parties:

(A) whether the petitioner would be entitled to be promoted notionally also after retirement under the CAS in the event university is found to have faulted with the career of the petitioner by denying his due promotion as Professor for no justifiable reason; and

(B) whether as per the U.G.C. Regulation 2.1, petitioner having retired as Associate Professor was also entitled for re-employment and that proviso to the said regulation would be limited to applying the guidelines to the extent provision is silent on general principles that proviso would not take away or dilute the mandate contained under the principal provision.

12. Before dealing with the two points framed above, I would like to indicate here the admitted fact positions between the parties:

(i) Petitioner's status as Associate Professor in the department of Dharmagam, Faculty of Sanskrit Vidya Dharm Vigyan is not questionable and also that his entitlement to become Professor got matured on 04.11.2021 under CAS;

(ii) Petitioner also moved necessary application for consideration of his candidature for his promotion as Professor in the department on 04.11.2021 which was received on 05.01.2022 in the concerned cell of the University dealing with promotions under CAS and the concerned designated cell did not process the papers only on the ground that there was no Executive Council; and

(iii) The Executive Council is not functioning in the university since November, 2020 and it is now very recently that the Central Government has issued circular directing the Vice Chancellor to take up the task of executive council by exercising power under Section 7-C(5) of the B.H.U. Act, 1915.

13. Coming to point (A) i.e. on the question of promotion of the petitioner and his entitlement and that too after his attaining age of superannuation, it is required to be looked into as to what were the rules of promotion under CAS and what procedures were prescribed there and whether it was by way of seniority with certain statutory period of service that promotion was to be offered in routine way under the CAS or it was by way of selection. In the event of former, petitioner may have a claim to be given notional promotion and consequential benefits but in the event of promotion by selection, it may not be feasible now to consider the candidature of a candidate like petitioner after his attaining age of superannuation more especially in the circumstances, when petitioner did not file any petition seeking such promotion prior to his superannuation.

14. In order to find answer, I proceed to examine the relevant provisions of the U.G.C. Regulations in the first instance. There is no dispute or quarrel about the U.G.C. Regulations 2018 that provide for promotion under CAS. The Regulations do provide for assessment of a teacher to be promoted on the basis of his self appraisal

report and over all performance for which a teacher is to provide documents in support of his claim. Regulations 6.1. and 6.2 and it sub-regulations are there in this regard and are, accordingly, reproduced hereinunder:

" 6.1 Assessment Criteria and Methodology:

a) Tables 1 to 3 of Appendix II are applicable to the selection of Assistant Professors/ Associate Professors/ Professors/ Senior Professor in Universities and Colleges;

(b) Table 4 of Appendix II is applicable to Assistant Librarians/ College Librarians and Deputy Librarians for promotion under Career Advancement Scheme; and

(c) Table 5 of Appendix II is applicable to Assistant Directors/ College Director of Physical Education sports and Deputy Directors/ Directors of Physical Education and Sports for promotions under Career Advancement Scheme.

6.2 The constitution of the Selection Committee and Selection procedure as well as the Assessment Criteria and Methodology for the above cadres, either through direct recruitment or through Career Advancement Scheme, shall be in accordance with these Regulations."

15. UGC Regulations, 2018 vide Regulation 5 provide for constitution of selection committee and guidelines for selection procedure. Regulation 5.1(X) provides for the Screening-cum-Evaluation Committee for the purposes of promotion under CAS for Assistant Professors, Associate Professors Regulation 5.1(X) is reproduced hereinunder:

"X. The "Screening-cum-Evaluation Committee" for CAS promotion of Assistant Professors/ equivalent cadres in Librarians/Physical Education and Sports from one level to the other higher level shall consist of:

A. For University teachers:

i) The Vice-Chancellor or his/her nominee shall be the Chairperson of the Committee;

ii)The Dean of the Faculty concerned;

iii) The Head of the Department/ Chairperson of the School; and

iv) One subject expert in the subject concerned nominated by the Vice-Chancellor from the University panel of experts."

16. Clause (I) of Regulation 6.3 provides a candidate to apply in advance from the due date and the university is required to initiate process of his screening/selection and complete the process within six months. Vide clause (III), the CAS promotion from lower stage to higher stage is to be done by Screening-cum-Evaluation Committee as provided under Table 1 of Appendix-II. The Regulations also provide that CAS promotion criterion from Associate Professor to Professor would be 'satisfactory' or 'good' in Annual Performance Assessment report of at least last three years assessment period as per Table 1 Appendix-II and at least 110 research score, as per Appendix-II Table 2. The promotion of-course is to be recommended by the selection committee that is to be constituted for this purpose under the U.G.C. Regulations. Regulation 6.3 is reproduced hereinunder:

"6.3 The criteria for promotions under Career Advancement Scheme laid down under these Regulations shall be effective from the date of notification of these Regulations. However, to avoid

hardship to those faculty members who have already qualified or are likely to qualify shortly under the existing regulations, a choice may be given to them, for being considered for promotions under the existing Regulations. This option can be exercised only within three years from the date of notification of these Regulations.

I. A teacher who wishes to be considered for promotion under the CAS may submit in writing to the university/college, within three months in advance of the due date, that he/she fulfils all the requirements under the CAS and submit to the university/college the Assessment Criteria and Methodology Proforma as evolved by the university concerned supported by all credentials as per the Assessment Criteria and Methodology guidelines set out in these Regulations. In order to avoid any delay in holding the Selection Committee meetings for various positions under the CAS, the University/College may initiate the process of screening/selection, and complete the process within six months from the receipt of application. Further, in order to avoid any hardship, the candidates who fulfil all other criteria mentioned in these Regulations, as on and till the date on which these regulations are notified, can be considered for promotion from the date, on or after the date, on which they fulfil these eligibility conditions.

II. The Selection Committee specifications as contained in Clauses 5.1 to 5.4 shall be applicable to all direct recruitments of faculty positions and equivalent cadres and Career Advancement promotions from Assistant Professor to Associate Professor, from Associate Professor to Professor, Professor to Senior Professor (in University) and for equivalent cadres.

III. The CAS promotion from a lower stage to a higher stage of Assistant Professor shall be conducted through a "Screening-cum-Evaluation Committee", following the criteria laid down in Table1 of Appendix II.

IV. The promotion under the CAS being a personal promotion to a teacher holding a substantive sanctioned post, on his/her superannuation, the said post shall revert back to its original cadre.

V. For the promotion under the CAS, the applicant teacher must be on the role and in active service of the University/College on the date of consideration by the Selection Committee.

VI. The candidate shall offer himself/herself for assessment for promotion, if he/she fulfils the minimum grading specified in the relevant Assessment Criteria and Methodology Tables, by submitting an application and the required Assessment Criteria and Methodology Proforma. He/she can do so three months before the due date. The university shall send a general circular twice a year, inviting applications for the CAS promotions from the eligible candidates.

i) If a candidate applies for promotion on completion of the minimum eligibility period and is successful, the date of promotion shall be from that of minimum period of eligibility.

ii) If, however, the candidate finds that he/she would fulfils the CAS promotion criteria, as defined in Tables 1, 2, 4, and 5 of Appendix II at a later date and applies on that date and is successful, his/her promotion shall be effected from that date of the candidate fulfilling the eligibility criteria.

iii) The candidate who does not succeed in the first assessment, he/she shall have to be re-assessed only after one year.

When such a candidate succeeds in the eventual assessment, his/her promotion shall be deemed to be one year from the date of rejection.

VII Regarding the cases pending for promotions from one Academic Level/Grade Pay to another Academic Level/Grade Pay under the Career Advancement Scheme provided under the UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2010 and its subsequent amendments, the teachers shall be given the option to be considered for the promotion from one Academic Level/Grade Pay to another Academic Level/Grade Pay as per the following:

(a) The teachers shall be considered for promotion from one Academic Level/Grade Pay to another as per the CAS under these Regulations.

OR

(b) The faculty members shall be considered for the promotion from one Academic Level/Grade Pay to another as per the CAS provided under the UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2010 and its amendments with relaxation in the requirements of Academic Performance Indicators (API) based Performance Based Appraisal System (PBAS) upto the date of notification of these Regulations. The relaxation in the requirements of Academic Performance Indicators (API) based Performance Based Appraisal System (PBAS) upto the date of notification of these Regulations for the promotion from one Academic Level/Grade Pay to another under CAS as provided in UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2010 and its amendments, is defined as under :

i. Exemption from scoring under Category I, as defined in Appendix III of said above mentioned UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2010 and its amendments including University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) (4th Amendment), Regulations, 2016, for faculty and other equivalent cadre positions. ii. Scoring in Category II and Category III for faculty and other equivalent cadre positions shall be as provided for in the UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2010 with the following combined minimum API score requirement for Category II and Category III taken together, as mentioned below."

17. Thus, a candidate in the first instance as per Clause (VI) of Regulation 6.3 would make an application along with her/his self assessment for promotion by submitting application upon a required assessment criteria and methodology proforma three months before due date and it is thereafter that the papers are completed and placed before the selection committee.

The claim of the petitioner is that he moved an application on 04.11.2021 when his case matured and that application was received in the Selection and Assessment Cell of the University on 05.01.2022 but the University failed to constitute any selection committee as contemplated under the U.G.C. Regulations possibly for there being no executive council in the university. The U.G.C. Regulations do provide or contemplate a situation in the event an application is moved on the date the promotion is due, the same could not be considered as required then there has to be a process and procedure to be followed and the eligibility criterion as given in Clause C(IV) of U.G.C. Regulation 6.4 is reproduced hereinunder:

"C. Career Advancement Scheme (CAS) for University teachers

IV. Associate Professor (Academic Level 13A) to Professor (Academic Level 14)

1) An Associate Professor who has completed three years of service in Academic Level 13A.

2) A Ph.D Degree in the subject concerned/allied/relevant discipline.

3) A minimum of ten research publications in the peer-reviewed or UGC-listed journals out of which three research papers should have been published during the assessment period.

4) Evidence of having guided at least one doctoral candidate.

5) A minimum of 110 Research Score as per Appendix II, Table 2.

CAS Promotion Criteria:

A teacher shall be promoted if;

i) He/she gets a 'satisfactory' or 'good' grade in the annual performance assessment reports of at least two of the last three years of the assessment period, as per Appendix II,Table 1, and at least 110 research score, as per Appendix II,Table 2.

ii) The promotion is recommended by a selection committee constituted in accordance with these Regulations."

18. Except for the eligibility clause which every candidate seeking promotion under CAS is required to meet the only other parameter is 'satisfactory' or 'good' grade in annual performance assessment reports of at least 3 to 5 years as per table provided under the Appendix-II. It is, thus, the Screening-cum-Evaluation Committee which forwards the report for the purposes of according promotion.

19. In the total circumspect of Rules that are there provided for under CAS, it is clear that this rule of promotion is more by seniority than by selection and, therefore, if the executive council was not there and the Vice Chancellor was of the view that papers of the petitioner had reached to the assigned cell designated for the purposes of processing of evaluation, it was required for the designated cell to have processed the paper. Petitioner was very much active member of the service if Screening-cum-Evaluation Committee had met at the relevant point of time as per clause (I) of Regulation 6.3.

20. Having not done so upon lame excuses that there was no executive council functional in the university, in my considered view, the University was not justified in denying promotion to the petitioner that was due to him. The power could have been exercised by the Vice Chancellor under Section 7-C (5) meeting the requirement as an urgency. It is a statement made on behalf of the respondent- University that till date there

was no executive council and now the Central Government has issued an order that Vice Chancellor will act in its behalf.

21. Provisions as contained under Section 7-C(5) of Banaras Hindu University Act, 1915, is reproduced hereinunder:

"7C(5). If, in the opinion of the Vice-Chancellor, any emergency has arisen which requires immediate action to be taken, the Vice-Chancellor shall take such action as he deems necessary and shall report the same for approval at the next meeting to the authority which, in the ordinary course, would have dealt with the matter:

Provided that, if the action taken by the Vice-Chancellor is not approved by the authority concerned, he may refer the matter to the Visitor, whose decision thereon shall be final.

Provided further that, where any such action taken by the Vice-Chancellor affects any person in the service of the University, such person, shall be entitled to prefer, within thirty days from the date on which he receives notice of such action, an appeal to the Executive Council.

22. In my considered view, it was not necessary for the government to have passed an order asking the Vice Chancellor to act on behalf of the executive council in purported exercise of its power under Section 7-C (5). The provisions as contained under Section 7-C(5) were very much there and, therefore, the power could have been exercised even earlier by the Vice Chancellor. Petitioner has really, therefore, suffered for no fault on his part except for lack of formalities that were to be accomplished by the University through its screening committee. The Vice Chancellor had a free hand to form a screening committee exercising power under Section 7-C(5) and if he chose not to exercise this power, the petitioner cannot be made to suffer.

23. Thus, what here comes out to be a case where petitioner was not at fault and had the selection committee been constituted and considered the assessment and performance of petitioner of last three years, he would have been promoted. Under the order impugned, the ground taken is that selection committee and the interview could not have been held for promotion from Associate Professor to Professor for certain reasons but what reasons were there is not disclosed and only this much has been stated that there has been no constitution of executive council after June, 2021 when the term of the erstwhile executive council came to end. The entire rules also disclose very clearly that there is no selection criterion as such under the CAS If the Assessment criterion is sound as per the methodology tables provided under the Rules and the eligibility criterion is fulfilled as per Clause (iv) of Regulation 6, a candidate, who is eligible, would be promoted under the CAS from the date of eligibility. There is no prescribed procedure for holding selection as such or interview for a candidate to participate regarding his knowledge and expertise etc. In the circumstances, it can be taken to be that under the CAS, maturity of claim is only conditioned by self appraisal and assessment which is done on the parameters prescribed under the table.

24. In the case of ***Union of India & anr. vs Manpreet Singh Poonam & ors; 2022 LiveLaw (SC) 254,*** it was held that mere existence of vacancy will not create a right in favour of an employee for

retrospective promotion and in which the clearance of a candidate is dependent upon the selection process. The Court in that case, therefore, observed that if rules contemplate promotion on a vacancy for which a candidate has to pass through selection process such promotion cannot be given retrospectively from the date of actual vacancy arose. The Court also rejected the case of one Roshan Singh in the case of ***State of Uttar Pradesh & ors v. Roshan Singh & ors; 2006 (13) SCC 661*** for promotion retrospectively after retirement. The Court in that case distinguished the judgment in the case of ***Bangali Prasad Sharma v. State (Writ Petition No.13240 (SS) of 1990 decided on 03.08.1995 by Lucknow Bench of Allahabad High Court)*** on the ground that writ petition had been filed prior to his retirement.

25. However, in the present case, I find that since there to be no selection process as such and the university only failed to constitute Screening-cum-Evaluation Committee. Thus, career of the petitioner got jeopardised for none of his fault more especially, in the circumstances, when there was no question of requirement of any existing vacancy. It is upon maturity of claim that a candidate is required to undergo process of self assessment and assessment by a duly constituted screening committee. The university seems to have not considered promotion for no justifiable reasons. There may not have been a duly constituted executive council in existence but that power could have been exercised by the Vice Chancellor under Section 7(c)(5).

26. As the title of committee, Screening-cum-Evaluation Committee discloses, the only work is to make assessment of previous work of a candidate. CAS is a scheme to remove stagnation and give promotion to a teacher upto the highest level of professor upon achieving certain years of service at every stage in hierarchy. CAS scheme is not dependent upon the creation of post. It gives designation and pay scale and with further promotion and retirement, post being *co terminus* stands abolished.

27. Just because Central Government has now issued a circular that Vice Chancellor would exercise such powers as ifwas not there. In fact,

it was always with the Vice Chancellor and he should have exercised this power. The University's executive council is very important component in the administrative set up and since majority of the administrative orders are passed by the Vice Chancellor after the matter is already through the executive council, the Vice Chancellor cannot be permitted to just sit back and relax for there being no executive council. When the statute itself contemplates a situation and any such eventuality appears when the executive council has run out its term, Vice Chancellor will have to exercise power by constituting selection committee for all purposes. It is unfortunate that the vice Chancellor sat idle in the matter. The power was there and the Vice Chancellor needed no further executive directions from the central government. It is good that now the central government has now passed the order.

28. In the circumstances, in my considered view, the petitioner's claim for promotion from Associate Professor to Professor was wrongly not considered and the matter remained kept pending for no justifiable reasons.

29. Thus, petitioner is held entitled to be given notional promotion w.e.f. the date it has become due in order to give him the benefits and advantages in the fixation of pay and final retirement dues provided of-course his work and conduct at the relevant time as submitted him gets through a Screening-cum-Evaluation Committee and with the approval of Vice Chancellor. However, petitioner would not be entitled to for the actual payment of salary as he is not working as a Professor during the period in question.

30. Coming to the second point regarding petitioner's claim for re-employment, learned counsel for the petitioner in this regard placed reliance upon the UGC Regulation 2.1 which provided for re-employment to be offered to Assistant Professor, Associate Professor, Professor and Senior Professor after superannuation but the UGC regulations also carry a proviso to the regulations that every re-employment shall be strictly in accordance with the guidelines prescribed by the UGC from time to time. Now the question that arises for consideration of the Court is, as to whether the proviso would take away the mandate contained under the principal regulations 2.1. U.G.C. Regulation 2.1 are reproduced hereunder:

"2.1 Subject to the availability of vacant positions and fitness, teachers, such as Assistant Professor, Associate Professor, Professor and Senior Professor only, may be re-employed on contract appointment beyond the age of superannuation, as applicable to the concerned University, college and Institution, up to the age of seventy years.

Provided further that all such re-employment shall be strictly in accordance with the guidelines prescribed by the UGC, from time to time.

31. It has been argued on behalf of Union of India that since the guidelines have been issued by the UGC did provide for re-employment to Professor only and proviso says that re-employment has to be strictly in accordance with the guidelines, both have to be read together in order to find out the solution, whereas it has been argued on behalf of the petitioner that, when the substantive provision provides for re-employment to Assistant Professor, Associate Professor, Professor and Senior Professor then merely because the proviso refers to guidelines, it would not take away the main substantive provision.

32. It is submitted that regulations are silent about the manner and method of re-employment and so for this limited purpose, the UGC guidelines may have to be followed. In order to find answer to the question and to appreciate the arguments advanced by the rival parties, it becomes necessary to find out as to under which provision of law, the guidelines are framed by the U.G.C. The U.G.C. Act, 1956 does provide for power of the commission to frame regulations but does not provide for framing of any guidelines. Second 26 of the UGC Act, 1956 is reproduced hereinuder:-

26. (1) The Commission may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder–

(a) regulating the meetings of the Commission and the procedure for conducting business thereat;

(b) regulating the manner in which and the purposes for which persons

may be associated with the Commission under section 9;

(c) specifying the terms and conditions of service of the employees appointed by the Commission;

(d) specifying the institutions or class of institutions which may be recognised by the Commission under clause (f) of sub-section 2;

(e) defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University, having regard to the branch of education in which he is expected to give instruction; (f) defining the minimum standards of instruction for the grant of any degree by any University;

f) defining the minimum standards of instruction for the grant of any degree by any University;

(g) regulating the maintenance of standards and the co-ordination of work or facilities in Universities.

(h) regulating the establishment of institutions referred to in clause (ccc) of section 12 and other matters relating to such institutions;

(i) specifying the matters in respect of which fees may be charged, and scales of fees in accordance with which fees may be charged, by a college under sub-section (2) of section 12A;

(j) specifying the manner in which an inquiry may be conducted under sub-section (4) of section 12A;"

33. Upon reading of the various clauses of Section 26, I do not find anywhere any authority being vested with the commission to frame guidelines. Further, I find that Section 27 provides that no regulations shall be made except with the previous approval of the Central Government. Section 27(2) is reproduced hereinunder:-

"27.(2) No regulation shall be made under this section except with the previous approval of the Central Government."

34. Still further, Section 28 provides that every regulation has to be placed before both the Houses of Parliament which has to approve the same. Section 28 reproduced herinunder:-

"28. Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session, or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may, be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

35. A bare reading of the aforesaid provisions makes it clear that both the Houses of parliament may agree with the regulations or may provide for modifications in the rule or regulation and then it is, accordingly re-framed and passed. The UGC, therefore, could not have framed guidelines to supersede its regulations. However, in the general power of superintendence and in absence of regulations, an authority can issue executive directions and even frame guidelines to regulate the subject matter

procedurally. Subject matter of model guidelines shows that it had been framed subsequently for a particular subject only i.e. re-employment of superannuated teachers.

36. Since the regulations are absolutely silent about the manner and method of re-employment of such teachers, so to that extent guidelines may still be adhered to. It appears that since the guidelines were framed prior to regulations coming into force in the year 2018, they were pursued but once the regulations have been framed then the regulations will supersede the guidelines and provisions contained in the regulation shall prevail also and regulations approved by Parliament shall have supremacy over and above all executive instructions and guidelines.

37. Besides the above, the law is very much clear that proviso cannot take away the mandate contained under the principal provision and, therefore, in my considered view, the proviso will only be limited to the extent that whatever is not provided under the regulations can be borrowed from the guidelines in the matter of re-employment of retired teachers. In the case of ***Ali M.K.N. State of Kerala; (2003) 11 SCC 632***, Supreme Court has held that normally function of proviso is to carve out an exception out of enactment or to qualify something done in the main provision. Vide paragraph 10, the Court has held thus:

10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey; 1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso...." said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other.

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146) "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails.... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the

intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

38. From the above view expressed by the Supreme Court, it is very much clear that scope of proviso is to be interpreted and understood vis-a-vis the main language of the enacting part of the statute. If the enacting part of the statute does not deal with the particular subject matter then aid can be had of proviso to find out intendment of legislature while interpreting the provisions of statute. It is true that proviso qualifies or limits scope of a provision but it is to be seen contextually. In the present case while main provision of regulations do permit re-employment to all the three categories of teachers namely Assistant Professor, Associate Professor and Professor to be offered re-employment after retirement but the manner and method in which re-employment is to be offered is not detailed out or the conditions of re-employment otherwise is not provided for in the main provision. In the circumstances, therefore, the proviso is to be given purposive interpretation so as to read substantive provision meaningful as per its plain language and also to be read down with procedures and other conditions given under the guidelines. However, it is to be kept in mind that main provision of the regulation is having a statutory backing that guidelines do lack and, therefore, if the guidelines only provided for a professor to be given re-employment, it is to be read down in terms of the main provisions as contained in Regulation 6.2.

39. In the case of ***Prakash & ors v. Phulvati & ors; 2016 (2) SCC 36*** wherein the Supreme Court has held that scope of proviso or exception to the main provision is to be seen contextually and to ensure that the object for which the provision is enacted is not distorted. Vide paragraphs 19 to 21, the Court held thus:

"19. Interpretation of a provision depends on the text and the context. Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given.

20. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied.

21. Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters. Object of interpretation is to discover the intention of legislature."

40. The petitioner being Associate Professor was very much entitled to be re-employed immediately after he attained superannuation. Now the issue remains to be resolved, whether there existed any vacancy as required under the regulation and whether even today any such vacancy exists.

41. Sri Sanjeev Singh, learned Senior Advocate has argued that there existed vacancy and that was why the University who had issued advertisement to invite

applications for selection and appointment in the department of Dharm Viggyan from where petitioner retired. This advertisement was uploaded on official website of the University on 28.06.2023 as Advertisement No.11/2023/2024 with five teaching posts. Copy of the advertisement is filed as Annexure-12 to the writ petition. Vide paragraph 17 of the writ petition, it has been pleaded thus:

"17. That there are vacant posts in the Department of Dharmagam, Faculty of Sanskrit Vidya Dharm Vigyan, Barnas Hindu University, Varnasi and the petitioner fulfills all the eligibility conditions for further appointment for further period of 5 years in accordance with the UGC Regulation 2.1 but the respondent University is illegally rejected the same therefore the impugned order passed by the University on 22.05.2023 is illegal, arbitrary and against the UGC Regulations."

42. In reply to the above, vide paragraph 34 of the counter affidavit filed on behalf of the University, it has been stated as under:

"34. That the content of paragraph no.17 of the writ petition as stated are denied. In reply it is submitted that a suitable reply has already been given in preceding paragraph of this counter affidavit. Further, it is reiterated that as per the UGC Model Guidelines for re-employment of Superannuated Teachers, 2008 and UGCR2018 the petitioner does not fulfills the eligibility criteria for re-employment, accordingly, the order passed by the University dated 22.05.2023 and 09.10.2023 is fully based on the rules/guidelines/instructions of UGC issued from time to time."

43. Interestingly in the preceding paragraph 32 petitioner has been held to be ineligible as he retired as Associate Professor and not as Professor and as per U.G.C. Regulations, he would not be entitled. Paragraph 32 of counter affidavit is reproduced hereinunder:-

32. That since Dr. Bhaktiputra Rohtam has already been retired on 31.12.2022 and as per clause 6.3(V) of UGC Reguation, 2018 "For the promotion under the CAS, the applicant teacher must be on the role and in active service of the University/ College on the date of consideration by the Selection Committee." Therefore, his case of promotion on the post of Professor under CAS cannot be placed before the Selection Committee and on 09.10.2023 detailed and reasoned order has been already passed by the Vice Chancellor, BHU in respectful compliance to the order dated 07.08.2023 passed by the Hon'ble High Court. It is further submitted that with regard to re-employment, it is pertinent to mention here that clause 2.1 of UGC Regulation, 2018 deals with re-employment of retired teachers of the University, which is reproduced below:-

"subject to availability of vacant positions and fitness, teachers as Assistant Professor, Associate Professor, Professor and Senior Professor only, may be re-employed on contract appointment beyond the age of superannuation, as applicable to the concerned University, College and Institution, up to the age of seventy years.

Provided further that all such re-employment shall be strictly in accordance with the guidelines prescribed by the UGC, from time to time."

It is also pertinent to mention here that, clause 2.1 of the UGC Regulation, 2018 is only enabling in nature and does not confer any right for re-

employment. In case of necessity and on fulfillment of the condition laid down in the said Clause, the University may extend re-employment.

The UGC vide letter No.F.3-1/194(PS) Pt file dated 15th February, 2008 has provided the Model Guidelines for re-employment of superannuated teachers eligibility criteria of superannuated teachers eligible for re-employment shall be as per the said guidelines is reproduced below:-

3. Eligible Category:

The category of superannuated teachers eligible for re-employment shall be:

c) Professor only, in case of University; and

d) Professors, Readers and Lecturers (Selection grade) only in the case of Colleges"

In addition to the above, a provision has also been made at Clause 5(a) & (b) of Model Guidelines for re-employment of superannuated Teachers that, the institution shall follow the following principles, while taking up the cases of superannuated teachers for re-employment:

c) There shall be vacancies of teachers at the University Department or at the College, remaining unfilled for at least one year.

d) The number of teachers to be re-employed in a University Department and/or College at any given time shall be limited to 50% of the vacancies identified, as above-" The UGC Model guideline for re-employment of Superannuated Teachers, 2008 has not been superseded by UGC Regulation, 2018 and still in existence and impugned order has been passed accordingly. In view of the above the petitioner does not fulfill the eligibility criteria. The category of superannuated teachers eligible for re-employment shall be: a) Professor only, in the case of University: Since, Dr. Bhaktiputra Rohtam has superannuated from the service as Associate Professor therefore, his request for re-employment after superannuated /end of the academic session 2022-23 cannot be considered."

44. In Rejoinder affidavit pleadings have been raised vide paragraph 12 that U.G.C. guidelines being statutory would prevail and that it provides for extension of retired teachers upon re-employment upto 70 years of age and it has also been pleaded vide paragraph 13 of the rejoinder affidavit that post still exists in the department. Thus, it is sought to be pleaded that selection could not be held despite advertisement.

45. I have already held above that U.G.C. Regulations would prevail over the guidelines and whenever guidelines are contrary to regulations, these guidelines would be taken to have stood repealed. So if regulations provide for Assistant Professor and Associate Professor also to be entitled for re-employment, petitioner would be equally entitled. Since it is not the case of respondent- University that petitioner is not entitled to re-employment on his merit, it is held that he is entitled for re-employment as teacher in the department of Dharmagam if vacancy is existing.

46. Thus, in view of the above, writ petition succeeds and is allowed. The orders passed by the Registrar and Vice Chancellor dated 22.05.2023 and 09.10.2023; respectively, impugned in the writ petition and filed as Annexure-1 & 2, are hereby quashed and following directions are issued:-

(i) The Vice Chancellor shall immediately constitute a Screening-cum-

Evaluation Committee to look into and screen out documents of self appraisal etc. submitted by the petitioner on 04.11.2021 received in CAS promotion cell on 05.01.2022 and take a decision whether petitioner was eligible on merits on the basis of documents produced by him to be promoted as professor under CAS and if it finds favour with the claim of the petitioner, it shall accord notional promotion to the petitioner with consequential benefits of pay in question as admissible to such promotional post of Professor for revision of pension and other retirement dues only w.e.f. the date petitioner attained his age of superannuation and, accordingly, arrears of difference of pension and other retirement dues shall be paid. Appropriate decision shall be taken within a maximum period of three months from the date of production of certified copy of this order.

(ii) The respondent- University is directed to give re-employment to petitioner as teacher in the department of Dharmagam, Faculty of Sanskrit Vidya Dharm Vigyan, Banaras Hindu University, Varanasi if vacancy exists and appropriate order shall be passed in the above regard within three weeks of production of certified copy of this order.

47. Cost made easy.

(2024) 3 ILRA 697
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024
BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 18971 of 2022
with other cases

Smt. Usha Verma & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shoar Mohammad Khan, Sri Quazi Mohammad Akaram

Counsel for the Respondents:
C.S.C., Sri Vijai Kumar Srivastava

Service Law – Payment of Gratuity – Applicability of Payment of Gratuity Act, 1972 – Petitioners, retired or dependents of deceased employees of the Basic Education Department, sought gratuity under the Payment of Gratuity Act, 1972, claiming teachers are covered as employees under Section 2(e) – Held, the Act, 1972, is not directly applicable to teachers in Basic Schools, as their gratuity is governed by specific Government Orders (dated 23.11.1994, 10.06.2002, and 04.02.2004), which provide gratuity subject to conditions, such as opting to retire at age 60 – The exception in Section 2(e) allows the St. to frame separate rules for gratuity, and petitioners failed to plead or challenge these Government Orders, rendering their claim under the Act unsustainable. (Paras 3, 10, 12, 13, 17)

Service Law – Deficiency in Pleadings and Clean Hands Doctrine – Petitioners' writ petitions lacked specific pleadings regarding applicable Government Orders and failed to disclose material facts, such as the conditions for gratuity eligibility – Held, the petitioners did not approach the Court with clean hands by suppressing relevant Government Orders and delaying their claims (ranging from 2002 to 2023) – The absence of a challenge to the Government Orders and vague pleadings preclude relief, as per the principle that a litigant must fully disclose material facts, as held in *Anil Kumar Yadav* and *Shri K. Jayaram Vs Bangalore Development Authority*. (Paras 1, 7, 16, 17)

Service Law – Conditions for Gratuity under Government Orders – The Government Orders stipulate that teachers who work until age 62 or fail to submit an option to retire at age 60 are not entitled to gratuity –

Held, as per *Smt. Shiv Pyari Srivastav* and *Shivkali*, teachers retiring at 62 or not opting for retirement at 60 forfeit gratuity, and petitioners, most of whom retired at 62 or did not plead compliance with these conditions, are not entitled to relief – However, liberty was granted to pursue claims under the Government Orders if applicable, with reference to *Shivkali* and *Usha Rani*. (Paras 5, 8, 14, 15, 17)

Writ Petitions Disposed Of .

Liberty Granted to Pursue Claims Under Government Orders.

List of Cases Cited:

1. Birla Institute of Technology Vs The St. of Jharkhand & ors., (2019) 15 SCC 586

2. Nagar Ayukt Nagar Nigam, Kanpur Vs Sri Mujib Ullah Khan & anr., Civil Appeal No. 2628 of 2017, decided on 02.04.2019

3. U.P. St. Sugar Corporation Vs Smt. Sharada Devi & ors., 2015 (4) ADJ 559

4. Biharilal Dobray Vs Roshan Lal Dobray, (1984) 1 SCC 551

5. District Basic Education Officer & anr.Vs Shivkali & ors., Special Appeal Defective No. 651 of 2021, decided on 06.10.2021

6. Smt. Shiv Pyari Srivastav & ors. Vs St. of U.P. & ors., Writ-A No. 37216 of 2014, decided on 18.01.2024

7. Maniben Maganbhai Bhariya Vs District Development Officer Dahod & ors., 2022 SCC OnLine SC 507

8. Dhanraj Vs Vikram Singh & ors., Civil Appeal No. 3117 of 2009, decided on 10.05.2023

9. Anil Kumar Yadav Vs St. of U.P. & ors., Neutral Citation No. 2023:AHC:193413

10. Shri K. Jayaram & ors. Vs Bangalore Development Authority & ors., (2022) 12 SCC 815

11. Usha Rani Vs St. of U.P. & ors., Neutral Citation No. 2019:AHC:180910

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In order to make out a case to grant the relief sought, a writ petition has to be drafted very carefully. Pleadings are essential part of any litigation. The relief sought should be supported by pleadings. The present bunch of writ petitions are example of it where the prayers sought are not only vague but not supported by material pleadings also. Even the petitioners have approached this Court by not disclosing entire relevant facts which goes adverse to their case, i.e., petitioners have not approached this court with clean hands.

2. Petitioners (retired employees or husband, father or mother of deceased employees), as the case may be, while working in Basic Education Department, have retired or died (before or after retirement) and period goes as old as 2002 to as recent as 2023. They have not raised any demand of gratuity for many years and only in 2022 and 2023, these writ petitions are filed seeking relief that concerned District Basic Education Officers be directed to release and pay the petitioners their respective amount of gratuity alongwith interest. Details of petitioners and relation with deceased employee, date of retirement/ date of death, age as on retirement/death, etc. are given hereinafter in the form of following chart:

Sl. No.	W.P. No.	Name of Petitioner	Year of retirement/ death	Age as on retirement/ death
1.	18971/2022	Smt. Usha Verma and Km.	2014 and 2016	62

		Kishwar Ara		
2	6271/2023	Paras Nath Tiwari	2015	62
3.	10540/2023	Dan Bahadur	2010	60
4.	10928/2023	Prabhu Nath	2007	62
5.	10932/2023	2009	2009	62
6.	10939/2023	Chaitu Ram	2011	62
7.	11086/2023	Shakeela Begum **(wife of employee)**	2012	62 Y 6 M
8.	11629/2023	Lal Bahadur Patel	2023	62
9.	11702/2023	Ram Jiyawan	2022	62
10.	12051/2023	Daya Shankar	2006	62
11.	12065/2023	Grihraj	2008	62
12.	13800/2023	Ramakaran	2002	60
13.	14043/2023	Vimla Devi	2020	62
14.	14359/2023	Ravinder Bansal **(son of employee)**	2009	51
15.	15528/2023	Devamatiya **(wife of employee)**	2014	61
16.	15781/2023	Asha Srivastava **(wife of employee)**	2018	61
17.	16328/2023	Manorama Singh **(daughter of employee)**	2007	61
18.	17864/2023	Smt. Shanti Devi **(wife of employee)**	2006	62
19.	20563/2023	Smt. Kusma Devi **(wife of employee)**	2022	62
20.	5588/2023	Bindra Prasad Patel	2017	64
21.	7771/2023	Awadh Narayan Patel	2018	62
22.	7780/2023	Mohan Lal	2014	62
23.	7783/2023	Ram Nidhi	2011	62
24.	9695/2023	Bhagwati Prasad Kushwaha	2011	62
25.	21010/2022	Aslam Jainavi **(Voluntary Retirement)**	2021	60

3. Petitioners have claimed aforesaid relief primarily on ground that Payment of Gratuity Act, 1972 *(hereinafter referred to as "Act, 1972")* will be applicable to Teachers of Basic Schools. However, they have not disclosed that payment of gratuity for Teachers working in these Schools are presently governed by different Government Orders. Neither relevant Government Orders dated 23.11.1994, 10.06.2002 and 04.02.2004, were placed on record nor there was any averment in regard to their existence in writ petitions. The writ petitions are also silent about huge delay in claiming relief.

4. Despite aforesaid material shortcomings in pleadings, Sri Shoar Mohammad Khan, Sri Quazi Mohammad Akram and Sri Tawvab Ahmed Khan, Advocates for petitioners, proceeded to argue the case on merits that petitioners are employees under the definition of 'employee' as mentioned in Section 2(e) of Act, 1972. Learned counsel also referred Section 14 of Act, 1972 that it will override on all other enactments. It was also argued

that there was no need to mention Government orders or to challenge it. Argument was also raised on 'repugnancy', so much as age of superannuation was increased upto 62 years without any conditions so condition of submitting any option was illegal. They also placed reliance on a judgment passed by Supreme Court in **Birla Institute of Technology vs. The State of Jharkhand and others, (2019) 15 SCC 586** that since Teachers of said Institute were considered to be employees, therefore, petitioners would also fall under the definition of 'employee'. Reliance was also placed on another judgment passed by Supreme Court in **Nagar Ayukt Nagar Nigam, Kanpur vs. Sri Mujib Ullah Khan and another, (Civil Appeal No. 2628 of 2017)**, **decided on 02.04.2019** and this Court's judgment in **U.P. State Sugar Corporation vs. Smt. Sharada Devi and others, 2015(4) ADJ 559.**

5. Per contra, Sri K. Shahi, Sri Shivendra Singh Bhadauriya, Sri Bipin Bihari Pandey, Sri Sanjay Kumar Singh, Sri Bhanu Pratap Singh Kachhawah, Sri C.S. Singh and Sri Akhilesh Kumar Sharma, Advocates for Respondents-Basic Education Officers; Sri Ashish Kumar Nagvanshi and Sri Shashi Prakash Singh, Additional Chief Standing Counsel; Sri Ravi Prakash Srivastava, Standing Counsel and Mrs. Shruti Malviya, Brief Holder for State-Respondents, submitted that not only there is huge delay in approaching this Court but there is no challenge to Government orders whereby provision of gratuity is provided to Teachers subject to certain conditions. They further submitted that according to referred Government Orders since petitioners have worked till 62 years or not submitted option, they are not entitled for payment of gratuity. Reliance is placed on Supreme Court's decision in **Biharilal Dobray vs. Roshan Lal Dobray, (1984)1 SCC 551** and this Court's decision in **District Basic Education Officer and another vs. Shivkali and others (Special Appeal Defective No. 651 of 2021),** decided on 06.10.2021. Reliance is also placed on a recent judgment of this Court in **Smt. Shiv Pyari Srivastav and others vs. State of U.P. and others (Writ-A No. 37216 of 2014), decided on 18.01.2024** that since petitioners have worked till 62 years, they were not entitled for payment of gratuity.

6. Heard learned counsel for parties and perused the material available on record.

7. In above legal and factual background, substantial arguments raised before this Court by petitioners are not substantially supported by pleadings of writ petitions. It is difficult to believe that petitioners have no knowledge about relevant Government Orders whereby gratuity is payable to Teachers in certain conditions, despite they have worked for many years in Primary Schools/ Junior High Schools. Not disclosing the said Government Orders is nothing but an attempt to mislead the Court.

8. As referred in **Smt. Shiv Pyari Srivastav (supra)**, according to Government orders, if Teachers have worked upto the age of 62 years, they are not entitled for gratuity. Relevant part thereof is mentioned hereinafter:

"10. In the above factual and legal background, this Court has to consider interpretation of above referred G.Os. dated 04 February, 2004 and 23 November, 1994. According to G.O. of 23

November, 1994, in a case where an employee opt to work till the maximum age of retirement i.e. up to 62 years, he has to forego his right of gratuity and will be entitled for pension only.

11. I have also carefully perused the G.O. dated 04 February, 2004 and I have found merit in the argument of learned counsel for respondent that the said G.O. is in regard to extension of age of retirement only and it does not co-relate or extend any right to petitioners for gratuity even working till age of 62 years i.e extended date of retirement.

12. I have also carefully perused the impugned order as reproduced in previous paragraphs wherein concerned respondent has taken the same interpretation as discussed above. So far as, another G.O. is concerned, I do not find that petitioners will have any case on basis of said G.O., which was related only to an effect that petitioners were absorbed in the present service though they were earlier working in other service.

13. Therefore, petitioners are failed to point out any irregularity or illegality in the impugned order which is based on correct interpretation of concerned Government Orders, accordingly, I do not find any case for interference in impugned order, therefore, these writ petitions are accordingly, dismissed."

9. So far as payment of gratuity is concerned, Section 1(3) of Act, 1972 provides applicability of Act and being relevant, is reproduced hereinafter:

(3) It shall apply to -

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, or, any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."

10. It is also relevant to mention definition of 'employee' as mentioned in Section 2(e) of Act, 1972, which is reproduced hereinafter:

"(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

11. Supreme Court in recent judgments has extended scope of "Establishment" and amended definition of "employee" and included "teachers working at private institutions" and "Angawadi workers / helpers" working under a scheme in **Birla Institute of Technology (supra) and Maniben Maganbhai Bhariya v. District Development Officer Dahod and others, 2022 SCC OnLine SC 507** respectively and held that they are entitled for gratuity.

12. In all above cases, there was no separate Act or Rules were enacted for

payment of gratuity. Central Government/ State Governments have framed separate Act/ Rules for payment of gratuity for Teachers working under State/ Central Institutions, as the case may be. Later on payment of gratuity was made applicable to Teachers working in schools run by Basic Education Board by way of issuing Government Orders (referred above). The later part of definition of 'employee' has carved out an exception to do so, i.e., to frame Act/ Rules for this purpose. It is upto the State to carry on present procedure or to frame specific Act/ Rules for payment of gratuity for Teachers in Basic Schools.

13. In aforesaid circumstances, presently gratuity is paid to Teachers in terms of referred Government Orders in certain circumstances. The details of Government Orders are not part of writ petitions. Petitioners have not pleaded about its applicability. Government Orders are also not under challenge, except oral argument on 'repugnancy'.

14. The argument on 'repugnancy' is also liable to be rejected since there is no challenge to Government Orders and for this purpose reference to a judgment of Supreme Court in **Dhanraj vs. Vikram Singh and others (Civil Appeal No. 3117 of 2009), decided on 10.05.2023**, would be relevant, wherein it has been observed that, ***"We are of the view that in absence of any specific challenge to the validity of the statutory provisions, the High Court ought not to have undertaken the exercise of going into the question of repugnancy."***

15. The Division Bench of this Court in **Shivkali (supra)** has considered the issue of payment of gratuity to Teachers working at Junior High Schools and not only upheld Government Orders on payment of gratuity but interpreted conditions in benefit of Teachers also. Relevant paragraphs 13 and 14 thereof are mentioned hereinafter:

"13. In so far as the contention of the learned counsel for the appellants that by Government Order dated June 10, 2002 the option could have been exercised only upto first day of July in which the incumbent was to attain the age of 58 years is concerned, the same is not acceptable. Because a plain reading of the Government Order dated June 10, 2002 would reflect that it is in two parts. The first part is in respect of fixing the last date for exercise of option to retire early to avail the benefits of early retirement whereas the second relates to the last date for change of the option submitted earlier. In the first part, the age of retirement is not mentioned. What is stated in the first part is that those who could not exercise their option to avail the benefits under the earlier Government Order dated 23.11.1994 may exercise their option by the first day of July of the year in which they attain the age of superannuation. The second part gives option to those, who had already opted to retire at the age of 58 years, to change their option before they retire. Meaning thereby that if suppose a person has given an option to retire at the age of 58 years, before he attains the age of 58 years, he can change the option. Thus, as by Government Order dated February 4, 2004 the age of superannuation was enhanced from 60 years to 62 years by specifically providing that the benefits that were available on retirement at the age of 58 years would now be available upon completion of the age of 60 years and those that were to be available at the age of 60 years, would now be available on completion of the age of 62 years, by

necessary implication, the option that could earlier be exercised upto the first day of July in which the incumbent was to attain the age of 58 years became exercisable upto the first day of July in which the incumbent would attain the age of 60 years.

14. In the instant case, since the date of birth of the first respondent's husband was 01.07.1951, he would have completed 60 years on June 30, 2011. Thus, the last day by which he could have opted to retire at the age of 60 years would be the first day of July, 2010, which never came in the life time of the first respondent's husband. Thus, for all the reasons given above, the benefit of death gratuity that would have been available to the incumbent's dependents/ heirs on incumbent's death, before attaining the age of 60 years, under the Government Order dated September 10, 2009, would be available to his heirs/dependents."

16. With regard to deficiency of pleadings and that a litigant has to approach this Court with clean hands, few paragraphs of a judgment passed by this Court in **Anil Kumar Yadav vs. State of U.P. and others, Neutral Citation No. 2023:AHC:193413** are referred hereinafter:

"(ख). *इस स्तर पर उच्चतम न्यायालय द्वारा पारित किये गये निर्णय* ***श्री के जयराम व अन्य प्रति बैंगलोर डेवलपमेंट अथॉरिटी व अन्य : (२०२२) १२ एस सी सी ८१५*** *से निम्न अंश का उल्लेख करना महत्वपूर्ण होगाः-*

" ३८-....स्थापित विधि के अनुसार,जो पक्ष संविधान के अनुच्छेद ३२ के अंतर्गत इस न्यायालय या अनुच्छेद २२६ के अंतर्गत उच्च न्यायालय के असाधारण क्षेत्राधिकार को आहूत करता है, तो यह माना जाता है कि वो सत्यवादी, स्पष्टवादी और विवर्त होगा। उसे बिना किसी निग्रह से सभी वस्तुगत तथ्यों को उद्घाटित करना चाहिए, भले ही वे उसके विरुद्ध हों । उसको तथ्यों की 'छुपा-छुपी' (हाईड एंड सीक) खेलने या उनका 'चयन और चुनने' (पिक एंड चूज़) करने की अनुमति नहीं दी जा सकती, जिन्हें वह प्रकट और छुपाना (पर्दा डालना) या वो अन्य तथ्य जिनको उद्घाटित नहीं करना (छिपाना) पसंद करता है। आज्ञापत्र क्षेत्राधिकार का मूल आधार, सत्य व पूर्ण (सही) तथ्यों के प्रकटन पर आधारित है।अगर वस्तुगत तथ्य छुपाये या विकृत किये जाते है तो आज्ञापत्र न्यायालय की कार्यवाही ही और उपयोग असंभव हो जायेगा । याचिकाकर्ता को बिना किसी निग्रह के वांछित अनुतोष पर प्रभाव कारित करने वाले सभी तथ्यों को अवश्य ही उद्घाटित करना है।ऐसा इसलिए क्योंकि "न्यायालय विधि को तो जानता है लेकिन तथ्यों को नहीं।"

(देखे : ***श्री के जयराम व अन्य प्रति बैंगलोर डेवलपमेंट अथॉरिटी व अन्य : (२०२२) १२ एस सी सी ८१५) का प्रस्तर संख्या ३८)***

(हिन्दी में अनुवाद न्यायालय द्वारा किया गया है।)

(रेखांकित कर प्रमुखता न्यायालय द्वारा प्रदान की गयी है।)"

17. In aforesaid circumstances, though the relief sought in writ petitions, was not supported by pleadings, still on basis above discussion, I do not find that petitioners are entitled for gratuity only on basis of Payment of Gratuity Act as presently it is governed by referred Government Orders permitted by legal provisions also. The petitioners have not pleaded to take benefit of relevant Government Orders for payment of gratuity, therefore, this Court cannot enter into said arena. However, if petitioners' case still falls under referred Government Orders, they have liberty to take available legal recourse to avail it's benefit for payment of gratuity and for that reference of **Shivkali (supra)** and **Usha Rani vs. State of U.P. and others, Neutral Citation No. - 2019:AHC:180910** be taken note of.

18. The writ petitions are accordingly **disposed off.**

(2024) 3 ILRA 704
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2024
BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 19344 of 2023

Arpit Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Kumar Kesherwani

Counsel for the Respondents:
C.S.C., Sri Aditya Kumar Singh, Sri Manu Saxena

Service Law – Compassionate Appointment – Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – Petitioner sought compassionate appointment on a Class-III post following the death of his father, a Class-IV employee, on 31.07.2022 – Held, the rejection of the petitioner's application by the Chairman, Nagar Palika Parishad, Faridpur, Bareilly, vide letter dated 26.09.2023, was valid, as Rule 5 of the Rules, 1974, and Government Order dated 17.06.2014, do not entitle the dependent to a post higher than that held by the deceased employee – The petitioner's higher qualification does not override the requirement that "suitable employment" be commensurate with the deceased's post, as clarified by the Supreme Court. (Paras 3, 5, 8, 15, 16, 17, 18)

Service Law – Interpretation of "Suitable Employment" under Rule 5 – The petitioner relied on Smt. Premlata to argue that "suitable employment" under Rule 5 should be based on the dependent's qualifications – Held, the Supreme Court in St. of U.P. Vs Premlata (reversing the Division Bench) and Suneel Kumar Vs St. of U.P. clarified that "suitable employment" under Rule 5 must be interpreted with reference to the post held by the deceased employee, not the dependent's qualifications – Appointment on a higher post (e.g., Class-III) is not permissible when the deceased held a Class-IV post. (Paras 9, 12, 15, 16, 17, 18)

Service Law – Absence of Vacancy and Supernumerary Post – The petitioner argued for the creation of a supernumerary Class-III post, citing Sushma Gosain – Held, the Supreme Court in Suneel Kumar held that a supernumerary post cannot expand the scope of "suitable employment" beyond the deceased's post – The respondents confirmed no Class-III vacancy existed, and the petitioner's refusal of a Class-IV post offer further justified the rejection – The petitioner was granted liberty to apply for a Class-IV post, to be considered per the Rules, 1974. (Paras 5, 6, 11, 16, 18, 20)

Writ Petition Dismissed.

Liberty Granted to Apply for Class-IV Post.

List of Cases Cited:

1. Sushma Gosain Vs U.O.I., (1989) 4 SCC 468

2. Smt. Premlata Vs St. of U.P. & ors., Special Appeal Defective No. 620 of 2018

3. St. of U.P. Vs Premlata, (Supreme Court, reversing Special Appeal Defective No. 620 of 2018)

4. Suneel Kumar Vs St. of U.P. & ors., AIR 2022 SC 5416

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for the State-respondents and Sri Manu Saxena, learned counsel for the respondent nos. 4 & 5.

2. Present petition has been filed with the following prayers:-

"(a) Issue, a writ or direction in the nature of certiorari to quash the impugned communication letter dated

26.9.2023 (Annexure No.1) issued by Respondent no.4-Chairman, Nagar Palika Parishad, Faridpur, Bareilly whereby refused to grant the appointment on Class-III post.

(b) Issue, a writ, order or direction in the nature of mandamus commanding and directing the respondent authorities to appointment the petitioner on the post of Clerk (Class-III) under the Dying-In-Harness Scheme on account of the death of his father or according to this qualification as possible as earliest."

3. Brief facts of the case are that father of petitioner was working as Class-IV employee at Nagar Palika Parishad, Faridpur, Bareilly. During the course of service, father of petitioner died on 31.7.2022. After his death, petitioner has submitted an application for appointment as Class-III employee on compassionate ground, which was rejected. His appointment has not been considered, therefore, petitioner has filed an application before the District Magistrate upon which ADM has sought instruction from the respondent no.4, which was replied by him vide impugned letter dated 26.9.2023. In the said letter, it is mentioned that no post is vacant for Class-III employee and further in light of Government Order dated 17.6.2014, dependent of deceased has no right to claim particular position or place and it is the discretion of appointing authority to pass appropriate order warranted in the facts and circumstance of the case. Though, the letter dated 26.9.2023 was not communicated to petitioner, but coming to know that his claim has been rejected at the end of respondent No. 4 vide letter dated 26.09.2023, he has challenged the same by filing present petition.

4. Learned counsel for the petitioner submitted that in case post is vacant, it is required on the part of respondents to create supernumerary post for Class-III employee and grant appointment. He has placed reliance upon the judgment of Apex Court in the case of ***Sushma Gosain vs. Union of India reported in 1989 (4) SCC 468*** as well as Division Bench of this Court in the case of ***Smt. Premlata vs. State of U.P. and others passed in Special Appeal Defective No. 620 of 2018 and Rule 5 of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as Rules, 1974)*** and submitted that petitioner is entitled for appointment on the post for which he is having qualification.

5. Sri Manu Saxena, learned counsel for the respondent nos. 4 & 5 has vehemently opposed and submitted that in light of Government Order dated 17.6.2014, petitioner has no right to claim particular post. He next submitted that State Government has challenged the judgment of Division Bench of this Court given in ***Smt. Premlata (Supra)*** before the Apex Court and Apex Court has reversed the judgment with specific finding that mere qualification cannot be a ground for appointment on higher post than the post held by the deceased employee. He also pointed out that it is not the case of petitioner that post of Class-III is vacant rather respondents are having specific case that post of Class-III employee is not vacant, which is also not disputed by the petitioner.

6. He further submitted that again the similar issue came up before the Apex Court in the matter of ***Suneel Kumar vs. State of U.P. and others reported in AIR 2022 SC 5416*** and Apex Court has taken specific view that supernumerary post cannot determine the scope of the words

"suitable employment." He firmly submitted that in both the cases, Rule 5 of Rules, 1974 has been interpreted, which was subject matter of Division Bench of this Court in the case of ***Smt Premlata (Supra)***, therefore, under such facts and interpretation made by Apex Court, petitioner is not entitled for appointment on Class-III post on compassionate ground.

7. I have considered the rival submission advanced by the learned counsel for the parties and perused the record, Rule 5 of Rules, 1974 as well as judgments relied upon by the parties. Facts of this case are undisputed. The only issue before the Court is interpretation of judgements as well as Rule 5 of Rules, 1974 relied by both the parties.

8. To appreciate the present controversy, Rule 5 of Rules 1974 is being quoted hereinbelow:-

[5. Recruitment of a member of the family of the deceased.-(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.] [5A. Recruitment of member of the family of Police/P.A.C. Personnel who dies in May, 1973.-

Notwithstanding anything contained to the contrary contained in Rule 5 or in any other rule, the provisions of these rules shall apply in the case of members of the family of twenty-two police or per Provincial Armed Constabulary personnel who died as a result of disturbances in May, 1973, as they apply in the case of a Government servant during dying in harness after the commencement of these rules.]

9. Rule 5 of Rules, 1974 was interpreted by Division Bench of this Court in the matter of ***Smt. Premlata (Supra)*** and Court has opined that suitable appointment means appointment commensurate to the qualification.

10. I have perused the judgment of Apex Court in the case of ***Sushma Gosain (Supra)***. Relevant paragraph of the said judgment are quoted hereinbelow:-

"9. We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant."

11. This judgment of Apex Court does not deal with the interpretation of Rules 5 of Rules, 1974 as well as suitable employment. It only says that claim for appointment on compassionate ground there should have been delay and in case of unavailability of post, supernumerary post should be created to accommodate the applicant. Here, the post of class-IV is available in light of Government Order dated 17.6.2014, same has been offered to petitioner, which was refused by petitioner only on the ground that he is having higher qualification. Facts of the case is entirely different and not applicable in the case of petitioner.

12. I have also perused the judgment of Division Bench of this Court in the case of ***Smt. Premlata (Supra)***. Relevant paragraph of the said judgment are quoted hereinbelow:-

"A bare perusal of Rule 5 of the Rules of 1974 makes it crystal clear that appointment under Rule 5 aforesaid is required to be given on a suitable post. The term 'suitable' in Rule 5 aforesaid pertains to suitability of the person who desires for appointment and it has nothing to do with the post held by the deceased Government Servant. The suitability of the aspirant is required to be assessed on basis of the educational qualification and other eligibilities so possessed by such person. In the case in hand, the appellant-petitioner is having the qualification of Bachelors Degree in Arts as well as Bachelors Degree in Education.

Looking to the qualification aforesaid, appellant-petitioner is suitable to be employed on a post in Grade-III and there is no just and valid reason for not employing her in the grade aforesaid. Suffice to mention that it is not the case of the appellant-petitioner that no Class-III post is available in the entire Department of Police of Uttar Pradesh.

In view of it, we are of considered opinion that learned Single Bench erred while rejecting the writ petition on the count that the husband of the appellant-petitioner was working in Class-IV cadre and, therefore, appointment in Class-IV cadre is justified."

13. Division Bench of this Court has taken view that suitable employment means appointment commensurate to the qualification. Court has also opined that there is vacancy of Class-III post, therefore, same has to be taken to petitioner in that case.

14. Facts of the present case are slightly different to the case relied upon. In the present case, post of class-III is not vacant, therefore, facts of the present case is not similar with the judgment and order of Division Bench of this Court passed in the matter of ***Smt. Premlata (Supra)***.

15. Apart that, State Government has challenged the judgment of Division Bench

of this Court passed in the matter of ***Smt. Premlata (Supra)*** and Apex Court has reversed the said judgment with detailed finding. Relevant paragraph of this said judgment is being quoted hereinbelow:-

"10. Thus as per the law laid down by this court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased.

10.1 Applying the law laid down by this court in the aforesaid decisions and considering the observations made hereinabove and the object and purpose for which the appointment on compassionate ground is provided, the submissions on behalf of the respondent and the interpretation by the Division Bench of the High Court on Rule 5 of Rules 1974, is required to be considered

. 10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that 'suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. 'Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment. In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of ClassII or ClassI post and the deceased employee was working on the post of Class/Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.

10.3 In the present case as observed hereinabove initially the respondent applied for appointment on

compassionate ground on the post of Assistant Operator in Police Radio Department. The same was not accepted by the Department and rightly not accepted on the ground that she was not fulfilling requisite eligibility criteria for the post of Assistant Operator. Thereafter the respondent again applied for appointment on the compassionate ground on the post of Workshop Hand. The case of the respondent was considered, however, she failed in the physical test examination, which was required as per the relevant recruitment rules of 2005. Therefore, thereafter she was offered appointment on compassionate ground as Messenger which was equivalent to the post held by the deceased employee. Therefore appellants were justified in offering the appointment to the respondent on the post of Messenger. However, the respondent refused the appointment on such post.

11. In view of the above and for the reasons stated above, the Division Bench of the High Court has misinterpreted and misconstrued Rule 5 of the Rules 1974 and in observing and holding that the 'suitable post' under Rule 5 of the DyingIn Harness Rules 1974 would mean any post suitable to the qualification of the candidate and the appointment on compassionate ground is to be offered considering the educational qualification of the dependent. As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground.

12. In view of the above for the reasons stated above, present appeal succeeds. The impugned judgment and order passed by the Division Bench of the High Court dated 14.09.2018 in Special Appeal Defective (SAD) No.620 of 2018 is hereby quashed and set aside. Consequently the writ petition preferred by the respondent before the learned Single Judge being Writ Petition No.16009 of 2018 stands dismissed and the order passed by the learned Single Judge dated 31.07.2018 dismissing the writ stands restored. No costs.

16. This issue was again before the Apex Court in the matter of ***Suneel Kumar (Supra)***. Relevant paragraph of the said judgment is quoted hereinbelow:-

"10. At the same time, as far as the question relating to the entitlement as it were of the appellant to be considered to the post of Gram Panchayat Officer is concerned, it is without doubt a post borne in Class-III. The father of the appellant was working as a Sweeper borne in Class-IV post. We have noticed the view taken by this Court in Premlata (supra). In other words, the law as declared is to the effect that the words "suitable employment" in Rule 5 must be understood with reference to the post held by the deceased employee. The superior qualification held by a dependent cannot determine the scope of the words "suitable employment".

11. It is clear that the Annexure P-1 does not represent statutory Rules. We do not think we should be persuaded to take a different view as things stand. We cannot eclipse the dimension that the whole purport of the scheme of compassionate appointment is to reach immediate relief to the bereaved family. In such circumstances, the meaning placed on the words "suitable employment" bearing in mind the post held by the deceased employee cannot be said to be an unreasonable or incorrect view."

17. Apex Court had twice interpreted the Rule 5 Rules 1974 as well as suitable employment as referred herein. Apex Court has clearly held that "suitable employment"

in Rule 5 must be construed with the post held by the deceased employee and not by the higher qualification held by the dependent. View of the Apex Court is that compassionate appointment shall not be given upon a higher post than the post held by the deceased employee. Therefore, as on date, law of land is that legal heir cannot be given appointment on compassionate ground to a post higher than the post held by the deceased employee.

18. Now coming to the present case. Undisputedly father of petitioner was working on the Class-IV post and after his death, he has been offered employment on the post of Class-IV, which was refused by him on the ground that he is having qualification for the post of Class-III. Therefore, in light of interpretation of Rule 5 of Rules 1974 made by the Apex Court as well as this Court, petitioner is not entitled for the post of Class-III on compassionate ground.

19. Accordingly, the writ petition lacks merit and is **dismissed**. No order as to costs.

20. However, this order does not preclude the petitioner to file application for appointment on Class-IV post. In case any such application is filed by petitioner, same shall be considered and decided in accordance with Rules, 1974 as well as law laid down by this Court.

(2024) 3 ILRA 710
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 20031 of 2023
Connected with
Writ A No. 18909 of 2023

Committee of Management Hindu College Moradabad & Anr. ...Petitioners
Versus
Mahatma Jyotiba Phule Rohilkhand University, Bareilly & Ors. ...Respondents

Counsel for the Petitioners:
Sri Indra Raj Singh, Sri Adarsh Singh, Sri Pramod Kumar Singh

Counsel for the Respondents:
C.S.C., In Person, Sri Rohit Pandey

Service Law – Disciplinary Proceedings – Authority of Committee of Management – Dr. Sudha Garg, an Associate Professor appointed on the recommendation of the Higher Education Service Commission, challenged the Committee of Management's authority to initiate disciplinary proceedings, arguing that only the St. Government through the Director of Higher Education could do so – Held, under Statutes 14.03, 14.04, and 14.07 of the First Statute of Mahatma Jyotiba Phule Rohilkhand University, read with Section 31(1) of the U.P. St. Universities Act, 1973, the Committee of Management is the appointing and disciplinary authority for teachers in affiliated colleges, subject to Vice Chancellor's approval – The U.P. Higher Education Service Commission Act, 1980, governs only the selection process, not disciplinary matters, and its overriding effect under Section 30 does not extend to disciplinary proceedings, which remain under the University Act and Statutes. (Paras 12(a), 23, 25, 32, 34, 35, 41, 42)

Service Law – Principles of Natural Justice in Disciplinary Enquiry – Dr. Garg challenged the enquiry process, alleging denial of opportunity to cross-examine witnesses and access documents – Held, the enquiry report dated 30.07.2019 was vitiated due to procedural lapses, including failure to supply copies of witness St.ments and affidavits, denial of cross-examination opportunities, and lack of discussion on Dr. Garg's documentary evidence and replies – The enquiry committee's findings were not supported by adequate evidence,

particularly on charges related to delaying practical examinations and closing optional subjects, violating principles of natural justice as per Kumaon Mandal Vikas Nigam Ltd. and Salahuddin Ansari – The enquiry was deemed a farce, justifying its quashing. (Paras 12(b), 44, 47, 48, 49, 50, 51, 52, 54, 55, 59)

Service Law – Vice Chancellor's Role and Findings – The Committee of Management challenged the Vice Chancellor's order dated 04.10.2023, which reinSt.d Dr. Garg despite sustaining charges 1 and 6, arguing inconsistency – Held, the Vice Chancellor, under Statute 14.06(3), has the authority to review the enquiry process and findings for approval of punishment but erred in reinstating Dr. Garg while sustaining charges, as this contradicted the finding that no charges were proved – Given the enquiry's procedural flaws, the appropriate course was to remit the matter for a fresh enquiry rather than reinSt. – The Vice Chancellor's order and the enquiry report were quashed, with directions for a fresh enquiry. (Paras 12(c), 60, 61, 64, 65, 67, 68)

Writ Petitions Disposed Of .

Enquiry Report and Vice Chancellor's Order Quashed – Directions Issued for Fresh Enquiry.

List of Cases Cited :

1. P.VS Srinivasa Sastry Vs Comptroller and Auditor General , (1993) 1 SCC 419

2. Jai Jai Ram Vs U.P. St. Road Transport Corporation , (1996) 4 SCC 727

3. Kumaon Mandal Vikas Nigam Ltd. Vs Girja Shankar Pant & ors. , (2001) 1 SCC 182

4. Salahuddin Ansari Vs St. of U.P. & ors. , 2008 (3) ESC 1667 (All)

5. Subhash Chandra Sharma Vs U.P. Cooperative Spinning Mills & ors. , 2001 (2) UPLBEC 1475

6. St. of U.P. & anr. Vs T.P. Lal Srivastava , 1997 (1) LLJ 831

7. U.O.I. & ors. Vs Subrata Nath , (Supreme Court, recent judgment)

8. Air India Corp. Vs VSA. Rebellow , (case followed in Divisional Controller, Karnataka St. Road Transport Corporation Vs M.G. Vittal Rao)

9. Francis Klein & Co. (P) Ltd. Vs Workmen , (case followed in Divisional Controller, Karnataka St. Road Transport Corporation Vs M.G. Vittal Rao)

10. BHEL Vs M. Chandrasekhar Reddy , (case followed in Divisional Controller, Karnataka St. Road Transport Corporation Vs M.G. Vittal Rao)

11. Divisional Controller, Karnataka St. Road Transport Corporation Vs M.G. Vittal Rao , (2012) 1 SCC 442

12. Managing Director ECIL, Hyderabad Vs B. Karunakar , (1993) 4 SCC 727

13. Committee of Management, Muslim Inter College & anr.Vs St. of U.P. & ors. , 2023 (1) ADJ 308 (DB)

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

1. Heard Sri Indra Raj Singh, learned counsel for the petitioner in the present petition and as counsel for the respondent Committee of Management in connected Writ Petition being Writ A No. 18909 of 2023 as well and Sri Rohit Pandey, learned Advocate appearing for the University in both the matters and Dr. Sudha Garg, who has personally appeared being respondent no. 3 in present petition and being petitioner in connected Writ Petition being Writ A No. 18909 of 2023.

2. Writ A No. 20031 of 2023 has been filed by the Committee of Management of Hindu College Morabadabd whereas Writ Petition No. 18909 of 2023 has been filed by Dr. Garg, Associate Professor and Head of Departmental of Zoology at Hindu College Moradabad.

3. Dr. Garg is a caveator in Writ A No. 20031 of 2023 and pleadings have been

exchanged between the contesting parties including University. Both the writ petitions are directed against the order of Vice Chancellor dated 4.10.2023, and therefore, are being heard and decided together taking writ petition 20031 of 2023 as a leading petition.

4. Briefly stated facts of the case are that Dr. Garg, namely third respondent was placed under suspension by the Committee of Management of the institution vide order dated 18.2.2019 and the same day she was served with a chargesheet containing as many as eight charges. Dr. Garg right from the beginning has been questioning the authority of the Committee of Management to hold enquiry against her not only for the reason that charges were ill founded but also that Committee of Management was not entitled to hold any enquiry for she being appointed upon recommendation of Director of Higher Education. According to her, therefore, any enquiry could have been conducted only at the instance of State Government through Director of Higher Education. Dr. Garg submitted her reply to the charge sheet on 10.4.2019 denying all eight charges, but the enquiry committee after holding enquiry into the charges, returned findings to the effect that all the charges against Dr. Garg stood proved vide its report dated 30th July,2019. Dr. Garg was served with a show cause notice alongwith enquiry report on 3rd August, 2019 to which she submitted her reply on 14th August, 2019. The Committee of Management after having deliberations upon reply submitted by Dr. Garg found it appropriate to inflict upon her major penalty of dismissal/ termination from service by adopting resolution to this effect on 27th August, 2019, the same stood forwarded to the Vice Chancellor Mahatma Jyotiba Phule Rohilkhand University for its approval. The Vice Chancellor passed an order dated 25th August, 2022, which came to be challenged before this Court by Committee of Management as well as Dr. Garg vide Writ A No. 14616 of 2022 and 19389 of 2022 respectively. The order was set aside by this Court under its detailed judgment and order dated 17th July, 2023 and directions got issued to the Vice Chancellor to take decision afresh after giving personal hearing to the parties on a fixed date i.e. 11.8.2023. Dr. Garg was also directed to be paid subsistence allowance since her status as was during pendency of the disciplinary proceeding, was maintained as such and joining and payment of regular salary was held to be subject to the fresh decision by Committee of Management and the Vice Chancellor. Dr. Garg claimed to have appeared before Vice Chancellor with detailed reply afresh filed by her before Vice Chancellor on 5.8.2023. The Vice Chancellor proceeded to hear the matter on merits afresh and after hearing rival parties a passed final order on 4.10.2023 holding that Dr. Garg having not been found guilty of any of charges, approval could not be granted to the termination of her service as proposed by the Committee of Management and since determination of point nos. 2,3 and 4 have been made in her favour, Dr. Garg was held entitled to reinstatement with all consequential benefits. It is this above order that has been challenged by the Committee of Management as well as Dr. Garg in their respective writ petitions.

5. One of the arguments advanced by Ms. Sudha Garg appearing in present petition was that she having been recommended for appointment by Higher Education Service Commission for appointment in the institution in question, the Committee of Management may be a *de*

jure appointing authority for the purpose of giving appointment and joining to the petitioner but de facto power lies with the State to make recommendations. It is in this context she submitted that in view of Statute No. 14.05 of the First Statute of the University, there was no contract of employment as such stricto Sensu between her and the Committee of Management to attract provisions contained under the statute nos. 14.06 and 14.07- A .

6. She further submitted that chargesheet issued by the Manager/Secretary of the Committee of Management of the institution who was not competent to either hold enquiry or issue chargesheet.

7. The argument advanced by Dr. Garg appearing in person, was that she performed her duties honestly and to the best of her ability, knowledge and skill and her integrity was also certified as teacher and head of department but on account of lack of proper infrastructural facilities to be provided by the management, she felt compelled to suggest the students not to go for optional subjects of cytology or Entomology. She claimed to have had never any grudge against either management or colleagues but of course had the one against the system. She always tried to give best eduction to the students. She submitted her reply in detailed on 10.04.2019 to the charge-sheet served upon her on 18.2.2019, which was not considered by the enquiry officer and chages were not proved by evidence and the enquiry was also vitiated for want of reasonable opportunity of hearing. She had, as claimed, even demanded number of documents which were filed on behalf of the management in support of the charges that were led before the enquiry committee but neither any information in relation to all those documents was furnished, nor the documents demanded were supplied to her. She submitted that even copy of enquiry report was never supplied to her. It was further submitted that in respect of those witnesses who were examined, petitioner was not permitted to even cross examine them and claimed it to be fully reflected from the enquiry report that no date was fixed to cross examine and thus findings that were returned, were all ex parte. She further submitted that vice chancellor was justified in holding that enquiry was not held as per procedure prescribed and in the matter of oral enquiry for the purposes of inflicting a major penalty it was necessary for the enquiry committee to have fixed specific dates to permit cross examination of the witnesses that were produced by the management in support of the charges inasmuch students who had appeared with their respective Ids.

8. It was also argued that in the matter of departmental proceedings when the enquiry was to be conducted and charges to be framed as such that may invite major penalty, it was always to be looked into as to what kind of intrinsic material had been placed before the enquiry committee against the delinquent employee. It was further submitted that in support of basic charge that petitioner proceeded to close down the department to force students not to opt for optional subjects, there was not supportive material worth evidenciary value. It was further submitted that at no point of time any such material was placed even before the enquiry officer which could have proved that notice in question was got published by the petitioner. She further submitted that in the matter of departmental enquiry, she led evidence and was always trying her level best to rebut the allegations

and material evidence led in respect of the charge-sheet but enquiry committee failed to discuss all these details that were there in her reply and as such no finding has come to be returned in the finding part of the enquiry report that petitioner failed to hold examination as per instructions issued by the University. She also argued that those who came to be examined by submitting their written submissions before Enquiry Committee, were not permitted to be cross examined. If there were certain crucial witnesses in so far as running of the department and academic activities in department were concerned, petitioner was required to be given an opportunity to cross examine but being not given any opportunity, she submitted that entire departmental enquiry was biased and so report could not be sustained so as to maintain the order of dismissal/ termination from service. She also submitted that Vice Chancellor had not been justified in sustaining charge no. 1 and 6 inasmuch as her entire reply had not been considered by the Vice Chancellor in its correct perspective. She submitted that reply submitted by her before Vice Chancellor after matter was remitted by this Court in the first round of litigation and yet points raised in reply as point nos, 2.6, 2.7 and no. 2.8 have not been considered at all. She submitted that Vice Chancellor was also not justified in affirming the findings of enquiry report and sustaining the charge nos. 1 and 6.

9. Sri Rohit Pandey on the contrary has argued that Vice Chancellor was justified in passing order impugned, inasmuch as Vice Chancellor was well within his right to examine as to whether departmental enquiry was properly held and findings returned were proper or not and whether principles of natural justice were followed or not in the matter of holding of the departmental enquiry and disciplinary proceedings. He has taken the Court to the Statute 14.04 and 14.07 under which Vice Chancellor was well within his duty and power to examine all these aspects of the matter and cannot be faulted with for findings so returned in the order impugned. He, however, disputed the authority of the Vice Chancellor to interfere with the order of punishment and as an appellate authority and so it was appropriate to permit employer/ disciplinary authority to reconsider the imposition of punishment of a lessor degree.

10. Sri I.R. Singh, learned counsel for the petitioner submitted that in Writ Petition No. 20031 of 2023 Committee of Management has assailed the order of Vice Chancellor on three grounds: firstly on the ground that Vice Chancellor while sustaining charge no. 1 to 6, was not justified in finally returning a finding that none of charges was proved against delinquent employee, and therefore, she deserved reinstatement with salary. Second argument was that as per Statute 14.03 read with 14.04, where charge was proved against delinquent employee, Management was entitled to dismiss such employee from employment. He took the Court to relevant statutes for this purpose and also appendix B in which, according to him, point nos. 1 and 5 were established for misconduct upon which findings had come to be returned in the enquiry report, and therefore, Committee of Management was fully justified in dismissing the petitioner from service; and third, Vice Chancellor was not justified in holding that punishment was disproportionate in any manner to the charges proved .

11. Mr. Singh submitted, once integrity was held to be doubtful or

otherwise not worth certification by the employer, such an employee could always be dismissed from employment. He has argued that manner and method in which department was being run as had borne out from the departmental enquiry, the Committee of Management had no other option but to dismiss her from service. He submitted that charge of closing branches in respect of optional subjects like cytology or Entomology was serious one. He submitted that Dr. Garg ought to have contacted the employer for this purpose and better solution could have been obtained, instead of pasting any notice or forcing students as per findings returned in the enquiry report, not to go for these two optional subjects. He further submitted that Statute 31 prescribed Committee of Management to be appointing authority and Section 60-d authorized management to forward bills for the purposes of payment of salary and so it was a disciplinary authority.

12. Having heard learned counsel for the respective parties and Dr. Garg who appeared in person and having noticed the arguments so advanced and having perused the records, I find three points to be emerging in the present petition:

(a) Whether a recognized Committee of Management of recognized/affiliated degree College of University is empowered to institute disciplinary proceedings and hold departmental enquiry against teachers of the college who are appointed on recommendations of the Higher Education Service Commission;

(b) Whether the departmental enquiry held by the enquiry committee and consequential decision taken by the disciplinary authority has been as per procedure prescribed for and principles laid down in various authorities of the Supreme Court and this Court that govern departmental enquiries; and

(c) Whether Vice Chancellor is justified in holding that no charges have been proved to entitle Dr. Sudha Garg reinstatement even while sustaining charge no. 1 and 6 as per his own findings.

13. Taking the **first point '(a)'** I proceed to examine relevant provision of first statute of the University of Rohilkhand to which institution in question is affiliated to.

14. The first statute of the University is framed under U.P. State Universities Act, 1973 and provisions contained therein deal with teachers and employees of the University, their service conditions and administrative powers of the Chancellor, Vice Chancellor, Registrar, Dean of faculty, Dean of the Students Welfare, Head of Department, Laboratory, Proctor, the Court and also these powers in relation to the affiliated colleges that impart higher education to students.

15. Chapter II of the first statute starting with Statute No. 11.01 deals with affiliated colleges and Statute No. 11.05 provides for constitution of management of every college and its recognition and approval by the Vice Chancellor. Chapter XIV-A deals with conditions of service of teachers of the University and provides vide Clause 14.02-A that teacher shall be maintaining absolute integrity and further provides vide 14.03-A that any breach of provision of the Code of Professional Ethics mentioned in Statute 14.04 and code of conduct as set out in Appendix-C shall be deemed to be misconduct and then 14.04-A provides for removal/dismissal/

termination of a University teacher on any of the grounds mentioned therein. Statute 14.07-A (a) provides for suspension of teacher during pendency and/or in contemplation of enquiry into charges against him/her on the grounds mentioned in Sub-clause (a) to (e) of the Clause (1) of the Statute 14.04. The provisions as contained in Statute 14.02-A, 14.03-A, 14.04-A and 14.07-A are reproduced hereunder:

"14.02-A A teacher of the University shall at all times maintain absolute integrity and devotion to duty and shall observe the Code of Conduct professional ethics mentioned in Statute 14.34 and the code of conduct as set out in Appendix 'C, which shall form part of the agreement to be signed by the teacher at the time of appointment. (Section 49) (d)

14.03-A- A breach of any of the provisions of the Code of Professional ethics mentioned in statute 14.34 and code of conduct as set out in Appendix 'C' shall be deemed to be a misconduct within the meaning of Statute 14.04-A(1). (Section 49) (d)

14.04A- (1) A teacher of the University may be dismissed or removed or his services terminated on one or more of the following grounds:

(a) willful neglect of duty;

(b) misconduct,

(c) breach of any of the terms of contract of service;

(d) dishonesty connected with the University examinations;

(e) scandalous conduct or conviction for an offence involving moral turpitude;

(f) physical or mental unfitness;

(g) incompetence;

(h) abolition of the post.

(2) Except as provided by Section 31(2), not less than three months notice (or where notice is given after the month of October, then three months' notice or notice ending with the close of the session whichever is longer) shall be given on either side for terminating the contract of service or in lieu of such notice, salary for three months (or such longer period as aforesaid) shall be paid or refunded, as the case may be:

Provided that where the University dismisses or removes or terminates the services of a teacher, under clause (1) or when the teacher terminates the contract for breach of any of its terms by the University, no such notice shall be necessary:

Provided further that the parties will be free to waive the condition of notice, in whole or in part by mutual agreement.

14.07-A(1) The disciplinary committee referred to in statute 8.01 may recommend the suspension of a teacher during the pendency or in contemplation of an inquiry into charges against him/here, on the ground mentioned in sub-clause (a) to (e) of Clause (1) of Statute 14.04. The order of suspension, if in operation on the expiry of four weeks unless the teacher has in the mean time been communicated the charges on which the inquiry was contemplated.

(2) A teacher of University shall be deemed to have been placed under suspension-

(a) with effect from the date of his conviction, if in the event of a conviction for an offence, he is sentenced to a term of imprisonment exceeding 48 hours and is not forth with dismissed or removed consequent to such conviction;

(b) In any other case, for the duration of his detention, if he is detained

in custody, whether the detention is for any criminal charge or otherwise."

16. Thus above provisions are corresponding to the provisions as contained Section 49(d) and Section 21(1)(xvii) of the State Universities Act, 1973.

17. Similarly Chapter XV Part-1 of the first statute deals with the conditions of service of teachers of colleges. The provisions as contained in Statute 14.03(1), 14.04(1) and 14.07 are pari materia to the aforesaid quoted provisions. Accordingly, for ready reference and better appreciation, statute 14.03, 14.04 and 14.07 are reproduced hereunder:

"14.02. Except in the case of an appointment under Section 31(3) in a vacancy caused by the grant of leave to a teacher for a period not exceeding 10 months, teachers of an affiliated college shall be appointed on a written contract in form (1) or form (2) set out in Appendix 'C' as the case may be. (Section 49) (o)

14.03. (1) A teacher of the a College shall at all times maintain absolute integrity and devotion to duty and shall observe the Code of Professional Ethics mentioned in statute 14.34-A and Code of Conduct as set out in Appendix C, which shall form part of the agreement to be signed by the teacher at the time of appointment.

(2) A breach of any of the provisions of the Code of Professional Ethics mentioned in statute 14.34-A and Code of Conduct as set out in Appendix C shall be deemed to be misconduct within the meaning of Statute 14.04 (1). (Section 49) (o)

14.04(1) teacher of an affiliated college (other than a Principal) may be dismissed or removed or his services terminated on one or more of the following grounds:-

(a) willful neglect of duty;

(b) misconduct, including disobedience to the order of the Principal;

(c) breach of any of the terms of contract of service;

(d) dishonesty connected with the University or College examinations;

(e) scandalous conduct or conviction for an offence involving moral turpitude;

(f) physical or mental unfitness;

(g) incompetence;

(h) abolition of the post

(2) A principal of an affiliated college may be dismissed or removed, or his services terminated on grounds mentioned in clause (1) or on the ground of continuous mismanagement of the college.

(3) Except as provided by clause (4), not less than three months' notice (or where notice is given after the month of October, then three months' notice or notice ending with the close of the session whichever is longer)shall be given on either side for terminating the contract of service or in lieu of such notice, salary for three months (or longer period as aforesaid) shall be paid or refunded, as the case may be:

Provided that where the Management dismisses or removes or terminates the services of a teacher, under clause (1) or clause (2) or when the teacher terminates the contract for breach of any of its terms by the Management, no such notice shall be necessary:

Provided further that the parties will be free to waive the condition of notice, in whole or in part by mutual agreement.

(4) In the case of any other teacher appointed in a temporary or officiating capacity services shall be

terminable, by one month's notice or on payment of salary in lieu thereof, on either side.

14.07. The Management shall have the power to suspend a teacher during the pendency or in contemplation of an inquiry into charge against him, on the grounds mentioned in subclass (a) to (e) of clauses (1) of Statute 14.04. In an emergency, (in the case of teacher other than principal) this power may be exercised by the principal in anticipation of the approval of the Management. The Principal shall immediately report such case to the Management. The order of suspension if passed in contemplation of an inquiry shall cease at the end of four weeks of its operation unless the teacher has in the mean time being communicated the charge of the charges on which the inquiry was contemplated."

(emphasis added)

18. It is also important to refer to here Clause 14.16 of Chapter IV of first statute, which had been heavily relied upon by Dr. Garg in support of her arguments. The relevant provisions as contained under Clause 14.16 is reproduced hereunder:

" The provisions of clauses (2) to (4) of the Statute 14.07-A, 14.29-A to 14.34-A shall mutatis mutandis apply to every teacher of a college with the following modification, namely:-

(a) In clauses (2) to (4) of Statute 14.07-A, for the words "Vice Chancellor", and "Executive Council", the words "Management" and "Vice Chancellor" shall respectively be substituted.

(b) In statute 14.29-A for the words "Vice Chancellor", and Head of Department", the words "Principal" and the "Senior-most Assistant Professor in the Department" shall respectively be substituted."

19. The provisions as noted above do provide that provisions as contained under Statute 14.07-A , 14.29-A and 14.34-A shall *mutatis mutandis* apply to every teacher of the college with modifications that wherever Vice Chancellor and the Executive Council have been referred to will be Management and Vice Chancellor in respect of the colleges in so far as 14.07-A is concerned.

20. Sub-clause (b) is not of the importance here for the purpose of arguments advanced.

21. Now 14.07-A talks of Disciplinary Committee referable to Statute 14.04-A (a) to (e). Obviously it is power of suspension vested with Vice Chancellor and power of approval or dismissal from service vests with Executive Council, and therefore, in reference to an affiliated college, it will obviously be Committee of Management and for approval the Vice Chancellor. The Statute 14.07 does authorize the management to suspend a teacher during pendency or in contemplation of the enquiry. The said statute as prescribed under Pat-1 of Chapter XIV is already reproduced above

22. All these provisions as noted above and being discussed are referable to Section 49-(d) of the U.P. Universities Act, 1973 that provides for statutes and ordinances to govern the matters relating to University and its affiliated / associated colleges. Section 49-(d) is reproduced hereunder:

"[(d) the classification and recruitment (including minimum

qualifications and experience) of Principals and other teachers of the University and of affiliated and associated colleges, the maintenance by them of their annual academic progress report, the rules of conduct to be observed by them and their emoluments and other conditions of service (including provisions relating to compulsory retirement);"

23. It is worth noticing here that Section 31(1) does confer the power of appointment upon Committee of Management qua teachers and employees of the affiliated / associated colleges. Section 31(1) for ready reference is reproduced hereunder:

*"31. - **Appointment of Teachers-** (1) Subject to the provisions of this Act, the teachers of the University and the teachers of an affiliated or associated college (other than a college maintained exclusively by the State Government 2[* * *]) shall be appointed by the Executive Council or the Management of the affiliated or associated college, as the case may be, on the recommendation of a Selection Committee in the manner hereinafter provided.[The Selection Committee shall meet as often as necessary.]"*

24. Chapter XIV Part-1 itself empowers the management to dismiss or remove the services of the teachers subject to approval of the Vice Chancellor. 14.06 and the same in its entirety is reproduced hereunder:

"14.06 (1) No order dismissing, removing or terminating the services of a teacher on any ground mentioned in clause (1) or clause(2) of Statute 14.04 (except in the case of conviction for an offence involving moral turpitude or of abolition of post) shall be passed unless a charge has been framed against the teacher and communicated to him with a statement of the grounds on which it is proposed to take action and he has been given adequate opportunity-

(i) of submitting a written statement of his defense;

(ii) of being heard in person, if he so desires; and

(iii) of calling and examining such witnesses in his defense as he may desire:

Provided that the Management or the officer authorized by it on conduct the inquiry may, for sufficient reasons to be recorded in writing refuse to call any witness.

(2) The Management may, at any time, ordinary within two months from the date of the inquiry Officer's report pass a resolution dismissing or removing the teacher concerned from service, or terminating his services mentioning the grounds of such dismissal, removal or termination.

(3) The resolution shall forthwith be communicated to the teacher concerned and also be reported to the Vice-Chancellor for approval and shall not be operative unless so approved by the Vice Chancellor.

(4) The Management may, instead of dismissing, removing or terminating the service of the teacher, pass a resolution inflicting one or more of the following lesser punishments namely-

(i) Reduction of pay for a specified period

(ii) Stoppage of annual increments for specified period not exceeding three years

(iii) Deprivation of his pay not including subsistence allowance during a period of his suspension, if any.

The resolution by the management inflicting such punishment shall be reported by the Vice-Chancellor and shall be operative on when and to the extent, approved by the Vice- Chancellor."
(emphasis added)

25. Upon bare reading of the aforesaid provisions one can easily come to conclude that Committee of Management has been vested with power in the matters of imposition of punishment and deduction of pay of teachers subject to of course approval of Vice Chancellor as per Statute 14.06(3) and 14.06(4).

26. Thus there is no question to refer to any other provision so as to take out inference that disciplinary committee as is sought to be constituted under Statute 8.01, is the only disciplinary committee which is to be referred to for the purposes of holding disciplinary proceedings against a teacher of an affiliated college for taking disciplinary actions. The Disciplinary Committee that is referable to Statute 8.01 is in respect to the enquiry committee to be constituted for the purposes of teachers and employees of the University and not of its affiliated colleges.

27. It is necessary here to deal with argument raised by Dr. Sudha Garg that in view of the Section 30 of the U.P. Higher Education Service Commission Act, 1980, this new Act shall have overriding effect and shall prevail over and above contrary provisions contained under the U.P. State Universities Act, 1973, the first statutes and ordinances framed thereunder as well.

28. I have examined aims and object of the Higher Education Service Commission Act and find that the Act had been enacted by U.P. legislature to constitute a Service Commission for selection of teachers to be appointed in the affiliated and/or recognized colleges of the University. So basic object is to hold selection for appointment of teachers. Section 12 of the Act that came into force on 22nd November, 1991 as substituted by amending Act No. 2 of 1992, provides that every appointment as teacher of any college shall be made by management but in accordance with the provisions of the Act. Section 12 of the Commission Act is reproduced hereunder:

12. Procedure for appointment of teachers- (1) Every appointment as a teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

"Provided that a permanent teacher of an ffiliated or associated college, who has been appointed in accordance with the provisions of this Act and has completed (five years') service as such and who wishes to be transferred to any other college, may be transferred in the manner prescribed by rules from one college to another, only when the respective management of the colleges concerned give their consents in writing."

(1-a) Notwithstanding any decree or order of a court, a teacher who has been appointed as such by transfer from one college to another in pursuance of the Government Orders No. 429 Shiksha Mantri/Sattar-6-98-15-95, dated August 17, 1998 or No. 393/Sattar-1-9915(6)-99, dated October 28, 1999 shall be deemed to have been validly appointed as if the provisions of the principal Act as amended by the Uttar Pradesh Higher Education Services Commission (Second Amendment)

Act, 2004 were in force at all material times."

(2) The management shall intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation— The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject wise consolidated list of vacancies intimated to him from all colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a college shall be such, as may be determined by regulations : Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under sub-section (3) :

Provided further that the candidates shall be required to indicate their order of preference for the various colleges, vacancies wherein have been advertised.

29. From above quoted provisions, it comes out that upon occurrence of vacancy, the Manager would be intimating the same to the Director of of Higher Education, who in-turn would be notifying the same to the Commission for holding selection for appointment upon such vacancies. Sub-section 4 provides for procedure to be prescribed under the regulations to be framed under the Commission Act. Section 13 of the Act provides for recommendation of Commission qua selected candidates and selection is by way of advertising the vacancy, holding written examination and interview and submitting the final select list to the Director. The relevant provision of Section 13 of the Higher Education Service Commission Act is reproduced hereunder:

Recommendation of Commission 13. *(1) The Commission shall, as soon as possible, after the notification of vacancies to it under sub-section (3) of section 12, hold interview (with or without written examination) of the candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so for as practicable, twenty-five per cent more than the number of vacancies in that subject such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.*

(2) The list sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to subsection.

(4) of section 12, intimate to the management the name of a candidate from the list referred to in sub-section (1), for being appointed in the vacancy intimated under sub-section (2) of section 12. (4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2), and such vacancy has not been notified to the Commission under sub-section (3) of section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, where to abolition of any post of teacher in any college, services of the person substantively

appointed to such post is terminated, the State Government may make suitable order for his appointment in suitable vacancy, whether notified under subsection (3) of section 12 or not, in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under sub-section (3) or sub-section (4) or sub-section (5) to the candidate concerned."

30. The Commission is the selecting body in so far as post of teacher of affiliated degree colleges of the University is concerned and then recommendation shall be made by the Commission to the Director. Powers have been vested with Director to forward the names to the management to issue appointment order. Section 14 of the Commission Act makes it mandatory for the Committee of Management to issue appointment letter to the person whose name has been intimated by the Director and if such candidate does not turn up then management may ask for alternative name. Section 14 is reproduced hereunder:

"Duty of Management 14. *(1) The management shall, within a period of one month from the date of receipt of intimation under sub-section (3) or sub-section (4) or sub-section (5) of section 13, issue appointment letter to the person whose name has been intimated. (2) Where the person referred to in sub-section (1) fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such person is otherwise not available for appointment, the Director, shall on the request of the management intimate fresh name from the list sent by the Commission under sub-section (1) of section 13 in the manner prescribed.] "*

31. Director has been given administrative power to hold enquiry under Section 15 of the Commission Act in the event management does not offer appointment to such recommended candidate and so also the power to call for information in matters referred to under Section 11 for the purposes of selection and appointment of teachers. Commission may also inspect records. Section 15,17 and 18 are reproduced hereunder:

"Inquiry by Director 15. *(1) Where any person is entitled to be appointed as a teacher in any college in accordance with sections 12 to 14, but he is not so appointed by the management within the time provided therefor, he may apply to the Director for a direction under sub-section (2).*

(2) On receipt of an application under sub-section (1), the Director may hold an inquiry, and if he is satisfied that the management has failed to appoint the applicant as a teacher in contravention of the provisions of this Act, he may by order, require-

(a) the management to appoint the applicant as a teacher forthwith, and to pay him salary from the date specified in the order; and

(b) the principal of the College concerned to take work from him as a teacher.

(3) The amount of salary, if any due to such teacher shall, on a certificate issued by the Director, be recoverable by the Collector as arrears of land revenue.

16. *[* * *]*

17. Power to call for information- *The Commission may require the management of any college to submit*

such information or return regarding the matters referred to in section 11 as it thinks fit, and the management shall be bound to comply with the same.

18. Power to inspect records, register etc.- *The Secretary or any other officer authorized by the Commission shall have access to every record, register or document in possession of the management and he may enter at any reasonable time, any premises where he believes such record, register or document to be, and may inspect and take copies of relevant records or documents. "*

32. Besides the above, Commission Act also provides for exemption to minority institution vide Section 24 and then action against those not complying with direction of the Commission and powers of the Director vide Section 25 and then punishment also vide Section 26. Section 31 empowers the State Government to remove difficulties, Section 31-(b)(c) and (d) provide for regularization of certain appointments of teachers working on ad hoc basis and then Section 31-(e) provides for absorption of teacher, and further Section 32 also provides for State Government to frame rules to carry out purpose of the Act. Looking to all these sections referred to hereinabove as contained in Chapter III and V of the Commission Act, 1980 and so also entire scheme qua selection and appointment of teachers in affiliated and recognized colleges of the University, I find all these provisions to be clearly stipulating a precise manner and method in which selection has to take place as per regulations that are framed thereunder and it places the respective managements of the affiliated colleges and recognized colleges under an obligation to make appointment upon recommendation by the Commission. Thus in so far as selection of teachers of the affiliated and recognized college of the University is concerned, only this much power qua selection of teachers is now taken away from the Committee of Management and is vested with Higher Education Service Commission.

33. Now coming to Section 30 of the Commission Act that gives overriding effect. Section 30 of the Act is reproduced hereunder:

"30. Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything to the contrary contained in the Uttar Pradesh State Universities Act, 1973 or the Statutes or Ordinances made thereunder."

34. From bare reading of the provisions it becomes clear that overriding effect is only to the extent of provision of the University Act, 1973 and the Statutes and ordinances framed therein are found contrary to the Commission Act.

35. Since Commission Act only refers to selection of teachers against vacancies that are existing or may occur in future in affiliated and/or recognized degree college of the University, so to that extent only provisions contained under the State Universities Act or the first statute of the university or its ordinance stand superseded by Commission Act but for disciplinary proceedings and other incidental matters relating to condition of service etc. it would still be governed under the State Universities Act, 1973, the first statute of the concerned university and ordinance issued in that regard from time to time by university.

36. The provisions as have been noticed above and discussed clearly,

provide only for selection and recommendation to be made to the Committee of Management for making appointment. Thus power still lies with management to make appointments by issuing appointment order. This is something like Public Service Commission that holds selection and makes recommendation but power to appoint by issuing appointment orders lies with the Government. The Commissioner cannot become a disciplinary authority in respect of such employees, merely for selecting candidates and recommending them for appointment except in cases where it has been vested with power of prior approval in the matter of punishment.

37. From the perusal of the appointment letter of the petitioner, it is clear that this appointment letter of the petitioner dated 18th January annexed as annexure 2 to the writ petition no. 18909 of 2023 filed by Dr. Garg, had been issued by the Manager of Hindu College, Moradabad upon recommendation received from the Director of Higher Education, Allahabad vide letter dated 9.12.1999. This appointment, therefore, is completely in tune with the provisions as contained under Section 12 read with Section 13 and 14 of the Commission Act.

38. It is well settled law that in the absence of any rule an appointing authority would either be disciplinary authority or an authority above the appointing authority would be disciplinary authority but here the disciplinary authority is defined as Committee of Management in the statute of University.

39. In the case of **P.V. Srinivasa Sastry v Comtroller and Auditor General (1993) 1 SCC 419**, the Court has held that Article 311(1) provided that departmental proceeding must be initiated only by the appointing authority but it is always open for the Union or the State Government to make any rule prescribing for such proceedings against delinquent employee and the enquiry officer should not be subordinate to the appointing authority. Vide paragraph 4, the Court has held thus:

4. Article 311(1) says that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds civil post under the Union or a State "shall be dismissed or removed by an authority subordinate to that by which he was appointed". Whether this guarantee includes within itself the guarantee that even the disciplinary proceeding should be initiated only by the appointing authority? It is well known that departmental proceeding consists of several stages: the initiation of the proceeding, the inquiry in respect of the charges levelled against that delinquent officer and the final order which is passed after the conclusion of the inquiry. Article 311(1) guarantees that no person who is a member of a civil service of the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. But Article 311(1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, it is open to Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority. Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or protection to the holder of a civil post. But

in absence of any such rule, this right or guarantee does not flow from Article 311 of the Constitution. It need not be pointed out that initiation of a departmental proceeding per se does not visit the officer concerned with any evil consequences, and the framers of the Constitution did not consider it necessary to guarantee even that to holders of civil posts under the Union of India or under the State Government. At the same time this will not give right to authorities having the same rank as that of the officer against whom proceeding is to be initiated to take a decision whether any such proceeding should be initiated. In absence of a rule, any superior authority who can be held to be the controlling authority, can initiate such proceeding.

40. The above view has been reiterated by the Supreme Court in the case of **Jai Jai Ram v U.P. State Road Transport Corporation, (1996) 4 SCC 727**. The Court in this case has held that it is not contemplated under Article 311 that appointing authority should definitely be disciplinary authority. Herein in the case in hand when the first statute of the University itself provided, as discussed above, that the Committee of Management would be disciplinary authority, there is no further requirement to follow principle of any statute or rules which is not applicable in respect of teachers of college governed under the First Statute of the University.

41. In view of above, therefore, the argument raised by Dr. Garg that since she was selected by the Commission and appointed under the letter of the Director of Higher Education, therefore, management would not be disciplinary authority is not acceptable.

42. Admittedly there is no dispute of the Committee of Management in the institution and, therefore, **first point '(a)'** stands answered in favour of the Committee of Management and against Dr. Garg, the third respondent.

43. Now coming to **point '(b)',** I proceed to examine the procedure adopted in holding departmental enquiry as it was claimed by the Committee of Management to have been duly adopted by the enquiry committee contrary to what was argued by Dr. Garg. It is not disputed between rival parties that after reply was submitted by Dr. Garg, three member committee headed by Dr. Kishan Swaroop Bhatnagar, Senior Advocate of Civil Court, Moradabad, proceeded to enquire into the charges.

44. Looking to the enquiry report, I find that it records that delinquent employee, namely, Dr. Garg was given 5 days notice on 5th February, 2019 to submit reply to which Dr. Garg had submitted reply. However later on Dr. Garg demanded time vide letter dated 18th March, 2019 and then she submitted reply on 10.4.2019. The enquiry report records further that Dr. Garg was informed about 26.4.2019 as the date fixed for appearance before the enquiry committee and that she did appear and on that date the Lab Assistant Mr. A Naqvi and two teachers Dr. Deepa Seth and Dr. Shalini Rai had filed their statements on affidavit and Associate Professor Dr. J.K. Pathak could not give his statement as he was out of station, and so there was request by him for 7 days' time. It also records that one M.Sc. final Year student Shailesh Kumar S/o Moti Ram had also given his statement in writing against Dr. Garg and similarly two girl students of M.Sc. Final year, namely, Ms. Khatiza Mumtaz and Ms. Mumtaz Hussain also gave their joint statements on affidavit but no date is disclosed as to when these two students

gave their affidavits. It is also recorded that another student Ahmad Shane Rahman of M.Sc. Final year gave statement against Dr. Garg but date of submission of statement is again not disclosed. All these students gave their statements to the effect that they were not permitted to take admission in optional subject of their choice in Zoology. The enquiry report also records that one M.Sc. Part -2 student Divyanshi Tiwari gave her statement on affidavit that laboratory of M.Sc. Second year was closed and that she suffered great hardships and then students were required to give Rs. 2,000/- for submission of examination forms. One of the statements that has come in the enquiry report is that all these students had given their statements before Dr. Garg and were read out to Dr. Garg but Dr. Garg did not cross examine these students even after looking to their affidavits. The statements were also made by Dr. Deepa Sethi against petitioner regarding demand of Rs. 2000/- and that Dr. Garg had put lock on the laboratory. The enquiry report also records that Dr. Shalini Rai also gave her statement against Dr. Garg for spoiling atmosphere in the department by putting lock on the door of room of Professor J.K.Pathak. and Dr. Deepa Sethi respectively. The enquiry report further records that Dr. Sudha Garg submitted supplementary statement on 24.4.2019 and then second supplementary statement on 25.4.2019 and Dr. J.K.Pathak had submitted his written statement on 21.5.2019 in which he also stated that because of Dr. Garg a very tens environment was prevailing in the department. He had given statement that on 25th September, 2019 administrative work was taken from Dr. Garg. The enquiry report also records that Dr. Sudha Garg took time to submit her evidence, and therefore, she was given time to appear on 1.6.2019. The enquiry report also records that documents were given by eight students of the Zoology, department to the Committee of Management in the form of complaints and two complaints were received by registered post, which were all supplied to the enquiry committee for consideration. It records that on 1.6.2019 Dr. Sudha Garg demanded further time to submit reply and so 22nd July, 2019 was fixed and 22nd July, 2019 she appeared and submitted her notary affidavit, a compact disc and certain other documents. The enquiry report thereafter records that Dr. Garg had submitted documents of her skill and merits and had stated that Dr. K.C. Gupta being her relative was enimical to her and that was why Dr. Gupta was not cooperating with department. The enquiry report thereafter discusses also her statement of regret regarding change in the time table and that she had pasted notice in the interest of students but Dr. Garg did not, as per report, submit any explanation as to why she did not permit students to opt optional subject whereas they claimed that she forced 2nd year students to take admission in a subject as per her dictates. This enquiry report finally holds Dr. Garg to be guilty of charges.

45. After discussing the entire enquiry report, I find four dates to be relevant, i.e. 26.4.2019, 21.5.2019 and 2nd July, 2019. On 26.4.2019, it is claimed that all the departmental witnesses gave their statements on their affidavits though regarding teachers only the date shown to be 26.4.2019. 21.5.2019 is the date when Dr. Pathak gave statement and then on 2nd July, 2019, Dr. Garg submitted further explanation, her evidence and a compact disc etc.

46. The argument advanced by Dr. Garg has been that she was not given any

copy of the statements submitted before enquiry report whereas findings in the enquiry report are to the effect that two teachers gave their statement on 26.4.2019 and students had appeared before enquiry committee and gave their statements in presence of Dr. Garg and Dr. Garg refused to cross examine them. This argument of no opportunity to meet various affidavits and cross examine witnesses is contrary to what is recorded in the enquiry report, and therefore, it becomes necessary now to examine this aspect and go through the documents to that count brought on record. There is one such document appended to the writ petition filed by Dr. Garg and which formed part of her reply submitted to the Vice Chancellor. This is of 21st May, 2019 which records that Committee was fixing a date on the request of Dr. Garg for furnishing her evidence but this also records that Dr. Garg pleaded before the enquiry committee that she was not given any opportunity to cross examine witnesses and that she had demanded copies of the statements and evidence collected by the enquiry committee, and therefore, all these documents should be supplied to her. Relevant document dated 21st May, 2019 which appears to be ordersheet of the enquiry report, is reproduced hereunder:

"आज दिनांक21.05.2019 को जाँच कमेटी के द्वारा डॉ० सुधा गर्ग के निलम्बन के प्रकरण में महाविद्यालय के प्रागण में आकर डॉ० जे०के० पाठक के लिखित ब्यान लिये गये जिस पर डॉ० सुधा गर्ग के द्वारा जिरह करने से इन्कार किया। डॉ० सुधा गर्ग से सम्बन्धित सभी पत्राचार/प्रपत्र प्राचार्य के द्वारा जाँच कमेटी को दिये गये। डॉ० सुधा गर्ग के द्वारा अपना साक्ष्य देने हेतु समय मांगा उनकी सहमति से जाँच कमेटी के द्वारा दिनांक 01.06.2019 (शनिवार) को दोपहर 12:00 बजे की अगली तारीख नियत की जा रही है।

ह० अपठनीय ह० अपठनीय

ह० अपठनीय

(किशन स्वरूप भटनागर) (डॉ० वी०के० त्यागी)

(विनीत कुमार गौड़)

अध्यक्ष सदस्य सदस्य "

"Sir,

1. I never provided any opportunity of cross-examination of any of the witnesses who have submitted their statements & evidence till date.

2. I have the right to have true copies of all the statements/evidences collected so far by the Inquiry Committee in this matter.

3. I again submit to provide me the true copy of all collected statements/ evidences so that can cross-examine all the things & or submit my statement further in the matter.

I highly object this unfair proceedings of the Inquiry Committee."

Applicant
Sudha Garg
Signature
21.05.2019

47. The enquiry report is absolutely silent about this request letter made by the petitioner on 21st May, 2019 which is obviously subsequent to the recording of the statements of various students, as claimed, on 26.4.2019. It becomes, therefore, difficult to justify findings in the enquiry report that all the statements were read out to Dr. Garg and yet she refused to cross examine the witnesses. Had it been a correct fact that Dr. Garg was apprised with statements or the statements were made before her then all that the enquiry committee was required to record was that this request demanding various affidavits and documents and 21st May, 2019 was only with an intention to delay the enquiry. The ordersheet dated 21st May, 2019 only refers to the fact that Dr. Garg refused to even examine Dr. J.K.Pathak and no other witness has been named. Regarding 2nd July, 2019 as discussed in the enquiry report ordersheet is absolutely silent as to

any opportunity being afforded to the petitioner to cross examine teachers and the students and Dr. J.K.Pathak after they submitted reply in between 21st May, 2019 and 22nd July, 2019. It is therefore, clearly established that in the matter of oral enquiry held by the enquiry committee, petitioner though might have been given an opportunity to appear but she was never supplied with requisite documents that formed material evidence against her, nor was afforded any opportunity to cross-examine such witnesses. The finding part of the enquiry report to the contrary is based upon no evidence more especially in the face of there being no discussion as to ordersheet dated 21st May, 2019 that reflected that all those affidavits and documents furnished by teachers and students were required by the petitioner in order to to meet them.

48. Yet another aspect also worth noticing is that while Dr. Garg has questioned the findings in the enquiry report besides procedural part, her reply and documentary evidence placed and led before enquiry report were also not accorded due consideration. I find that in the entire enquiry report the documents furnished by Dr. Garg have not been discussed and the compact disc etc. has also not been discussed. The enquiry committee does refer to 27 documents supplied by petitioner but in the discussion part on internal page 11 of the enquiry report, there is no single reference as to what those 27 documents were all about.

49. The entire enquiry report only discusses affidavits filed by three teachers and students against petitioner but those evidence and documents in the absence of there being any cross examination by the petitioner and denial of opportunity for rebuttal, could not have been relied upon **(Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Others, (2001) 1 SCC 182).**

50. On the finding part of the enquiry report, I find, there are about eight charges levelled against Dr. Garg and what is interesting to notice is that basic charge was in respect of closing admission in the two optional subjects of Cytology and Entomology of the Zoology subject and that practical examinations were not held as per schedule. While enquiry report discusses the statement of students that they were forced not to take admission in these two optional subjects but as to the charge that practical examination of first and second year zoology students was unnecessarily delayed and were deferred against the schedule of the University, no evidence has been discussed. All the testimonies were of students of M.Sc. third year and not M.Sc. 1st and 2nd year in whose respect the charge was that their practical examination was delayed. Dr. Garg's reply to this above charge was that students were duly informed by affixing notice on 30th January, 2019 and then on 31st January, 2019 that practical will be held between 11th February, 2019 and 22nd February, 2019 and that practicals were so held but this reply has not been at all referred to.

51. Point No. 7(2) of the reply stated that Dr. Garg was doing every possible effort to comply with instructions of the University and that practicals were held and examiners were appointed and yet the entire enquiry report is absolutely silent about this reply. This reply was to the charge no. 6.

52. The other charges were regarding taking of Rs. 2,000/- etc. vide charge no. 3

but reply by Dr. Garg vide Point No. 3 to the above charge has also not been discussed except allegation of teachers whose testimonies/ statements were not supplied to the petitioner, and they were also not permitted to be cross examined. Cahrge Nos. 4 and 5 were not serious charges and except for the affidavit of J.K.Pathak whose affidavit was not supplied to the petitioner there was no further evidence. As far as charge nos. 7 and 8 are concerned, I do not find there to be any discussion except for the statement of certain teachers that because of the conduct of the Dr. Garg the atmosphere got spoilt and was not conducive to the academic activities on campus.

53. In paragraph 8 of the counter affidavit in reply to para 8 to the writ petition no. 20031 of 2023, Dr. Garg has taken a plea that entire enquiry committee held enquiry in violation of principles of natural justice without recording relevant facts and also not worth in the name of sustained charge. In reply to these averments, vide paragraph 9 of the rejoinder affidavit filed on behalf of petitioner's Committee of Management, only plain and simple denial has been made with further assertion that Committee of Management of the institution after giving opportunity of hearing to the petitioner against enquiry report passed the order considering the gravity of the charges.

54. Rule of discretion is to be rational and should not be arbitrary vague and fanciful. In other words, it should be legal and regular and must be based upon twin sound principles of justice and fair play. A fair hearing means giving a reasonable opportunity to an individual and in service jurisprudence to an employee who is sought to be proceeded against on the ground misconduct, indiscipline etc. The entire chain of events in the matter of departmental enquiry should not smack of any personal clash or adaptation of a method unknown to law in the hottest haste. Besides this, the procedure adopted should not give any room to any kind of bias whatsoever (Kumaon Mandal Vikas Nigam Ltd *(supra)*).

55. A division bench of this Court in the case of **Salahuddin Ansari v. State of U.P. and Others, 2008(3) ESC 1667 (All)** relying upon earlier judment of division bench in the case of **Subhash Chandra Sharma v. U.P. Cooperative Spinning Mills and Others, 2001 (2) UPLBEC 1475** held that if no oral enquiry is held it amounts to denial of compliance of principles of natural justice to the prejudice of the delinquent employee. Vide paragraph 12,13 and 14, the Court held thus:

12. An oral inquiry would be necessary even if the delinquent employee has a failed to submit reply to the charge-sheet. In State of U.P. and anotherv. T.P. Lal Srivastava, 1997 (1) LLJ 831, the Hon'ble Apex Court held that even if the employee has failed to submit reply to the charge-sheet, it would not absolve the Inquiry Officer from proceeding with the oral inquiry and submit report as to whether charge is proved or not. After recording of evidence, he will find out whether the charge is proved or not and submit report to the disciplinary authority.

13. The aforesaid exposition of law makes it clear that the delinquent em. ployee has a right to defend himself at different stages. When the charge-sheetis served upon him, he has a right to submit his reply and in case he does not submit reply, that itself would not amount to admission of guilt or that the charge stand

proved. If the allegations are serious and may result in major penalty, the disciplinary authority may appoint Inquiry Officer. Such Inquiry Officer, thereafter would have to fix a date for oral evidence. At this stage the delinquent employee has a right to participate in the oral inquiry, examine witnesses, if produced by the department, and after the evidence of the department is completed, the delinquent employee may produce evidence in his defence. During the course of oral inquiry, the delinquent employee has right to participate at every stage and date and if there is any failure in participation on one or more occasions, the Inquiry Officer cannot deny him participation from the subsequent stage. The delinquent employee can participate at subsequent other stage also. The Inquiry Officer, after completion of oral inquiry, will submit its report after discussing the entire material and if any charge is proved, the disciplinary authority shall supply a copy of the inquiry report to the delinquent employee and he would again have a right to submit reply to the inquiry report.

14. Non holding of oral inquiry, therefore, is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment."

56. I may observe at this stage that of course, there are limitations to exercise of power under Article 226 of the Constitution in matters of disciplinary proceedings where after enquiry, disciplinary authority has proceeded to impose punishment and the scope further gets narrowed down when it comes to test action of the authority as to nature of particular punishment as has been discussed and held in a recent judgment of the Supreme Court in the case of Union of India **(UOI) and Others v. Subrata Nath,** the Court in that case held that *" Once the gravity of the misdemeanour is established and the inquiry conducted is found to be consistent with the prescribed Rules and reasonable opportunity contemplated under the rules, has been afforded to the delinquent employee, then the punishment imposed is not open to judicial review by the Court. As long as there wqas some evidence to arrive at a conclusion that the Disciplinary Authority did, such an order becomes unassailable and the High Court ought to forebear from interfering. And " it is equally true that where there is bona fide loss of confidence of employer in his or her employee then order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity" (Vide Air India Corpn. v. V.A. Rebellow, Francis Klein & Co. (P) Ltd. v. Workmen and BHEL v. M.Chandrasekhar Reddy, followed in* ***Divisional Controller, Karnataka State Road Transport Corporation v. M.G.Vittal Rao (2012) 1 SCC 442).***

57. But question remains to be answered as in the case in hand, as to whether there was an enquiry conducted in consonance with the rules of procedure so as to close the doors of Court to interfere with final award of punishment and further the finding of bona fide loss of confidence and trust is vitiated for lack of transparency and fairness in procedure adopted to conduct enquiry. The case in hand is one such case where from the enquiry report it is apparent on the face of record that enquiry committee just referred to two basic events that oral evidence was accepted in presence of Dr. Garg and yet she refused to cross examine and then she also supplied written submissions, a large number of documents and a compact disc, but as I have discussed above, there is no

reference to the order-sheet dated 1.6.2019, inasmuch as there is no discussion on any documents furnished by her including the compact disc. This shows that the enquiry committee did not consider it appropriate to give Dr. Garg a reasonable opportunity by supplying documents required by her and to permit her to cross examine the departmental witnesses.

58. This in my considered view, therefore, is not a fair procedure and, thus, it becomes a case *'singularly singular'*, an expression used by the Supreme Court in Kumaon Mandal Vikas Nigam Ltd. *(supra)* case to interfere with. It is well said that each case is to be tested on its own facts and looking to the facts of the case in hand, I come to conclude that there is definite lack of transparency in terms of reasonable opportunity to delinquent employee to defend her case. There are departmental evidence utilized by the enquiry committee in bringing home the charges but opportunity of rebuttal by supplying those documents to the petitioner and opportunity of cross examination of the departmental witnesses were not provided inasmuch as the documentary and other material evidence submitted by petitioner in rebuttal, were not discussed at all.

59. In the resolution passed by the Committee of Management to terminate petitioner, I find only findings returned by enquiry committee to have been relied upon and so also in the entire order passed by the Manager of the college. Any subsequent opportunity by way of second show cause notice to delinquent employee would not fill up inherent lacunae on the part of the enquiry committee in conducting the enquiry. Thus, merely because Dr. Garg was given opportunity by way of second show cause notice would not make deficient enquiry good. Thus second point **'(b)'** stands answered in favour of Dr. Garg and against the Committee of Management to effect that entire enquiry conducted by enquiry committee was a farce.

60. Coming to the **third point**, as Committee of Management has assailed the order of the Vice Chancellor on the ground that once he himself sustained the charge nos. 1 and 6, he could not have returned a finding that Dr. Garg was not guilty of the charges and therefore, the order deserves to be set aside, I find substance in this argument.

61. Sri Rohit Pandey, learned counsel appearing for Vice Chancellor sought to defend the order on the ground that statute of University and the 1973 Act do permit Vice Chancellor to examine entire enquiry report while matter of approval was placed before him. He submitted that as far as point nos. 1,2,3 and 4 that has been referred to in the penultimate paragraph of the order of the Vice Chancellor, the same was referable to those 5 points that he had formulated to examine and test the correctness of the procedure adopted in holding enquiry and also as to correctness of the findings returned in the enquiry report so as to approve the order of dismissal or not. He submits approving authority has traces of appellate authority and therefore, approving authority was well within its right to examine the matter, might not as enquiry officer but as superintending and revising authority. He has referred to Statute No. 14.06(3) and 2.02 of the first statute of the University read with Section 13(1) and Section 49 and thus he submitted that Vice Chancellor can require any document .

62. Dr. Garg has assailed the finding part as far as 1st and 6th charges

are concerned and submitted that she did submit reply to the entire enquiry report to the Vice Chancellor, by way of reply to the notice, after the matter was remitted in the first round of litigation to Vice Chancellor but he failed to look into all those replies in their correct perspective.

63. I have examined the order of the Vice Chancellor and find that Vice Chancellor has though framed virtually four points to be examined by him but he did deal with finding part as far as charge nos. 1 and 6 are concerned, independently and sustained those charges.

64. In my considered view if the Vice Chancellor was of the view that 1st and 6th charges were sustainable then he was certainly not justified in holding that Dr. Sudha Garg was not guilty of any of the charges. However, it appears that Vice Chancellor since found there to be non compliance of natural justice, therefore, he proceeded to pass this kind of order reinstating the petitioner. In my considered view if there has been violation of principles of natural justice, then best course would have been to remit the matter to the authority concerned to re-hear the matter and pass order afresh in accordance with law.

65. In the instance case, since I have already held point no. 'b' in favour of Dr. Garg, in my considered view , the matter is required to be re-investigated by Committee of Management by setting up the enquiry committee as enquiry is not sustainable in law and deserves to be quashed.

66. In the case of **Managing Director ECIL, Hyderabad v. B. Karunakar, 1993 (4) SCC 727** the Court has held that if the Court for want of compliance of any mandatory procedural aspects finds that matter needs reconsideration, then the Court or Tribunal should remit the matter to that stage only. It has also been so held by a Division Bench of this Court in a recent judgment in the case of **Committee of Management, Muslim Inter College and Another v. State of U.P. and Others, 2023 (1) ADJ 308 (DB).**

67. In view of above, while I am quashing the order of Vice Chancellor dated 4.10.2022 reinstating the petitioner, I am also quashing the enquiry report dated 30th July, 2019 with following further directions:

i). Petitioner shall be restored to the status of the suspended teacher as she had been at the time of initiation of departmental enquiry and shall be paid subsistence allowance regularly including arrears, if any, due.

ii). The Committee of Management shall constitute enquiry committee afresh within three weeks from the date of presentation of certified copy of this order. However, this time, it will endeavour, as far as possible, to include teachers of the college and of the University, if possible, who are senior to Dr. Garg also as members of enquiry committee.

iii). The Committee of Management shall immediately supply all the documents that were available with earlier enquiry committee including affidavits of teachers and students to the petitioner within two weeks from the date of production of certified copy of the order and petitioner shall within two weeks thereafter submit her additional reply with reference to the documents so supplied.

iv). The enquiry committee shall fix a date and notify all those witnesses who were examined by the enquiry committee earlier to appear before it fixing a date, time and place and shall give opportunity to Dr. Garg to cross examine each of the witnesses but not more than 2 or 3 dates shall be fixed for this purpose.

v). After cross-examination procedure is completed, the enquiry committee shall submit report afresh to the Committee of Management within three months of its constitution who shall then proceed in accordance with and as per procedure prescribed meeting the requirements of second show cause notice, if enquiry committee held her guilty of charges, in the light of the judgment in **Managing Director ECIL, Hyderabad** *(supra)*. Final decision shall be taken by Committee of Management within next one month's time of submission of enquiry report.

68. In the circumstances, impugned order dated 4.10.2023 passed by respondent Vice Chancellor, Mahatma Jyotiba Phule Rohilkhand University Bareilly as well as resolution of the Committee of Management dated 27.08.2019 are quashed.

69. With these aforesaid observations and directions, these two writ petitions stand disposed of.

70. Cost made easy.

(2024) 3 ILRA 733
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 27144 of 2018

Dr. Rubina Iqbal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhanu Pratap Singh, Sri Arvind Srivastava, Sri Gajendra Singh, Sri Gautam Baghel, Sri Shivendra Rajwar

Counsel for the Respondents:
C.S.C., Sri Utkarsh Singh

Service Law – Disciplinary Proceedings – Compliance with Natural Justice – Petitioner, a Principal at a minority institution, challenged her termination order dated 17.09.2018, alleging non-compliance with procedural requirements under Regulation 37 of Chapter III of the U.P. Intermediate Education Act, 1921 – Held, the enquiry was vitiated due to failure to serve the petitioner with the suspension order, charge-sheet, enquiry report, or show cause notice, and no opportunity was provided for her to participate in the enquiry – The Committee of Management's counter affidavit failed to provide evidence of service of these documents or notices, violating principles of natural justice as mandated by St. of U.P. Vs T.P. Lal Srivastava and Managing Director ECIL, Hyderabad Vs B. Karunakar – The termination order and enquiry report were quashed. (Paras 2, 5, 7, 8, 9, 10, 13)

Service Law – Minority Institutions and Regulatory Compliance – The Committee of Management, a minority institution, argued that the termination was justified and that the petitioner failed to cooperate with the enquiry – Held, even in minority institutions, compliance with Regulations 35 to 37 of the U.P. Intermediate Education Act, 1921, is mandatory when they are regulatory in nature and do not infringe upon Article 30 rights – The absence of an enquiry sub-committee, lack of oral enquiry, and failure to issue a second show cause notice with the enquiry report violated statutory procedures, rendering the termination unsustainable, as supported by Girish Chandra Vs St. of U.P. and other cited cases. (Paras 9, 10, 11)

Service Law – Relief and Further Proceedings – The petitioner's termination

was set aside due to procedural irregularities – Held, the petitioner is entitled to reinSt.ment with salary, but the respondents were granted liberty to initiate fresh proceedings in accordance with the law, ensuring compliance with Regulations 35 to 37 and principles of natural justice. (Para 13)

Writ Petition Allowed .

Termination Order and Enquiry Report Quashed – Petitioner ReinSt.d with Liberty to Respondents to Proceed Afresh.

List of Cases Cited :

1. St. of U.P. & anr.Vs T.P. Lal Srivastava , 1997 (1) LLJ 831

2. Salahuddin Ansari Vs St. of U.P. & ors. , 2008 (3) ESC 1667 (All)

3. Subhash Chandra Sharma Vs Managing Director & anr. , 2000 (1) U.P.L.B.E.C. 541

4. Managing Director ECIL, Hyderabad & ors. Vs B. Karunakar & ors. , (1992) 3 JT (SC) 605

5. Girish Chandra Vs St. of U.P. & ors. , Civil Misc. Writ Petition No. 28553 of 2013, decided on 23.05.2023

6. Hardev Singh Vs Committee of Management, D.B. Santokh Singh Khalsa Inter College, Agra & anr. , 2004 (2) LBESR 1138

7. Tariq Ayyub Vs St. of U.P. & ors. , decided on 21.10.2010

8. Abha Saxena Vs St. of U.P. & ors. , 2012 (10) ADJ 484

9. Mohd. Ramzan Khan , AIR 1991 SC 471

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

1. Heard Sri Shivendra Rajwar, Advocate holding brief of Sri Gautam Baghel, learned counsel for the petitioner, Sri Utkarsh Singh, learned counsel appearing on behalf of fifth respondent and learned Standing Counsel for State-respondents and perused the record.

2. Petitioner before this Court is aggrieved by the order of termination of her services dated 17.09.2018 and the basic plea taken is that in spite of the fact that the petitioner was continuing in substantive appointment in the institution as Principal, she was never served at any point of time either with any suspension order, the charge-sheet or was permitted to participate in the alleged enquiry conducted by respondent-Committee of Management. She was even not served with any show cause notice as to the proposed punishment, nor was given any enquiry report. These pleadings have come to be raised in paragraph-24 of the writ petition to which reply has come to be made in paragraph-23 of the counter affidavit filed by fifth respondent, who is the Disciplinary Authority in the matter. Thus according to learned counsel for the petitioner, enquiry being de hors the procedure prescribed under Regulation 37 of Chapter XXXIII of the U.P. Intermediate Education Act, 1921 (for short, the Intermediate Act, 1921"), the order of termination of services of the petitioner cannot be sustained in law.

3. Sri Utkarsh Singh, learned counsel appearing on behalf of fifth respondent has sought to justify the order for the reasons assigned therein and has further taken the plea by way of defence set up in paragraphs-8 and 9 of the counter affidavit. He also submitted that reply to the pleadings raised in paragraph-24 of the writ petition, has been given in paragraph-23 of the counter affidavit.

4. Learned Standing Counsel has taken his stand that the management was required to furnish detail report to the

petitioner regarding the proceedings being drawn against her but the management being a minority institution choosen not to take the same. He submits that in the absence of any paper being submitted before the Education Authority, he could neither approve the order of termination, nor could he say anything in the matter. However, he submits that from the recital made in the order of termination, it is clear as is stated in the said order that the petitioner did not appear before the enquiry committee but there is no material discussed as to when she was offered opportunity to appear and she refused to appear. In the circumstances, he says that the principles of natural justices, appears to have not been complied with in the matter of imposition of major penalty.

5. Heard learned counsel for the respective parties and perused the record. I find that specific pleadings have been raised in paragrap-24 of the writ petition with regard to the fact that neither the order of suspension nor charge-sheet was ever served upon the petitioner. She was not even served with the enquiry report and straightway the order of termination has been passed. Paragraph-24 of the writ petition is reproduced hereunder:-

"24. That virtually the suspension order dated 07.08.2018 was not served on the petitioner and firstly only informed by the Peon of the College, that you are suspended and not permitted to enter into the College then the petitioner attended the hearing made by D.I.O.S. dated 06.09.2018 and 17.09.2018, and lastly on 17.09.2018 it was communicated on behalf of respondent no. 5 to the D.I.O.S. since the petitioner has been terminated hence the hearing on her suspension is not required; and as both the said papers i.e. Suspension and Termination were nor communicated to the petitioner hence knowing the correct facts she obtained the completed papers relating to the present matter in dispute form the D.I.O.S. under R.T.I. Act on 03.12.2018 and from the perusal of such papers the following fact came in the light-

(i) Neither the Suspension was communicated to the petitioner nor properly to the D.I.O.S. mentioning the fact as per Regulation 39 (1) of Chapter III of Regulation framed under Act, 1921

(ii) From the perusal of all the such papers provided by the office of D.I.O.S. to the petitioner on 03.12.2018 under R.T.I. Act, it also reveals the suspension was wrongly done by the respondent no. 5 without any report or resolution of committee of management.

(iii) Neither any charge-sheet containing in the suspension order nor the supporting documents were either provided to the D.I.O.S. or to the petitioner.

(iv) From the perusal of said papers it reveals that neither the enquiry into the matter in dispute was contemplated nor the date, time and place either of enquiry or for hearing of petitioner was ever Informed to the petitioner nor any papers/ documents were supplied for reply.

(v) Neither any copy of the complaint, report or enquiry report was ever been supplied by the respondent no. 5 or by the alleged enquiry officer and the petitioner abruptly terminated without providing mandatory opportunity of hearing.

(vi) Lastly it is submitted that the complete process from suspension to termination of the petitioner has been wrongly, illegally and malafiedly done by the Manager of the institution on the behest of one Sri Abdul Hasib (the real brother of the respondent no. 5) in utter violation of the provisions contained under Regulation

39 of Chapter III of Regulation framed under Act, 1921 and as such the complete process is illegal, wrong, malafied and liable to quashed."

6. In reply to paragraph-24 of the writ petition, it has come to be averred in paragraph-23 of the counter affidavit that this paragraph being repetitive in nature, reply already given in preceding paragraphs be read here also in reply and, therefore, the pleadings raised in paragraph-24 did not call for any reply. Paragraph-23 of the counter affidavit is reproduced hereunder:-

"23. That the content of the paragraph no. 24 of the writ petition are repetitive in nature which has been already replied in the preceding paragraphs of this counter affidavit, hence do not call for any reply."

7. However, so far the preceding paragraphs in the said counter affidavit are concerned, I do not find any statement anywhere in support of the stand that petitioner was ever served with any notice except certain dates mentioned regarding suspension in paragrap-22 and paragraph 25 and that the Committee of Management had requested the District Inspector of Schools to direct the petitioner to appear and face the enquiry. Paragraph-8 of the counter affidavit also states about the service of the charge-sheet but no material has been brought on record evidencing the factum of service of charge-sheet and enquiry report upon the petitioner, nor any document has been brought on record to demonstrate that the petitioner was ever served with any notice to appear before the Enquiry Committee. Paragraphs-8, 22 and 25 of the counter affidavit are reproduced hereunder:-

"8. That disciplinary proceeding was initiated against the petitioner by the institution and the services of the petitioner was suspended vide order dated 07/08/2018 and thereafter charge sheet was served upon the petitioner on 18/08/2018.

22. That the content of the paragraph no.23(iii) & (iv) of the writ petition are not admitted as stated hence denied. In reply thereto it is submitted that the management upon receiving notice dated 04.09.2018 calling for explaining the suspension of the petitioner by the manager on the date fix 06.09.2018 by the D.I.O.S. The management via letter dated 06.09.2018 informed the D.I.O.S. office that the manager of the institution was out of station for business of the institution. Hence, the manager couldn't appear before the D.I.O.S on the dates fixed for hearing by respondent no.4.

25. That the content of the paragraph no.26 of the writ petition are not admitted as stated hence denied. In reply thereto the inquiry committee headed by Mohd. Javed via letter dated 06.09.2018 has requested D.I.O.S to direct the petitioner to appear before the inquiry committee and cooperate with proceeding of inquiry committee. The copy of the same was also sent to the petitioner."

8. Thus, from the above pleadings raised in the writ petition and the counter affidavit filed by the Committee of Management, it bornes out clearly that there was never any effective service of charge-sheet upon which the enquiry is alleged to have been conducted by the Enquiry Committee constituted by the Committee of Management. Thus according to me, it cannot be said that proper procedure being religiously followed as prescribed for under Regulation 37 of the Act. To appreciate about the conduct of enquiry by the

Committee, it is relevant to reproduce Regulation 35 to 37 as contained under Chapter III of the Act, hence the same is reproduced hereunder:-

"35. शिकायत अथवा गम्भीर प्रकृति के आरोपों की प्रतिकूल आख्या प्राप्त होने पर समिति अध्यापकों एवं अन्य कर्मचारियों के विषय में प्रधानाध्यापक अथवा आचार्य अथवा प्रबन्धक को जाँच अधिकारी नियुक्त करेगी (अथवा प्रबन्धक स्वयं जाँच करेगा यदि समिति द्वारा नियमों के अन्तर्गत उसे यह अधिकार प्रतिनिहित हो गये है) और प्रधान अध्यापक अथवा आचार्य के विषय में एक छोटी उपसमिति होगी जिसे आख्या यथाशीघ्र प्रस्तुत करने के निर्देश होंगे।

चतुर्थ श्रेणी के कर्मचारियों के सम्बन्ध में प्रधानाचार्य/प्रधानाध्यापक द्वारा किसी वरिष्ठ अध्यापक को जाँच अधिकारी नियुक्त किया जायेगा।

36. (1) The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the employee charged and which shall be so clear and precise as to give sufficient indication to the charged employee of the facts and circumstances against him. He shall be required within three weeks of the receipt of the charge-sheet to put in a written statement of his defence and to state whether he desired to be heard in person. If he or the inquiring authority so desires an oral inquiry shall be held in respect of such of the allegations as are not admitted. At that inquiry such oral evidence will be heard as that inquiring authority considers necessary. The person charged shall be entitled to cross-examine the witnesses, to give evidence in person, and to have such witnesses called as he may wish: provided that the inquiring authority conducting the inquiry may for sufficient reasons to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof. The inquiring authority conducting the inquiry may also separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the employee.

(2) Clauses (1) shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him.

(3) All or any of the provisions of clause (1) may for sufficient reasons to be recorded in writing be waived where there is difficulty in observing exactly the requirements thereof and those requirements can in the opinion of the inquiring authority be waived without injustice to the person charged.

37. जाँच अधिकारी से कार्यवाही की आख्या तथा संस्तुति प्राप्त होने के बाद शीघ्र ही कर्मचारी को नोटिस देने के बाद प्रवन्ध समिति की बैठक कार्यवाही की आख्या तथा संस्तुति पर विचार करने के लिए होगी और उस मामले पर निर्णय लेगी। कर्मचारी को, यदि वह चाहता है समिति के समक्ष स्वयं उपस्थित होने की आज्ञा दी जायेगी जिससे वह अपना अभियोग प्रस्तुत कर सके और बैठक में उपस्थित किसी सदस्य द्वारा पूछे गये किसी प्रश्न का उत्तर दे सके। तब समिति पूर्ण आख्या समस्त सम्बन्धित कागज-पत्र सहित निरीक्षक अथवा मण्डलीय निरीक्षिका को उसके द्वारा प्रस्तावित कार्यवाही को स्वीकृत हेतु प्रेषित करेगी।

किन्तु, चतुर्थ श्रेणी के कर्मचारियों के सम्बन्ध में निरीक्षक निरीक्षिका को स्वीकृति हेतु कोई आख्या नहीं भेजी जायेगी। इनके सम्बन्ध में उपरोक्त सारी कार्यवाही नियुक्ति प्राधिकारी द्वारा की जायेगी।"

9. From a bare reading of the above provisions as contained under relevant regulations, it has come to be absolutely clear that there has to be a Enquiry Sub-Committee in the matter. However, even the enquiry report has not been brought on record by the Committee of Management so as to justify that there was a lawfully constituted Enquiry Committee as contemplated under Regulation 37 of the

Intermediate Act. Thus, it is writ large on the face of the record that proper procedure as prescribed for under the relevant regulation of the Intermediate Education Act, have not been followed by the Committee of Management. The legal position is very well clear that in the matter of imposition of major penalty, the disciplinary proceedings have to be conducted in accordance with the procedure prescribed for. Secondly, the second show cause notice is must, if the disciplinary authority proceeds to concur with the finds returned by the enquiry committee, a show cause notice along with copy of enquiry report be served upon the petitioner so as to invite her explanation to the findings returned in the enquiry report. Thirdly, all the more important aspect is that in the matter of imposition of major penalty there has to be oral enquiry held which the Supreme Court has repeatedly held in its various decision. The authorities of the Supreme Court as well as this Court are quoted hereunder:-

(I) In the case of **State of U.P. and another vs. T.P. Lal Srivastava; 1997** (1) **LLJ 831**, the Supreme Court has held that even if the employee has failed to submit reply to the Charge-sheet, it would not absolve the Inquiry Officer from proceeding with the oral inquiry to record the statement of the department witnesses and submit a report as to the proof of charge-sheet.

(II) In the case of **Salahuddin Ansari vs. State of U.P. and others; 2008 (3) ESC 1667 (Allahabad)**, a Division Bench of this Court has relied upon an earlier judgment in the case of Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, and held that if, no oral enquiry is held, it amounts to denial of principles of natural justice to the delinquent employee.*The Court has relied upon the judgment of Supreme Court in the case of* ***T.P. Lal Srivastava (Supra).***

(III) Regarding second show cause notice and supply of enquiry report, the Supreme Court has laid down guidelines in the judgment passed in the Case of ***Managing Director ECIL, Hyderabad and other vs. B. Karunakar and others (1992) 3 JT (SC) 605,*** *the Supreme Court in paragraphs 29 and 30 has observed as follows:-*

"29. Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. Hence the incidental questions raised above may be answered as follows:

(i) Since the denial of the report of the Inquiry Officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

(ii) The relevant portion of Article 311(2) of the Constitution is as follows:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."

Thus the Article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The Article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, and when the Inquiry Officer is not the disciplinary authority the delinquent employee will have the right to receive the Inquiry Officer's report notwithstanding the nature of the punishment.

(iii) Since it is the right of the employee to, have the report to defend himself effectively, and he would not know in advance whether the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the, report or not, the report has to be furnished to him.(iv) In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the inquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan Khan's case (AIR 1991 SC 471) (supra) should apply to employees in all establishments whether Government or non- overnment, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the Inquiry Officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule

of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to a "unnatural expansion of natural justice" which in itself is antithetical to justice."

"That in the matter of major penalty there has to be oral enquiry and that the delinquent employee should be permitted to participate in the enquiry to examine and cross examine the departmental witnesses."

10. As is reflected from the order of termination that there is no notice at all except for a date of notice without there being any time, date and place fixed to hold the enquiry, hence it can be safely presumed that no oral enquiry was held. In such circumstances, therefore, the order of termination of services of the petitioner cannot be sustained in law.

11. In view of the above, therefore, once the enquiry is held to be vitiated in law, the final order of termination of service also stands vitiated and, therefore, in these circumstances both the enquiry report and the final order of termination cannot be sustained. In my above view supported by the judgment of learned Single Judge placed before me, which is also relating to a minority institution in the case of **Girish Chandra vs. State of U.P. and others in Civil Misc. Writ Petition No. 28553 of 2013** decided on 23rd May, 2023, in which after recording the contention of learned counsel for the petitioner in paragraphs-8 and 9, the Court returned its finding in paragraphs-10 and 11 and allowed the writ petition. The relevant paragraphs- 8 to 11 are reproduced hereunder:-

"8. Sri Ashok Khare contends that the impugned order is violative of the procedure prescribed under Regulations 35 to 37 of Chapter III of the U.P. Intermediate Education Act, 1921 and not only this, the charges are absolutely frivolous and the inquiry has proceeded without giving notice to the petitioner. He further contends that none of the documents were provided which was demanded by him. On the contrary a reply was given by the Committee that the documents were not required as they were not necessary for the purpose of the reply. He, therefore, submits that the respondent - Committee of Management has proceeded to terminate the services of the petitioner without complying with the principles of natural justice and in clear violation of the provisions aforesaid. He has relied upon on three decisions of this Court in the case of ***Hardev Singh Vs. Committee of Management, D.B. Santokh Singh Khalsa Inter College, Agra, and another, 2004 (2) LBESR 1138,*** *the decision in the case of Tariq Ayyub Vs. State of U.P. and others, decided on 21.10.2010 and the third decision in the case of* ***Abha Saxena Vs. State of U.P. and others, 2012 (10) ADJ 484,*** *to urge that even in minority institutions where regulations have been violated, this Court can exercise its*

discretion under Article 226 of the Constitution of India and interfere with the order of termination.

9. Replying to the aforesaid submissions, Sri Pandey for the Management, submits that this is a case where the charges are serious enough that warrant the dismissal of the petitioner. The charges were inquired into in accordance with the procedure prescribed but the petitioner failed to cooperate with the inquiry and, therefore, the impugned order is justified. He submits that the reply, which was given by the petitioner, was absolutely unsatisfactory and not only this, his conduct in the institution is such that it is not desirable to continue him further in service. Sri Pandey, therefore, submits that the impugned order does not require any interference and the findings of fact recorded cannot be a subject matter of appeal before this Court under Article 226 of the Constitution of India.

10. Having heard learned counsel for the parties and having considered the decisions that have been cited at the bar, the interference in service matters relating to employees of minority institutions is limited to the extent of violation of procedure prescribed under the Regulations, provided they are regulatory in nature, and do not impinge upon the fundamental rights guaranteed under Article 30 of the Constitution of India. The judgments, which have been relied upon by the learned counsel for the petitioner, permits such interference and in the instant case the stand taken by the petitioner is that the inquiry is vitiated for non-compliance of Regulations 35 to 37 of Chapter III of the 1921 Act.

11. I have perused the impugned order and the opening part thereof clearly recites the manner in which the Management has proceeded to consider the non-cooperation of the petitioner as one of the grounds for proceeding to pass the termination order. Regulation 37 of Chapter III categorically requires that after the inquiry is concluded, the report of the Enquiry Officer shall be considered by the Committee of Management and then the Committee shall offer an opportunity to the delinquent employee to give his explanation and hear him before passing the order of termination. There is no material discussed by the District Inspector of Schools to enable this Court to infer that the Committee had ever complied with the said provision. The order impugned dated 15.4.2013 is clearly deficient on this aspect. Learned counsel for the respondent - Committee of Management, therefore, could not support the order on this ground. The impugned order, therefore, being in violation of Regulation 37 of Chapter-III of 1921 Act cannot be sustained."

12. In view of the above, this writ petition succeeds and is allowed.

13. The order of termination of service of the petitioner dated 17.09.2018 and the enquiry report dated 15.09.2018 are, accordingly, hereby quashed. The petitioner shall be reinstated in service and shall be paid salary. It is however, left open for the respondents to proceed afresh in accordance with law, if so desire.

(2024) 3 ILRA 741

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

HON'BLE BRIJ RAJ SINGH, J.

Writ A No. 28394 of 2021
connected with

Writ A No. 28396 of 2021

Lucknow Nagar Nigam ...Petitioner
Versus
State Public Service Tribunal & Anr. ...Respondents

Counsel for the Petitioner:
Vishal Kumar Upadhyay, Namit Sharma

Counsel for the Respondents:
Shikhar Anand, Amit Kumar, Birendra Kumar Yadav, Lalta Prasad Misra, M.K. Yadav, Satendra Jaiswal

Service Law – Validity of Appointment and Cancellation – Fraudulent Appointment Letters – The answering opposite parties no.2 (Rajesh Kumar and Sachin Kumar) challenged the cancellation of their appointment letters dated 27.08.2016, confirmed on 08.09.2017 and 27.11.2019, alleging wrongful termination – Held, the appointment letters were fraudulent, issued in connivance with Municipal Corporation officials, as the opposite parties did not figure in the final select list, having scored below the cut-off marks of 32 (24.14 and 30.86 respectively) – The cancellation was upheld after due opportunity of hearing, as fraudulent appointments confer no right to continue in service, supported by an FIR lodged against involved employees. (Paras 2, 3, 7, 18, 35, 41(1))

Service Law – Selection Process and Statutory Compliance – The opposite parties argued that the selection should have followed the U.P. Procedure for Direct Recruitment for Group 'C' Post Rules, 2002 – Held, the selection was governed by the Uttar Pradesh Municipal Corporation Act, 1959, and Uttar Pradesh Nagar Mahapalika Sewa Niyamavali, 1962, as the Municipal Corporation is an autonomous statutory body – The selection process complied with Section 107(3) and Rule 17 of the 1962 Rules, and the opposite parties' reliance on the 2002 Rules was misplaced, as these apply to St. Government employees, not Municipal Corporation employees. (Paras 8, 9, 19, 23, 30, 32, 41(4))

Service Law – Limitation on Appointments Beyond Advertised Vacancies – The opposite parties claimed a right to continue based on their appointment letters and over five years of service – Held, appointments beyond the advertised 72 backlog vacancies (40 OBC, 27 SC, 5 ST) are impermissible under Articles 14 and 16(1) of the Constitution, as established in Vivek Kaisth , Rakhi Ray , and Mukul Saikia – The select list was exhausted upon filling the advertised vacancies, and the opposite parties, not being in the final select list, had no right to claim appointment. (Paras 7, 9, 20, 21, 22, 31, 41(2))

Service Law – Estoppel in Challenging Selection Process – The opposite parties, having participated in the selection process without protest, challenged it after failing to secure appointment – Held, as per Karunesh Kumar , candidates who participate in a validly conducted selection process are estopped from challenging it after being unsuccessful, reinforcing that the opposite parties had no right to claim appointment beyond the advertised vacancies. (Paras 27, 41(3))

Judicial Review – Tribunal's Overreach Beyond Pleadings – The Tribunal allowed the claim petitions, relying on the 2002 Rules, despite no such pleading by the opposite parties – Held, the Tribunal erred in granting relief beyond the pleadings, violating settled law in Mrs. Akella Lalitha and Messrs. Trojan & Co. Ltd. , as courts cannot grant relief not prayed for, leading to a miscarriage of justice – The Tribunal's orders were set aside. (Paras 24, 25, 26, 42)

Writ Petitions Allowed.

Tribunal's Orders Dated 16.08.2021 Quashed – Claim Petitions Dismissed.

List of Cases Cited :

1. Vivek Kaisth & anr.Vs St. of H.P. & ors. , (2023) SCC

2. Rakhi Ray & ors. Vs High Court of Delhi & ors. , (2010) 2 SCC 637

3. Mukul Saikia & ors. Vs St. of Assam & ors. , (2009) 1 SCC 386

4. The St. of Uttar Pradesh Vs Karunesh Kumar & ors. , (2022) SCC Online SC 1706

5. Anmol Kumar Tiwari & ors. Vs The St. of Jharkhand & ors. , Civil Appeal Nos. 429-430 of 2021, decided on 18.02.2021

6. Vikas Pratap Singh & ors. Vs The St. of Chhattisgarh & ors. , Civil Appeal Nos. 5318-5319 of 2023, decided on 09.07.2013

7. Md. Zamil Ahmed Vs St. of Bihar & ors. , 2016 (34) LCD 3085

8. Mrs. Akella Lalitha Vs Sri Konda Hanumantha Rao & anr. , (2022) Live Law (SC) 638

9. Messrs. Trojan & Co. Ltd. Vs Rm.N.N. Nagappa Chettiar , AIR 1953 SC 235

10. Bharat Amratlal Kothari & anr.Vs Dosukhan Samadkhan Sindhi & ors. , AIR 2010 SC 475

11. U.O.I. & ors. Vs Ishwar Singh Khatri & ors. , (1992) Supp 3 SCC 84

12. Gujarat St. Deputy Executive Engineers' Association Vs St. of Gujarat & ors. , (1994) Supp 2 SCC 591

13. St. of Bihar & ors. Vs The Secretariat Assistant S.E. Union 1986 & ors. , AIR 1994 SC 736

14. Prem Singh & ors. Vs Haryana St. Electricity Board & ors. , (1996) 4 SCC 319

15. Ashok Kumar & ors. Vs Chairman, Banking Service Recruitment Board & ors. , AIR 1996 SC 976

16. St. of Punjab Vs Raghbir Chand Sharma & ors. , AIR 2001 SC 2900

17. Anupal Singh , (referred in Karunesh Kumar)

18. Madan Lal Vs St. of J&K , (1995) 3 SCC 486

19. K.H. Siraj Vs High Court of Kerala , (2006) 6 SCC 395

20. U.O.I. Vs S. Vinodh Kumar , (2007) 8 SCC 100

21. Chandra Prakash Tiwari Vs Shakuntala Shukla , (2002) 6 SCC 127

22. Sadananda Halo Vs Momtaz Ali Sheikh , (2008) 4 SCC 619

23. Om Prakash Shukla Vs Akhilesh Kumar Shukla , 1986 Supp SCC 285

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Both the writ petitions under Article 226 of the Constitution of India have been filed seeking quashing of the impugned judgement and orders dated 16.08.2021 passed by the State Public Services Tribunal (for short "the Tribunal"), whereby the claim petitions filed by Rajesh Kumar and Sachin Kumar (hereinafter referred to as "the answering opposite parties no.2") impugning the orders dated 27.08.2016 along with consequential orders dated 08.09.2017 and 27.11.2019 cancelling their appointment letters, have been allowed.

Brief Facts:-

2. Nagar Nigam, Lucknow issued an advertisement to fill up 72 backlog posts for clerical cadre under Other Backward Class, Scheduled Caste and Scheduled Tribe categories, which includes 40 posts for Other Backward Class category, 27 posts for Scheduled Caste category and 5 posts for Scheduled Tribe category. In the advertisement, the requisite qualification has been prescribed that the candidate should have possessed Intermediate qualification with 25 words per minute Hindi typing speed. In pursuance of the

aforesaid advertisement, answering opposite parties no.2 applied from Other Backward Class and Scheduled Caste category and cleared the written examination. Thereafter, call letters were issued to the answering opposite parties no.2 for typing test vide letter dated 13.10.2009. Answering opposite parties no.2 were successful in typing test and, therefore, they were called for interview on 12.4.2010 and 24.4.2010 respectively. Thereafter, select list was prepared by the selection committee and the cut off marks for selection was 32 for Other Backward Class and Scheduled Caste categories, whereas answering opposite parties no.2 had secured 24.14 and 30.86 marks respectively, therefore, they were not selected. However, surprisingly answering opposite parties no.2 were issued appointment letters on 26.2.2011 in spite of the fact that they were not selected and they were given the joining on 9.8.2011 and 6.9.2011 respectively.

3. An FIR at Case Crime No.588 of 2013, under Section 408 IPC, Police Station Hazratganj, District Lucknow came to be lodged on 28.12.2013 against the employees of the Nagar Nigam, who were involved in committing the fraud in issuing fake appointment letters to the answering opposite parties no.2 and others. On coming to know the factual situation that answering opposite parties no.2 were working though they were not selected, but their appointment letters were cancelled by the competent authority vide order dated 27.8.2016.

4. Aggrieved by the aforesaid orders, answering opposite parties no.2 filed Writ Petition Nos.21568 (SS) of 2016 and 22118 (SS) of 2016 respectively before this Court. The said writ petitions were disposed of by this Court vide order dated 28.9.2016 with the direction that answering opposite parties no.2 would be afforded an opportunity of hearing by issuing a show cause notice along with a copy of the select list and, thereafter, appropriate order would be passed. In compliance of the order dated 28.9.2016, show cause notices were issued to answering opposite parties no.2 on 27.10.2016, to which they filed reply on 13.12.2016 and 19.12.2016 respectively. After considering the reply and affording opportunity of hearing to answering opposite parties no.2, the competent authority passed the order on 8.9.2017, by which the order of cancellation of appointment letters of answering opposite parties no.2 were confirmed.

5. Feeling aggrieved against the orders passed by the competent authority, answering opposite parties no.2 preferred departmental appeals before the Commissioner, Lucknow Division, Lucknow, which too were rejected vide order dated 27.11.2019. Answering opposite parties no.2 challenged the respective orders i.e. 27.8.2016, 8.9.2017 and 27.11.2019 before the Tribunal by way of Claim Petition Nos.2174 of 2019 and 2199 of 2019 respectively.

6. The Nagar Nigam filed written statement in the claim petitions by giving para-wise reply and after hearing the parties and perusing the material on record, the Tribunal allowed both the claim petitions by means of the impugned judgement/orders. Hence the present writ petitions have been filed by the petitioner.

Submissions on behalf of the petitioner

7. Sri S.C. Mishra, learned Senior Advocate assisted by Sri Namit Sharma,

learned counsel for the petitioner has submitted that an advertisement was issued on 13.11.2008 for filling up 72 backlog posts of clerical cadre (40 for OBC category, 27 for SC category and 5 for ST category). He has further submitted that for Other Backward Class category, 4368 candidates appeared at the time of typing test, out of which 939 candidates were declared successful for interview. The interview was held and the names of 40 candidates figured in the select list prepared by the selection committee and the opposite party no.2 (Rajesh Kumar) was not selected as he scored 24.14 marks, which was below the cut off marks i.e. 32 marks. Similarly, 4701 candidates applied in the category of Scheduled Caste, out of which 1173 candidates were declared successful for interview, including opposite party no.2. However, after completion of interview process, the final select list was prepared and 27 candidates were selected under the Scheduled Caste category and opposite party no.2 (Sachin Kumar) was not selected as he scored 30.86 marks, which was below the cut off marks i.e. 32 marks. It has further been submitted that average marks were awarded by calculating the marks given by all members of the committee.

8. Learned counsel for the petitioner has further submitted that answering opposite parties no.2 managed their appointment letters by playing fraud in connivance with certain employees of the department, against whom an FIR was also lodged. The appointment letters obtained by the answering opposite parties no.2 are fraudulent papers and on the basis of which they cannot claim any right to continue in service because they were not selected in the merit list. It has also been submitted that learned counsel for the answering opposite parties no.2 has wrongly relied upon the U.P. Procedure for Direct Recruitment for Group 'C' Post (Outside the Purview of the U.P. Public Service Commission) Rules, 2002 and amended in 2003 (hereinafter referred to as "the Rules, 2002") for the present recruitment as the Municipal Corporation is an autonomous statutory body having its own Act i.e. Uttar Pradesh Municipal Corporation Act, 1959 (for short "the Act, 1959") and the Rules i.e. Uttar Pradesh Nagar Mahapalika Sewa Niyamavali, 1962 (for short "the Rules, 1962"), which are holding the field for selection.

9. Lastly, it has been submitted by the learned counsel for the petitioner that 72 backlog vacancies have been filled up in pursuance of the procedure envisaged under Section 107(3) of the Act, 1959 read with Rule 17 of Rules, 1962. The selection is based on the basis of transparent open procedure as per statutory requirement and standard. The answering opposite parties no.2 were not successful in the selection and their names do not find place in the select list, therefore, their appointment *de hors* the Rules and they cannot claim any right to continue in the department in absence of valid appointment letters.

10. In support of his contentions, learned counsel for the petitioner has placed reliance on the following judgements:-

1. ***Vivek Kaisth and another vs. State of Himachal Pradesh and others,*** reported in (2023) SCC;

2. ***Rakhi Ray and others vs. High Court of Delhi and others,*** reported in (2010) 2 SCC 637;

3. ***Mukul Saikia and others vs. State of Assam and others,*** reported in (2009) 1 SCC 386; and

4. ***The State of Uttar Pradesh vs. Karunesh Kumar and others***, reported in (2022) SCC Online SC 1706

Rival submissions on behalf of opposite parties no.2

11. Dr. L.P. Misra, learned counsel for opposite parties no.2 has submitted that answering opposite parties no.2 have not committed any fraud or misrepresentation, rather they were issued the appointment letters and thereafter they joined their services. Their names also figured in the seniority list and they had worked for more than five years in the department. Services of answering opposite parties no.2 have been dispensed with on the ground that they were not selected and their names do not find place in the select list though answering opposite parties no.2 had appeared in interview after passing out the written examination and they were also issued the appointment letters.

12. Learned counsel for opposite parties no.2 has further submitted that the Tribunal has passed well reasoned orders after summoning the records of the selection committee and the Tribunal found that answering opposite parties no.2 were appointed as per the terms and conditions enumerated in the advertisement and as per the provisions of the Rules, 2002. Learned counsel has also submitted that the selection was held as per the Rules, 2002 and as per the terms and conditions mentioned in the advertisement.

13. Learned counsel for answering opposite parties no.2 by placing reliance on the advertisement dated 13.11.2008, has submitted that in the advertisement itself, it is mentioned that the selection will be made in accordance with Rules, 2002. He has further submitted that procedure for selection by the petitioner was adopted under Rules, 2002 and the petitioner has not produced any relevant record indicating that any selection had taken place as per the Rules, 2002.

14. The other argument advanced by the learned counsel for the opposite parties no.2 is that the opposite parties no.2 had worked for more than five years in the department and they did not play any fraud, therefore, they are entitled to continue their services. The appointment letters were issued and the opposite parties no.2 were placed in the tentative seniority list.

15. In support of his contention, learned counsel for the opposite parties no.2 has placed reliance on the following judgements:-

1. Civil Appeal Nos.429-430 of 2021, Anmol Kumar Tiwari and others Vs. The State of Jharkhand and others, decided on 18.02.2021;

2. Civil Appeal Nos.5318-5319 of 2023, Vikas Pratap Singh and others Vs. The State of Chhattisgarh and others, decided on 9.7.2013;

3. Md. Zamil Ahmed Vs. State of Bihar and others, 2016 (34) LCD 3085

16. We have heard learned counsel for the petitioner and the learned counsel for the opposite parties no.2.

17. For ascertaining the correct facts and proper decision of the cases, we have summoned the original record pertaining to the selection in question and the same has been perused.

Analysis on the submissions of the learned counsel for the petitioner

18. The argument of learned counsel for the petitioner that the answering opposite parties no.2 have no right to continue in the department as they were not selected, has force for the reason that after perusing the original record, we noticed that in the final select list, 40 candidates were recommended from the Other Backward Class category and 27 candidates from the Scheduled Caste category, in which names of answering opposite parties no.2 did not figure. The appointment letters issued to the opposite parties no.2 are fictitious documents and the same were obtained in connivance with the officials of the Municipal Corporation. Once opposite parties no.2 were not selected and their names did not find place in the final select list, there was no occasion to issue the appointment letters to continue them in the department for more than five years.

19. The argument of learned counsel for the petitioner that the selection has been held in pursuance of the provisions contained in Section 107 of the Act, 1959 read with Rule 17 of Rules, 1962, has also force as the law is settled that a thing should be done in a manner it is provided to be done under law and no other manner. The Municipal Corporation is a legal entity and has got its own Act and the Rules, wherein the procedure for selection is envisaged leaving no scope to opposite parties no.2 to claim that the selection was required to be done in consonance with Rules, 2002.

20. In the case of ***Vivek Kaisth*** (supra), which has been relied upon by the learned counsel for the petitioner, it is provided that the appointment can only be made against the vacancies which have been advertised and not beyond. Paragraphs 32, 33 and 34 of the aforesaid case are extracted herein-below:-

*"32. In **Rakhi Ray** & Ors. v. High Court of Delhi & Ors. (2010) 2 SCC 637, the practice of making appointments on future vacancies from the waiting list was held to be wrong. "In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/ waiting list becomes meaningless and cannot be pressed in service any more"3.*

33. We are referring to the position of law on "waiting list" because one of the arguments of the appellants (in connected appeals) before us is that, since in any case there was a direction in Malik Mazhar-2 for having a "waiting list", therefore the names of those two appellants ought to have been considered as names from the "waiting list". In our opinion, this cannot be done, as the question would still remain whether selection/appointment can be made on vacancies, which were never advertised, apart from the fact that this would in any case go against the very concept of a 'waiting list' that we have explained above. The vacancies on which the appointments have been made could not be anticipated Para 12 at the time of advertisement (February 1st, 2013), and hence these vacancies were not advertised. These two vacancies were in fact, created on 18.03.2013 i.e., after the notification of vacancies on 01.02.2013. These were the "future vacancies", which earlier could fall under the "C" category given in Malik Mazhar but were deleted in Malik Mazhar-2. These vacancies technically could only be filled next year and should have been notified by January 15th, 2014 as per the directions in Malik Mazhar. The argument of the appellants (in connected appeals), particularly against the present appellants,

that had there been a waiting list they could have been considered for appointment in that category for these vacancies, in our opinion, is a complete misunderstanding of the concept of a "waiting list".

34. To sum up the position of law as it stands, once clear and anticipated vacancies have been advertised, appointments can only be made on these vacancies. Vacancies which could not be anticipated before the date of advertisement, or the vacancies which did not exist at the time of advertisement, are the vacancies for the future i.e., next selection process. Malik Mazhar mandates yearly selection/appointment on the post of Civil Judge (Junior Division). There is a time line fixed, and 'vacancies' have to be declared on January 15th of each year. The process has to be completed by October of the same year. Once this is followed, as it ought to be, the object sought to be achieved (under the guidelines given in Malik Mazhar), of timely filling of judicial vacancies is achieved."

21. The second case which has been relied upon by the learned counsel for the petitioner is ***Rakhi Ray*** (supra), in which it is held that any appointment made beyond the number of vacancies advertised, is without jurisdiction. Paragraphs 7, 10, 11, 12 and 13 of the aforesaid case are extracted herein below:-

"7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide Union of India & Ors. v. Ishwar Singh Khatri & Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors. (1994) Supp 2 SCC 591; State of Bihar & Ors. v. The Secretariat Assistant S.E. Union 1986 & Ors AIR 1994 SC 736; Prem Singh & Ors. v. Haryana State Electricity Board & Ors. (1996) 4 SCC 319; and Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board & Ors. AIR 1996 SC 976).

10. In State of Punjab v. Raghbir Chand Sharma & Ors. AIR 2001 SC 2900, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:– "With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of

the person appointed from the panel or any other vacancies arising subsequently."

*11. In **Mukul Saikia** & Ors. v. State of Assam & Ors. AIR 2009 SC 747, this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.*

12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/ advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

13. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room."

22. Similar view has been taken in the case of ***Mukul Saikia*** (supra), in which the Supreme Court has reiterated the legal position to the extent that the State cannot appoint more persons than the number of vacancies advertised. Paragraphs 33, 43 and 44 of the aforesaid case are extracted herein-below:-

"33.At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The selection list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The fact that evidently and admittedly the names of the appellants appeared in the select list dated 17.07.2000 below the persons who have been appointed on merit against the said 27 vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not entitled to claim any relief for themselves. The question that remains for consideration is whether there is any ground for challenging the regularization of the private respondents.

"43. Annexure-1 attached to Service Order, 1994 contains class of posts, cadre of posts, cadre strength, scale of pay

and qualifications & experience for the service. At serial No. 3, in Class II the total cadre strength of CDPOs has been shown as 68 in the pay scale of Rs.1635-3950/-. Column 6 of Annexure I prescribes that 40 per cent of the posts of CDPOs have to be filled up by promotion from amongst the persons who have rendered 10 years of continuous service in the cadre of ACDPOs/Assistant Superintendent Homes and Allied Cadre and 60 per cent by direct recruitment. The private respondents, no doubt, were appointed on ad hoc basis and admittedly they have not completed 10 years of continuous service in the cadre of ACDPOs, but the State of Assam, with the approval of the Cabinet, decided to regularize the services of the appellants as a special case by giving relaxation under para 11 of the Service Order. Therefore, the decision of the Cabinet pursuant whereof the State Government issued Notification cannot be held to be arbitrary and irrational. The appellants fall in different categories and they have no enforceable right to challenge the regularization of the private respondents who have been regularized against the vacancies meant for promotional quota. In their writ petition, they have prayed for their appointment because their names were included in the select list by the APSC against the direct quota. The State Government appointed 27 persons in order of merits out of the select list prepared by the APSC, as such the appellants being selectees cannot claim appointment as a matter of right in excess to the advertised vacancies.

44. It is well settled law that filling up of the vacancies over and above the number of vacancies advertised would be violative of Articles 14 and 16 of the Constitution of India. Mere inclusion of the appellants in the select list of the direct appointees does not confer any right on them to be appointed against the vacancies reserved for promotees."

23. The argument advanced by the learned counsel for the petitioner that the Tribunal travelled beyond the pleadings of the claim petitions filed by opposite parties no.2 as there was no pleading in the claim petitions that the selection ought to have been done in consonance with Rules, 2002, is also acceptable as we have already discussed above that the Municipal Corporation has got its own enacted provisions, in which the selection procedure for appointment is provided; thus there is no reason to subscribe to the view that the selection ought to have been held in accordance with the provisions of Rules, 2002, which are applicable to the employees of the State Government.

24. So far the impugned judgement/order passed by the Tribunal in regard to exercise of its jurisdiction is concerned, we find that the Tribunal travelled beyond the pleadings of the claim petitions filed by opposite parties no.2 as there was no pleading in the claim petitions that the selection ought to have been done in consonance with Rules, 2002. It is settled law that relief should be based on pleadings. If a Court considers or grants a relief for which no prayer or pleadings was made depriving the other party of an opportunity to oppose or resist such relief, it would lead to miscarriage of justice.

25. Hon'ble Supreme Court in the case of ***Mrs. Akella Lalitha Vs. Sri Konda Hanumantha Rao and another***, (2022) Live Law (SC) 638 (Civil Appeal Nos.6325-6326 of 2015, decided on 28.07.2022), while dealing with the question of jurisdiction and while considering the judgements of the Supreme

Court in regard to question of jurisdiction, held as under:-

"..... It is settled law that relief not found on pleadings should not be granted. If a Court considers or grants a relief for which no prayer or pleading was made depriving the respondent of an opportunity to oppose or resist such relief, it would lead to miscarriage of justice.

16. In the case of ***Messrs. Trojan & Co. Ltd. Vs. Rm.N.N. Nagappa Chettiar,*** *AIT 1953 SC 235, this Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under:-*

"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

17. In the case of ***Bharat Amratlal Kothari & Anr. Vs. Dosukhan Samadkhan Sindhi & Ors.,*** *AIR 2010 SC 475 held:*

"Though the Court has very wide discretion in granting relief, the Court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

26. In view of the aforesaid settled legal position, we find that the Tribunal has erred in traversing beyond the pleadings though the Court has very wide discretion in granting relief, which does not imply, that it can grant a relief beyond what was prayed by the party before it ignoring and keeping aside the norms and principles governing grant of relief. Therefore, to that extent also, the impugned judgement/order passed by the Tribunal is liable to be set aside.

27. The last argument advanced by the learned counsel for the petitioner that answering opposite parties no.2 had participated in the selection, therefore, they cannot be allowed to challenge the selection proceedings, seems to have force as the case set up before us is not a case that the conditions of recruitment were in any manner violated or there was any thing wrong with the selection or the eligibility of any candidate. It is settled principle that a person should be estopped to challenge the selection proceedings in case he participated in the selection held validly. The said view has been expressed by the Supreme Court in the case of ***Karunesh Kumar*** (supra). Paragraph 21 of the aforesaid case is extracted herein below:-

"21. A candidate who has participated in the selection process adopted under the 2015 Rules is estopped and has acquiesced himself from questioning it thereafter, as held by this Court in the case of Anupal Singh (supra):

"55. Having participated in the interview, the private respondents cannot challenge the Office Memorandum dated 12-10-2014 and the selection. On behalf of the appellants, it was contended that after the revised Notification dated 12-10-2014, the private respondents participated in the interview without protest and only after the result was announced and finding that they were not selected, the private respondents chose to challenge the revised Notification dated 12-10- 2014 and the private respondents are estopped from challenging the selection process. It is a settled law that a person having consciously participated in

the interview cannot turn around and challenge the selection process.

56. Observing that the result of the interview cannot be challenged by a candidate who has participated in the interview and has taken the chance to get selected at the said interview and ultimately, finds himself to be unsuccessful, in Madan Lal v. State of J&K [(1995) 3 SCC 486 : 1995 SCC (L&S) 712], it was held as under : (SCC p. 493, para 9) "9. ... The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted."

57. In K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345], it was held as under : (SCC p. 426, para 73) "73. The appellant-petitioners having participated in the interview in this background, it is not open to the appellant-petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper."

58. In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792], it was held as under : (SCC p. 107, para 19) "19. In Chandra Prakash Tiwari v. Shakuntala Shukla [(2002) 6 SCC 127 : 2002 SCC (L&S) 830] ....

xxx xxx xxx It was further observed : (SCC p. 149, para 34) '34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

59. Same principle was reiterated in Sadananda Halo v. Momtaz Ali Sheikh [(2008) 4 SCC 619 : (2008) 2 SCC (L&S) 9] wherein, it was held as under : (SCC pp. 645-46, para 59) "59. It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule. This position was reiterated by this Court in its latest judgment in Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] .... The Court also referred to the judgment in Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644], where it has been held specifically that when a candidate appears in the examination without protest and subsequently is found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise."

Analysis of the arguments made on behalf of the opposite parties

28. For the sake of convenience, it would be proper to have a look at the enacted provisions of the Municipal

Corporation, which are applicable to the selection of Class-III and other employees. For ready reference, Section 107 of the Act, 1959 is quoted below:-

"107. Appointment of posts. - (1) 21[Appointments to the post of Deputy Municipal Commissioner, Assistant Municipal Commissioner, 22[Mukhya Abhiyanta, Nagar Swasthya Adhikari, Mukhya Nagar Lekha Parikshak and to other posts as the Mayor may specify, shall be made by the Mayor] after consultation with the State Public Service Commission in the manner prescribed and not otherwise]:

Provided that the appointment of Nagar Swasthya Adhikari shall preferably be made out of officers of the Public Health Department of the State Government whom the State Government may be agreeable to send on deputation and in such case consultation with the Public Service Commission shall not be necessary.

(2) 23[Appointments to the posts not included in the posts referred to in subsection (1)] per mensem shall be made after consultation with the State Public Service Commission in the manner prescribed and not otherwise.] The authority to appoint such officers and servants of the Corporation shall vest (a) in respect of those officers and servants who are immediately subordinate to the Mukhya Nagar Lekha Parikshak, in the Mukhya Nagar Lekha Parikshak, and (b) in respect of all other officers and servants, in the Municipal Commissioner.

(3) All other appointments except those specified in sub-sections (1), (2) and (5) shall be made in accordance with the recommendations of a Selection Committee constituted under sub-section (4) and authority to make such appointments shall vest - (a) in respect of those officers and servants who are immediately subordinate to the Mukhya Nagar Lekha Parikshak, in the Mukhya Nagar Lekha Parikshak, and (b) in respect of all other officers and servants, in the Municipal Commissioner.

(4) The Selection Committee referred to in sub-section (3) shall consist of the Municipal Commissioner or his nominee, the Mukhya Nagar Lekha Parikshak and Head of the Department for which the appointment is to be made. The Municipal Commissioner and, in his absence, the member designated by him for the purpose, shall be the Chairman of Selection Committee:

[Provided that the Committee referred to above which may be substituted in connection with the appointments of officers and servants immediately subordinate to the Municipal Commissioner or the Mukhya Nagar Lekha Parikshak, shall consist of the Municipal Commissioner or the Mukhya Nagar Lekha Parikshak, as the case may be, as Chairman and two other officers of the Corporation who shall be nominated by the Executive Committee as members.] (5) Appointments to posts in the engineering, 25[public health and other departments of the Corporation carrying scales of pay lower than the scales of pay of the posts referred to in sub-section (3)] shall be made by the Heads of the departments concerned specified under Section 112 subject however to any bye-laws made by the Corporation in this behalf. (6) In the case of any difference of opinion between the appointing authority and the State Public Service Commission a reference shall be made by the Municipal Commissioner to the State Government whose decision shall be final."

29. Rule 17 of Rules, 1962 is worth to be mentioned and the same is quoted below:-

"17. By direct recruitment-- *Where appointment to a post under sub-section (3) of Section 107 is to made by direct recruitment, the Selection Committee constituted under sub-section (4) of the said Section shall decide whether the selection shall be made by holding an interview or a written examination or both."*

30. The argument of Dr. L.P. Mishra, learned counsel for the answering opposite parties no.2 that the selection in question is to be held in the light of Rules, 2002 and amended Rules, 2003, cannot be appreciated for the reason that the Municipal Corporation is a separate entity and it has got its own statutory provisions i.e. Act, 1959 and the Rules, 1962. We cannot also appreciate the fact that the selection should be made in accordance with Rules, 2002 for the reason that it is settled law that a thing should be done in a manner it is provided to be done under law and no other manner. Once the selection in the Municipal Corporation has taken place, the Rules framed by the State of Uttar Pradesh cannot be made applicable as there is complete scheme provided under Section 107 of the Act, 1959. Section 107(4) of the Act, 1959 postulates that the selection committee referred to in sub-section (3) of Section 107 of the Act, 1959 shall make the selection after considering the merit.

31. From perusal of the original record, it transpires that for Other Backward Class category, 4368 candidates applied, out of which 939 candidates were declared successful, in which name of opposite party no.2 (Rajesh Kumar) also finds place. However, after completion of interview process, the final select list was prepared by the selection committee and 40 candidates were selected and the lowest merit of the last candidate was 32 marks, wheres opposite party no.2 obtained 24.14 marks. Similarly, in the case of opposite party no.2 (Sachin Kumar), 4701 candidates applied in the category of Scheduled Caste, out of which 1173 candidates were declared successful for interview, including opposite party no.2. However, after completion of interview process, the final select list was prepared and 27 candidates were selected and the lowest merit of the last candidate was 32 marks, wheres opposite party no.2 obtained 30.86. Thus, both opposite parties no.2 were not selected. For ready reference, the select lists of candidates of Other Backward Class (40) and Scheduled Caste (27) categories are quoted below:-

Select List of OBC candidates

Sl.No.	***Name and Father Name***		***Average Marks***
1.	*Sri Manoj Kumar Verma S/o Sri S.P. verma*	*775/4055*	*38.28*
2.	*Sri Pankaj Kumar Verma S/o Deep Narain Verma*	*191/1001*	*36.14*
3.	*Km. Renu Verma D/o Late Jai Prakash Verma*	*321/1575*	*35.00*
4.	*Sri Imran Ahamd S/o Sri Israr Husain*	*21/127*	*34.85*
5.	*Sri Mohd. Javed S/o Sri Mohd. Razi*	*300/1478*	*34.42*
6.	*Sri Muneshwar Singh Yadav S/o Sri Mohan Lal Singh Yadav*	*872/4352*	*34.00*
7.	*Sri Tafzeel Ahmad Siddiqui S/o Sri Shabbuir Ahmad*	*827/4268*	*33.85*
8.	*Sri Vinay Kumar Yadav, S/o Sri Ram*	*20/126*	*33.71*

	Krishna Yadav		
9.	*Sri Ramnjeet Kumar Singh S/o Sri Ram Lakhan Verma*	*552/2862*	*33.16*
10.	*Sri Ashish Sharma, S/o Sri Avinash Chandra Sharma*	*731/3749*	*32.85*
11.	*Sri Awadhesh Kumar Yadav S/o Sri Tej Pal Yadav*	*97/505*	*32.71*
12.	*Sri Amit Kumar Yadav, S/o Sri Hoshiyar Singh*	*461/2421*	*32.71*
13.	*Sri Ravindra Singh, S/o Sri Narottam Singh*	*823/4256*	*32.71*
14.	*Sri Vinod Kumr Yadav S/o Sri Radhey Shyam Yadav*	*205/1038*	*32.57*
15.	*Sri Akhilesh Kumar Yadav, S/o Sri Ram Singh Yadav*	*221/1108*	*32.57*
16.	*Km. Geeta Yadav D/o Sri Attar Singh Yadav*	*371/1888*	*32.57*
17.	*Sri Omkar Rajbhar, S/o Late Chandrika Rajbhar*	*424/2168*	*32.57*
18.	*Sri Chand Babu S/o Late Munna*	*917/969*	*32.57*
19.	*Sri Rajeev Kumar S/o Sri Shanker lal*	*527/2722*	*32.50*
20.	*Sri Rishabh Pal S/o Sri Ram Chandra Pal*	*311/1511*	*32.42*
21.	*Sri Arjun Yadav S/o Sri Brahma Deen Yadav*	*570/2936*	*32.33*
22.	*Sri Pankaj Kumar S/o Sri Jamuna Prasad*	*18/113*	*32.28*
23.	*Sri Jailendra Singh S/o Sri Ram Das Verma*	*581/2996*	*32.16*
24.	*Sri Ramakant S/o Sri Pyare Lal*	*398/2074*	*32.14*
25.	*Sri Ajay Kumar Yadav S/o Sri Balak Ram Yadav*	*496/2588*	*32.14*
26.	*Sri Raj Kishore Yadav S/o Sri Ram Charan Yadav*	*814/4228*	*32.14*
27.	*Smt. Neelam Sahu W/o Sri Mohan Kumar Sahu*	*816/4235*	*32.14*
28.	*Km. Reena Singh D/o Sri Natha Singh*	*17/108*	*32.00*
29.	*Sri Jitendra Sharma S/o Sri Rajendra Kumar Sharma*	*133/651*	*32.00*
30.	*Sri Kishan Kumar Verma S/o Sri Ram Shanker Verma*	*248/1315*	*32.00*
31.	*Sri Ayoob S/o Sri Chhotey Lal*	*380/1955*	*32.00*
32.	*Sri Anuj Gupta S/o Sri Shiv Kumar Gupta*	*397/2071*	*32.00*
33.	*Sri Sarvesh Pal S/o Sri Ram Kishan Pal*	*573/2947*	*32.00*
34.	*Sri Santosh Kumar Yadav S/o Sri Ram Naresh Yadav*	*610/3195*	*32.00*
35.	*Sri Ashutosh Gupta S/o Sri Ram Autar*	*820/4252*	*32.00*
36.	*Km. Shabnam Siddiqui W/o Abdul Ali*	*838/4284*	*32.00*
37.	*Km. Mamta Gaur D/o Sri Manni Lal*	*849/4311*	*32.00*
38.	*Sri Suresh Singh Chauhan S/o Late Dirja Singh Chauhan*	*919/4117*	*32.00*
39.	*Sri Satyendra Kumar S/o Sri Siya Ram*	*936/1954*	*32.00*
40.	*Sri Amar Nath Verma S/o Sri Purushottam Verma*	*939/677*	*32.00*

Select List of SC candidates

Sl.No.	Name and Father Name		Aggregate Marks
1.	Sri Kunwar Mahendra Bhushan S/o Sri Kunwar Kailash Bhushan	1080/4587	37.85
2.	Sri Sunil Kumar S/o Sri Pramod Kumar	1079/4586	37.28
3.	Sri Budhi Ram S/o Late Sanehi Ram	1078/4585	37.14
4.	Sri Pradeep Chandra S/o Sri Ram Awadh	519/2309	37.00
5.	Smt. Ratna Singh D/o Sri Rajesh Singh	884/3821	36.71
6.	Km. Reema D/o Brij Lal	1068/4550	36.57
7.	Sri Birendra Kumar S/o Sri Ram Asrey Prasad	672/2901	35.57
8.	Sri Rahul Kumar Kannaujia S/o Sri Vanshidhar Kannaujia	1067/4549	35.28
9.	Km. Rekha Kumari D/o Sri Chandra Bhan	1148/4701	34.57
10.	Sri Prem Sagar S/o Sri Chavinath Prassad	17/56	33.80
11.	Sri Sarvesh Kumar S/o Sri Jialal	835/3569	33.00
12.	Sri Akhileshwar Chand S/o Sri Baleswar Prasad	601/2595	32.85
13.	Sri Dinesh Gautam S/o Sri Hawaldar Gautam	615/2644	32.85
14.	Sri Rakesh Kumar S/o Late Ashok Kumar	1142/4692	32.85
15.	Sri Ajay Kumar S/o Sri Indramani	814/3501	32.82
16.	Sri Shailendra Kumar S/o Sri Dileep Kumar	1146/4698	32.82
17.	Sri Pawan Kumar S/o Sri Prabhu Nath	955/4095	32.42
18.	Km. Saroj Gautam D/o Sri Ram Das Gautam	527/2344	32.33
19.	Sri Kuldeep Chaudhary S/o Sri Kailash Chand Chaudhary	207/1117	32.28
20.	Km. Nishi Priya D/o Sri Sankher	243/1256	32.28
21.	Sri Narendra Kumar S/o Sri Ram Kailash	791/3409	32.28
22.	Km. Kusum Saroj D/o Sri Hari Ram	232/1223	32.14
23.	Km. Neetu D/o Sri Sanvley	382/1802	32.14
24.	Sri Vineet Kumar S/o Sri Vansi Lal	489/2200	32.00
25.	Sri Prem Nath S/o Sri Satya Narain	939/4024	32.00
26.	Sri Ajay Singh S/o Sri Ram Kesh Pankaj	972/4163	32.00
27.	Sri Alok Kumar Sonkar S/o Sri Rakesh Chandra Sonkar	1029/4376	32.00

32. In view of the aforesaid, it cannot be appreciated that the advertisement provides that the selection should be based in pursuance of the Rules, 2002 for the reason that the advertisement itself indicates that the selection in the office of the State Government will be made in accordance with Rules, 2002 and amended Rules, 2003. We have already held that the Municipal Corporation is a separate statutory body, which has got its own Act and the Rules and the same are holding the field for recruitment. Therefore, we hold that the selection was done in accordance with the enacted provisions of the Municipal Corporation.

33. Further, the argument of Dr. L.P. Mishra, learned counsel for opposite parties no.2 that selection is based on Rules, 2002 and there is no select list in pursuance of the selection held under Rules, 2002, is also fallacious because we have perused the original record produced by the Municipal Corporation and found that all the candidates appeared before the selection committee and their tabulation chart indicates the marks obtained by each candidate, which have neither been doubted nor questioned. The answering opposite parties no.2 are rather claiming the benefit of same selection beyond what they are entitled to.

34. It is the admitted case that answering opposite parties no.2 had appeared in the interview and secured 24.14 and 30.86 marks respectively, whereas the last selected candidate obtained 32 marks; thus they were not part of the select list of 40 candidates of Other Backward Class and 27 candidates of Scheduled Caste categories.

35. The other argument of learned counsel for opposite parties no.2 that answering opposite parties no.2 had worked for more than five years on the basis of the appointment letters issued to them without any fraud being played, therefore, they have right to continue, we take judicial note of the fact that they were not selected and their names do not figure in the select list. The appointment letters appear to be based on false representation or collusion, which is within the ambit of fraudulent act done by the employees of the Municipal Corporation, who were at the helm of affairs.

36. Now, we have to discuss the ratio of case laws cited by the learned counsel for the opposite parties no.2.

37. The first case which has been relied upon by the learned counsel for opposite parties no.2 is ***Anmol Kumar*** (supra). Paragraphs 8 and 9 of the judgement are extracted herein-below:-

"8. On behalf of the Writ Petitioners, it was argued that though the selections initially were made on the basis of preference to the 3 categories of posts that were advertised. It was later found that the select list should have been prepared on the basis of merit and thereafter, preference has to be taken into account. Having realized the mistake that was committed, the authorities revised the select list pursuant to which the appointment of the Writ Petitioners was cancelled. By the time a decision was taken to revise the select list and cancel their appointments. The Writ Petitioners had completed their training and had worked for a considerable period of time. According to them, the High Court correctly granted relief to the Writ Petitioners by taking into account the fact that they were not responsible for the irregularities committed in the preparation of the initial select list.

9. Two issues arise for our consideration. The first relates to the correctness of the direction given by the High Court to reinstate the Writ Petitioners. The High Court directed reinstatement of the Writ Petitioners after taking into account the fact that they were beneficiaries of the select list that was prepared in an irregular manner. However, the High Court found that the Writ Petitioners were not responsible for the irregularities committed by the authorities in preparation of the select list. Moreover, the Writ Petitioners were appointed after completion of training and worked for some time. The High Court was of the opinion that the Writ Petitioners ought to

be considered for reinstatement without affecting the rights of other candidates who were already selected. A similar situation arose in Vikas Pratap Singh's case (supra), where this Court considered that the Appellants-therein were appointed due to an error committed by the Respondents in the matter of valuation of answer scripts. As there was no allegation of fraud or misrepresentation committed by the Appellants therein, the termination of their services was set aside as it would adversely affect their careers. That the Appellants-therein had successfully undergone training and were serving the State for more than 3 years was another reason that was given by this Court for setting aside the orders passed by the High Court. As the Writ Petitioners are similarly situated to the Appellants in Vikas Pratap Singh's case (supra), we are in agreement with the High Court that the Writ Petitioners are entitled to the relief granted. Moreover, though on pain of Contempt, the Writ Petitioners have been reinstated and are working at present."

38. In the aforesaid case of ***Anmol Kumar*** (supra), it appears that the appellants were declared successful in the select list. However, after investigation by high level committee, it was found that there was bungling in the selection and the select list was prepared wrongly by ignoring the merit of the candidates. The unsuccessful candidates filed writ petitions before the High Court and during pendency of the writ petition, 42 candidates were appointed on the basis of the original select list, which was later on cancelled. The appellants were ousted from the selected list, therefore, the Court came to the conclusion that they did not commit any fraud and on the basis of wrong selection, they were appointed. Therefore, it was noted that an error was committed by the department and the Court had allowed the candidates to continue their services on the analogy that the appellants could not be made to suffer on account of the wrong being committed by the department. Thus, the said case is not applicable in the present case for the reason that answering opposite parties no.2 have not been selected and their names do not find place in the final select list of candidates of Other Backward Class and Scheduled Caste categories.

39. The second case relied upon by the learned counsel for opposite parties no.2 is ***Md. Zamil Ahmed*** (supra). Paragraph 22 of the aforesaid judgement is extracted herein-under:-

"22. In these circumstances, we are of the view that there was no justification on the part of the State to woke up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration and nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the

appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State."

40. In the aforesaid case, it was noted that petitioner was given appointment under the Dying-in-Harness Rules by the department and after fifteen years of service, his appointment was cancelled on the ground that he was brother of the deceased, therefore, he does not come within the definition of the "dependent of the deceased'. In the aforesaid background, the Court came to the conclusion that after fifteen years of service, the termination was not justified because the department had considered his claim and issued appointment letter. The appellant did not commit false representation by suppressing material fact. Thus, the facts of the aforesaid case are also not applicable to the facts of the present case.

Finding:

41. Having considered the arguments advanced by the learned counsel for the parties and going through the record and analysis arrived by us in the preceding paragraphs, we summarise our findings in the following manner:-

1. Since answering opposite parties no.2 were not selected and their names did not figure in the final select list, they cannot claim their right to continue in the department on the basis of appointment letters issued to them, which are fraudulent documents as the same were issued to the answering opposite parties no.2 in connivance with the officials of the Municipal Corporation, against whom an FIR was also lodged; therefore, such appointment letters were rightly cancelled by the Corporation after affording opportunity of hearing.

2. The department filled up the number of backlog vacancies of different categories, which were advertised, therefore, the answering opposite parties no.2 have no right to claim appointment in respect of their categories beyond the number of advertised vacancies in view of the law laid down by the Supreme Court in the cases of ***Vivek Kaisth*** (supra), ***Rakhi Ray*** (supra) and ***Mukul Saikia*** (supra), particularly when their names did not figure in the final select list.

3. Admittedly, answering opposite parties no.2 appeared in the selection process validly held and were unsuccessful, therefore, they have no right to claim benefit beyond the advertised vacancies in view of the law laid down by the Supreme Court in the case of ***Karunesh Kumar*** (supra).

4. The argument of learned counsel for the answering opposite parties no.2 that selection should be made in accordance with Rules, 2002, is misplaced because Municipal Corporation has got its own statutory Act, 1959 and Rules, 1962, wherein complete scheme and selection is envisaged and said Rules, 2002 are applicable only to the employees of the State Government and not to the employees of the Municipal Corporation.

42. In view of the aforesaid discussions and conclusion, both the writ petitions are ***allowed*** and the impugned judgement and orders dated 16.08.2021 passed by the Tribunal in Claim Petition Nos.2174 of 2019 and 2199 of 2021 are hereby set aside; consequently, both the claim petitions filed by the answering opposite parties no.2 are dismissed. Consequences to follow.

(2024) 3 ILRA 760
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2024
BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 40447 of 2014
With
Writ A No. 55061 of 2014
With
Writ A No. 39733 of 2017

Smt. Mala Yadav & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Kumar Mishra, Sri Abhishek Kumar Yadav, Sri Ashok Khare (Sr. Advocate), Sri Chandan Sharma, Sri Prabhakar Awasthi, Sri V.K. Yadav, Sri Himanshu Singh

Counsel for the Respondents:
C.S.C., Sri A.K.Yadav, Ms. Archana Singh, Sri B.P. Singh, Sri Vikram Bahadur Singh, Sri Shivendra Singh Bhadauriya

Service Law – Equivalence of Educational Qualifications for Appointment –

Petitioners, holding Certificate in Nursery Training (C.T. Shishu Shiksha) and having passed the Uttar Pradesh Teachers Eligibility Test (TET) 2013, challenged their non-appointment as Assistant Teachers in primary schools (Classes I to V), claiming equivalence of their Nursery Training Certificate with the Diploma in Elementary Education as per NCTE notifications dated 23.08.2010 and 29.07.2011 – Held, the Nursery Training Certificate, designed for pre-school and up to Classes I-II (children aged 4-6 and 6-8), is not equivalent to the Basic Teachers Certificate (BTC) or Diploma in Elementary Education required for teaching Classes I to V, as clarified by NCTE and supported by the Division Bench in Uttar Pradesh Basic Shiksha Parishad Vs Sakshi Shukla – The petitioners' qualifications did not meet the advertisement's requirement of a 2-year BTC, Urdu BTC, or Special BTC. (Paras 2, 3, 5, 11, 12, 21, 24, 25, 26)

Service Law – NCTE's Authority and Statutory Compliance – Petitioners relied on NCTE notifications dated 23.08.2010 and 29.07.2011, arguing that their Nursery Training Certificate qualifies as a Diploma in Elementary Education (by whatever name known) – Held, NCTE's authority under the National Council for Teacher Education (Amendment) Act, 2011, to prescribe minimum qualifications for teachers in primary schools is binding, but the Nursery Training Certificate is recognized under Appendix-4 of NCTE Regulations, 2002, for early childhood education (pre-school and Classes I-II), not for Classes I-V under Appendix-1 or 2 of NCTE Regulations, 2009 – The St.'s advertisement specifying BTC as a requirement was consistent with NCTE standards and the U.P. Basic Education (Teachers) Service Rules, 1981. (Paras 4, 5, 12, 16, 20, 21)

Judicial Precedent – Interpretation of Harsh Kumar and U.P. Basic Shiksha Parishad – Petitioners relied on Harsh Kumar Vs St. of U.P. (Special Appeal (D) No. 130 of 2014), which mandated considering qualifications under NCTE notifications for Assistant Teacher appointments – Held, Harsh Kumar did not specifically address the equivalence of Nursery Training Certificate with BTC and left verification to authorities – In contrast, U.P. Basic Shiksha Parishad Vs Sakshi Shukla explicitly held that the Nursery Training Certificate is not suitable for teaching Classes III-V, limiting its scope to pre-school and Classes I-II – The latter judgment, considering NCTE's stand and a subsequent notification dated 12.11.2014, prevails over petitioners' claims. (Paras 7, 9, 12, 19, 20, 21)

Service Law – Course Content and Teaching Competence – The Court compared the syllabus of the Certificate in Nursery Training (C.T. Shishu Shiksha) with that of the Basic Teachers Certificate (BTC) – Held, the BTC's comprehensive curriculum, covering subjects like Hindi, Environmental Studies, Mathematics, and classroom teaching for Classes I-V, is more extensive than the C.T.

Shishu Shiksha, which is limited to early childhood education principles and methods suitable for pre-school and up to Class II – The petitioners failed to provide evidence that their course content equips them to teach up to Class VS (Paras 22, 23, 24, 25, 26)

Service Law – Allegation of Fraudulent Application – Respondents alleged that petitioners misrepresented having BTC qualifications in their online applications – Held, while the issue of fraud was raised, the Court's decision rested on the non-equivalence of the Nursery Training Certificate with BTC, rendering the fraud issue secondary – The petitioners' ineligibility due to lack of required qualifications was sufficient to dismiss the petitions. (Para 10)

Writ Petitions Dismissed .

Interim Orders Vacated.

List of Cases Cited :

1. Harsh Kumar & anr. Vs St. of U.P. & ors. , Special Appeal (D) No. 130 of 2014, decided on 05.02.2014

2. Uttar Pradesh Basic Shiksha Parishad Vs Sakshi Shukla & ors. , Special Appeal No. 915 of 2015, decided on 07.04.2016

3. Shiv Kumar Sharma Vs St. of U.P. , 2013 (6) ADJ 310

4. Ram Surat Yadav & ors. Vs St. of U.P. & ors. , (Full Bench, cited in Harsh Kumar)

5. Basic Education Board, U.P. Vs Upendra Rai & ors. , (referred in Harsh Kumar)

6. Ashok Kumar Bajpai , (cited in Special Appeal (D) No. 356 of 2015)

7. Hind Lamps Ltd. , (cited in Special Appeal (D) No. 356 of 2015)

8. St. of U.P. & ors. , (cited in Special Appeal (D) No. 356 of 2015)

9. Uma Yadav , (cited in U.P. Basic Shiksha Parishad)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Petitioners before this Court have passed Certificate in Nursery Training Examination-2013 (for short "Nursery Training Certificate") conducted by Examination Regulatory Authority, Uttar Pradesh (for short "Authority") and their respective certificates are part of record.

2. Petitioners have also passed Uttar Pradesh Teachers Eligibility Test, 2013 (for short "TET") and thereafter participated in counselling for appointment of Assistant Teachers but they were not appointed purportedly on a ground that they have not possessed essential qualification in terms of notification/advertisement dated 17.10.2013 i.e. they have not qualified 2 years BTC Course/2 years Urdu BTC Course or Special BTC Course and that "Nursery Training Certificate" would not be equivalent to said essential qualification. For reference, Vigyapti/Advertisement for district Barabanki dated 17.10.2013 is mentioned below -:

"विज्ञप्ति

कार्यालय जिला बेसिक शिक्षा अधिकारी जनपद बाराबंकी

पत्रांक दिनांक

जनपद बाराबंकी में उत्तर प्रदेश बेसिक शिक्षा परिषद् द्वारा संचालित परिषदीय प्राथमिक विद्यालयों में शासनादेश संख्या-3635/79-5-2013-14(10) दिनांक 25 सितम्बर 2013 एवं शासनादेश संख्या - 3774/79-5-2013-14(10)/10 दिनांक 15 अक्टूबर 2013 के अनुक्रम में **सहायक अध्यापकों के रिक्त पदों के सापेक्ष द्विवर्षीय बी.टी.सी., द्विवर्षीय उर्दू बी.टी.सी. एवं विशिष्ट बी.टी.सी. प्रशिक्षण प्राप्त तथा उत्तर प्रदेश राज्य अथवा केन्द्र सरकार द्वारा आयोजित अध्यापक पात्रता परीक्षा उत्तीर्ण अभ्यर्थियों से कुल 100 रिक्त पदों पर नियुक्ति हेतु ऑनलाइन ई-आवेदन पत्र आमंत्रित किये जाते है।** ऑनलाइन ई-आवेदन पत्र का प्रारूप आपरेशनल दिशा निर्देश एवं

जनपदवार रिक्तियों का विवरण वेबसाइट http://upbasiceduparishad.gov.in/ पर दिनांक 17.10.2018 से दिनांक 13.11.2013 की रात्रि 12 बजे तक उपलब्ध रहेगा। परिषदीय प्राथमिक विद्यालयों में सहायक अध्यापक के पदों पर चयन/नियुक्ति अध्यापक सेवा नियमावली 1981(अद्यतन तथा संशोधित) तथा विद्यालयों में अध्यापक तैनाती नियमावली 2008 (अद्यतन तथा संशोधित) के अनुसार की जायेगी। परिषदीय प्राथमिक विद्यालयों में सहायक अध्यापक पद पर इच्छुक अर्ह अभ्यर्थियों द्वारा सर्वप्रथम निर्दिष्ट वेबसाइट पर निर्धारित प्रक्रियानुसार रजिस्ट्रेशन कर वांछित प्रविष्टियों को पूर्ण करना होगा। रजिस्ट्रेशन के उपरान्त ई-चालान से किसी भी जनपद के किसी भी भारतीय स्टेट बैंक की शाखा में सचिव उ.प्र. बेसिक शिक्षा परिषद के नाम पर निर्धारित शुल्क जमा कर ई-चालान आई.डी/जर्नल (Journal) नम्बर प्राप्त करना होगा इसके अतिरिक्त अभ्यर्थी सभी बैंको के ATM Cum Debit cards/Credit Cards तथा SBI Internet Banking द्वारा भी आवेदन शुल्क का भुगतान कर सकते है। ई-चालान आई-डी/जर्नल (Journal) नम्बर प्राप्त करने के दो बैंकिग कार्यदिवस के पश्चात पुनः निर्दिष्ट वेबसाइट पर बैंक द्वारा प्राप्त ई-चालान आई-डी/जर्नल (Journal) नम्बर से आवेदन पत्र को पूर्ण करना अनिवार्य होगा अभ्यर्थी द्वारा काउन्सिलिंग के समय रजिस्ट्रेशन, ई-चालान रसीद तथा फोटो अपलोड़ करने के बाद भरे गये आवेदन का प्रिन्ट आउट प्रस्तुत करना भी आवश्यक होगा।

जिला बेसिक शिक्षा अधिकारी
जनपद बाराबंकी"

3. Essentially, case of the petitioners is that Nursery Training Certificate is equivalent to Diploma in Elementary Education (by whatsoever name known) in terms of notification dated 23.08.2010 issued by National Council for Teachers Education (fort short "NCTE") as such it would be equivalent to BTC Course.

4. It is further case of the petitioners that after enforcement of Right of Children to Free and Compulsory Education Act, 2009 (for short "Act of 2009") and thereafter enforcement of Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 (for short "Rules of 2011"), and whereby subsequent to notification issued by NCTE (competent authority) which provided minimum qualification for appointment of Assistant Teacher in primary school and promotion of Assistant Teacher in State of UP have to be in terms of Notification dated 23.08.2010 and amended Notification dated 29.07.2011 issued by NCTE.

5. Sri Ashok Khare, Senior Advocate assisted by S/Sri Himanshu Singh, Prabhakar Awasthi and Ajay Kumar Mishra, learned counsel for the petitioners has vehemently referred and placed reliance upon notification dated 23.08.2010 issued by NCTE that minimum qualification for teachers of class I to V is Senior Secondary or its equivalent with at least 50% marks and two years Diploma in Elementary Education (by whatsoever name known) and that since the petitioners have Nursery Training Certificates which is equivalent to Diploma in Elementary Education though known by said terminology and is also equivalent to Basic Training Certificate i.e. BTC, therefore, they possessed minimum eligibility.

6. Learned Senior Advocate also urged that minimum qualification prescribed in terms of aforesaid notification dated 23.08.2010 has not been completely followed by respondents and despite petitioners were duly eligible having minimum educational qualification were wrongly denied from their appointment despite they participated in counselling and they would have definitely in merit list if their result were declared.

7. In support of his submissions, learned Senior Advocate has placed reliance upon a judgment of Division Bench of this Court in **Special Appeal (D)**

No. 130 of 2014 (Harsh Kumar and another vs. State of U.P. and others) passed on **05.02.2014** and relevant paragraphs thereof are mentioned below -:

"8. On 23 August 2010, the NCTE prescribed the minimum qualifications for a person to be eligible for appointment as a teacher for Classes I to VIII in a school referred to in Section 2 (n) of the Act of 2009 with effect from the date of notification. This notification was amended by the notification dated 29 July 2011. As per the amended notification, the minimum qualifications which have been prescribed for appointment of an Assistant Teacher for teaching students from Classes I to V are now as follows:

"(i) Classes I-V.

(a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure) Regulations, 2002

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

OR

Graduate and two year Diploma in Elementary Education (by whatever name known)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose."

9. At this stage, it may also be necessary to note that the Parliament enacted the National Council for Teacher Education (Amendment) Act, 2011 to provide that the Act shall apply, inter-alia, to schools imparting pre-primary, primary, upper primary, secondary or senior secondary education and to colleges providing senior secondary or intermediate education and to teachers of such schools and colleges. Similarly, the expression 'school' was defined in Section 2(ka) to mean any recognised school imparting pre-primary, primary, upper primary, secondary or senior secondary education, or a college imparting senior secondary education. Section 12A was inserted into the principal legislation to empower the NCTE to determine the qualifications of persons to be recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or by a State Government or a local or other authority. The provisions of the Act and Regulations have been held to be binding by a Full Bench of this Court in Shiv Kumar Sharma (supra). Prior to the enforcement of the amending Act, the Supreme Court had referred for consideration by a larger Bench of three Hon'ble Judges, an earlier view taken in Basic Education Board, U.P. Vs. Upendra Rai & Ors.2 in which it had been held that the NCTE Act does not deal with ordinary educational institutions like primary schools, high schools, intermediate colleges or universities and would, consequently, not override the U.P. Basic

Education Act and the Rules made thereunder. In view of the amending Act, a Bench of three learned Judges of the Supreme Court, while deciding the reference on the correctness of the view in Upendra Rai (supra), observed that during the pendency of the appeals, the Amending Act had rendered the issues for consideration referred to the larger Bench as academic. These developments have been taken due note of in a recent judgment of a Full Bench of this Court in Ram Surat Yadav & Ors. Vs. State of U.P. & Ors.3

10. Thus, the point to be noted is that after the enforcement of the Act of 2009 and the issuance of the notification of 23 August 2010, the qualifications which have been prescribed for appointment of primary teachers must necessarily be those that are stipulated in the notification dated 23 August 2010, as amended by the notification dated 27 August 2011.

11. Undoubtedly, the Rules of 1981 do prescribe the essential qualification for appointment of Assistant Teachers in Junior Basic Schools where education is imparted from Classes I to V. The relevant qualifications which are prescribed in Rule 8 are as follows:

"(ii) Assistant Master and Assistant Mistress of Junior Basic School

A Bachelor's Degree from a University established by law in India or a Degree recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate, Vishist Basic Teachers Certificate (B.T.C.) two years BTC Urdu Special Training Course, Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training training course recognised by the Government as equivalent there:

Provided that the essential qualification for a candidate who has passed the required training course shall be the same which was prescribed for admission to the said training course."

12. The qualifications, which have been prescribed by the NCTE in the notification dated 29 July 2011 include Senior Secondary with at least 50% marks together with a 2-year Diploma in Education (Special Education). Once, these qualifications have been prescribed by the NCTE, this would necessarily be binding and it is not open to the State Government to exclude (from the zone of eligibility) the persons who are otherwise qualified in terms of the notification dated 23 August 2010 as amended on 29 July 2011.

13. In this view of the matter, we are of the opinion that the learned Single Judge was in error in coming to the conclusion that since the recruitment was in pursuance of a special drive, the Government was justified in confining the eligibility qualifications only to those who held the BTC qualifications for the reason that such candidates could not be adjusted earlier for want of TET qualification. The passing of the TET was introduced as a mandatory requirement by the notification dated 23 August 2010 issued by the NCTE. Persons who did not fulfill the eligibility conditions prescribed in the notification dated 23 August 2010, as amended on 29 July 2011, were not qualified for consideration for appointment as primary school teachers. Hence, there was no occasion for the State to contend or for that matter the learned Single Judge to accept the submission that in order to adjust such BTC qualified candidates, the present advertisement had been issued. The learned Single Judge held that the appellants could not claim equivalence with those candidates who possess BTC qualification. This, in our view, begs the question because once the Diploma in Education

(Special Education) is held to be a qualification which is recognised for appointment of Assistant Teachers for teaching Classes I to V, it would be impermissible for the State Government to exclude them from being considered for appointment. In a special drive or otherwise, it is not open to the State Government to exclude one class of teachers who fulfill the qualifications for eligibility prescribed by the NCTE. Any such action would be impermissible for the simple reason that the exclusive power to prescribe eligibility qualifications for such teachers is vested in the NCTE. Once the NCTE has spoken on the subject, as it has through its notification, those qualifications must govern the eligibility requirement. Jurisdiction and power of the NCTE to do so is now settled beyond any doubt, as noted by the Supreme Court.

14. In the circumstances, the special appeals would have to be allowed and are, accordingly, allowed. The impugned judgment and order of the learned Single Judge dated 14 November 2013 is set aside. A mandamus would, accordingly, issue directing the State to permit the appellants and such other persons who claim to be holding the qualifications which are within the purview of the notification issued by the NCTE on 23 August 2010, as amended on 29 July 2011, to apply for the post of Assistant Teachers for Classes I to V which was the subject matter of the advertisement in question.

15. Since the Court is informed that the process of counseling is still to commence, we direct the State Government to act in accordance with the aforesaid direction in processing and completing the selection process.

16. We clarify that the issue as to whether the appellants hold the qualifications strictly in accordance with the notification issued by the NCTE has not been decided by us since that is a matter of verification by the authority concerned."

[emphasis supplied]

8. Learned Senior Advocate also submitted that above referred mandamus was not honoured and despite petitioners' case was squarely covered with above referred judgment in Harsh Kumar (supra), still they were not selected.

9. In present bunch of cases, an interim order was passed on 25.09.2024 that result of petitioners be declared and in case their aggregate was above the cut off merit, appointment letters be issued to them. The interim order was challenged by the State in Special Appeal (D) No. 356 of 2015. The Division Bench of this Court allowed the Special Appeal by a judgment dated 01.02.2019. Relevant part thereof is quoted below -:

"The Division Bench in the case of U.P. Basic Shiksha Parishad (supra) had clearly distinguished between NTT Diploma which is only eligible for pre-school teaching and maximum upto Class 1 and 2 and does not cover Junior Basic School in which education is imparted for Class 1 to 5. The said Teachers Certificate (Shishu Shiksha), which is equivalent to NTT and this diploma at best can be for teaching in preschools education and not for Junior Basic Schools, which is imparting education from Class 1 to 5.

In view of the above, the learned Single Judge erred in directing the respondents-appellants to declare the result of the petitioners-respondents and issue appointment letters on the basis of the judgment of Harsh Kumar (supra) and Uma Yadav (supra) as both the Division Benches

had only held that the minimum prescribed qualification for appointment of Assistant Teachers shall be, as per the notification of NCTE dated 23.8.2010 as amended on 29.7.2011 and have no where dealt the issue in regard to the present Teachers Certificate (Shishu Shiksha) or Nursery Teachers Training (NTT). It was only in the case of U.P. Basic Shikha Parishad that the issue was dealt in depth and both the aforesaid Division Bench judgments were also taken note off.

Further, in view of the judgment of this Court in the case of Ashok Kumar Bajpai (supra), Hind Lamps Ltd.(supra) and State of U.P. and others (supra), we are of the view that no final relief can be granted at the interim stage, unless and until the Court is satisfied that ultimately the petitioner is bound to succeed and fact situation warrants granting such a relief. In the present case, as one of the Division Bench had taken a view that diploma in NTT is not equivalent to BTC as such, the relief granted would amounts to final relief and in the facts of the case the situation does not warrant for passing of such order at the interim stage.

Hence the order passed by the learned Single Judge dated 25.9.2014 is set aside, and the Special Appeal is allowed leaving it open for the learned Single Judge to decide the matter on its own merits after the exchange of affidavits and also considering the subsequent Division Bench Judgment in the case of U.P. Basic Shiksha Parishad (supra)."

[emphasis supplied]

10. Per contra, Ms. Archana Singh, learned counsel for the respondent, Sri Shivendra Singh Bhadauriya, learned counsel for the respondent no. 5 and Sri R.N. Pandey, Sri Shashi Prakash Singh, learned Additional Chief Standing Counsel, Sri Ashish Kumar Nagvanshi, Sri Ravi Prakash Srivastava, Ms. Shruti Malviya and Sri Survesh Srivastava, learned Standing Counsel for

the State respondents have submitted that petitioners' act were not bonafide. In online form, it was declared that they have passed BTC course and filled imaginary maximum number and imaginary number they got, knowingly they have never passed BTC. Learned counsel for respondents have referred copy of forms submitted by petitioners online, being part of a supplementary counter affidavit filed on 24.05.2019 and they have submitted that petitioners have played fraud.

11. Learned counsel further urged that Nursery Training Certificate was only for nursery teachers i.e. for pre-school and maximum upto Class I and II which could not be equivalent to teaching skill required for students of class I to V.

12. Learned counsel further placed reliance on a judgment passed by Division Bench of this Court in Uttar Pradesh Basic Shiksha Parishad vs. Sakshi Shukla and others (Special Appeal N. 915 of 2015, decided on 07.04.2016) wherein a subsequent notification dated 12th November, 2014 issued by NCTE was also consideration that whether Diploma in Nursery Teacher Education was one of minimum qualifications for Pre-school/nursery followed by first two years in a formal school and whether it was not included in minimum qualification for primary and upper primary (for class I to VIII). Relevant part of judgment is mentioned hereinafter -:

"N.C.T.E. was not at all a party before the learned Single Judge and

the learned Single Judge on this bona fide belief that the issue raised is squarely covered by the law laid down in the case of Uma Yadav (supra), proceeded to allow the writ petition and in view of this, as we had no other option, we asked for assistance of N.C.T.E. before us and N.C.T.E. has come up with the specific stand that the course in question that has been pursued by petitioners-respondents from Dau Dayal Mahila P.G. College, Firozabad, which was recognised on 30th April, 2004, has been as per Appendix-4 of Regulation 2002 known as Norms and Standards for Nursery Teacher Education Programme (form of Application for recognition, the time limit of submission of application, Determination of Norms and Standards for Recognition of Teachers Education Programme and permission to start new course of training), Regulation 2002 and N.T.T. course is basically meant for children in the age group of 4-6 followed by first 2 years in a formal education i.e. of children in the age group of 6-8 years as mentioned in Appendix-4 of Regulations, 2002.

N.T.T. course is not recognized under Appendix I or II of N.C.T.E. Recognition (Norms and Procedure) Regulation 2009 as Appendix-I of Regulation 2009 is only meant for Early Childhood Education Programme leading to Diploma in Early Childhood Education (D.E.C.Ed.). Early Childhood Education (E.C.E.) includes Class I and II of the Primary Education and same is of crucial importance from the point of view and perspective of the development of child's language, intelligence and personality. Elementary Teacher Education Programme aims at preparing teachers for elementary stage of education i.e. Classes I to VI/VIII and in Recognition (Norms and Procedure) Regulation 2009, Appendix-I has subsumed Pre-School Teacher Education Programme (P.T.T.) and Nursery Teacher Training Programme (N.T.T.) both i.e. Appendix-3 and 4 of Recognition (Norms and Procedure) Regulation 2002 and said nomenclature has been changed to Diploma in Early Childhood Education (D.E.C.Ed.) as Appendix-1 and N.T.T. course of 2 years duration in Dau Dayal P.G. Mahila College was granted Recognition under appendix-4 of the Regulation 2002 and not at all under the Regulations of 2009.

N.T.T. Course as mentioned in the Government Order dated 30.06.2010 is not at all recognized under the Appendix-1 or 2 of the Regulations 2009 and N.T.T. Course is recognized as per Appendix-4 of the Regulation 2002. Petitioners-opposite party have completed two years course of Nursery Teacher Training from Dau Dayal Mahila (P.G.) College, Firozabad, after they have applied for persuing said Course pursuant to Government Order dated 30.06.2010, wherein categorical mention has been made that in reference of Nursery Teacher Training, Nursery School means where children upto the age of 6 years and below Class I are being imparted instructions. Petitioners-opposite party right from day one knew fully well the nature of course that was pursued by them and the said course/training was designed to impart instructions child below six years of age and to classes below 1st standard. Basic Shiksha Parishad in the State of U.P. does not accord recognition to any Nursery School to run additionally Class 1 and 2. There are three category of institutions (1) Nursery School (ii) Junior Basic School (iii) Senior Basic School. Petitioners-opposite parties can be at the best appointed in Nursery School but they cannot be appointed in Junior Basic School/Senior Basic School.

Once such is the specific stand of N.C.T.E., then we cannot arrive to a conclusion that petitioners-opposite parties, who have proceeded to pursue N.T.T. course from Dau Dayal Mahila P.G. College Firozabad that has received recognition on 13th April, 2004 as per Appendix-4 of Regulation, 2002, can be said to be equipped with the facilities of imparting instructions qua teachers eligible to teach Class I to V.

Once N.T.T. Course as per the petitioners-opposite parties is designed for children in the age group of 4-6 followed by first 2 years in the formal school i.e. of children in the age group of 6-8 years, then the said course in question cannot be carried forward even to the students of Class III to V as it would be going beyond the N.T.T. course that has been designed.

Much emphasis has been laid on the fact that petitioner-opposite parties have cleared Teacher Eligibility Test meant for class 1 to 5 and in view of this, there exclusion in selection on its face value is arbitrary.

We may at this juncture, refer to a Full Bench judgement of our Court in the case of Shiv Kumar Sharma vs. State of U.P. 2013 (6) ADJ 310, wherein view has been taken that teacher eligibility test is an essential qualification that has to be possessed by every candidate who seeks appointment as a teacher of elementary education in Class 1 to 5 as per the notification dated 23.08.2010. Academic Authorities are empowered to fix minimum qualification which is inclusive of Teacher Eligibility Test, and Teacher Eligibility Test has to be passed in addition to the educational/training qualification. Merely because one has undertaken Teacher Eligibility Test, does not mean that he/she fulfils educational/training qualification also.

Consequently, in the facts of the case, the Basic Shiksha Parishad is right at the point of time when it submits that learned Single Judge has erred in giving directions by blindly following the judgement in the case of Uma Yadav (supra) and Harsh Kumar (supra) and in view of this, Special Appeal is allowed. Judgement of learned Single Judge is set aside. Petitioner-opposite parties have received training N.T.T. from an institution entitled to impart training for childhood in the age group of 4-6 followed by two years in formal school, are not eligible to teach class 1 to 5, in Institutions run and managed by Basic Shiksha Parishad."

[emphasis supplied]

13. Learned Senior Advocate for petitioners has responded to above submission that U.P. Basic Shiksha Parishad (supra) was in regard to private institutions. He has referred documents annexed with supplementary affidavit and referred following paragraphs of it -:

"(a) Although as mentioned above, the training holders of C.T. (Nursery) have always been appointed in the Nursery Schools as well as in Primary Schools run by the Board and accordingly, it was specifically clarified by the then Secretary of the Board on 04.01.1986. Similarly, through other circulars of the Board Issued on 12.3.2002, 4.3.2003, 17.3.2004, 4.1.2007 and 12.6.2008 by the respective Secretaries posted time to time along with Directorate, S.C.E.R.T., U.P., Lucknow and also by the State Govt. through government order dated 09.01.2009. The copies of the initial Rules of 1981 enforced on 03.01.1981 and the Rules of 1981 after incorporation of the 19th Amendment dated 30.05.2014 shall be placed at the time of arguments. However,

the copies of the said circulars of Board dt: 4-1-1986 12.3.2002, 4.3.2003, 17.3.2004, 4.1.2007 and 12.6.2008 and the government order dated 09.01.2009 are being jointly annexed herewith as Annexure no.3 to this Affidavit.

(b) It is also respectfully submitted that through the said government order dated 09.01.2009, the teachers having C.T. training qualification had also been made eligible for their promotion as L.T. Grade teacher after having attained experience of 5 years (as C.T. grade has become Dying Cadre) in the Intermediate colleges.

(c) It is also respectfully submitted that an advertisement made by the Basic Shiksha Adhikari, Allahabad on 11.10.2002 mentioning C.T. training qualification as an eligibility qualification and thereafter, appointments of respective candidates were also made. Similarly, the appointment of C.T. training holders was also made in District Shahjahanpur and Allahabad on the instructions of the Secretary, Board. The coples of the advertisement dated 11.10.2002, the instruction of the Secretary, Board dated 11.11.2002 and the appointment order issued pursuant thereto on 29.11.2002 are being jointly annexed herewith and marked as Annexure no.4 to this Affidavit.

(d) The Right of Education was made fundamental right to the children at the age of 6 to 14 years under Article 21-A of the Constitution of India and for enforcement thereof, the R.T.E. Act, 2009 (Act no.35 of 2009) was made, which was enforced on 26.08.2009; and in view thereof, the T.E.T./C.T.E.T. was prescribed as a minimum qualification and the Diploma in Elementary Education (D.El.Ed.)(by whatever name known) as an eligibility qualification for the appointment as a teacher from Class-I to V by the N.C.T.E. through their notifications dated 23.08.2010 and 29.07.2011, which have also been accepted by the State Government through U.P.R.T.E. Rules, 2011 enforced on 27.07.2011. In the said Act, Rules or notifications of the N.C.T.E., it has nowhere been stated that C.T. training holders are not eligible for appointment. A such, in view thereof, even after enforcement of the R.T.E. Act, 2009, the appointments of C.T. training holders have been made in different districts on different dates by the respective Basic Shiksha Adhikaris of the State. The copies of the direction issued by the Secretary, Board dated 31.07.2009, appointment letter dated 14.09.2009 issued by the Basic Shiksha Adhikari, Mirzapur and the another appointment letter dated 25.11.2009 issued by the Basic Shiksha Adhikari, Varanasi are being jointly annexed herewith and marked as Annexure no.5 to this Affidavit."

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

15. The issue before this Court for consideration is that whether "Nursery Training Certificate" is equivalent to "Diploma in Elementary Education" (by whatsoever name known) (as mentioned in NCTE notification dated 23.08.2010 as amended on 29.07.2011) and subsequent notification dated 12.09.2014 and whether it is also equivalent to "Basic Teachers Training Certificate" for purpose of minimum qualification for post of Assistant Teacher in primary school (class I to V) run by Basic Education Board?

16. The crux of argument of petitioners is that once NCTE, the appropriate Authority under National Council for Teachers Education (Amendment) Act, 2011, by a notification

has provided minimum qualification in terms of Act of 2009, the same will govern irrespective of any minimum qualification prescribed for appointment on post of Assistant Teacher by of any State.

17. In order to substantiate argument, learned Senior Advocate has referred various provisions of above referred Act, Rules and Circulars which do not require to elaborate since they have been considered by Division Bench of this Court in Harsh Kumar (supra), a judgment relied upon by petitioner.

18. Relevant part of Harsh Kumar (supra) has already been quoted in earlier part of this judgment and for disposal of this judgment, a general mandamus issued in Harsh Kumar (supra) is repeated hereinafter -:

"14. In the circumstances, the special appeals would have to be allowed and are, accordingly, allowed. The impugned judgment and order of the learned Single Judge dated 14 November 2013 is set aside. **A mandamus would, accordingly, issue directing the State to permit the appellants and such other persons who claim to be holding the qualifications which are within the purview of the notification issued by the NCTE on 23 August 2010, as amended on 29 July 2011, to apply for the post of Assistant Teachers for Classes I to V which was the subject matter of the advertisement in question.**

15. Since the Court is informed that the process of counseling is still to commence, we direct the State Government to act in accordance with the aforesaid direction in processing and completing the selection process.

16. We clarify that the issue as to whether the appellants hold the qualifications strictly in accordance with the notification issued by the NCTE has not been decided by us since that is a matter of verification by the authority concerned."

19. The above mandamus was that the essential qualification given in Notification dated 23.08.2010 as amended by Notification dated 27.08.2011 be applied in selection process in question subject to verification whether candidate possesses qualification in terms of notification, therefore, there was no occasion for Division Bench to consider whether "Nursery Training Certificate" would be a minimum qualification equivalent to BTC Course?

20. The above issue was later on considered by another Division Bench of this Court in Uttar Pradesh Basic Shiksha Parishad (supra) wherein Harsh Kumar (supra) as well as a subsequent notification dated 12.11.2014 issued by NCTE was also considered. As well as stand of NCTE was also heard.

21. The Division Bench in Uttar Pradesh Basic Shiksha Parishad (supra) has thereafter arrived to a considered opinion that -:

"i. "Nursery Training Programme" as mentioned in the Government Order dated 30.06.2010 is not at all recognized under Appendix I or II of NCTE (Recognitions Norms and Procedure) Regulations, 2009. N.T.T. Course is recognized as per Appendix-4 of Regulations, 2009 meant for early childhood education.

ii. Early Childhood Education (ECE) is for pre-school and class I and II of primary education only.

iii. Elementary Training Education Programme aims of preparing teachers for elementary stage of education i.e. class I to VI/VII.

iv. Basic Shiksha Parishad of State of U.P. does not accord recognition to any nursery school to run additionally class I and II. There are three categories of institutions (i) Nursery School (ii) Junior Basic School (iii) Senior Basic School. Petitioners-opposite parties can be at the best appointed in Nursery School but they cannot be appointed in Junior Basic School/Senior Basic School.

v. Once N.T.T. Course as per the petitioners-opposite parties is designed for children in the age group of 4-6 followed by first 2 years in the formal school i.e. of children in the age group of 6-8 years, then

the said course in question cannot be carried forward even to the students of Class III to V as it would be going beyond the N.T.T. course that has been designed."

22. The above reference makes a clear difference in nursery school and Junior basic school and their respective requirement of teachers in terms of their minimum education. The certificate in question is "Certificate Teacher (Shishu-Shiksha) Examination-2013. The subject of course are शिक्षा सिद्धांत तथा शिक्षालय संगठन, बाल अध्ययन, विशेष पाठन विधि ज्ञानोपकरण, विशेष पाठन विधि विषय and for reference, a certificate and result of one petitioner is scanned hereinafter -:

क्रमांक 13507003

परीक्षा नियामक प्राधिकारी उत्तर प्रदेश

अनुक्रमांक 03

टीचर्स सर्टीफिकेट (शिशु-शिक्षा) परीक्षा 2013

(केवल महिलाओं के लिये)

(बैच 2007)

प्रमाणित किया जाता है कि संस्थागत/आंशिक परीक्षार्थिनी

कुमारी/श्रीमती बेबी रानी

आत्मजा श्री सालिक राम

राजकीय-शिशु-प्रशिक्षण-महिला-महाविद्यालय, इलाहाबाद

संस्था/परीक्षा-केन्द्र से सन 2013 की टीचर्स सर्टीफिकेट (शिशु-शिक्षा) परीक्षा

(दो वर्षीय पाठ्यक्रम) में उत्तीर्ण हुई।

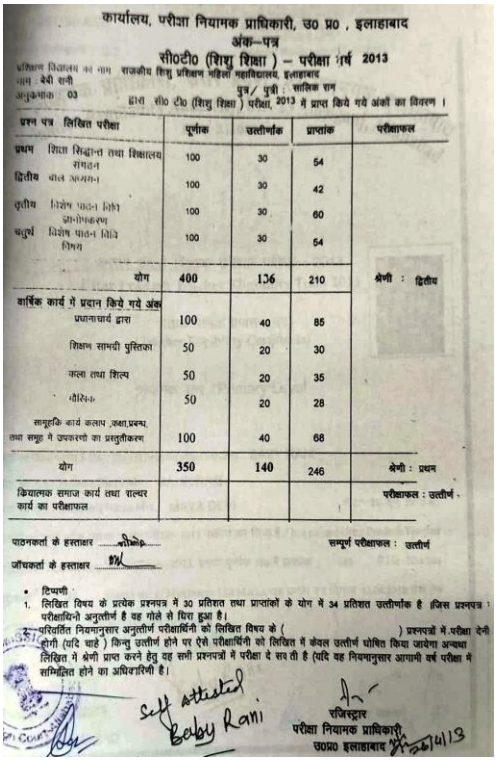
इनका लिखित तथा क्रियात्मक परीक्षाओं का परीक्षाफल निम्नांकित है:-

1. लिखित द्वितीय श्रेणी
2. कक्षा शिक्षण प्रथम श्रेणी
3. क्रियात्मक समाज कार्य तथा बालघर-कार्य उत्तीर्ण

इलाहाबाद
दिनांक 26 APR 2013

(श्रीमती नीना श्रीवास्तव)
सचिव
परीक्षा नियामक प्राधिकारी, उत्तर प्रदेश
इलाहाबाद

Self Attested



कार्यालय, परीक्षा नियामक प्राधिकारी, उ० प्र० , इलाहाबाद

अंक–पत्र

सी०टी० (शिशु शिक्षा) – परीक्षा वर्ष 2013

प्रशिक्षण विद्यालय का नाम राजकीय शिशु प्रशिक्षण महिला महाविद्यालय, इलाहाबाद

नाम बेबी रानी

अनुक्रमांक 03

पुत्र/ पुत्री सालिक राम

द्वारा सी० टी० (शिशु शिक्षा) परीक्षा, 2013 में प्राप्त किये गये अंकों का विवरण।

प्रश्न पत्र	लिखित परीक्षा	पूर्णांक	उत्तीर्णांक	प्राप्तांक	परीक्षाफल
प्रथम	शिक्षा सिद्धान्त तथा शिक्षालय संगठन	100	30	54	
द्वितीय	बाल अध्ययन	100	30	42	
तृतीय	विशेष पाठन विधि ज्ञानोपकरण	100	30	60	
चतुर्थ	विशेष पाठन विधि विषय	100	30	54	
	योग	400	136	210	श्रेणी : द्वितीय
वार्षिक कार्य में प्रदान किये गये अंक					
	प्रधानाचार्य द्वारा	100	40	85	
	शिक्षण सामग्री पुस्तिका	50	20	30	
	कला तथा शिल्प	50	20	35	
	गीत/नृत्य	50	20	28	
	समुदायिक कार्य कलाप ,कक्षा प्रबन्ध, तथा समूह में उपकरणों का प्रस्तुतीकरण	100	40	68	
	योग	350	140	246	श्रेणी : प्रथम
क्रियात्मक समाज कार्य तथा बालघर कार्य का परीक्षाफल					परीक्षाफल : उत्तीर्ण

पाठनकर्ता के हस्ताक्षर

जाँचकर्ता के हस्ताक्षर

सम्पूर्ण परीक्षाफल : उत्तीर्ण

- टिप्पणी :
1. लिखित विषय के प्रत्येक प्रश्नपत्र में 30 प्रतिशत तथा प्राप्तांकों के योग में 34 प्रतिशत उत्तीर्णांक है ,जिस प्रश्नपत्र में परीक्षार्थिनी अनुत्तीर्ण है वह गोले से घिरा हुआ है।
2. परिवर्तित नियमानुसार अनुत्तीर्ण परीक्षार्थिनी को लिखित विषय के ( ) प्रश्नपत्रों में परीक्षा देनी होगी (यदि चाहे) किन्तु उत्तीर्ण होने पर ऐसे परीक्षार्थिनी को लिखित में केवल उत्तीर्ण घोषित किया जायेगा अन्यथा लिखित में श्रेणी प्राप्त करने हेतु वह सभी प्रश्नपत्रों में परीक्षा दे सकती है (यदि वह नियमानुसार आगामी वर्ष परीक्षा में सम्मिलित होने का अधिकारिणी है।

Self Attested
Baby Rani

रजिस्ट्रार
परीक्षा नियामक प्राधिकारी
उ०प्र० इलाहाबाद 26/4/13

23. Petitioners have not brought on record details of study material/syllabus of referred examination in order to show that it would sufficient upto class-V also, whereas the Basic Teacher Certificate course has extensive study material much more than C.T. (Shishu Shiksha). For reference same is mentioned below -:

First Year

Education and principles of teaching

Psychological basis of child Development

Teaching subject: Hindi, Environmental studies, Social Studies, Mathematics, Sanskrit/Urdu, English

Cognitive Aspects: Moral Education, Physical Education and Music, Art

Psycho Motor Aspect: Class Teaching, Curriculum Analysis

Second Year

Emerging Trends of Elementary: Education and Education Evaluation, School Management, Community Education and Health education

Teaching Methods, work experience and Relevant Practical work: Hindi, Environmental Education, Science, Social Studies, Mathematic, SUPW, Sanskrit/Urdu, English

Cognitive Aspects: Physical education and music

Psycho motor aspect: class room teaching, school experience (internship) Community work and Action research, Analysis of Curriculum and text book

24. This Court has undertaken above exercise as Harsh Kumar (supra) has also granted liberty to verify whether course of a candidate would be same in terms of notification issued by NCTE, otherwise, U.P. Basic Shiksha Parishad (supra) is completely against the petitioners.

25. A bare consideration of standards of course material of Certificate Training (Shishu Shiksha) and Basic Teacher Certificate are sufficient to observe that course material of Basic Training Certificate is proposed for purpose of teaching upto Class-V, whereas course material of CT (Shishu Shiksha) would be limited to pre-school i.e. up to class-II only.

26. In view of aforesaid observations, not only U.P. Basic Shiksha Parishad (supra) is against the petitioners but above consideration of course material of CT (Shishu Shiksha) is not equivalent to course material of minimum qualification i.e. B.T.C. for appointment of Assistant Teachers.

27. Therefore, all writ petitions being sans-merit are **dismissed.**

28. Interim orders are vacated and its legal consequence shall follow.

(2024) 3 ILRA 772
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2024
BEFORE
THE HON'BLE AJIT KUMAR, J.

Writ A No. 56246 of 2014

Bhwendra Nath Borah ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Durga Tiwari, Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C.

Service Law – Disciplinary Proceedings and Principles of Natural Justice – Petitioner, a Class IV employee (Library Peon) at Government Degree College, Sambhal, challenged his termination orders dated 29.09.2014 and 01.10.2014, alleging procedural irregularities – Held, the disciplinary proceedings were vitiated due to non-compliance with principles of natural justice, specifically the failure to supply the enquiry report to the petitioner and the absence of a show cause

notice for the proposed punishment, as mandated by Managing Director, ECIL, Hyderabad Vs B. Karunakar – The enquiry officer's failure to conduct an oral enquiry despite the petitioner's denial of charges further violated procedural fairness, as established in Salahuddin Ansari Vs St. of U.P. and St. of U.P. Vs T.P. Lal Srivastava . (Paras 14, 24, 27, 29, 30, 31, 33, 34)

Service Law – Validity of Enquiry Officer's Findings – The enquiry officer's report dated 21.06.2014 failed to conclusively establish the petitioner's guilt on charges of insubordination and false allegations against the Manager and Principal – Held, the enquiry officer did not hold an oral enquiry, examine departmental witnesses, or verify affidavits, rendering the findings procedurally defective – The Regional Joint Director of Education erred in approving the termination without independently assessing the enquiry report or addressing the lack of evidence, contrary to Saroj Kumar Sinha Vs St. of U.P. , which requires an enquiry officer to act as an independent adjudicator. (Paras 29, 30, 32, 33, 36, 37)

Service Law – Role of Approving Authority – The Regional Joint Director of Education, tasked with approving the termination after a prior High Court order quashed earlier proceedings, wrongly affirmed a consequential order dated 29.09.2012, which had already been set aside – Held, once the earlier approval order was quashed, the Regional Joint Director should have issued a fresh show cause notice with the enquiry report and directed the Principal to pass a new order, rather than approving a defunct order – This procedural lapse rendered the termination order unsustainable. (Paras 23, 35, 39)

Service Law – Proportionality of Punishment – The petitioner, a Class IV employee with 15 years of service, was accused of insubordination for lodging a police complaint and an application under Section 156(3) Cr.P.C., alleging harassment by the Manager and Principal – Held, in the absence of prior complaints about the petitioner's conduct and considering the context of his allegations during a period when the Committee of Management was dissolved, the termination was disproportionate – A warning would have sufficed, given the petitioner's long service and the lack of evidence supporting the charges. (Paras 40, 41)

Judicial Review – Relief in Disciplinary Proceedings – The Court found the enquiry procedurally flawed and the punishment excessive, but declined to remit the matter for fresh enquiry due to the petitioner's prolonged litigation and status as a Class IV employee – Held, remitting the case would be unjust given two prior remissions and the lack of conclusive evidence against the petitioner – The termination orders were quashed, and the petitioner was awarded 50% back wages for the period he did not work. (Paras 41, 42)

Writ Petition Allowed.

Termination Orders Dated 29.09.2014 and 01.10.2014 Quashed – Petitioner Entitled to 50% Back Wages.

List of Cases Cited :

1. Salahuddin Ansari Vs St. of U.P. & ors. , 2008 (4) ADJ 58

2. Managing Director, ECIL, Hyderabad Vs B. Karunakar , (1993) 4 SCC 727

3. St. of Uttar Pradesh & ors. Vs Saroj Kumar Sinha , (2010) 2 SCC 772

4. St. of U.P. & anr.Vs T.P. Lal Srivastava , 1997 (1) LLJ 831

5. U.O.I. Vs Subrata Nath , 2022 SCC OnLine SC 1617

6. Divisional Controller, Karnataka St. Road Transport Corporation Vs M.G. Vittal Rao , (2012) 1 SCC 442

7. Committee of Management, Muslim Inter College & anr.Vs St. of U.P. & ors. , 2023 (1) ADJ 308 (DB)

8. Subhash Chandra Sharma Vs Managing Director & anr. , 2000 (1) U.P.L.B.E.C. 541

9. Subhash Chandra Sharma Vs U.P. Cooperative Spinning Mills & ors. , 2001 (2) UPLBEC 1475

10. Laturi Singh Vs U.P. Public Service Tribunal & ors. , Writ Petition No. 12939 of 2001, decided on 06.05.2005

11. Indrani Bai (Smt.) Vs U.O.I. , 1994 Supp (2) SCC 256

12. Air India Corporation Vs VSA. Rebellow , (referred in context of loss of confidence)

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

1. Heard Ms. Durga Tiwari, learned counsel for the petitioner, learned Standing Counsel for the State respondents and Sri Gautam Baghel, learned counsel for respondent nos. 4, 5 & 6.

2. Petitioner Bhwendra Nath Borah was a duly selected and appointed Class - IV employee working in the Institution namely Government Degree College, Sambhal prior to termination of his service from the College Establishment by the order passed by the Joint Director of Education on 01.10.2014 granting approval to the proposed punishment of termination of service vide order dated 29.09.2014.

3. This case has a checkered history with two round of litigation previously before this Court and this is the third round of litigation arising out of disciplinary proceedings

4. Before coming to the orders impugned, the facts of the case briefly stated are that the petitioner was appointed on 08.04.1995 on the post of Library Peon but as he claimed, he continued to discharge duties of Peon at the residence of the then Manager Suresh Chandra and then his son Shantanu Kumar. It so happened, in the year 2011, when according to the petitioner, the Committee of Management was not recognized for a short time that petitioner was given posting in the Institution as Chowkidar under the orders of Principal dated 11.02.2011. He protested by writing a letter dated 12.02.2011 that only the work of Peon should be taken from him and he is not Chowkidar but nothing happened. He then raised legal pleas before the District Inspector of Schools vide letter dated 12.07.2011 that he having been appointed as Library Peon could not have been asked to discharge night duties of Chowkidar and he also complained that Principal was forcing him to resume working at the residence of Manager of the Institution or else remain posted as Chowkidar.

5. It transpires that the Committee of Management came into office in the meantime and so suddenly on 12.10.2011 as was alleged in the letter written to the Senior Superintendent of Police, Bheemnagar while petitioner signed the attendance register, the Manager Suresh Chandra and his son Shantanu Kumar and others started abusing and threatening him of dismissal from service and also physically assaulted him. Thus complaint was made on 16.10.2011 but when nothing happened, it transpires petitioner moved an application under Section 156(3) Cr.P.C. which came to be dismissed on 14.04.2012. This approach was taken by the Manager and Principal of the Institution as a case of serious misconduct in the nature of insubordination and accordingly petitioner was issued with a show cause notice on 15.02.2012 to explain his conduct of gross indiscipline and making insidious remarks against the Manager of the Institution coupled with the false allegations of physical assault. This show cause notice was issued on 15.02.2012 to which petitioner submitted reply on 05.03.2012 and took the plea that for 15 long years he

worked under pressure of Manager at his residence like bonded labour giving 12 hours long duty and when the Committee of Management was dissolved for a short while that petitioner got freed from the custody of the Manager. He claimed in his entire reply that he had been unnecessarily forced to discharge duty of a Chowkidar for 12 hours else he was to resume duty at the residence of Manager, failing which action would be taken. The Principal of the Institution, instead of closing the matter with the warning to the petitioner, chose to set up an enquiry making one Advocate of the District Court as Enquiry Officer and it is this Advocate namely Mr. Kamal Kumar issued charge sheet to the petitioner on 25.06.2012. Two charges were basically leveled: one fictitious and false allegations were made to malign the image of the Manager of the Institution Mr. Suresh Chandra as well as Shantanu Kumar which amounted to gross misconduct and insubordination; and the second charge was regarding allegations made against one Dr. Balendu, the Senior Reader in the Department of Geography and one Mr. P.K. Agarwal, the officiating Principal in an application filed under Section 156(3) Cr.P.C.

6. Petitioner submitted his reply to the charge sheet and even questioned the appointment of an Advocate as an Enquiry Officer in an educational institution. However, nothing happened to his complaint and the Enquiry Officer submitted his report bringing home the charges and the papers were forwarded to District Inspector of Schools for the purpose of approval in the matter of dismissal from service vide letter dated 06.08.2012.

7. Admittedly, no show cause notice was issued to the petitioner in the matter of proposed punishment, nor the enquiry report was supplied to him before the Principal passed orders on 06.08.2012 accepting the report of enquiry officer dated 01.08.2012.

8. Petitioner challenged both the charge sheet as well as report of the enquiry officer before this Court vide Writ - A No. 43774 of 2012. The Court, instead of interfering with the orders, took view that since the District Inspector of Schools as per statute 18.02(3) remains an approving authority to the decision of Principal and Committee of Management in the matter of dismissal/ termination of class - 3 and 4 employees, it would be better that the petitioner approaches the authority who will be looking into all such aspects as raised in the writ petition. The operative portion of the order dated 05.09.2012 is reproduced hereunder:

"Petitioner's entire emphasis is on the fact that Inquiry Officer has been illegally appointed and coupled with this entire inquiry proceeding is farce and on the same no credibility should be attached. All these things can be very well looked into, examined and considered by the District Inspector of Schools at the point of time when he proceeds to take up the matter for grant of approval. In view of this liberty is given to the petitioner to bring on record all such factual aspect of the matter substantiating his version that disciplinary proceeding is farce and violative of principles of natural justice. In the event of any such claim being set up by the petitioner, the District Inspector of Schools, Moradabad shall taken into consideration the issues raised by the petitioner and thereafter shall take appropriate decision in the matter, in accordance with law, by means of a reasoned and speaking order.

Writ petition stands disposed of accordingly."

9. This order was communicated to the District Inspector of Schools along with representations dated 11.08.2012 and 17.09.2012 and held that no such incident as alleged to have taken place on 12.10.2011 and such an allegation made in application under Section 156(3) Cr.P.C. was also turned down by the Magistrate for want of evidence and that the learned Advocate was rightly appointed as an enquiry officer and petitioner has been found guilty of the serious charges of misconduct and insubordination and accordingly he approved the order of termination of his service.

10. This order was passed by District Inspector of Schools on 29.07.2012. On 29.09.2012 the officiating Principal issued order terminating the services of the petitioner and directing him not to appear in the Institution. These two orders came again to be challenged before this Court vide Writ - A NO. 52340 of 2012 but the court declined to interfere granting liberty to the petitioner with the agreement of learned Advocates appearing for the parties that matter may be heard and decided by a higher authority namely the Joint Director of Education and thus, the direction was issued to District Inspector of Schools, Moradabad to forward all the papers to the office of Joint Director of Education, who shall be taking decision in the matter after giving opportunity of hearing to the petitioner.

11. Accordingly, petitioner made a detailed representation within the time prescribed, on 12.12.2012 before the Regional Joint Director of Education who passed a detailed order finally on 18.04.2013 with a direction that the officiating Principal should be appointed an enquiry officer and departmental enquiry be held de novo. The Principal of the Government Inter College accordingly issued a notice on 12.02.2014 to the petitioner that he may submit his reply by 03.03.2014 before him as well as any teacher or non teaching staff to whom he wanted to appear in his suport to and may also file affidavits, petitioner demanded time vide letter dated 20.02.2014 but it appears that fresh enquiry was also finalized but the report was directly submitted to the Regional Joint Director of Education. Thus, petitioner had come to notice from the letter of Regional Joint Director of Education dated 22.07.2014. Accordingly, petitioner applied for enquiry report under the Right to Information Act, 2005 vide letter dated 17.07.2014 but that remain unanswered. Petitioner wrote letters to the Regional Joint Director of Education on 26.07.2014 and 06.08.2014 on the date fixed, to adjourn hearing but he was not supplied with enquiry report. Petitioner also wrote similar letter on 30.08.2014 and he did appear before the Regional Joint Director of Education when the date was fixed later on 06.08.2014 and then again on 09.09.2014. The Regional Joint Director of Education, it transpires from the order impugned, heard the parties and finally concluded that the proposal moved by the Principal of the Institution for termination of services of the petitioner deserved approval and accordingly vide order dated 29.09.2014 accorded approval to the termination of the services of the petitioner.

12. In the counter affidavit that has been filed on behalf of the Principal of the Institution as well as the Committee of Management, the entire pleas are concentrated upon the act and conduct of

the misconduct on the part of the petitioner in lodging complaint with the police and also making application under Section 156(3) Cr.P.C. A legal plea is also taken that this Court would not interfere with the findings returned by the enquiry officer. However, the fact pleaded by the petitioner with regard to non supply of the enquiry report has not at all been disputed. The basic plea taken is that the very trust of the Principal and Manager of the Institution, reposed in Class - IV employee of the Institution got absolutely eroded and, therefore, once the confidence of the authorities of the Institution have got shakened in an employee, the only way out to save the establishment is to fire such an employee and so this Court should not interfere in the matter.

13. In the supplementary counter affidavit also the plea taken is that the complaint made under Section 156(3) Cr.P.C. having been found fictitious and vague without there being any iota of evidence, was rejected and this would go on to prove that the petitioner was deliberately making false and fictitious allegations against the Principal and Manager of the Institution and even dared to show eyes by approaching the Superintendent of Police. Sri Baghel submits that this is sufficient enough to show a kind of insubordination shown by the petitioner and, therefore, the petitioner deserves no clemency.

14. The arguments advanced by learned counsel for the petitioner are:

(i) The very appointment of enquiry officer being an outsider was bad and this question was not addressed to and remained unanswered. Accordingly, the very appointment being void, the enquiry stood vitiated in law;

(ii) There was no oral enquiry held in the matter even though charges were specifically denied. Even at the stage of Joint Director of Education, the enquiry was held and was devoid of fair procedure and sans oral enquiry.

(iii) Neither any show cause notice was issued to the petitioner of the proposed punishment at the point of time when the fresh enquiry report was received by the Regional Joint Director of Education, nor even the enquiry report was supplied to; and

(iv) Charges leveled against the petitioner were only with an intention to punish him for his denial to work at Manager's residence, more especially when he complained to the Principal and the Superintendent of Police regarding utter harassment meted out to him. It is also argued that there was no evidence to prove such charges against the petitioner, inasmuch as, there was never any complaint regarding work and conduct and discharge of duties by the petitioner prior to the solitary incident.

15. Ms. Durga Tiwari, has relied upon the authorities of Supreme Court in the case of **Salahuddin Ansari vs. State of UP & ors; 2008 (4) ADJ 58; Managing Director, ECIL, Hyderabad v. B. Karunakar, (1993) 4 SCC 727; and State of Uttar Pradesh & Ors v. Saroj Kumar Sinha (2010) 2 SCC 772.**

16. The arguments advanced by learned counsel appearing for the Principal and Committee of Management are:

(i) It was a glaring example of gross insubordination and indiscipline at the end of a Class IV employee to have

made a false complaint of harassment and physical assault by the Manager and his men to the police and then to make an application before the Magistrate under Section 156(3) Cr.P.C. which was came to be rejected for false allegations.

(ii) False and frivolous charges and allegations were made only with an intention to implicate higher authorities of the Institution namely the Manager and the Principal by a class IV employee to bulldoze down them only for vested interest. This act and conduct has completely sheckened the confidence of employer in employee and his continuance any further in the Institution would not have been in the interest of the establishment and so he deserved no mercy and was rightly punished for dismissal from service.

(iii) Admission is the best piece of evidence and police complaint and application to Magistrate under Section156(3 Cr.P.C. with a prayer to direct police for registration of first information report against the Manager and the Principal , admittedly made by the petitioner, having been dismissed for want of evidence or intrinsic material to support the charge, nothing more was required to be led in the departmental enquiry to prove the charge for this act of insubordination and indiscipline; and there is no lacuna in the departmental proceedings and this Court would not interfere with the appointment of the enquiry officer and the enquiry report filed by him.

17. Sri Baghel has relied upon the judgments in the case of **Managing Director, ECIL, Hyderabad v. B. Karunakar, (1993) 4 SCC 727 and Union of India v. Subrata Nath, 2022 SCC OnLine SC 1617; Divisional Controller, Karnataka State Road Transport Corporation v. M.G. Vittal Rao (2012) 1 SCC 442; Union of India v. Subrata Nath 2022 SCC OnLine SC 1617; 2023 (1) ADJ 308 (DB), Committee of Management, Muslim Inter College & Anr v. State of U.P. & Others.**

18. Sri Baghel also submitted in the end that if this Court finds the enquiry to be vitiated in law for any procedural defect, this Court may remand the matter to that stage to the authority proceed afresh in the light of the judgment passed in Managing Director, ECIL, Hyderabad *(supra)* and Committee of Management, Muslim Inter College *(supra)*.

19. Having heard learned counsel for the respective parties, their arguments raised across the bar and having perused the records, I find the first point that needed to be addressed is, **whether** procedure was followed by the Regional Joint Director of Education after the matter was remitted to him on the question of complaint of the petitioner qua appointment of enquiry officer and **whether** the Regional Joint Director of Education has acted in consonance with the principles of natural justice in passing the order. The third point that is needed to be addressed is, as to **whether** the Regional Joint Director of Education could have affirmed the earlier approval order of District Inspector of Schools in spite of direction issued to him to take a fresh decision in the light of findings. Once he himself held the earlier enquiry report to be bad and expressed his view that the fresh enquiry was required to be held and accordingly, he had appointed Principal of the Government Inter College as new enquiry officer.

20. All the above points are related to each other and are decided simultaneously.

21. In order to find answer to the contentious issue qua procedure part of the enquiry as has been assailed by the learned counsel for the petitioner and the said allegation rebutted by learned counsel for the Principal and Manager of the Institution.

22. I would here first refer to the order passed by this Court on 08.10.2023 allowing writ petition being Civil Misc. Writ Petition No. 52340 of 2012. It is a very short order and therefore, in order to appreciate the entire issue, I find it more appropriate to reproduce the same here itself:

"Hon'ble V.K. Shukla,J.

Earlier while matter was pending before the District inspector of Schools, petitioner Bhwendra Nath Borah was before this Court and this Court on 5.9.2012 proceeded to pass following order. Relevant extract of the order is being quoted below:-

"Petitioner's entire emphasis is on the fact that Inquiry Officer has been illegally appointed and coupled with this entire inquiry proceeding is farce and on the same no credibility should be attached. All these things can be very well looked into, examined and considered by the District Inspector of Schools at the point of time when he proceeds to take up the matter for grant of approval. In view of this liberty is given to the petitioner to bring on record all such factual aspect of the matter substantiating his version that disciplinary proceeding is farce and violative of principles of natural justice. In the event of any such claim being set up by the petitioner, the District Inspector of Schools, Moradabad shall taken into consideration the issues raised by the petitioner and thereafter shall take appropriate decision in the matter, in accordance with law, by means of a reasoned and speaking order. Petitioner's entire emphasis is on the fact that Inquiry Officer has been illegally appointed and coupled with this entire inquiry proceeding is farce and on the same no credibility should be attached. All these things can be very well looked into, examined and considered by the District Inspector of Schools at the point of time when he proceeds to take up the matter for grant of approval. In view of this liberty is given to the petitioner to bring on record all such factual aspect of the matter substantiating his version that disciplinary proceeding is farce and violative of principles of natural justice. In the event of any such claim being set up by the petitioner, the District Inspector of Schools, Moradabad shall taken into consideration the issues raised by the petitioner and thereafter shall take appropriate decision in the matter, in accordance with law, by means of a reasoned and speaking order.

Writ petition stands disposed of accordingly."

After the said order judgement has been delivered by this Court, petitioner submits that same was uploaded on the website of High Court on 17.9.2012 and based on the same, petitioner submits that he requested the District Inspector of Schools to grant two weeks time to file objection on 17.9.2012. Petitioner submits that again letter dated 24.9.2012 was issued fixing 26.9.2012 and said letter was received by him at about 7.35 A.M. by special messenger. Petitioner submits that he requested for adjournment of one week on medical ground and thereafter, he submitted his objection on 29.9.2012 and thereafter he has been served with the copy of the order dated 27.9.2012 which is impugned. Petitioner in this regard submitted that entire action which has been

so taken is in violation of Principle of natural justice and District Inspector of Schools has colluded with the Management of the institution concerned.

When the matter has been taken up, this much is clear that this Court has proceeded to pass order giving liberty to petitioner to file all possible objection and thereafter, District Inspector of Schools was obliged to consider the objection so moved on behalf of the petitioner. District Inspector of Schools has proceeded to fix 29.8.2012 as the date of hearing and on the said date request was made by the petitioner to extend the date and accordingly next date fixed in the matter was 7.9.2012. In between, writ petition had been filed by the petitioner and same has been decided on 5.9.2012 and the next date fixed in the matter was 26.9.2012. Petitioner on 26.9.2012 requested for adjournment of the date and the very next date order in question has been passed.

Once this Court had given liberty to the petitioner to file objection and petitioner had been requesting for adjournment for filing objection, then District Inspector of Schools ought to have been reasonable by providing opportunity of hearing to the petitioner instead of proceeding to take decision on the premises that no reply has been submitted to the charge sheet in question. Order passed by the District Inspector of Schools in the present case, cannot be approved of inasmuch as same is in violation of principle of natural justice and specially when the date fixed was 26.9.2012 and information of the said hearing was received in the morning itself and request was being made to accord time to file objection pursuant to the order passed by this Court, but the reason best known to the District Inspector of Schools, he has chosen to proceed ahead and accord approval. The District Inspector of Schools, at no point of time, proceeded to examine the claim as to ***whether*** *in free and impartial manner inquiry has been held or not and straight way on the inquiry report, order was passed that petitioner has not submitted his reply, has proceeded to pass order, in view of this background order passed, is hereby quashed and set aside.*

Both Ms. Durga Tiwari, Advocate as well as Sri R.K. Ojha, Advocate appearing along with Gautam Baghel, Advocate agreed that if petitioner is not at all satisfied with the District Inspector of Schools, then matter be sent to any of the authority, who may consider the matter of approval, and both the parties have agreed that matter be decided by the Joint Director of Education of region concerned.

In view of this District Inspector of Schools, Moradabad is directed to transmit entire paper to the office of the Joint Director of Education Moradabad Region, Moradabad and Joint Director of Education, Moradabad Region, Moradabad is directed to take appropriate decision by means of reasoned order on the basis of papers produced and on the basis of objection so filed on behalf of the petitioner after providing opportunity of hearing to the petitioner as well as Secretary of Management.

With these observation, writ petition is allowed. "

23. Upon reading of the aforesaid order I find that the Court very much recorded and reproduced its earlier order dated 05.09.2012 passed in the earlier round of litigation in which the appointment of the enquiry officer was questioned and so the enquiry proceeding was claimed to be a farce. The Court noticed that petitioner was given opportunity to file objection but the District

Inspector of Schools proceeded to pass order. The Court found this order of the District Inspector of Schools to be highly improper and arbitrary and accordingly set aside the order of approval of dismissal of services of the petitioner dated 26.09.2012. The Court, with the agreement of the parties referred the matter to the Regional Joint Director of Education. Thus, every aspect of the matter right from the appointment of the enquiry officer, the manner and procedure followed in holding the enquiry, the proposed punishment and the order of District Inspector of Schools regarding approval, remained open. A very positive direction thus got issued by this Court and the Regional Joint Director of Education upheld the objections of the delinquent employee namely the petitioner and directed for a fresh enquiry. Operative portion of the order of Regional Joint Director of Education dated 18.04.2013 is reproduced hereunder:

" माननीय उच्च न्यायालय इलाहाबाद द्वारा अपने निर्णय दिनांक 05-09- 2012 में यह स्पष्ट निर्णय दिये हैं जिला विद्यालय निरीक्षक मुरादाबाद / सम्भल सेवा समाप्ति अनुमोदन देने से पूर्व याची द्वारा जॉच अधिकारी सम्बन्धी व अन्य आपत्तियों का गहनता से परीक्षण करेंगे। जिला विद्यालय निरीक्षक मुरादाबाद / सम्भल कार्यवाहक प्राचार्य तथा जाँच अधिकारी द्वारा दिनांक 16-07-2012 को यह लिखते हुए कि मैं एक अधिवक्ता हूँ और दो दशक से अधिक समय से प्रेक्टिस कर रहा हूँ कानून और उसकी प्रक्रिया से परिचित हूँ। श्री भवेन्द्र नाथ वरहा द्वारा अपने प्रत्यावेदनों में माननीय सर्वोच्च न्यायालय के आदेश Indrani Bai (Smt.) Vs. Union of India 1994 Supp (2) S.C.C 256 *को संज्ञान में लेने का उल्लेख किया है जिसमें यदि आरोपित व्यक्ति को निष्पक्ष जाँच न होने का संदेह हो तथा वह जॉच अधिकारी को बदलकर दूसरे जाँच अधिकारी की नियुक्ति की प्रार्थना करता है तब जॉच अधिकारी को बदल दिया जाना चाहिए था परन्तु पत्र में न तो कार्यरत प्राचार्य, जॉच अधिकारी और न ही जिला विद्यालय निरीक्षक, मुरादाबाद / सम्भल ने लेश मात्र विचार किया जिसको माननीय उच्च न्यायालय इलाहाबाद ने अपने निर्णय दिनांक 05-09-2012 में स्पष्ट संकेत किया है।"*

24. Dr. Avnish Kumari Shukla who was the Principal of the Government Degree College was appointed as enquiry officer and enquiry officer gave opportunity to the petitioner to appear on 03.03.2014 vide letter dated 12.02.2014 as last opportunity. The petitioner, it is true initially took time by writing letter dated 20.02.2014 that he be given further time but ultimately appeared and submitted his reply. The enquiry officer submitted report but copy whereof was never supplied to him and upon letter being written to the enquiry officer under Right to Information Act about the enquiry report, the enquiry officer wrote back to the petitioner on 17.07.2014 that entire record has been sent to the Regional Joint Director of Education including the original enquiry officer and so he should contract the Regional Joint Director of Education. Regional Joint Director of Education has been repeatedly informing the petitioner to appear him and petitioner kept asking for the enquiry report. Neither the petitioner was supplied with the enquiry report, nor the petitioner had the opportunity to meet the findings in such report and the Regional Joint Director of Education accepted the report and approved the punishment order.

25. From these facts it is borne out that after the order was passed by the Regional Joint Director of Education on 18.04.2013, the issue regarding the appointment of the enquiry officer no more remained alive as he had appointed a new enquiry officer.

26. Now it is to be examined whether enquiry officer did enquire into the charges giving proper opportunity to the petitioner or not and whether the final order could have been passed even without furnishing

the enquiry report to the delinquent employee.

27. A very specific plea has come to be taken in the writ petition that the enquiry officer refused to give enquiry report taking the plea that the entire documents have been forwarded to the Regional Joint Director of Education vide para 38 and 39. In reply to the same in the counter affidavit filed on behalf of the Principal and the Committee of Management not a single whisper is there in para 20 as to whether any such enquiry report was supplied to the petitioner.

28. A document ofthe Principal of the Government Degree College, Sambhal dated 01.01.2015 has been annexed along with the rejoinder affidavit to show that this letter was issued after the order approving the dismissal/ termination from service was came to be passed by the Regional Joint Director of Education on 29.09.2014 and 01.10.2014.

29. Thus, it is clear that while the Regional Joint Director of Education proceeded to consider the enquiry report, petitioner had no opportunity to contest the same. It is also reflected from these documents filed that before the enquiry officer, Principal of Government Inter College, Sambhal, the affidavits were filed by the employees of Institution regarding factum of incident of assault upon the petitioner that had taken place. The report of the enquiry officer dated 21.06.2014 that has been brought on record by the petitioner now shows that the enquiry officer did not fix any date to hold oral enquiry except for the date mentioned to give one opportunity only to the petitioner to appear before her on 03.03.2014. So virtually there has been no oral enquiry at all.

30. In the circumstances it can be very safely concluded that after a fresh enquiry officer appointed, he did not held any oral enquiry except for inviting petitioner once to appear before the enquiry officer to meet the charges. The affidavits of the employees of the institution filed before the enquiry officer were also not examined and thus enquiry officer did not asked any of these employee to appear before her to rebut the charges and give testimony in favour of the delinquent employee. Similarly, the enquiry officer also did not asked the Principal and Manager to appear before her. The enquiry officer virtually proceeded to believe the documents furnished by the Principal and Manager and returned her finding that the claim of the incident to have taken place by the petitioner did not get prove.

31. A division bench of this Court in the case of **Salahuddin Ansari** *(supra)* has held that where the charges are denied, oral enquiry is must. The division bench has relied upon the judgment of Supreme Court in the case of **State of U.P. & Anr v. T.P. Lal Srivastava, 1997 (1) LLJ 831**. The Court vide para 11, 12, 13 & 14 of the said judgment has held thus:

"11. A Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to ***whether*** *holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subhash Chandra Sharma Vs. U.P. Cooperative Spinning Mills & others, 2001 (2) UPLBEC 1475 and Laturi Singh Vs. U.P. Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005.*

12. An oral inquiry would be necessary even if the delinquent employee has failed to submit reply to the charge sheet. In State of U.P. & another Vs. T.P. Lal Srivastava, 1997 (1) LLJ 831, the Hon'ble Apex Court held that even if the employee has failed to submit reply to the charge sheet, it would not absolve the Inquiry Officer from proceeding with the oral inquiry and submit report as to ***whether*** *charge is proved or not. After recording of evidence, he will find out* ***whether*** *the charge is proved or not and submit report to the disciplinary authority.*

13. The aforesaid exposition of law makes it clear that the delinquent employee has a right to defend himself at different stages. When the charge sheet is served upon him, he has a right to submit his reply and in case he does not submit reply, that itself would not amount to admission of guilt or that the charge stand proved. If the allegations are serious and may result in major penalty, the disciplinary authority may appoint Inquiry Officer. Such Inquiry Officer, thereafter would have to fix a date for oral evidence. At this stage the delinquent employee has a right to participate in the oral inquiry, examine witnesses, if produced by the department, and after the evidence of the department is completed, the delinquent employee may produce evidence in his defence. During the course of oral inquiry, the delinquent employee has right to participate at every stage and date and if there is any failure in participation on one or more occasions, the Inquiry Officer cannot deny him participation from the subsequent stage. The delinquent employee can participate at subsequent other stage also. The Inquiry Officer, after completion of oral inquiry, will submit its report after discussing the entire material and if any charge is proved, the disciplinary authority shall supply a copy of the inquiry report to the delinquent employee and he would again have a right to submit reply to the inquiry report.

14. Non holding of oral inquiry, therefore, is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment."

32. I further find that the enquiry officer has also failed to return any finding bringing home the charge against the petitioner so as to hold him guilty of the charges. The finding part of the report of enquiry officer is reproduced hereunder:

" जहाँ तक इनके बन्धुआ मजदूर के रूप में कार्य करने का प्रश्न है - यह महाविद्यालय के स्थाई कर्मचारी हैं इनको नियमित रूप से वेतन एवं वेतन वृद्धि आदि सेवा सम्बन्धी सभी लाभ मिलते रहे हैं। इसलिये इनको बन्धुआ मजदूर की श्रेणी में नहीं रखा जा सकता। दिनांक 12-10-2011 को घटित घटना के सम्बन्ध में जिन पांच व्यक्तियों को श्री भवेन्द्र नाथ बराह ने आरोपित किया है उनमें से चार व्यक्तियों का कथन है कि यह घटना के समय महाविद्यालय में उपस्थित ही नहीं थे। पांचवे व्यक्ति घटनास्थल पर उपस्थित नहीं थे।

1- शान्तनु कुमार, सचिव प्रबन्ध समिति ने अपना चित्तिसीय परीक्षण Fortis Escorts Heart Institute, New Delhi में दिनांक 11-10-2011 को कराया और रू० 500/- का भुगतान किया- Bill Cum Receipt No 11/RCF2-H17554/CA/0/OH058938 (O.P.D No-OPO 1288415) इसके उपरान्त अगले दिन दिनांक 12-10-2011 को श्री शान्तनु कुमार का श्री शान्तनु कुमार का Stress Eco Test किया गया जिसका Bill No. 11/MBB2- H07104/C.A. OHO59128 (OPD No OPO 1288859) ता उनें Patient Record पर अंकित हैं। उनका Stress Eco Test दिनांक 12-10-11 को प्रातः 9.26 पर शुरु हुआ।

श्री शान्तनु कुमार ने हरियाणा मेडिकल सेन्टर, पटपड़ गंज दिल्ली से रू० 3176/- की दवाईयाँ खरीदीं। केश मैमो नं० 4759 दिनांक 12-10-2011

2- डॉ० बालुन्दु वशिष्ठ रीडर भूगोल विभाग तथा लेखाकार श्री मुकेश बाबू दिनांक 12-10-2012 को महाविद्यालय से अवकाश लेकर बाहर गये थे जिसके साक्ष्य प्रस्तुत किये गये हैं और मधुबन पर रू० 50/- का वाहन कर भी अदा किया गया है। वाहन सं० 7607 (संलग्नक-12,13 व 14)

3- साहू श्री सुरेश चन्द्र ने वक्तव्य दिया है कि वह उक्त दोनों दिवसों पर अपने पुत्र श्री शान्तनु कुमार के साथ उनके इलाज हेतु दिल्ली में थे।

4- डॉ० पी०के० अग्रवाल तत्कालीन प्राचार्य का कथन है कि यद्यपि वह महाविद्यालय में उपस्थित थे किन्तु घटना के समय प्रातः 10.00 बजे के पश्चात् महाविद्यालय के नियमित राउण्ड पर थे।

उपरोक्त प्रकरण का गहनता से अध्ययन करने के उपरान्त दिनांक 12- 10-11 को श्री भवेन्द्र नाथ बराह के साथ हुई घटना के विषय में स्पष्ट रूप से कुछ कहा जाना नहीं है।

प्राचार्य

33. Thus, it is clear that neither the enquiry officer found anything true about the allegation against the petitioner, nor did he find the charges to be proved against the petitioner in the departmental enquiry, inasmuch as, the enquiry officer did not hold any enquiry, get the departmental witnesses examined or the affidavits filed by the petitioner duly verified by getting the deponents examined. Still further I find that after the enquiry report was submitted, no show cause notice was issued to the petitioner by any point of time by the Regional Joint Director of Education and he proceeded to pass a final order appreciating the enquiry report without supply the copy thereof to the petitioner.

34. In the case of **Managing Director, ECIL, Hyderabad v. B. Karunakar, (1993) 4 SCC 727**, the Constitution Bench of Supreme Court has held that non supply of the enquiry report by the disciplinary authority is a denial of reasonable opportunity of hearing. The Court laid down the guidelines in the matter of departmental enquiry and punishment vide para 29 and 30 that are reproduced hereunder:

"29. Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. Hence the incidental questions raised above may be answered as follows:

(i) Since the denial of the report of the Inquiry Officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory

rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

(ii) The relevant portion of Article 311(2) of the Constitution is as follows:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."

Thus the Article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The Article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, and when the Inquiry Officer is not the disciplinary authority the delinquent employee will have the right to receive the Inquiry Officer's report notwithstanding the nature of the punishment.

(iii) Since it is the right of the employee to, have the report to defend himself effectively, and he would not know in advance ***whether*** *the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of his right.* ***Whether****, therefore, the employee asks for the, report or not, the report has to be furnished to him.*

(iv) In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the inquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan Khan's case (AIR 1991 SC 471) (supra) should apply to employees in all establishments ***whether*** *Government or non-Government, public or private. This will be the case* ***whether*** *there are rules governing the disciplinary proceeding or not and* ***whether*** *they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the Inquiry Officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.*

(v) The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable

opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. ***Whether*** *in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits.*

It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to a "unnatural expansion of natural justice" which in itself is antithetical to justice.

35. What is further surprising is that, once the earlier order approving the dismissal/ termination of the service of the petitioner by the District Inspector of Schools dated 26.09.2012 came to be quashed by the High Court, the consequential order dated 29.09.2012 by the Principal of the Institution terminating/ dismissing the petitioner from service automatically stood quashed and therefore, the Regional Joint Director of Education was not justified in affirming the order dated 29.09.2012, a consequential order to the order of District Inspector of Schools. All that now required was for the Regional Joint Director of Education, to have issued a show cause notice with a copy of enquiry report to the petitioner in the first instance and then to pass order afresh directing the Principal to pass order. The Court, therefore, comes to this definite conclusion that the entire procedure followed by the Regional Joint Director of Education in holding enquiry was vitiated for non compliance of the Principles of natural justice, inasmuch as, the Regional Joint Director of Education was not justified in affirming and approving the order which has stood quashed by this Court.

36. Still further, the enquiry officer having not returned finding as to guilt of the petitioner to bring home the charge, it is difficult to understand as to how the Regional Joint Director of Education could have proceeded to pass order approving the termination from service without returning his own finding as to his disagreement with the findings of the enquiry officer in the enquiry report. There is no doubt that in matters of disciplinary proceedings, this Court in exercise of power under Article 226 of the Constitution will not interfere **Union of India v. Subrata Nath, 2022 SCC OnLine SC 1617.**

37. This legal proposition stands intact as on date but it is also equally true that if the procedures are not followed in holding the enquiry then this Court will certainly interfere. In Saroj Kumar Sinha's case *(supra)* vide paragraph nos. 28, 31 & 32 this Court has held thus:

"28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the departmental/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to ***whether*** *the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined*

the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

31. In Shaughnessy v. United States, 97 L Ed 956 : 345 US 206 (1952) (Jackson, J.), a Judge of the United States Supreme Court has said : (L Ed p. 969)

:...Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

32. The affect of non-disclosure of relevant documents has been stated in judicial Review of Administrative Action by De Smith, Woolf and Jowell, 5th Edn., p. 442 as follows:

"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of ***whether*** *the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving the use of undisclosed reports by administrative tribunals and other adjudicating bodies. If the deciding body is or has the trappings of a judicial tribunal and receives or appears to receive evidence ex parte which is not fully disclosed, or holds ex parte inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked."*

38. There is no quarrel to the proposition propounded by Supreme Court in **Air India Corporation v. V.A. Rebellow** and followed in a catena of case including the one **M.G. Vittal Rao's** case that *"if employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge"* provided of course confirmation is by way of definite findings returned in the enquiry report prepared with procedural fairness on both the above counts I find this above proposition is not attracted to the case in hand. Neither enquiry was procedurally fair, nor the enquiry officer appointed by Director of Education has been confident enough to return such findings affirmatively.

39. There is yet another issue involved, as to when the enquiry officer has failed to record any finding to bring home the charge, **whether** it was open for the Regional Joint Director of Education to have proceeded to hold petitioner guilty of the charges bypassing the authority of the Principal of the Institution who is the appointing authority and the District Inspector of Schools who is the approving authority. Once the Regional Joint Director of Education had directed for appointment of enquiry officer under its order dated 18.04.2013, his job was over. The order of the High Court quoted above was very categorical that Regional Joint Director of Education would consider the matter of approval. Once he refused to grant approval to the appointment of enquiry officer by Principal of the Institution the directions of the Court dated 08.10.2012 stood complied with. Now, therefore, it was a matter to be decided afresh by sending it to the disciplinary authority to pass order on the basis of final enquiry report or if the Regional Joint Director of Education assumed the status of employer as per direction of this Court in earlier writ petition, he was certainly required to follow the procedure as to punishment on the basis of findings arrived in the new enquiry report should have passed order afresh on the question of punishment.

40. Further, I do not find the order of the Regional Joint Director of Education to be sustainable as in the absence of supply of enquiry report to the petitioner and without there being any show cause notice as to the proposed punishment, the Regional Joint Director of Education could not have passed the kind of order he has passed. The matter, therefore, could have been remitted in the light of law laid down in Managing Director, ECIL, Hyderabad *(supra)* and the Division Bench judgment of this Court in Committee of Management, Muslim Inter College *(supra)* in the first instance, but looking to the enquiry report and the manner in which the allegations have been made what surprises the Court is that for 15 years until the management got disturbed at one level with intervention of the Authorized Controller or a single hand operation as the case might have been, this controversy erupted. A class IV employee who had remained docile for 15 years may be working under compulsion at the residence of Manager or otherwise would not have raised his voice against Manager and the Principal knowing very well that he would be penalized for the same. There is no allegation either by the Manager or Principal of the Institution or any of their men that petitioner at any point of time disobeyed them in performance of duty except during the interregnum period when the Management was not there and the Authorized Controller was appointed or single hand operation was operating.

41. This above scenario of this case in the background goes to the root of the matter, and, therefore, in my considered view the petitioner deserved at the most a warning and to improve himself and be careful in conducting himself in future. This is one of the exceptional cases where I find the matter should not be remitted on rule. Petitioner is a class IV employee and I think he has been punished much by now because twice matter has been remitted in the past.

42. In view of the above, the order passed by the Regional Joint Director of Education dated 29.09.2014 and the consequential order dated 01.10.2014 passed by respondent no. 5 are hereby quashed. Consequences to follow. Petitioner would be entitled to 50% of salary for the period he has not worked.

(2024) 3 ILRA 788
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2024
BEFORE
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 56766 of 2008

Smt. Seema Bharti ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Chandra Srivastava, Sri Vidya B. Srivastava, Sri Manoj Kumar Singh

Counsel for the Respondents:
C.S.C., Sri B.R. Maurya

Service Law – Disciplinary Proceedings and Financial Irregularities – Petitioner, an Assistant Teacher, challenged her dismissal and recovery order of ₹10,63,085 for alleged financial irregularities in construction projects at eight primary schools – Held, the departmental enquiry followed due process, with the petitioner given opportunities to respond to charges via show cause notices dated 06.01.2006 and 13.03.2006 – The enquiry report, based on physical inspections and technical evaluations, established financial

irregularities, and the petitioner failed to provide evidence to refute the allegations or prove the work was completed. (Paras 3, 5, 6, 7, 19, 21, 22)

Service Law – Scope of Judicial Review – Petitioner argued the enquiry report was incomplete due to lack of details on inspection dates, technical evaluators, and presence of village representatives – Held, under Article 226, the High Court's judicial review is limited to assessing procedural fairness, not re-evaluating evidence or substituting findings, as per Indian Oil Corporation Vs Ajit Kumar and Deputy General (Appellate Authority) Vs Ajay Kumar Srivastava – The absence of specific details in the enquiry report did not vitiate the process, as physical inspections and technical evaluations were conducted, and the petitioner provided no evidence to challenge their validity. (Paras 11, 14, 15, 16, 19, 22)

Service Law – Proportionality of Punishment – Petitioner was dismissed and ordered to repay ₹10,63,085 for financial irregularities across eight school construction projects – Held, dismissal was proportionate given the gravity of financial misconduct, which undermined the petitioner's credibility as a teacher, as per U.O.I. Vs Const. Sunil Kumar – The recovery order was justified, as funds were withdrawn for incomplete or non-existent work (e.g., roofs not constructed, furnishings not provided), and the petitioner failed to substantiate claims of completed work or challenge the technical evaluation. (Paras 24, 24(a), 24(b), 24(c))

Service Law – Burden of Proof and Evidentiary Standards –

Petitioner contended that the enquiry lacked evidence, as no specific inspection dates or evaluators' details were provided – Held, the enquiry report relied on physical inspections and technical department evaluations, which confirmed incomplete work and financial misappropriation – The petitioner's mere assertions without supporting evidence (e.g., receipts, muster rolls) were insufficient to establish a "no evidence" case, and the enquiry findings were upheld as rational and based on record. (Paras 19, 21, 22)

Service Law – Administrative Feasibility and Gender Considerations – Petitioner, a female teacher, argued it was unreasonable to assign her construction responsibilities for eight schools across different blocks – Held, the petitioner never raised objections to the assignment during the process, and no legal provision mandates that village representatives must be present during inspections – The administrative decision to assign her as construction in-charge was not challenged contemporaneously, and her gender did not exempt her from accountability for financial irregularities. (Paras 11, 22)

Writ Petition Dismissed.

Interim Orders Vacated.

List of Cases Cited :

1. Government of Andhra Pradesh Vs S. Sree Rama Rao , AIR 1963 SC 1723

2. Damoh Panna Sagar Rural Regional Bank Vs Munna Lal Jain , (2005) 10 SCC 84

3. St. Bank of India Vs Ramesh Dinkar Punde , (2006) 7 SCC 212

4. Suresh Pathrella Vs Oriental Bank of Commerce , (2006) 10 SCC 572

5. Chairman and Managing Director, VSS.P. Vs Goparaju Sri Prabhakara Hari Babu , (2008) 5 SCC 569

6. St. Bank of India Vs Narendra Kumar Pandey , (2013) 2 SCC 740

7. Indian Oil Corporation Vs Ajit Kumar , 2023 LiveLaw (SC) 478

8. Deputy General (Appellate Authority) Vs Ajay Kumar Srivastava , (2021) 2 SCC 612

9. U.O.I. Vs Const. Sunil Kumar , 2023 LiveLaw (SC) 49

10. Commandant, 22nd Battalion, CRPF Vs Surinder Kumar , (2011) 10 SCC 244

11. U.O.I. Vs R.K. Sharma , (2001) 9 SCC 592

12. Sanjay Kumar Singh Vs U.O.I. , (2011) 14 SCC 692

13. Lalit Popli Vs Canara Bank , (2003) 3 SCC 583

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

१. याचिकाकर्ता श्रीमती सीमा भारती, जो सहायक अध्यापक प्राथमिक विद्यालय डूमर डीहा (प्रा० वि० मनबसा सम्प्रति समायोजित) विकास क्षेत्र- दुद्धी, सोनभद्र में कार्य कर रही थी, के द्वारा जनपद के विभिन्न परिषदीय विद्यालयों के भवन निर्माण हेतु ग्राम शिक्षा निधि में प्रेषित धनराशि, टी.एल.ई. एवं साज़ सज्जा हेतु प्रेषित धनराशि में बरती गई वित्तीय अनियमित्ताओं के सम्बन्ध में एक विभागीय जांच प्रारंभ की गयी।

२. इस क्रम में सहायक बेसिक शिक्षा अधिकारी, दुद्धी, सोनभद्र द्वारा याचिकाकर्ता से १५ बिन्दुओं पर उनका स्पष्टीकरण एक विभागीय पत्र दिनांक ०६.०१.२००६, द्वारा मांगा गया।

३. याचिकाकर्ता ने उपरोक्त के संदर्भ में अपना स्पष्टीकरण दिनांक १६.०१.२००६ द्वारा प्रेषित किया, कि उस पर लगाये गये सभी आरोप निराधार है। उसने कोई वित्तीय अनियमितता नहीं करी है व समस्त भवन निर्माण कार्य सुचारू रूप से पूर्ण कराये जा रहें है। उसने प्राप्त आहरित धनराशि एवं शेष धनराशि का विवरण भी दिया।

४. उपरोक्त पर विचार करने के उपरान्त जिला बेसिक शिक्षा अधिकारी, सोनभद्र द्वारा एक जाँच आख्या दिनांक २४.०१.२००६ को प्रेषित की, जिसके अनुसार याचिकाकर्ता ने हर एक निर्माण में वित्तीय अनियमितता कारित करी।

५. जिला बेसिक शिक्षा अधिकारी, सोनभद्र (जाँच अधिकारी) द्वारा दी गई जाँच आख्या का सार निम्न हैः-

" (क.) उ०प्रा०वि० कनौड़िया वि०खण्ड म्योरपुर के नवीन विद्यालय भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। जिसके क्रम मे कुल धनराशि रू० ३,८३,००० (तीन लाख तिरासी हजार) भेजी गयी थी। समस्त धनराशि आहरित करने के उपरांत, स्थलीय सत्यापन में यह पाया गया है कि भवन निर्माण में एक कमरे का प्लास्टर एवं फर्श, बरामदे का फर्श, एवं विद्यालय के बाहरी दीवारों का प्लास्टर अवशेष है। एक कमरे में दरवाजा नहीं लगा है। निर्माण कार्य निर्धारित मानक के अनुसार नहीं है एवं चाहर दिवारी के लिए प्रेषित धनराशि रू० ५०,०००/- (पचास हजार) भी भवन प्रभारी द्वारा आहरित कर लिया गया है, किन्तु चाहर दिवारी नहीं बनी है। इसके साथ ही विद्यालय के साज-सज्जा एवं टी.एल.ई. तथा अन्य मदों से रू० ६७०३०/- (सरसठ हजार तीस) भी अनाधिकृत तरीक से आहरित कर लिया गया है। मूल्यांकन रिपोर्ट के अनुसार रू० २५,०००/- के शासकीय धन का दुरूपयोग हुआ है साथ ही ग्राम शिक्षा निधि खाते से भवन निर्माण के अतिरिक्त भेजी गयी धनराशि रूपया ६७०३०/- तथा चाहर दिवारी की अलग से भेजी गयी धनराशि रूपया ५०,०००/- भी आहरित कर लिया गया है। इस प्रकार उ०प्रा०वि० कनौड़िया वि०खण्ड़ म्योरपुर भवन के ग्राम शिक्षा निधि खाते से श्रीमती सीमा भारती द्वारा कुल १,४२,०३०/- रू० की वित्तीय अनियमितता की गयी है।

(ख.) उ०प्रा० विद्यालय बेलहत्थी विकास खण्ड-म्योरपुर के भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खाते में इकाई लागत के हिसाब से कुल धनराशि रूपया २,८०,०००/- (दो लाख अस्सी हजार) भेजी गयी थी। भवन प्रभारी का कथन है कि दो कमरे का छत पड़ गया है और बाकी कार्य अवशेष है। जांच मे यह पाया गया कि श्रीमती सीमा भारती द्वारा उक्त धनराशि मे से रूपया २,०५,०००/- का आहरण कर लिया गया है। निर्माणाधीन भवन के स्थलीय निरीक्षण मे यह पाया गया है कि भवन प्रभारी द्वारा मात्र दिवाल स्तर तक कार्य करवाया गया है शेष कार्य अद्यतन अपूर्ण है। भवन मे दरवाजों व खिड़कियों को भी नहीं लगवाया गया है। भवन के अवशेष कार्यो का मूल्यांकन तकनीकी विभाग द्वारा कराये जाने के पश्चात उक्त भवन को पूर्ण कराने हेतु रू० १,२१,०००/-(एक लाख इक्कीस हजार) की आवश्यकता बतायी गयी है। जबकि सम्बन्धित ग्राम शिक्षा निधि खाते में मात्र ७५,०००/- अवशेष है। इस प्रकार श्रीमती सीमा भारती द्वारा उ०प्र० विद्यालय बेलहत्थी विकास खण्ड-म्योरपुर के भवन निर्माण मे कुल रू० ४६,०००/- की वित्तीय अनियमितता की गयी है।

(ग.) उ०प्रा०वि० खाड़पाथर वि०खण्ड म्योरपुर के भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खाते मे इकाई लागत के हिसाब से कुल धनराशि रूपया २,८०,०००/-(दो लाख अस्सी हजार) भेजी गयी है। स्थलीय निरीक्षण में यह पाया गया कि उक्त धनराशि में से रूपया २,३३,५००/- का आहरण कर लिया गया है। तथा नींव स्तर से ४ फीट ऊंचाई तक ही निर्माण कार्य कराया गया है, शेष कार्य अद्यतन अपूर्ण है। तकनीकी विभाग द्वारा मूल्यांकन करने के पश्चात, भवन को पूर्ण कराने हेतु रूपया १,७५,०००/-(एक लाख पचहत्तर हजार) की

आवश्यकता बतायी गयी है जबकि ग्राम शिक्षा निधि खाते मे मात्र ४६५००/- की धनराशि अवशेष है। इस प्रकार श्रीमती सीमा भारती द्वारा उ०प्रा०वि० खाड़पाथर वि०खण्ड म्योरपुर के भवन निर्माण में रूपया १,२८,५००/-(एक लाख अट्ठाइस हजार पांच सौ) की वित्तीय अनियमितता की गयी है।

(घ.) उ०प्रा०वि० रघुनाथपुर वि०खण्ड चतरा के भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खाते में इकाई लागत के हिसाब से कुल धनराशि रूपया २,८०,०००/- (दो लाख अस्सी हजार) भेजी गयी थी। उक्त के सम्बन्ध मे भवन प्रभारी का कथन है कि छत का कार्य पूर्ण हो चुका है। जबकि स्थलीय जांच में यह पाया गया कि उक्त धनराशि मे से रूपया २,७३,०९६/- का आहरण कर लिया गया है। मात्र दरवाजे के स्तर तक ही निर्माण कार्य कराया गया है, शेष कार्य अद्यतन अपूर्ण है। भवन के अवशेष कार्यों का मुल्यांकन तकनीकी विभाग द्वारा कराये जाने के पश्चात उक्त भवन को पूर्ण कराने हेतु रूपया २,२१,३७८/- (दो लाख इक्कीस हजार तीन सो अठहत्तर) की आवश्यकता है जबकि ग्राम शिक्षा निधि खाते में मात्र ६९०४/- की धनराशि अवशेष है। इस प्रकार श्रीमती सीमा भारती द्वारा उ०प्रा० विद्यालय रघुनाथपुर के भवन निर्माण मे रूपया २,१४,४७४/-(दो लाख चौदह हजार चार सौ चौहत्तर) की वित्तीय अनियमितता की गयी है।

(ड) प्रा० वि० हिरनखुरी वि० खण्ड चतरा के भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खातें में इकाई लागत के हिसाब से कुल धनराशि रूपया २,४१,०००/-(दो लाख इक्तालिस हजार) भेजी गयी थी। भवन प्रभारी के कथन अनुसार दरवाजे के स्तर तक दीवाल बनवा दी गयी है। जबकि जांच में यह पाया गया कि भवन प्रभारी द्वारा मात्र नींव स्तर तक ही निर्माण कार्य कराया गया है, शेष कार्य अद्यतन अपूर्ण है। भवन के अवशेष कार्यों का मुल्यांकन तकनीकी विभाग द्वारा कराये जाने के पश्चात उक्त भवन को पूर्ण कराने हेतु रूपया १,४१,९१५/- (एक लाख इक्तालिस हजार नौ सौ पन्द्रह) की आवश्यकता बतायी गयी है। जबकि ग्राम शिक्षा निधि खाते में मात्र १,०९,०७७/- की धनराशि अवशेष है। इस प्रकार श्रीमती सीमा भारती द्वारा प्रा० वि० हिरनखुरी के भवन निर्माण में रूपया ३२,८३८/-(बत्तीस हजार आठ सौ अडतिस) की वित्तीय अनियमितता की गयी है।

(च) उ०प्रा० वि० नगवां वि० खण्ड ,दुद्धी के भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खाते में इकाई लागत के हिसाब से कुल धनराशि रूपया ४,३३,०००/- (चार लाख तैंतीस हजार) भेजी गयी थी भवन प्रभारी का कथन है कि वि० भवन के फर्श का कार्य मात्र शेष है। जांच में यह पाया गया कि श्रीमती सीमा भारती ने उक्त धनराशि मे से रू० ४,३१,१३५/- का आहरण कर लिया है, जबकि उक्त नर्माणाधीन विद्यालय के खिड़कियों में पल्ले नहीं लगवाये गये है, फर्श, ब्लैक बोर्ड, अप्रेन गैलरी का दरवाजा, चैनल व शौचालय का निर्माण अद्यतन अपूर्ण है। भवन के अवशेष कार्यों का मुल्यांकन तकनीकी विभाग द्वारा कराये जाने के पश्चात उक्त कार्यों को पूर्ण कराने हेतु रू० ५५,३८६/- (पचपन हजार तीन सौ छियासी) की आवश्यकता बतायी गयी है। जबकि ग्राम शिक्षा निधि खाते में मात्र १,८६५/- रूपया ही शेष है। इस प्रकार श्रीमती सीमा भारती द्वारा उ०प्रा० विद्यालय नगवां के भवन निर्माण में रूपया ५३,५२१/- (तिरपन हजार पांच सौ इक्कीस) की वित्तीय अनियमितता की गयी है।

(छ) उ०प्रा० विद्यालय डूमरडीहा विकास खण्ड ,दुद्धी के भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खाते में इकाई लागत के हिसाब से कुल धनराशि रूपया २,८०,०००/- (दो लाख अस्सी हजार) भेजी गयी थी। विद्यालय भवन के निर्माण के सम्बन्ध मे भवन प्रभारी का कथन है कि भवन का निर्माण कार्य पूर्ण है, केवल फर्श प्लास्टर एवं खिड़की दरवाजा लगवाने का कार्य शेष है। स्थलीय निरीक्षण में पाया गया है कि भवन के फर्श निर्माण का कार्य अपूर्ण है तथा खिड़कियों के पल्ले, चौखट, गैलरी का दरवाजा, चैनल आदि का कार्य अद्यतन अवशिष्ट है। विद्यालय के अवशेष कार्यों का मूल्यांकन तकनीकी विभाग द्वारा कराये जाने के पश्चात उक्त कार्य को पूर्ण कराने हेतु रू० ७९,९७६/- की आवश्यकता बतायी गयी है, जबकि सम्बन्धित ग्राम शिक्षा निधि खाते से निर्माण हेतु प्रेषित सम्पूर्ण धनराशि के अतिरिक्त रूपया २,०००/- साज-सज्जा के मद का भी आहरण श्रीमती सीमा भारती द्वारा अनाधिकृत ढंग से कर लिया गया है। इस प्रकार श्रीमती सीमा भारती द्वारा उ०प्रा० विद्यालय डूमरडीह वि० खण्ड़ दुद्धी के ग्राम शिक्षा निधि खाते से कुल रूपया ८१,९७६/- की वित्तीय अनियमितता की गयी है।

(ज) प्रा०वि०करी वि०खण्ड दुद्धी भवन का निर्माण प्रभारी श्रीमती सीमा भारती को नियुक्त किया गया था। ग्राम शिक्षा निधि खाते में इकाई लागत के हिसाब से कुल धनराशि रू० २,४१,०००(दो लाख इक्तालिस हजार) भेजी गयी थी। भवन प्रभारी के अनुसार निर्माणाधीन विद्यालय का छत पूर्ण (ढल) हो गया है, तथा भवन के प्लास्टर का कार्य मात्र अवशेष है जबकि स्थलीय निरीक्षण में पाया गया है कि निर्माणाधीन विद्यालय के फर्श, प्लास्टर, खिड़कियों के चौखट व पल्ले, दरवाजे, चैनल, शौचालय, चहार दीवारे आदि का कार्य अद्यतन अवशेष है। जबकि ग्राम शिक्षा निधि खाते से भवन निर्माण हेतु प्रेषित धनराशि के अतिरिक्त भी साज – सज्जा मद का रूपया १६,०००/- का भी आहरण कर लिया गया है। निर्माणाधीन विद्यालय के कार्यों का मुल्यांकन

तकनीकी विभाग द्वारा कराये जाने के पश्चात उक्त कार्यों को पूर्ण कराने में रू० १,०८,४००/- की आवश्यकता बतायी गयी है। इस प्रकार श्रीमती सीमा भारती द्वारा उ०प्रा० वि० करी के भवन निर्माण में रूपया १,२४,४००/-(एक लाख चौबीस हजार चार सौ) की वित्तीय अनियमितता की गयी है।''

६. याचिकाकर्ता ने उपरोक्त जाँच आख्या के संबंध में पुनः एक स्पष्टीकरण दिनाँक १३.०३.२००६ को दिया तथा सभी आरोपों को मिथ्या बताया।

७. जिला बेसिक शिक्षा अधिकारी, सोनभद्र के आदेश दिनाँक १३.०४.२००६ द्वारा जाँच आख्या व याचिकाकर्ता के उत्तर पर विचार करने के उपरांत सभी आरोप सिद्ध पाये गये और याचिकाकर्ता को उसके पद से पदच्युत किया गया एवं रू० १०,६३,०८५/- की वसूली का आदेश भी दिया गया, आदेश का निष्कर्ष निम्न हैः-

''जांच अधिकारी की जांच आख्या एवं श्रीमती सीमा भारती द्वारा प्रस्तुत स्पष्टीकरण का सम्यक परिशीलन करने के उपरान्त निम्नवत् निर्णय लिया जाता हैः-

०१) श्रीमती सीमा भारती द्वारा उ०प्रा०वि० कनौड़िया, उ०प्रा०वि० बेलहत्थी, उ०प्रा०वि० खाड़पाथर विकास क्षेत्र- म्योरपुर एवं उ०प्रा० रघुनाथपुर, प्रा० वि० हिरनखुरी विकास क्षेत्र चतरा एवं उ०प्रा०वि० नगवां, उ०प्रा०वि० डूमरडीहा, प्रा०वि० करी विकास क्षेत्र दुद्धी के भवन निर्माण में कुल रू० ९२८०५५.००(नौ लाख अट्ठाइस हजार पचपन मात्र) की गई वित्तीय अनियमितता की वसूली श्रीमती सीमा भारती के व्यक्तिगत सम्पत्तियों एवं पावनाओं से किये जाने का आदेश दिया जाता है।

०२) श्रीमती सीमा भारती ने उ०प्रा०वि० कनौड़िया के ग्राम शिक्षा निधि खाते से टी.एल.ई. मद का रू० ६७०३०.०० चहार दिवारी का रू० ५०,०००/- तथा उ०प्रा०वि० डूमरडीहा के ग्राम शिक्षा निधि काते से साज-सज्जा मद का रू० २०००/- तथा प्रा० वि० करीं के ग्राम शिक्षा निधि खाते से साज-सज्जा मद का रू० १६,०००/- का अनाधिकृत ढंग से आहरण किया है। वित्तीय हस्तपुस्तिका के अनुसार श्रीमती सीमा भारती को दोष सिद्ध पाते हुए अनाधिकृत ढंग से आहरित किये गये शासकीय धन कुल रू० १३५०३०.००(एक लाख पैंतीस हजार तीस रूपये) की वसूली श्रीमती सीमा भारती की व्यक्तिगत सम्पत्ति व उनकी पावनाओं से किये जाने का आदेश दिया जाता है।

०३) श्रीमती सीमा भारती ने जुलाई २००४ से अद्यतन किसी भी विद्यालय पर अपनी उपस्थिति नहीं दिया है और न ही अपनी अनुपस्थिति के संबंध में किसी भी सक्षम अधिकारी को सूचना अथवा प्रार्थना पत्र प्रस्तुत की है। अतएव श्रीमती सीमा भारती, स०अ०, प्रा०वि० डूमरडीहा (प्रा० वि० मनबसा सम्प्रति समयोजित) को अपने मूल दायित्वों के निर्वाहन में जानबूझकर बराबर लापरवाही करने, आदेश/निर्देश की अवहेलना करने एवं स्वेच्छाचारी प्रवृत्ति अपनाये जाने के कारण दोष सिद्ध पाते हुए उन्हें दण्डित (पनिश) किये जाने का निर्णय लिया जाता है।

इस प्रकार श्रीमती सीमा भारती द्वारा बरती गई अनियमितताये दीर्घ दण्ड की परिधि में आती है। अतः उ०प्र० सरकारी सेवक (अनुशासन एवं अपील) नियमावली १९९९ में निहित प्राविधानों के अन्तर्गत तथा वित्तीय हस्तपुस्तिका खण्ड-२ भाग-२ से ०४ के अन्तर्गत मूल नियम ५२ के प्राविधानों के अन्तर्गत एवं महामहिम राज्यपाल महोदय उ०प्र० द्वारा नियुक्ति प्राधिकारी को प्रदत्त अधिकारों का प्रयोग करते हुए निम्नवत् आदेश निर्गत किया जाता हैः-

"श्रीमती सीमा भारती, स०अ०, प्रा०वि० डूमरडीह (प्रा०वि०मनबस सम्प्रति समायोजित) विकास क्षेत्र- दुद्धी, जनपद-सोनभद्र, उ०प्र० को उनके द्वारा कृत्य वित्तीय अनियमितताओं, उच्चाधिकारियों के आदेशों का अतिक्रमण करना, कर्मचारी आचरण संहिता का उल्लंघन करने, शासक धन का दुरूपयोग करने तथा रू० १०,६३,०८५.०० का गबन करने के आरोप में एतदद्वारा आदेश निर्गत होने की तिथि से उन्हें सरकारी सेवा से पदच्युत (डिस्मिस) किया जाता है। सरकारी देयको की वसूली उनके व्यक्तिगत सम्पत्तियों एवं पावनाओं से नियमानुसार की जायेगी। ''

. उपरोक्त दण्डादेश के विरूद्ध याचिकाकर्ता ने एक याचिका इस न्यायालय के समक्ष दायर की, परन्तु वो वैकल्पिक उपचार होने के कारण निरस्त कर दी गयी और याचिकाकर्ता ने तब, उ.प्र.बेसिक शिक्षा कर्मचारी नियमावली के 'नियम ५' के अंतर्गत एक अपील दायर की।

९. सचिव, उ.प्र. बेसिक शिक्षा परिषद, इलाहाबाद ने आदेश दिनाँक ३१.०७.२००८ द्वारा उक्त अपील को निरस्त कर दिया। आदेश के मुख्य अंश निम्न हैः-

''जांच अधिकारी द्वारा जांच आख्या में निम्नवत पुष्टि की गयी हैः-

१- याची श्रीमती भारती को उच्च प्रा० वि० कनौडिया विकास खण्ड म्योरपुर के नवीन विद्यालय का भवन प्रभारी वर्ष २००२-०३ मे बनाया गया जिसमें चाहर दीवारी, साज सज्जा एवं टी०एल०ई० व अन्य मदों की धनराशि कुल रूपया १४२०३०.०० की वित्तीय अनियमितता का उल्लेख किया गया है।

२- उच्च प्राथमिक विद्यालय बेलहस्थी, म्योर की मात्र दीवाल स्तर का कार्य किया गया, शेष अपूर्ण है, अवशेष कार्यों का मुल्यांकन तकनीकी विभाग से कराया गया, भवन कार्य पूर्ण कराने हेतु रू० १२१००.०० धन की आवश्यकता है। रूपया ४६०००.०० की वित्तीय अनियमितता बतायी गयी है।

३- उच्च प्रा० वि० खाड़पाथर म्योर के भवन निर्माण सें नीव स्तर से ४ फीट ऊचाई तक ही निर्माण कार्य बताया गया है शेष कार्य अपूर्ण है। तकनीकी विभाग द्वारा मुल्यांकन कराया गया है जिसमें भवन पूर्ण कराने हेतु रूपये १७,५००.०० की आवश्यकता बतायी गयी है।

४- उच्च प्रा० वि० रघुनाथपुर वि०ख० चतरा का निर्माण कार्य दरवाजे स्तर तक पूर्ण है तकनीकी विभाग द्वारा मुल्यांकन कराये जाने पर उक्त भवन को पूर्ण कराने हेतु रूपये २,२१,३७८.०० की आवश्यकता बतायी गयी है।

५- प्रा० वि० हिरनखुरी, चतरा के सम्बन्ध में जांच अधिकारी द्वारा अपनी आख्या में बताया गया है कि निर्माण कार्य नींव स्तर तक ही कराया गया है। मुल्यांकन तकनीकी विभाग से करायी गयी भवन पूर्ण कराने हेतु रू० १,४१,९१५.०० की आवश्यकता बतायी गयी है।

६- उच्च प्रा० वि० दुद्धी के भवन निर्माण के सम्बन्ध में जांच आख्या में उल्लेख किया गया है कि खिड़कियों मे पल्ले नहीं लगवाये गये है फर्श, ब्लैक बोर्ड, अप्रैन गैलरी का दरवाजा चैनल व शौचालय का निर्माण अद्यतन अपूर्ण है, मूल्यांकन तकनीकी विभाग से कराया गया कार्य पूर्ण कराये जाने हेतु रू० ५५,३८६.०० की आवश्यकता बतायी गयी है।

७- उच्च प्राथमिक विद्यालय डूमरडीहा, दुद्धी के स्थलीय निरीक्षण में भवन के फर्स का निर्माण कार्य अपूर्ण तथा खिड़कियों के पल्ले, चौखट, गैलरी का दरवाजा चैनल आदि अधाविधि अवशेष पाया गया, मुल्यांकन तकनीकी विभाग से करायी गयी जांच कार्य पूर्ण कराने हेतु रू० ७९,९७६.०० की आवश्यकता है। ८- प्रा० वि० करीं, दुद्धी के स्थलीय निरीक्षण में पाया गया कि फर्स, प्लास्टर, खिड़कियों के चौखट व पल्ले, दरवाजे, शौचालय चैनल आदि कार्य अवशेष हैं मूल्यांकन तकनीकी विभाग से करायी गयी कार्य को पूर्ण करने हेतु रू० १,०८४.०० की आवश्यकता है।

उपरोक्त जांच आख्या से स्पष्ट है कि याची द्वारा भवनों का निर्माण कार्य पूर्ण नहीं किया जा सकता है। किन्तु जांच आख्या में स्पष्ट किया गया है कि समस्त विद्यालयों का जांच अधिकारी द्वारा स्थलीय निरीक्षण किया गया, निर्मित/अर्धनिर्मित भवनों का तकनीकी विभाग द्वारा मूल्यांकन किया गया। निर्माण कार्य पूर्ण करने में उपरोक्त धनराशि की आवश्यकता है, किन्तु जांच आख्या में इस तथ्य का कही भी उल्लेख नहीं किया गया है कि जांच स्थलीय निरीक्षण किन-किन तिथियों को की गयी/तकनीकी विभाग का कौन अधिकारी/कर्मचारी द्वारा उक्त धनराशि का मूल्यांकन किया गया, जांच के समय ग्राम प्रधान/ग्राम सभा का कौन सा सदस्य उपस्थित था, जांच के समय भवन स्थल पर कोई सामग्री अवशेष नहीं थी अथवा थी, शेष थी तो उसका मूल्यांकन क्या था आदि बिन्दुओं का कोई उल्लेख जांच आख्या में नहीं है।

उक्त से स्पष्ट है कि याची सहायक अध्यापिका थी तथा एक ही सत्र में उसे कुल ८ विद्यालयों का भवन प्रभारी बनाया गया, जो अलग-अलग विकास खण्डों में विद्यालय स्थित थे। जिला बेसिक शिक्षा अधिकारी/सहायक बेसिक शिक्षा अधिकारी द्वारा याची को भवन प्रभारी बनाते समय इस तथ्य को संज्ञान में नही लिया गया कि, याची एक महिला शिक्षिका है तथा न ही उक्त अध्यापिका द्वारा भवन निर्माण हेतु अपनी अस्मर्थता व्यक्त की गयी।

जिला बेसिक शिक्षा अधिकारी सोनभद्र द्वारा प्राप्त आख्या एवं अभिलेखों के परीक्षण से श्रीमती सीमा भारती सहायक अध्यापिका द्वारा भवन निर्माण हेतु प्राप्त धनराशि रूपये १०,६३,०८५.०० रू० दस लाख तिरसठ हजार पच्चासी रूपये का शासकीय धन का दुरूपयोग होने तथा द्वारा वित्तीय अनियमितताओं/उच्चाधिकारियों के आदेश का अतिक्रमण करना प्रमाणित है, उनके इस कृत्य के लिए जिला बेसिक शिक्षा अधिकारी, सोनभद्र द्वारा दिया गया सेवा समाप्ति आदेश यथावत अनुमोदित किया जाता है।

निर्णय

उक्त के आलोक में मा० उच्च न्यायालय इलाहाबाद द्वारा पारित आदेश दिनांक- ०१.०६.०७ के अनुपालन में याची द्वारा प्रस्तुत प्रत्यावेदन बलहीन होने के कारण निरस्त किया जाता है।''

१०. उपरोक्त वर्णित आदेश दिनांक १३.०४.२००६ व ३१.०७.२००७ वर्तमान याचिका के माध्यम से आक्षेपित किये गये है।

११. श्री मनोज कुमार सिंह, याचिकाकर्ता के विद्वान अधिवक्ता ने आक्षेपित अपीलीय आदेश दिनाँक ३१.०७.२००७ के उक्त अंश पर न्यायालय का ध्यान आकर्षित कराया कि अपीलीय प्राधिकारी ने यह माना कि जाँच आख्या में यह उल्लेख नहीं किया

गया है कि जाँच स्थलीय निरीक्षण किन-किन तिथियों को किया गया। तकनीकी विभाग के किस अधिकारी/कर्मचारी द्वारा उक्त धनराशि का मूल्यांकन किया गया। जाँच के समय कौन सा अधिकारी/कर्मचारी उपस्थित था। जाँच के समय भवन स्थल पर कोई सामग्री शेष थी या नही और उसका मूल्यांकन क्या था, परन्तु अपील निरस्त कर एक वैधानिक त्रुटि कारित करी है। विद्वान अधिवक्ता ने यह भी कथन किया कि उपरोक्त कमियों के कारण जाँच आख्या पूर्ण नही मानी जा सकती है। ऐसी जाँच आख्या के आधार पर याचिकाकर्ता के विरूद्ध कोई भी आरोप सिद्ध नही हो सकता है। याचिका के महिला होने के कारण एक साथ कई स्थानो पर भवन निर्माण की जिम्मेदारी देना भी उचित नही था। याचिकाकर्ता पूर्णतः निर्दोष है, तथा उसको दिया गया दण्ड़ समानुपातिक भी नही है।

१२. उपरोक्त के विरूद्ध, विपक्षी के विद्वान अधिवक्ता ने उच्चतम न्यायालय द्वारा **आन्ध्र प्रदेश सरकार प्रति एस.श्री रामा राव, १९६३ ० ए.आई.आर. (एस.सी.)१७२३; दमोह पन्ना सागर रूरल रीजनल बैंक एवं अन्य प्रति मुन्ना लाल जैन, (२००५) १० सुप्रीम कोर्ट केसस ८४; स्टेट बैंक ऑफ इंडिया एवं अन्य प्रति रमेश दिनकर पुंडे, (२००६) ७ सुप्रीम कोर्ट केसस २१२; सुरेश पथरेला प्रति ओरियंटल बैंक ऑफ कॉमर्स, (२००६) १० सुप्रीम कोर्ट केसस ५७२; चेयरमैन एंड़ मैनेजिंग डाईरेक्टर, वी.एस.पी. एवं अन्य प्रति गोपाराजू श्री प्रभाकरा हरी बाबू, (२००८) ५ सुप्रीम कोर्ट केसस ५६९; स्टेट बैंक ऑफ इंडिया एवं अन्य प्रति नरेन्द्र कुमार पाण्डेय (२०१३)२ सुप्रीम कोर्ट केसस ७४०,** के प्रकरण मे दिये गये निर्णयों का संदर्भ देते हुए यह कथन किया कि जाँच प्रक्रिया में प्राकृतिक न्याय के सिद्धान्तो का पूर्ण पालन किया गया है तथा पूर्ण प्रक्रिया दोष मुक्त है, अतः यह न्यायालय एक अपीलीय प्राधिकारी का स्वरूप नहीं ले सकता है और न ही पत्रावली पर उपस्थित साक्ष्यों का पुनः अवलोकन कर सकता है। याचिकाकर्ता ने गंभीर वित्तीय आपत्तियां कारित करी है। याचिकाकर्ता ने कभी भी जिम्मेदारी न दिये जाने का प्रार्थना पत्र नहीं दिया था। अतः उसको दी गयी सजा समानुपातिक है।

१३. उभय पक्षों के विद्वान अधिवक्ताओं को ध्यान पूर्वक श्रवण किया गया एवं पत्रावली का परिशीलन किया गया।

१४. पक्षों की बहस को मनन करने के पूर्व, विभागीय कार्यवाही में इस न्यायालय द्वारा हस्ताक्षेप की विधिक सीमा से सम्बन्धित विधिक सिद्धान्तो का संक्षेप मे वर्णन करना आवश्यक है।

१५. उच्चतम न्यायालय के एक नवीन निर्णय जो, **इंडियन ऑयल कार्पोरेशन व अन्य प्रति अजीत कुमार व अन्य २०२३ लाइव लॉ(एस.सी.)** ४७८ के प्रकरण में पारित किया गया है और यह पुनः निर्धारित किया किः-

''इस न्यायालय द्वारा न्यायिक पुनर्विचार के दायरे पर डिप्टी जनरल (अपीलीय अथॉरिटी) बनाम अजय कुमार श्रीवास्तव (२०२१)२ एससीसी ६१२) के निर्णय व्यक्त किए गए विचार निम्न उद्धर्णित हैं :-

"२४. इस प्रकार यह निश्चित हो गया है कि, संवैधानिक अदालतों की न्यायिक पुनर्निरीक्षण की शक्ति, निर्णय लेने की प्रक्रिया का मूल्यांकन है, न कि निर्णय के गुण-दोष का। यह उपचार में निष्पक्षता सुनिश्चित करने के लिए है, न कि निष्कर्ष की निष्पक्षता सुनिश्चित करने के लिए। न्यायालय/न्यायाधिकरण अपचारी के विरूद्ध की गई कार्यवाही में हस्तक्षेप कर सकता है , यदि यह किसी भी तरह से, प्राकृतिक न्याय के नियमों के असंगत है या जांच के तरीके को निर्धारित करने वाले वैधानिक नियमों का उल्लंघन हुआ है या जहां अनुशासनात्मक प्राधिकारी का निष्कर्ष या जॉच परिणाम बिना किसी साक्ष्य पर आधारित है। यदि निष्कर्ष या जॉच परिणाम ऐसा हो जिस पर कोई भी उचित व्यक्ति कभी भी नहीं पहुंच सकता हो या जहां अनुशासनात्मक प्राधिकारी द्वारा साक्ष्य पर विचार करने पर दिया गया निष्कर्ष विकृत हो या पत्रावली के परिशीलन मात्र से आधारभूत त्रुटि से ग्रस्त प्रकट हो या किसी भी साक्ष्य पर आधारित न हो, तो उत्प्रेषण आज्ञा प्रत्र जारी किया जा सकता है। संक्षेप में, न्यायिक पुनर्निरीक्षण का दायरा वस्तुतः प्राधिकारी के निर्णय की शुद्धता या तर्क संगतता की जांच तक नहीं बढ़ाया जा सकता है।

२५- xx xx xx

२६- xx xx xx

२७- xx xx xx

२८.संवैधानिक न्यायालय, संविधान के अनुच्छेद २२६ या अनुच्छेद १३६ के तहत न्यायिक पुनर्निरीक्षण के अपने अधिकार क्षेत्र का प्रयोग करते हुए, विभागीय कार्यवाई के तथ्यात्मक जॉच परिणामों में दुर्भावना या दुराग्रह के प्रकरण को छोड़कर, यानी जहां किसी निष्कर्ष का समर्थन करने के लिए साक्ष्य न हो या जहां कोई निष्कर्ष ऐसा है कि कोई भी व्यक्ति तर्कसंगत और निष्पक्षता से उन तक नहीं पहुंच सकता है, हस्तक्षेप नहीं करेगा और जब तक विभागीय प्राधिकारी द्वारा दिये गए निष्कर्ष का समर्थन करने के लिए कुछ साक्ष्य हैं,

तब तक उसे संधारित रखा जाना चाहिए।"

(बल दिया गया)

तदुपरांत इसी तरह का विचार एक्स कांस्टेबल/डीवीआर मुकेश कुमार रैगर बनाम भारत संघ और अन्य के प्रकरण में इस न्यायालय के निर्णय में व्यक्त किया गया था।"

(हिन्दी रूपान्तरण न्यायालय द्वारा किया गया)

१६. इस स्तर पर यह भी उल्लिखित करना उचित रहेगा कि उच्च न्यायालय, अनुच्छेद २२६ के अधिकार क्षेत्र के अन्तर्गत विभागीय जांच के प्रकरणों में कब और किस सीमा तक हस्तक्षेप कर सकता है। इस विषय पर उच्चतम न्यायालय के कुछ और निर्णय उल्लेखनीय हैः-

"(अ). **संजय कुमार सिंह बनाम भारत सरकार व अन्य २०११(१४) एससीसी ६९२,** में उच्चतम न्यायालय ने प्रतिपादित किया कि, विभागीय जाँच के प्रकरणों में न्यायालय की भूमिका सीमित है एवं विभागीय प्राधिकारियों द्वारा सभी पक्षों को सुनकर व पत्रावली पर विचार के उपरान्त दिये गये मत के स्थान पर न्यायालय अपना मत प्रतिस्थापित कर सकता है।(कण्डिका २२)

(ब). **ललित पोपली बनाम केनरा बैंकः २००३(३) एससीसी ५८३,** में उच्चतम न्यायालय ने यह प्रतिपादित किया कि, उच्च न्यायालय अनुच्छेद २२६ की अधिकार क्षेत्र का प्रयोग करते हुए अपीलीय प्राधिकरण की तरह कार्य नहीं कर सकता है। न्यायिक पुनः निरीक्षण क्षेत्राधिकार का, अपीलीय प्राधिकरण की तरह उपयोग नहीं किया जा सकता है।**(कण्डिका १७)"**

१७. वर्तमान प्रकरण में प्रक्रिया की सुचिता में कोई दोष नहीं है और न ही याचिकाकर्ता ने ऐसी कोई चेष्टा ही की है और न ही प्राकृतिक न्याय के सिद्धान्तों की अवेहलना ही हुई है।

१८. न्यायालय को यह देखना है, कि क्या याचिकाकर्ता के कथनानुसार वर्तमान प्रकरण ' कोई साक्ष्य नहीं (No Evidence)' के अंतर्गत आता है या दिया गया 'दण्ड' समानुपातिक है, या नहीं। जैसा पूर्व मे कहा गया है कि मात्र उपरोक्त दशा (कोई साक्ष्य नहीं) में ही यह न्यायालय आक्षेपित आदेश में, कुछ परिस्थितियों में ही हस्तक्षेप कर सकता है।

१९. उपरोक्त के संदर्भ में मैने, जाँच आख्या का ध्यानपूर्वक परिशीलन किया। जाँच अधिकारी ने ऐसा उल्लेख किया है कि स्थलीय जाँच व अवशेष कार्यों का मुल्यांकन, तकनीकी विभाग द्वारा कराया गया था, और वित्तीय अनियमितताओं का निर्धारण भी किया गया था। स्थलीय जाँच आख्या पत्रावली पर नहीं है। याचिकाकर्ता द्वारा ऐसा कोई साक्ष्य पत्रावली पर नही है कि कोई स्थलीय जाँच नही हुई या तकनीकी मुल्यांकन भी नहीं हुआ था। कथन मात्र से यह नही माना जा सकता कि कोई स्थलीय जाँच नही हुई थी। याचिकाकर्ता ने मूल्यांकन में त्रुटि से संबंधित भी कोई साक्ष्य नहीं दिया है।

२०. यहां यह उल्लेख करना समीचिन रहेगा कि, याचिकाकर्ता व उसके पति के विरूद्ध दण्डनीय प्रक्रिया भी हुई थी। उनके विरूद्ध प्राथमिकी भी दर्ज हुई थी व उसका पति कारागार में भी निरूद्ध रहा।

२१. प्रतिवादी की ओर से दिये गये प्रतिशपथ पत्र के कुछ प्रस्तरों का उल्लेख करना भी उचित रहेगा कि, स्थलीय जाँच हुई एवं शेष कार्य का मुल्यांकन भी कराया गयाः-

"३४. यह कि याचिका के प्रस्तर संख्या ५४ इस कथन के साथ अस्वीकार है कि उक्त निर्माणाधीन विद्यालय भवनों के अवशेष कार्यों का मूल्यांकन भवन विशेषज्ञ (अभियन्ता) से कराया गया, और विशेषज्ञ द्वारा प्रस्तुत आख्या के आधार पर जाँच अधिकारी द्वारा स्थलीय निरीक्षण किया गया। स्थलीय निरीक्षण के दौरान उक्त निर्माणाधीन विद्यालय भवनों के समीप कोई भी निर्माण सामग्री उपलब्ध नहीं पायी गई, और न ही याचिनी द्वारा जाँच अधिकारी के समक्ष व्यय किये गये धन का विवरण व उससे सम्बन्धित रसीद/बाउचर, मास्टररोल आदि प्रस्तुत किया गया।

३५. यह कि याचिका के प्रस्तर संख्या ५५ इस कथन के साथ अस्वीकार है कि याचिनी को अभिलेखीय साक्ष्यों के परीक्षण के उपरान्त दोष सिद्ध पाये जाने के उपरान्त याचिनी को सरकारी सेवा से पदच्युत किये जाने का आदेश पूर्णतया वैधानिक व्यवस्थाओं के अनुरूप जारी किया गया है।

३६. यह कि याचिका का प्रस्तर संख्या ५६ अस्वीकार है। याचिनी ने विभाग के साथ धोखाधड़ी व विभागीय निर्देशों की अवमानना करते हुए शासकीय धन रू० १०६३०८५.०० का गबन करने का आपराधिक कृत्य किया है, जिससे याचिनी को सरकारी सेवा से पदच्युत किया जाना उचित व विधि सम्मत है।

३७. x x x

३८. x x x

३९. यह कि याचिका का प्रस्तर संख्या ५९ अस्वीकार है। याचिनी द्वारा विभाग के साथ धोखाधड़ी विभागीय निर्देशों के उपेक्षा व अवमानना करने, शासकीय धन का गबन करने, अनाधिकृत कार्य करने के कारण याचिनी को सरकारी सेवा से

पदच्युत कर गबन किये गये शासकीय धन की वसूली किया जाना विधि व न्यायहित में आवश्यक है।

४०. यह कि याचिका के प्रस्तर संख्या ६० अस्वीकार है। प्रस्तुत याचिका असत्य एवं आधारहीन तथ्यों के बल पर योजित की गई है, जिसे विधि व न्यायहित में निरस्त किया जाना आवश्यक है।''

२२. उपरोक्त विश्लेषण से यह निष्कर्ष निकलता है किः-

(क.) वर्तमान प्रकरण में विभागीय जांच प्रक्रिया में कोई दूषिता नहीं है। इस संबंध में याचिकाकर्ता का कोई विरोध भी नहीं है।

(ख.) याचिकाकर्ता का यह कथन कि, जाँच आख्या अपूर्ण व त्रुटिपूर्ण है व इस संबंध में अपीलीय आदेश के कुछ अंश उल्लेख का तर्क, निम्न कारणों से विधिक नही माना जा सकता।

• जाँच आख्या पत्रावली पर नहीं है। जाँच आख्या में स्थलीय जाँच आख्या व तकनीकी आख्या/मूल्यांकन का भी उल्लेख है। अतः यह नही माना जा सकता कि कोई जाँच ही नहीं हुई। याचिकाकर्ता ने अपने कथन के समर्थन मे कोई प्रमाण नहीं दिया है। ऐसा भी कोई विधि/प्राविधान नहीं बताया है कि निरीक्षण के समय गांव के किसी निवासी का उपस्थित होना अनिवार्य था। कथन मात्र से जाँच एवं मूल्यांकन का उपरोक्त वर्णन मिथ्या नहीं हो सकता है।

• आक्षेपित आदेश में जाँच आख्या व याचिकाकर्ता के कथन पर विचार करने के उपरांत ही निर्णय पारित किये गयें है। पत्रावली पर उपस्थित साक्ष्य के आधार पर ही आक्षेपित आदेश पारित किये गयें है। अतः वर्तमान प्रकरण 'कोई साक्ष्य नहीं '(No evidence)' का प्रकरण नहीं है।

२३. उपरोक्त विधिक विश्लेषण के आधार पर ऐसा कोई वैधानिक कारण नहीं है, जिसके कारण आरोपों के सिद्ध होने के आक्षेपित आदेश में हस्ताक्षेप किया जा सके।

२४. अब न्यायालय को यह देखना है कि दिया गया दण्डादेश, आरोप के सापेक्ष समानुपातिक है या नहीं।

(क) उच्चतम न्यायालय ने एक नवीन निर्णय जो, **यूनियन ऑफ इंडिया एवं अन्य प्रति कां० सुनील कुमार; २०२३ लाइव लॉ (एस.सी.)४९,** के प्रकरण में पारित किया है, में यह पुनःनिर्धारण किया है कि **"...कमांडेन्ट, २२वी बटालियन, सी.आर.पी.एफ. प्रति सुरिंदर कुमार;(२०११) १० एस.सी.सी. २४४,** के मामले में बर्खास्तगी की सजा में हस्तक्षेप करने में उच्च न्यायालय की न्यायिक समीक्षा की शक्ति पर विचार करते समय, **भारत संघ बनाम आर.के.शर्मा;(२००१)९ एससीसी ५९२**, के मामले में पूर्व के निर्णय पर विचार करने के बाद, इस न्यायालय द्वारा उल्लिखित एवं निर्धारित किया गया कि, न्यायिक समीक्षा की शक्तियों का प्रयोग करते हुए इस आधार पर बर्खास्तगी के दण्ड मे हस्तक्षेप करना कि वो अनुपातहीन था, वो दण्ड न केवल अनुपातहीन होना चाहियें, बल्कि आश्चर्यजनक रूप से अनुपातहीन होना चाहियें। जैसा कि उल्लिखित और निर्धारित किया गया कि मात्र एक अत्यंत प्रकरण में, जहां वाह्यरूप में ही विकृतियां तर्कहीन प्रकट हो, तो संविधान के अनुच्छेद २२६ या २२७ या अनुच्छेद ३२ के तहत न्यायिक समीक्षा हो सकती है।"

(हिन्दी रूपान्तरण न्यायालय द्वारा किया गया है)

(ख) दण्डादेश के अनुसार याचिकाकर्ता को पदच्युत करा गया है। आक्षेपित आदेशानुसार याचिकाकर्ता पर गंभीर वित्तीय अनियमितताओं का आरोप है। आरोप, साक्ष्य व जाँच आख्या के आधार पर पूर्ण रूप से सिद्ध हुए है। वित्तीय अनियमितता, एक गंभीर अपराध है, जो याचिकाकर्ता की विश्वसनीयता पर संदेह प्रकट करते है। ऐसे कर्मचारी को शिक्षक के पद पर रहने का कोई अधिकार नहीं है। अतः आरोपों के सापेक्ष दण्डादेश एक समानुपातिक आदेश है।

(ग) जहां तक वसूली के आदेश का संदर्भ है। आक्षेपित आदेश में यह विशिष्ट रूप से निर्धारित किया गया है कि आहरित धनराशि के सापेक्ष कार्य ही नहीं हुआ है। जैसे छत के बनाने की राशि आहरित की गयी, परन्तु छत डाली ही नही गयी है। साज़ सज्जा का सामान खरीदा, परन्तु वो पाया ही नही गया। पूर्ण भवन के निर्माण की राशि आहरित की गई, परन्तु मात्र नींव का ही काम हुआ है। याचिकाकर्ता ने ऐसा कोई साक्ष्य प्रस्तुत नहीं किया है कि मुल्यांकन गलत हुआ है। अतः वसूली का आदेश, सिद्ध आरोप की गंभीरता के सापेक्ष समानुपातिक होने के कारण न्यायसंगत है व इस कारण इसमें भी कोई हस्तक्षेप नहीं किया जा सकता है।

२५. अतः याचिका **निरस्त** की जाती है एवं अंतरिम आदेश भी **रद्द (vacate)** किया जाता है।

(2024) 3 ILRA 797
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2024

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ B No. 1841 of 2019

Shiv Charan & Ors. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Harsih Chandra Singh, Sri Dharampal Singh, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Ajay Kumar Singh, Sri Ashish Kumar Singh, Sri Punit Kumar Gupta

Civil Law - U.P. Tenancy Act, 1939 – Sections 171 & 172 – U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1956 – Sections 5 & 8 – U.P. Revenue Code, 2006 – Section 230 – Writ petition challenging orders dated 16.04.2019 (Board of Revenue), 20.11.2018 (Commissioner), and 24.08.2018 (Sub Divisional Officer) in suit for ejectment – Held, concurrent findings by all three revenue courts that zamindari not abolished in non-ZA area and suit maintainable under U.P. Tenancy Act – Petitioners failed to prove land demarcation under Section 5 of 1956 Act to vest in St. under Section 8 – U.P. Tenancy Act not repealed by U.P. Revenue Code, 2006, as not listed in First Schedule – No procedural irregularity or perversity in findings – Writ jurisdiction under Article 226 not to interfere with concurrent findings of fact absent manifest error. (Para 21-51)

Writ petition dismissed.

List of Cases Cited:

1. St. of M.P. Vs Kedia Leather & Liquor Ltd., (2003) 7 SCC 389

2. M/s Gammon India Ltd. Vs Spl. Chief Secretary, (2006) 3 SCC 354

3. Kashi Nath (Dead) through L.Rs. Vs Jaganath, (2003) 8 SCC 740

4. A.K.K. Nambiar Vs U.O.I., AIR 1970 SC 652

5. St. of Raj. Vs M/s Sindhi Film Exchange, AIR 1974 Raj 31

6. Awadhesh Singh Vs St. of U.P., 2023 (12) ADJ 554

7. St. of Jharkhand Vs Linde India Limited, 2022 SCC OnLine SC 1660

8. Chandrika (Dead) by LRs Vs Sudama (Dead) Thr. LRs., (2019) 5 SCC 790

9. Bansraj Vs Ram Naresh, (2020) 5 ADJ 10

10. Mahant Dooj Das Vs Udasin Panchayati Bara Akhara, (2008) 12 SCC 181

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri D.P. Singh, learned Senior Advocate assisted by Sri Harish Chandra Singh, learned counsel for the petitioners; Sri S.N. Srivastava, learned Additional Chief Standing Counsel for the State-respondents no.1 to 3 and Sri Punit Kumar Gupta, learned counsel for the respondent no.4.

2. By means of this writ petition the petitioners/Defendants have challenged the Order dated 16.04.2019 (Annexure-19) passed by the Board of Revenue U.P. at Allahabad in Second Appeal No.422 of 2019 (Shiv Charan and others versus Shekh Sauduzzuma; the judgment/order dated

20.11.2018 (Annexure-16) passed by the Learned Commissioner, Chitrakoot Dham Division, Banda in Case No.01600 of 2018 - Computerized Case No.C201807000001600 (Shiv Charan and others versus Shekh Sauduzzuma), and the judgment/decree dated 24.08.2018 (Annexure- 14) passed by the Sub Divisional Officer, Baberu (Banda) in Case No. 1648 of 2016 - Computerized No. T201607110111648 (Shekh Sauduzzuma versus Shiv Charan and others).

3. The controversy involved in this case pertains to the plots of land having Gata Nos. 4335, 4336, 4341, 4344 and 4334 measuring 1.518 hectare, situated at Village Ladakapurva, Tehsil and District Banda.

4. The facts in nutshell that culled out from the pleadings as available on record are that the Respondent No. 4/Plaintiff filed a suit for ejectment under section 171 & 172 of the U.P. Tenancy Act, 1939 against the petitioners/defendants in the Court of Assistant Collector First-Class, Banda, on the ground that the they are changing the nature of the land and are also trying to unlawfully transfer the same.

5. The averments in the plaint were to the effect that the Respondent/plaintiff are the Co-Zamindar and Lambardar of *Khata Kewat Patti No. 1, Muhal Yusuf Zama*, duly appointed by Collector Banda vide order dated 14.07.2015 and the land in question that situates in 'non-ZA area', was given on lease to defendants' father namely Kandhilal whose name stood recorded in *Ziman 8* and consequent upon his death the names of defendants came to be mutated in the Khatuani in *Ziman 8* (hereditary tenant with non-transferable rights).

6. A Written Statement was filed by the defendants pleading therein that the Zamindari stands abolished by the UP Urban Areas Zamindari Abolition and Land Reforms Act 1956 and the land stood vested with the State Government by virtue of section 8 thereof. It was also alleged that the United Provinces Tenancy Act 1939 stands repealed by section 84 of the said Act of 1956 as such the suit is not maintainable.

7. The application for interim injunction filed by the respondent/plaintiff is said to have been allowed by the trial Court vide order dated 28.04.2017 against which the petitioners/defendants filed a Revision before the Court of Commissioner (Respondent No. 2), however, the Revision preferred by the petitioners/defendants was dismissed by the Court of Commissioner on 20.12.2017 which is said to have not been challenged further.

8. The learned trial court framed six Issues including issue No. 3 to the effect as to whether Zamindari in the area in question has been abolished, as stated in Paragraphs No. 7, 12 and 13 of the Written Statement. The issues as framed by the court below are reproduced here under:

1- क्या वाद पत्र में अंकित शहरी जींदारी की भूमि का नम्बरदार प्रबन्धक व सह जमींदार है जैसा कि वाद पत्र की धारा 1 में कथन किया गया है?

2- क्या प्रतिवादी गण द्वारा काश्तकारी कर्तव्यों/अधिकारों का वि०भू० में उल्लंघन किया गया है जो कि कारण प्रतिवादीगण धारा-171-172 यू०पी० टेनेन्सी एक्ट के अन्तर्गत बेदखल होने योग्य है?

3- क्या वि०भू० की जमींदारी समाप्त की जा चुकी है जैसा कि प्रतिवाद पत्र की धारा-7 एव धारा-12-13 में आक्षेप किया गया है यदि हाँ तो इसका प्रभाव

4- क्या वि०भू० की बावत कोई वाद हेतु उत्पन्न नहीं हआ जैसा कि प्रतिवाद पत्र की धारा 15 में आक्षेप है?

5- क्या प्रतिवादीगण विशेष हर्जा वादी से पाने के अधिकारी हैं जैसा कि प्रतिवाद पत्र की धारा-17 के आक्षेप है

6- क्या वाद पोषणीय है"

9. The trial court of Sub-Divisional Officer, Baberu decreed the suit on 24.08.2018. While deciding Issue No. 3 negatively against the defendants it recorded a categorical finding that Zamindari with respect to the land in dispute has not been abolished. The court below also returned a finding that the allegation that zamindari has been abolished vide notification dated 24.06.1961 as relied upon by the defendants is not substantiated by any evidence as such the suit is maintainable under the provisions of U.P. Tenancy Act. The extract of the relevant finding is quoted below:

"……इसलिये उपरोक्त विवेचना और वर्णित बिन्दुओं के प्रकाश में वाद बिन्दु 03 एवं वाद नं0 6 प्रतिवादीगण के विरूद्ध नकारात्मक निर्णीत किया जाता है और ये अवधारित किया जाता है कि विवादित भूमि जो वर्तमान में भी एन० जेड०ए० में दर्ज है जमीन्दारी की भूमि है। प्रतिवादीगण जिमन 8 के काश्तकार रहे है और उक्त वाद यू०पी० टीनेन्सी एक्ट के अन्तर्गत पोषणीय है। इस सम्बन्ध में 2001 (92) आर डी पेज 48 हिन्दी भी स्पष्ट है।....."

10. The learned trial court, while deciding Issue No.1 recorded a finding that the Respondent No. 4/Plaintiff was appointed as Lambardar vide order dated 14.07.2015 passed by the Collector, Banda. The extract of the relevant finding recorded by the trial court is quoted below:

*"....विवादित भूमि ग्राम लड़ाकापुरवा एन०जेड०ए० मोहाल यूसुफ जमा जिमन 8 में प्रतिवादीगण काश्तकार अंकित है वादी ने सन् 1417- 1420 फ0 की नकल खेवट चौसाला ग्राम लड़ाकापुरवा मोहाल यूसुफ जमा की प्रस्तुत की है। खेवट में अंकित जमीनदारान के नाम अंकित है और 1420 फ० में तहसीलदार बाँदा के मु0 नं0 312 ता० फै0 05.02.2013 में आदेश विरासत दर्ज है कि शेख हाजी उज्जमा पुत्र मसूद उज्जमा का नाम खारिज करके इसके स्थान पर वारिस शेख सऊद उज्जमा पुत्र शेख हादी उज्जमा निवासी बलखण्डीनाका बाँदा का नाम बरासतन दर्ज है, इससे स्पष्ट है कि वादी सह जमीनदार मोहाल यूसुफ जमा का है। पत्रावली में वादी द्वारा प्रस्तुत की गई नकल फैसला जिलाधिकारी / कलेक्टर बाँदा धारा- 45 यू०पी० लैण्ड रेवेन्यू एक नान जेड एरिया निर्णय तिथि 14.07.2015 के अनुसार वादी को ग्राम लड़ाकापुरवा मोहाल यूफुफ जमा पट्टी नं० 1 एवं ग्राम भवानीपुरवा मोहाल यूसुफ जमा पट्टी नं० 1 का लम्बरदार नियुक्त किया गया है और न्यायालय ने यह आदेश आयुक्त महोदय के अपीलीय आदेश 09.05.2013 का समादर करते हुये उपजिलाधिकारी बाँदा / तहसीलदार बाँदा की संस्तुति आख्या 09.06.2015/03.06.2015 का सन्दर्भ लेकर किया है। उपरोक्त अभिलेखीय साक्ष्य से वादी वाद बिन्दु नं० 1 को सिद्ध करने में सफल है कि वादी सहजमींदार एवं लम्बरदार भी है। तदानुसार वाद बिन्दु सकारात्मक रूप से तय किया जाता gSA***

11. Feeling aggrieved by the aforesaid judgement and decree dated 24.08.2018 the petitioners/defendants preferred an appeal under Section 265 of the U.P. Tenancy Act, 1939 in the Court of Commissioner, Chitrakoot Dham, Banda Division which was registered as Case No. 01600/2018. The First Appellate court affirmed the judgement passed by the trial court by declining to interfere with the same. The said appeal was finally dismissed vide judgement and order dated 20.11.2018.

12. The first appellate court while deciding the appeal vide judgment and order dated 20.11.2018 returned a categorical finding to the effect that despite sufficient opportunity having been given to the defendants to adduce evidence to establish the alleged abolition of zamindari, have failed to substantiate the said allegations. The findings recorded by the

first appellate court in this regard are as under:

''....अधीनस्थ न्यायालय में प्रश्नगत वाद में 06 वाद बिन्दु निर्मित किये गये जो वादी प्रतिवादीगण के कथनों के आधार पर निर्णीत किये गये। वाद के पोषणीयता बिन्दु पर अवर न्यायालय द्वारा विवेचना की गयी है कि यदि विवादित भूमि की जमींदारी समाप्त होना मान लिया जाय तो अपीलकर्तागण को गाँवसभा या राज्य सरकार से पट्टा की कार्यवाही होती और उसके लिए आवंटन पत्रावली का सृजन किया जाता। अपीलकर्तागण को राज्य सरकार व गाँवसभा की ओर से कोई विवादित भूमि का पट्टा नहीं किया गया क्योंकि इस सम्बन्ध में अपीलकर्तागण द्वारा कोई साक्ष्य प्रस्तुत नहीं किया गया। इससे स्पष्ट है कि विवादित भूमि का पट्टा अपीलकर्तागण को जमींदार द्वारा प्रदत्त किया गया था। जनसूचना अधिकार से प्राप्त सूचना के आधार पर विवादित भूमि जमींदार से पट्टे के रुप में प्राप्त हुई थी जिसपर अपीलकर्तागण जिमन-8 मौरुसी काश्तकार के रुप में दर्ज चले आ रहे हैं। इससे स्पष्ट है कि 01 जुलाई 1961 को विवादित भूमि कृषि योग्य नहीं थी बल्कि जमींदारी भूमि थी, जिसके आधार पर भूमि राजस्व अभिलेखों में नान जेड० एरिया की खतौनी में दर्ज है। यदि विवादित भूमि की जमींदारी समाप्त हो गयी होती तो प्रश्नगत भूमि जेड०एरिया की खतौनी में दर्ज की जाती। अधीनस्थ न्यायालय में संलग्न राजस्व परिषद, उ०प्र० लखनऊ के परिषदादेश दिनांक 15 जून 2012 में स्पष्ट किया गया है कि नान०जेड०एरिया की जमींदारी समाप्त किये जाने के फलस्वरुप अरबो रुपया प्रतिकर के रुप में दिया जाना होगा। इसी दृष्टि को ध्यान में रखते हुए नगर क्षेत्रों की जमींदारी न तोडे जाने का निर्णय लिया गया है....''

13. Assailing the judgment passed by the first appellate court a Second Appeal was preferred by the petitioners/defendants before the Board of Revenue at Allahabad as Second Appeal No. 422 of 2019. The said Second Appeal preferred by the petitioners/defendants was also dismissed by the Board of Revenue vide its judgement/order dated 16.04.2019.

14. While deciding the Second Appeal, the learned Board of Revenue considered the questions of a lease having admittedly been granted by the zamindar in favour of late Kandhilal which came to be recorded vide order dated 08.09.1961, whereas the date of abolition of zamindari is stated to be 24.06.1961 and observed that as a natural corollary of the aforesaid pleadings/admission on the part of the appellants, the lease would either be rendered void, as the zamindar could not have been competent to grant the lease after 24.06.1961 i.e. the date of alleged abolition of zamindari or it would amount to an admission on the part of the appellants that zamindari existed after the date of alleged abolition of zamindari, otherwise there would have been no occasion for the zamindar to grant lease in favour of their father namely Khandi son of Babu Lal. The relevant portion of the findings recorded by the learned Board of Revenue are extracted below:

''.....उनका यह भी कथन है कि अपीलार्थी द्वारा अपने स्वत्व का आधार वह पट्टा बताया जाता है जिसके दाखिल खारिज का आदेश दिनांक 08.09.1961 को तत्कालीन परगनाधिकारी दवारा किया गया और राजस्व अभिलेखों में अंकन दिनांक 18.11.1961 को हुआ। उनका यह तर्क है कि अपीलार्थी द्वारा किसी भी स्तर पर जमींदार द्वारा पट्टा प्रदान किए जाने के तथ्य से इन्कार नहीं किया गया है, जब कि अपीलार्थी दवारा स्वंय ही प्रश्नगत सम्पति से संबंधित जींदारी का उन्मूलन दिनांक 24.06.1961 को होना बताया जा रहा है, अतः यदि तर्क हेतु अपीलकर्तागण की बात स्वीकार कर ली जाये तो स्वंय उन्हीं के तर्को के अनुसार उनके पिताँ कंघी पुत्र बाबू लाल को जमींदार द्वारा जमींदारी उन्मूलन हो जाने के उपरान्त पट्टा प्रदान हो नहीं किया जा सकता था एवं ऐसी परिस्थिति में अपीलार्थी के पक्ष में निष्पादित पट्टे को विधि शून्य दस्तावेज के रूप में संज्ञानित करना होगा, जिसके फलस्वरूप अपीलकर्ता के स्वत्व संबंधी इन्द्राज का आधार ही समाप्त हो जायेगा, इसलिए अपीलकर्तागण दवारा प्रस्तुत किया गया तर्क नितान्त भ्रामक एवं स्वंय अपीलकर्ता दवारा निम्न न्यायालयों के समक्ष किए गए कथन के विरुद्ध होने के कारण स्वीकार किए जाने योग्य नहीं है। उनका यह भी कथन है कि प्रतिपक्षी द्वारा प्रश्नगत सम्पत्ति का स्वरूप बदल कर विक्रय किये जाने सम्बन्धी प्रयासों के बावत वाद पत्र में किये गये अभिवचनों के विपरीत कोई कथन प्रतिवादीगण द्वारा अपने प्रतिवाद पत्र में नहीं किया गया है बल्कि स्वयं को प्रश्नगत सम्पत्ति का वास्तविक भू-स्वामी/ भूमिधर होने का

कथन कर स्वयं को सभी अधिकार प्राप्त होना बताया गया है जो कि स्पष्ट रूप से श्रेणी 8 के मौरूसी काश्तकार सम्बन्धी नियमों के विपरीत होने के कारण अपीलार्थी के विपरीत अवधारणा किये जाने हेतु पर्याप्त है।.....''

15. The learned Board of Revenue also considered the question of the impact of a notification issued under Section 8 of the U.P. Urban Areas Zamindari Abolition Act, 1956 that vests with State all agricultural areas falling under the urban areas. The Board of Revenue also recorded a finding that since the land in question stands recorded as 'non-ZA area' the burden of proving the fact of there being an identification/demarcation as per Section 5 of the Act of 1956 prior to coming into operation of Section 8 of the Act of 1956 lied upon the appellants but they failed in adducing any evidence in this regard despite having been granted sufficient opportunity. The Board of Revenue recorded a categorical finding that the provisions of U.P. Tenancy Act 1939 are applicable in the area in question and the appellants cannot be taken to be anything more than a hereditary tenant of Ziman-8. The findings recorded by the learned Board of Revenue in this regard are as under:

''..... अतः पक्षो के मध्य मूल विवाद इस आशय का है कि प्रश्नगत सम्पत्ति पर उत्तर प्रदेश काश्तकारी अधिनियम, 1939 के प्राविधान वर्तमान में लागू है अथवा नहीं। यद्यपि उक्त प्रश्न एक तथ्यात्मक प्रश्न है और तथ्यात्मक प्रश्नो पर द्वितीय अपीलीय न्यायालय द्वारा सामान्यतः विचार नही किया जाता है, परन्तु वर्तमान प्रकरण में उक्त तथ्यात्मक प्रश्न का विश्लेषण इस न्यायालय द्वारा किया जाना न्यायहित में आवश्यक प्रतीत होता है।

उत्तर प्रदेश शहरी क्षेत्र जमीदारी विनाश एवं भूमि व्यवस्था अधिनियम, 1956 में दिये गये प्राविधानों के अनुसार अधिनियम की धारा 8 के अन्तर्गत कृषि क्षेत्र का चिन्हांकन स्थल पर करने के उपरान्त उसे धारा 5 में आयुक्त द्वारा पुष्ट किया जायेगा जिसके उपरान्त राज्य सरकार द्वारा अधिकारिक गजट में प्रकाशन किये जाने की तिथि से हर वह क्षेत्र जो कि धारा 5 के अन्तर्गत पूर्व में प्रकाशित हो चुका हो, से जमीदारी समाप्त होकर सम्बन्धित कृषि क्षेत्र सभी अधिभारो से मुक्त होकर राज्य सरकार में निहित माना जायेगा। अधिनियम की धारा 8 यह स्पष्ट रूप से प्राविधानित करती है कि अधिनियम, 1956 के प्राविधान सिर्फ उन्ही भूमियों पर लागू होगे जो कि स्थल पर कृषि क्षेत्र के रूप में विमान हो तथा भूमि का चिन्हांकन धारा 4 में किये जाने के उपरान्त सम्बन्धित कृषि क्षेत्र का प्रकाशन धारा 5 में आपत्तियों के निस्तारण के उपरान्त किया गया हो। अधिनियम, 1956 की धारा 3 से 5 तक में किसी भी शहरी सम्पत्ति, जो कि उक्त अधिनियम प्रकाशित होने की तिथि पर कृषि क्षेत्र रही हो और उस सम्पत्ति के ऊपर उत्तर प्रदेश काश्तकारी अधिनियम, 1939 के प्राविधान लागू रहे हो, के निर्धारण, चिन्हांकन, सीमांकन एवं प्रकाशन की निम्न प्रकिया बतायी गयी है।

अधिनियम 1956 की धारा 3 के अन्तर्गत राज्य सरकार द्वारा गजट में प्रकाशित किये जाने के उपरान्त सर्वप्रथम सीमांकन (डीमार्केशन) अधिकारी निर्धारित प्रकिया के अनुसार शहरी क्षेत्र की सम्पूर्ण भूमि का परीक्षण करने के उपरान्त उन भूमियों का चिन्हांकन / निर्धारण करेगा जो कि कृषि भूमि के रूप में उपलब्ध हो और धारा 2(1) (स) के प्रथम परन्तुक तथा धारा 2(1) (द) से आच्छादित ना हो। तदोपरान्त सीमांकन (डीमार्केशन) अधिकारी धारा 3 की उपधारा 1 के अधीन, अधिसूचना प्रकाशित होने की तिथि से 3 महीने के अन्दर, अथवा ऐसी बढाई गयी अवधि के भीतर जिसे राजय सरकार किसी मामले में निश्चित करे, कारण बताते हुए अपने सीमांकन प्रस्तावो को आयुक्त के समक्ष प्रस्तुत करेगा। धारा 4(1) के अधीन प्राप्त उक्त प्रस्ताव पर आवश्यक संशोधनोपरान्त आयुक्त द्वारा विहित प्रारूप पर शासकीय राज्य पत्र में अथवा किसी अन्य रीति से जो राज्य सरकार निश्चित करें, इस प्रारूप में प्रकाशित कराएगा कि सीमांकन अधिकारी द्वारा दिया गया प्रस्ताव जिस कृषि क्षेत्र के सीमांकन से सम्बन्धित है एवं जिस कृषि क्षेत्र के सीमांकन पश्चात भूमियों को सूचित किया गया हो, उक्त नोटिस में निर्दिष्ट स्थानो पर निरीक्षण हेतु उपलब्ध कराया जायेगा। उक्त नोटिस प्रकाशित होने पर अधिनियम, 1956 की धारा 4 उपधारा (3) के अन्तर्गत सूत्रित सम्पत्ति में हित रखने वाला कोई भी व्यक्ति अथवा स्थानीय प्राधिकारी उपधारा (2) के अधीन नोटिस प्रकाशित होने की तिथि से 3 मास के भीतर ऐसे अधिकारी अथवा प्राधिकारी के समक्ष, और ऐसी रीति से जो विहित की जाये, उक्त प्रकाशित प्रस्ताव पर आपत्ति प्रस्तुत कर सकेगा। तदोपरान्त अधिनियम की धारा 4(3) के अन्तर्गत प्रस्तुत आपत्तियों का यथोचित निस्तारण किये जाने के उपरान्त चिन्हान्कित क्षेत्रो का अन्तिम प्रकाशन अधिनियम, 1956 की धारा 5 की उपधारा (2) के अन्तर्गत आयुक्त द्वारा शासकीय राज पत्र में अथवा ऐसी रीति से जो विहित

की जाये, इस आशय की नोटिस का प्रकाशन किया जायेगा कि सूत्रित कृषि क्षेत्रो का अन्तिम रूप से सीमांकन हो गया है। आयुक्त द्वारा किये गये अन्तिम निर्धारण / प्रकाशन के बिरूद्व राजस्व परिषद में अपील योजित किये जाने की व्यवस्था दी गयी है और चिन्हान्तन / सीमांकन सम्बन्धी आपत्तियों के आधार पर राजस्व परिषद द्वारा आयुक्त के निर्णय का न्यायिक विवेचन किये जाने के उपरान्त चिन्हांकन / सीमाकन के सम्बन्ध में आयुक्त द्वारा किया गया निर्णय अन्तिम माना जायेगा। अधिनियन की धारा 8 के अन्तर्गत सम्बन्धित जिले का प्रकाशन हो जाने के उपरान्त आयुक्त द्वारा किया गया चिन्हाकन सभी पर बाध्यकारी प्रभाव रखेगा और इस प्रकार सम्बन्धित क्षेत्र की उन भूमियों से जिनका चिन्हाकंन अन्तिम रूप से धारा 5 की उपधारा (2) के अन्तर्गत हो चुका हो, के सम्बन्ध में उत्तर प्रदेश काश्तकारी अधिनियम, 1939 निरसित होकर प्रभावहीन माना जायेगा।

वर्तमान प्रकरण में अपीलार्थीद्वारा अपने स्वत्व को अधिनियम 1956 के अन्तर्गत परिपक्व होना बताया जा रहा है जबकि पत्रावली पर उपलब्ध प्रश्नगत सम्पतित से सम्बन्धित राजस्व अभिलेखों में उक्त सम्पत्ति नॉन जेड ए० के रूप में दर्ज है अतः प्रश्नगत सम्पत्ति से सम्बन्धित चिन्हांकन / सीमांकन की कार्यवाही 1961 में किये गये धारा 8 के प्रकाशन के पूर्व अमल में लाया जाना साबित करने का भार प्रतिवादी/ अपीलार्थीगण पर माना जायेगा। इस सम्बन्ध में विधि का यह सुस्थापित सिद्धान्त है कि साक्ष्य प्रस्तुत करने का भार उस व्यक्ति के कंधो पर होता है जो कि किसी बात अथवा तथ्य के अस्तित्व में होने का कथन करता है। इसी तरह न्यायालय के क्षेत्राधिकार के सम्बन्ध में कोई आपत्ति के बावत् माननीय उच्चतम न्यायालय द्वारा (ए०आई०आर०, 1966 सुप्रीम कोर्ट पृष्ठ 1718) में यह स्पष्ट रूप से अवधारित किया गया है कि साक्ष्य प्रस्तुत करने का भार उस पक्ष पर धारित होता है जो कि किसी अधिनियम में प्राविधानित न्यायिक विश्लेषण की प्रकिया के लागू न होने के सम्बन्ध में अथवा किसी न्यायालय के क्षेत्राधिकार उपलब्ध न होने के सम्बन्ध में कथन करता है। वर्तमान प्रकरण में अपीलार्थी द्वारा प्रश्नगत सम्पत्ति पर अधिनियम, 1956 के लागू होने के आधार पर अवर न्यायालय को क्षेत्राधिकार प्राप्त न होने का कथन किया जा रहा है अतः यह अपीलार्थी के लिए आवश्यक है कि वहअधिनियम 1956 की धारा 3 से धारा 5 तक अपनायी गयी प्रकिया में प्रश्नगत सम्पत्ति सम्मिलित होने सम्बन्धी साक्ष्य न्यायालय के समक्ष प्रस्तुत करते परन्तु अपीलार्थी द्वारा ऐसा कोई भी अभिलेखीय साक्ष्य अवर न्यायालय के समक्ष पत्रावली पर उपलब्ध नहीं कराया गया है। इस सन्दर्भ में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधिक सिद्वान्त " महन्त दुजदास बनाम उदासीन पंचायती बड़ा अखाड़ा (ए०आई०आर० 2008 (सप्ली०) सुप्रीम कोर्ट पृष्ठ 1867) का सन्दर्भ आवश्यक हो जाता है जिसमें समान विषय वस्तु के सम्बन्ध में पारित निर्णय के प्रस्तर 15 में माननीय उच्चतम न्यायालय द्वारा निम्न विधिक मत अवधारित किया गया है-

"15- ....."

अतः माननीय उच्चतम न्यायालय द्वारा दी गई उक्त न्यायिक व्यवस्था के अनुक्रम में प्रश्नगत सम्पत्ति को अधिनियम 1956 से आच्छादित नही माना जा सकता। इस प्रकार अपीलार्थी का यह कथन कि उनके अधिकार जमीदारी टूटने के फलस्वरूप परिपक्व हो चुके है, अर्थहीन हो जाता है और अपीलार्थी द्वारा इस न्यायालय के समक्ष प्रस्तावित किये गये सारवान विधिक प्रश्न स्वयं में ही अर्थहीन हो जाते है। चूँकि अभिलेखो से यह सिद्ध है कि प्रश्नगत सम्पत्ति पर उत्तर प्रदेश काश्तकारी अधिनियम 1939 के प्राविधान पूरी तरह लागू होते है अतः अपीलार्थी के अधिकार श्रेणी 8 के मौरूसी काश्तकार से अधिक नही माने जा सकते हैं। उत्तर प्रदेश काश्तकारी अधिनियम के सुसंगत प्राविधानो के अन्तर्गत अधीनस्थ न्यायालय द्वारा दिये गये निर्णयों में किसी प्रकार की तथ्यात्मक अथवा विधिक त्रुटि परिलक्षित नही होती है. और वर्तमान द्वितीय अपील में किसी अन्य सारवान विधिक बिन्दु का निहित होना प्रतीत नही होता है अतः वर्तमान द्वितीय अपील बलहीन होने के कारण निरस्त होने योग्य प्रतीत होती है।....."

16. Being aggrieved by the aforementioned orders passed by the Trial Court, the Court of Commissioner and the Board of Revenue, i.e. the Respondents No. 1 to 3, the petitioners have preferred the instant writ petition under Article 226 of the Constitution of India.

17. One of the grounds taken in the writ petition is that the Petitioners were not afforded adequate opportunity of adducing evidence to the effect that the land in dispute was in fact demarcated under section 5 of the Act though the same is a question of fact which could have been proved only if an opportunity to lead evidence in this regard was given.

18. It has also been pleaded by the petitioners that they had filed an application dated 26.05.2017 (Annexure No. 5) under the provisions of Order VII Rule 11 of the Code of Civil Procedure but

the same was not decided by the Sub Divisional Officer on merits.

19. The Respondent No. 4 filed a Counter Affidavit stating therein that the application dated 26.05.2017 was misconceived as a distinctive issue had been framed by the Trial Court in this regard and the decision on the issue rendered the said application redundant.

20. It has also been stated in the counter affidavit filed by the Respondent No. 4 that it is petitioners' own admission in the written statement filed in the Suit that they are occupying an area in Mohal Yusuf Zaman itself amounts to an admission of zamindari of the respondent/plaintiff and that it is well-settled in law that admission is the best piece of evidence.

21. Before delving into the merits of the case it would be apt to address the question raised by this court vide order dated 19.08.2019 that whether after enforcement of the U.P. Revenue Code, w.e.f. 11.03.2016, the present Suit that was filed in the month of May 2016, under the U.P. Tenancy Act is maintainable. The more precise statement of the question would be whether upon enforcement of the U.P. Revenue Code, does the U.P. Tenancy Act survive, though not repealed, because the U.P. Urban Areas Zamindari Abolition Act, 1956 has been repealed by the Code.

22. The appropriate answer to the above question is to be found in the observations made by the Hon'ble Apex Court in the case of **State of M.P. versus Kedia Leather & Liquor Ltd.** reported in **(2003) 7 SCC 389** wherein the Hon'ble Supreme Court has been pleased to observe that there is a presumption against repeal by implication. This is based on the view that while enacting laws on a particular subject, the Legislature has a thorough knowledge of the laws that are already in force on that subject; therefore, the absence of a repealing provision in the subsequent law would imply the intention of the Legislature that the existing provision should not be repealed. Moreover, the Legislature would never intend to create confusion by retaining conflicting provisions.The relevant paragraph of the aforesaid judgement is being extracted below:

"……13.There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the legislature while enacting a law has complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. [See :Municipal Council, Palaiv.T.J. Joseph[AIR 1963 SC 1561] ,Northern India Caterers (P) Ltd.v.State of Punjab[AIR 1967 SC 1581] ,Municipal Corpn. of Delhiv.Shiv Shanker[(1971) 1 SCC 442 : 1971 SCC (Cri) 195] andRatan Lal Adukiav.Union of India[(1989) 3 SCC 537 : AIR 1990 SC 104] .] When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principleexpressio unius(persone vel rei)est exclusio alterius. (The express intention of one person or thing is the exclusion of another), as illuminatingly stated inGarnettv.Bradley[(1878) 3 AC 944 : (1874-80) All ER Rep 648 : 48 LJQB 186 : 39 LT 261 (HL)] . The continuance of the existing legislation, in the absence of an express provision of repeal being presumed,

the burden to show that these has been repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. But, if the two can be read together and some application can be made of the words in the earlier Act, a repeal will not be inferred. (See :A.G.v.Moore[(1878) 3 Ex D 276] ,Ratan Lal case[(1989) 3 SCC 537 : AIR 1990 SC 104] andR.S. Raghunathv.State of Karnataka[(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] .)....."

23. Further, in the case of **M/s Gammon India Ltd. versus Spl. Chief Secretary and Others** reported in **(2006) 3 SCC 354** the Hon'ble Supreme Court has been please to observe that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to affect such supersession, then it would amount to a repeal, notwithstanding the absence of the word 'repeal' in the later statute. In other words, the intention of the Legislature has to be inferred from the later statute to see if it proposed to preserve, modify, or completely obliterate the rights and liabilities attached to the earlier statute. This applies to both express as well as implied repeal. Thus, an analysis of the relevant authorities and case laws makes it clear that whenever an enactment is repealed and is accompanied by a simultaneous re-enactment, then the re-enacted statute is a reflection of a modified version of the earlier legislation, through express or implied repeal, as the case may be.Since Section 230 of the Uttar Pradesh Revenue Code, 2006 repeals enactments specified in the First Schedule thereof and the U.P. Tenancy Act, 1939 does not find place in the said First Schedule there is no express repeal nor the two enactments are shown to be irreconcilable so as to bring the former law within the sweep of implied repeal.

24. It has also been contended on behalf of the petitioner that the first appellate court has erred in law while deciding the first appeal without framing the points of determination. Refuting the aforesaid plea it has been submitted on behalf of the respondent that a first appeal under Section 265 of the U. P. Tenancy Act or under Section 207 of the U.P. Revenue Code not being an appeal under Section 96 of the Code of Civil Procedure, the provisions of Order XLI Rule 31 of the Code of Civil Procedure would not be applicable as it does not necessarily require the judgement of the first appellate court to state the points for determination. This court finds substance in the said arguments advanced on behalf of the respondent.

25. Further, Sri D.P. Singh, the learned Senior Advocate appearing on behalf of the petitioner has vehemently argued that since the affidavit filed by the respondent/plaintiff by way of evidence was not in accordance with the provisions of the U.P. Revenue Court Manual as the same was not verified hence is not admissible in evidence. He drew the attention of the Court to Rules 112, 113 and 118 of Chapter III of the U.P. Revenue Court Manual. In support of his contention he placed reliance on the judgements passed by the Hon'ble Supreme Court in the case of **A.K.K. Nambiar vs. Union of India and another reported in AIR 1970 Supreme Court 652** and **State of Rajasthan versus M/s Sindhi Film**

Exchange reported in **AIR 1974 Rajasthan 31 (V 61 C11)** wherein it has been held that in the absence of proper verification, affidavits cannot be admitted in evidence and the same is no affidavit in the eye of law.

26. However, during the course of argument Sri Puneet Gupta, learned counsel appearing on behalf of the respondent/plaintiff has placed before the Court a certified copy of the affidavit in question which bears the verification clause at the back of it. Although the same has been strongly objected to by Sri D.P.Singh the learned Senior Counsel for the petitioners, contending that the respondent has no right to file the same at this belated stage. Confronting the said objection, Sri Puneet Gupta learned counsel for the respondent no. 4 submitted that since this aspect of the matter challenging the irregularity in the 'form' of the affidavit was never raised by the petitioner earlier therefore there was no occasion for the respondents to bring the certified copy of the affidavit on record.

27. In any case, the certified copy of the affidavit as produced by the respondent bears a verification on the back side of it, the allegation of there being no verification of the contents of the affidavit does not appeal to the reason. It is also well-settled in law that a mere infirmity in the format of the affidavit would not render the same nullified. Further, the fact of no such objection as to the legality of the affidavit having been raised by the petitioner before the courts below would amount to acquiescence on their part. There is nothing on record to show that the plea as to flaw in the affidavit was ever raised by the petitioner/defendant before the courts below or even in the present writ petition. It is well-settled principle of law that the arguments cannot go beyond the pleadings of the parties and a party while entering into a case should know in advance the basic idea of the case they will have to face and one should not be allowed to be taken by surprise. The object and purpose of pleading are to enable the adversary party to know the case it has to meet.

28. The Hon'ble Supreme Court in the case of **Kashi Nath (Dead)** through **L.Rs. versus Jaganath** reported in **(2003) 8 SCC 740**, has been pleased to hold that where the evidence is not in line with the pleadings and is at variance with it, the evidence cannot be looked into or be depended upon. At the point where the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot concentrate its own attention or the attention of the parties thereon. Along these lines, it is said that no amount of evidence, on a plea that is not suggested in the pleadings, can be looked into to grant any relief.

29. The facts of **A.K.K. Nambiar** *(Supra)* and **M/s Sindhi Film Exchange** *(Supra)* as relied upon by learned counsel appearing for the petitioner are quite different from that of the present case and were decided on a different premise, as such the same are not attracted in the present factual matrix.

30. Moreover, as the petitioners are not shown to be deprived of any opportunity to rebut the averments made in the said affidavit, as such in substance, no prejudice has been caused to them. In view of what has been discussed in the preceding paragraphs, it is not open for the petitioners to raise the issue in respect of any flaw in

the affidavit for the first time at the stage of final hearing of the writ petition.

31. Another ground taken by the petitioners in the Writ Petition is that the Board of Revenue committed a manifest error of law in deciding/dismissing the Second Appeal without framing a substantial question of law.

32. This Court in a recent judgment passed in the case of **Awadhesh Singh versus State of UP and others,** reported in **2023 (12) ADJ 554** has dealt with the issue of non-framing of substantial question of law by the second appellate court and has held that the reversal of the final order and decree passed in appeal by the court below in exercise of its jurisdiction under Section 208 of the U.P. Revenue Code, 2006 is impermissible without formulating substantial question of law and a decision on such question, however, in the event of concurrence with the court below the formulation of substantial question of law is not a *sine qua non* and the same will not render the judgment of the second appellate court vitiated.

33. Shri S.N.Srivastava, learned Additional Chief Standing Counsel appearing for the State-respondents raised objection regarding the entertainability of the present writ petition by contending that the petitioner has basically disputed the findings of fact which have been affirmed by the first and the second appellate courts and as such the concurrent findings of fact cannot be interfered by this Court in exercise of its Writ jurisdiction under Article 226 of the Constitution of India. In support of his contention, the learned Standing Counsel has relied upon the judgment passed by the Hon'ble Supreme Court of India in the case of **State of Jharkhand and others versus Linde India Limited and another,** reported in **2022 SCC OnLine SC 1660; Chandrika (Dead) by LRS. versus Sudama (Dead) Thr. LRS. and others,** reported in **(2019) 5 SCC 790** and **Bansraj versus Ram Naresh and another,** reported in **(2020) 5 ADJ 10.**

34. The learned Additional Chief Standing Counsel further submitted that there is no infirmity or irregularity in the impugned orders passed by the learned trial court as well as the learned appellate courts. Further, the courts below, at all stages afforded full opportunity of hearing to the parties and decided the matter by passing detailed and reasoned orders, after taking into consideration all the grounds pleaded by the parties.

35. Having heard the rival contentions raised by the learned counsels for the parties and having perused the material available on record; the issue for consideration, at the first instance, before this Court is as to whether in the present case, the concurrent findings of fact recorded by the three Revenue Courts below warrants any interference by this Court in exercise of its powers, qua, Writ jurisdiction under Article 226 of the Constitution of India.

36. Before entering into the merits of the case, it would be apt to consider the legal context of "concurrent findings of fact" and reiterate the law in relation to the extent of interference by the Writ Courts in concurrent findings of the fact under Article 226 of the Constitution.

37. The Hon'ble Supreme Court in the case of **State of Rajasthan versus Shiv Dayal** reported in **(2019) 8 SCC 637, page**

639 has succinctly described the expression "concurrent findings of fact" in the following manner:

"15. It is a trite law that in order to record any finding on the facts, the trial court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the appellate court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the trial court or reverse it. If the appellate court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding.""

38. Further, it is also a settled legal proposition that the first appellate court is the final court of fact, as has been dealt with in detail by the Hon'ble Supreme Court in the cases of **Gurvachan Kaur and others versus Salikram (Dead) through LRS**, reported in **(2010) 15 SCC 530 and Santosh Hazari versus Purushottam Tiwari (Deceased) by LRS.** reported in **(2001) 3 SCC 179.**

39. Consequently, it can be affirmatively alluded that the concurrent findings of fact are to be considered as settled facts of the case and the High Court should ordinarily restrain itself from interfering with the concurrent findings of fact. The said restrain is on a much higher footing in cases where the High Court is not the appellate court, rather, it is exercising its Writ jurisdiction under Article 226 of the Constitution of India. In this regard, the Hon'ble Supreme Court in the case of **Abdul Razak (D) through LRS. and others versus Mangesh Rajaram Wagle and others,** reported in **(2010) 2 SCC 432** as reiterated in the case of **State of Jharkhand and others versus Linde India Limited and another** *(Supra)* has held that the High Court in exercise of its Writ jurisdiction is not an appellate court against the findings recorded on appreciation of facts and the evidence on record. Further, in the case **Chandrika (Dead) by LRS. versus Sudama (Dead) Thr. LRS. and others** *(Supra)* the Hon'ble Apex Court has been pleased to observe that the concurrent findings of fact are not only binding on the High Court but is also binding upon the Hon'ble Supreme Court. For ready reference, extract of Paragraph No. 12 of the aforesaid judgment in extracted hereinbelow,

"12. In our considered opinion, the finding impugned in this appeal being concurrent finding of fact and was rightly held by the High Court as binding on the High Court in its writ jurisdiction, it is also binding on this Court, calling for no interference therein…"

40. It may also be elucidated that the Hon'ble Apex Court in the case of **Union Bank of India versus Chandrakant Gordhandas Shah** reported in **(1994) 6 SCC 271 at page 274** has briefly explained the reason for non-interference with the concurrent findings of fact by observing that it is the trial court and the appellate court which is entrusted with the duty of recording the findings on questions of fact and it is not proper for the Writ courts to interfere with or disturb those findings. For a ready reference, extract of paragraph no. 11of the said judgment is quoted hereinbelow,

"11. It is trite that if the trial court and the appellate court, who are entrusted with the duty of investigating into

questions of fact record concurrent findings thereon on a proper discussion and appreciation of the materials placed before them, the High Court should not interfere with or disturb those findings while sitting in judgment over the same in its writ jurisdiction…"

41. However, it would not be out of place to discuss the other aspect of the issue, that the High Court still has the discretionary power to interfere in the concurrent findings of fact while exercising its powers under Article 226 of the Constitution of India, but the discretion must be exercised on sound judicial principles particularly, where the concurrent findings of fact is perverse in law in the sense that no reasonable person properly instructed in law should have come to such a finding or there is misdirection in law or a view on fact has been taken in the teeth of preponderance of evidence or the finding is not based on any material evidence or it has resulted in manifest injustice. The Hon'ble Apex Court in the case of **Babubhai Muljibhai Patel versus Nandlal Khodidas Barot, reported in (1974) 2 SCC 706, at page 715,** has observed that,

"10. ... The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 of the Constitution merely because in considering the petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition…. If, however, on consideration of the nature of the controversy, the High Court decides ... that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect."

42. Furthermore, in order to decide whether a particular case requires the High Court to enter into a disputed question of fact depends upon the facts and circumstances of that case, as this ordinary restrain on the interference on concurrent findings of fact should not be put in a routine and mechanical manner in the system of administration of justice. The purposes of interfering in the concurrent findings of fact, the question of perversity of an order passed by an authority must be determined by considering whether the said order is not supported by the evidence brought on record or it is against the law or it suffers from vice of procedural irregularity, as has been held by the Hon'ble Supreme Court in the case of **Gaya Din (dead) thr. L.Rs. versus Hanuman Prasad (dead) thr. L.Rs.** reported in **2001 (43) ALR 226 (SC).**

43. In the instant case the findings recorded by the Sub Divisional Officer (respondent no.4) with regard to the question of abolition of zamindari in the area in question, has been upheld by the first appellate court, i.e., the learned Court of Commissioner, Chitrakoot Dham Division, Banda and the learned Board of Revenue also concurred with the same in Second Appeal.

44. In the case of State of U.P. versus Lakshmi Sugar & Oil Mills Ltd., reported in **(2013) 10 SCC 509** the Hon'ble Supreme Court has been pleased to observed that the concurrent findings of fact could not have been reversed by the High Court in its writ jurisdiction. The extract of paragraph 20 the said judgement is reproduced as under:

"20. The order passed by the District Consolidation Director/Collector, Hardoi also concurred with the view taken by the officers below and held that there was no evidence on record to show that the subject land was ever held or occupied for agricultural purposes or that any agricultural activity was ever carried out on the same. These concurrent findings of fact, in our opinion, could not have been reversed by the High Court in its writ jurisdiction. The High Court obviously failed to appreciate that it was not sitting in appeal over the findings recorded by the authorities below. It could not reappraise the material and hold that the land was held or occupied for cultivation and substitute its own finding for that of the authorities. Inasmuch as the High Court did so, it committed an error. It is noteworthy that the revenue record clearly belied the assertion of the respondent Company and described the land as "parti kadim tilla" which meant that the land has not been cultivated for a long time and is in the form of a hillock."

45. In view of the settled legal position on the subject of 'concurrent findings of fact', it has become imperative to determine as to whether the facts and circumstances of the present case warrant any interference by this Court in the concurrent findings of fact recorded by the Sub Divisional Officer as concurred by the Commissioner and also by the Board of Revenue, in the Second Appeal.

46. For a ready reference the findings recorded by the trial court as to the question of abolition of Zamindari with respect to the area where the property in suit situates are as under:

".....वाद बिन्दु संख्या- ३-क्या विवादित भूमि की जमींदारी समाप्त की जा चुकी है जैसाकि प्रतिवाद पन्त्र की धारा- 12-13 में आक्षेप किया गया है, यदि हां तो इसका प्रभाव:

दोनों वाद बिन्दु 3 व 6 एक दूसरे से सम्बन्धित हैं क्योंकि यदि विवादित भूमि की जमींदारी समाप्त हो चुकी हैं तो वाद राजस्व संहिता 2006 के अन्तर्गत पोषणीय होगा। यदि जमीन्दारी बदस्तूर विवादित भूमि की कायम है तो वाद यू०पी० टेनेन्सी एक्ट के अन्तर्गत पोषणीय है।

प्रतिवादीगण पर अपने आक्षेप को सिद्ध करने का भार है। प्रतिवादीगण द्वारा अपने प्रतिवाद पत्र के विन्दु सं0- 12 एवं 13 में उ0प्र0 नगरीय क्षेत्र जमींदारी विनाश एवं भूमि व्यवस्था अधिनियम 1956 की धारा- 64 का उल्लेख किया गया है एवं कहा गया है, कि नगरीय क्षेत्र में जमीन्दारी टूटने के पश्चात् यू०पी० टीनेन्सी एक्ट लागू नहीं होगा और निरस्त समझे जायें। धारा- 65 का उल्लेख कर कहा गया है कि उ०प्र० नगरीय क्षेत्र जमीन्दारी विनाश एवं भूमि व्यवस्था अधि0 1956 में जिस भूमि की जमींदारी समाप्त हो जायेगी तो उ०प्र० जमीदारी विनाश एवं भू० व्यवस्था अधिनियम UPZA & LR Act. एवं भू राजस्व अधि0 1901 जमीन्दारी टूटने के पश्चात् लागू होंगे।

प्रतिवादीगण द्वारा प्रस्तुत शासनादेश 24 जून, 1961 के क्रमांक 108 को इंगित किया गया कि बाँदा म्यूनिस्पिलटी में भी जमीदारी 24 जून, 1961 को टूटी थी जबकि शासनादेश में स्पष्ट है कि "all agricultural areas in the following urban areas of State, which have been demarcated under sec. 5 of aforesaid Act, shall vest in state of Uttar Pradesh. All such agricultural areas shall stand, transferred to and vest, except as provided in the said Act, in the State free from all encumbrances."

ये बात स्पष्ट है कि 24 जून, 1961 के शासनादेश से लागू उ०प्र० नगरीय क्षेत्र जमींदारी अधिनियम 1956 के

अन्तर्गत केवल उन जोती बोई कृषि भूमि की जमीन्दारी बाँदा में समाप्त की गई थी|

प्रतिवादीगण ने ऐसा कोई अभिलेख 1368फ0 का पत्रावली में विवादित भूमि में जिन्स बोये होने का खसरा प्रस्तुत नहीं किया, ऐसा कोई सर्वे रिकार्ड भी प्रतिवादीगण ने पत्रावली में प्रस्तुत नहीं किया है, कि विवादित भूमि की जमींदारी तोड़े जोने और उसका प्रतिकर Zamindari Abolition Bond जमीनदारान को विवादित भूमि के सम्बन्ध में प्राप्त हो चुका है। इसलिये प्रतिवादी अपनी इस बात को साबित करने में पूरी तरह विफल है, कि विवादित भूमि की ज़मींदारी 1368 फ० में समाप्त हो चुकी है।

उल्लेखनीय यह है कि प्रतिवादीगण ने स्वयं ही रजिस्टर मालकान में अंकित आदेश दा० खारिज क्रमांक- 286 100 08.09.61/18.11.61 अपने पिता कन्धी पुत्र बाबूलाल का नाम जिमन 8 में खतौनी सन् 1368 फ० में दर्ज होने का प्रस्तुत किया है। प्रतिवादीगण ने अपने को जिमन 8 के काश्तकार होने की खतौनी NZA की अर्थात् जमींदारी जमीन की प्रस्तुत की है। खसरों से गाटा 1334 रकबा 0.088 हे० NZA वादी की भूमि मतरूक होना पाई जाती है जो बादी के मुहाल यूसुफ जमा के बंजर खाते में दर्ज की जाना जरूरी है।

प्रतिवादीगण द्वारा सन् 1413 फ० लगायत 1410 फ० के खसरे विवादित भूमि के सम्बन्ध में ग्राम लड़ाकापुरवा (नान जेड ए) के पेश किये गये हैं, जो जमींदारी भूमि के खसरे हैं। इस खसरों से 1368 फ० की स्थिति को जोड़कर नही देखा जा सकता है।

उल्लेखनीय है, कि प्रतिवादीगण ने इस पत्रावली में न्यायालय द्वारा पारित अन्तरिम निषेधाज्ञा आदेश के विरूद्ध मा० आयुक्त महोदय के समक्ष इन्ही आक्षेपो को मुख्य आधार बनाया था कि विवादित भूमि की जमीन्दारी टूट चुकी है इसलिये यू०पी० टीनेन्सी एक्ट की कार्यवाही पोषणीय नही है। यह कि अवर न्यायालय ने इसके बावजूद यू०पी० टेनेन्सी एक्ट वाद को पोषणीय मानकर निषेधाज्ञा पारित कर दी है, जो गलत है। इस निगरानी में मा० न्यायालय आयुक्त चित्रकूट मण्डल ने 20-12-2017 को गुण दोष पर निर्णय दिया कि विवादित भूमि की जमीन्दारी समाप्त नही हुयी है। विवादित भूमि नान जेड एरिया खतौनी में दर्ज है इसलिए नियमानुसार यू०पी० टेनेन्सी एक्ट के अन्तर्गत कार्यवाही पोषणीय है और इस न्यायालय द्वारा पारित आदेश 28 - 4 -2017 को बहाल रखा और निगरानी निरस्त कर दी गयी।

प्रतिवादीगण ने आयुक्त के निर्णय 20-12-2017के विरूद्ध न ही राजस्व परिषद, न ही माननीय उच्च न्यायालय में भी चुनौती दी गयी। ऐसी दशा में, इस न्यायालय में पोषणीयता के बिन्दु को प्रस्तुत करना न्याय उचित नही है।

इसलिये उपरोक्त विवेचना और वर्णित बिन्दुओं के प्रकाश में वाद बिन्दु 03 एवं वाद नं0 6 प्रतिवादीगण के विरूद्ध नकारात्मक निर्णीत किया जाता है और ये अवधारित किया जाता है कि विवादित भूमि जो वर्तमान में भी एन० जेड०ए० में दर्ज है जमीन्दारी की भूमि है। प्रतिवादीगण जिमन 8 के काश्तकार रहे है और उक्त वाद यू०पी० टीनेन्सी एक्ट के अन्तर्गत पोषणीय है। इस सम्बन्ध में 2001 (92) आर डी पेज 48 हिन्दी भी स्पष्ट है।.....''

47. The finding returned by the First Appellate Court affirming the findings of the trial court regarding the question of abolition of zamindari is extracted below:

''.....वाद की पोषणीयता बिंदु पर अवर न्यायालय द्वारा विवेचना की गयी है कि यदि विवादित भूमि की जमीदारी समाप्त होना मान लिया जाय तो अपीलकर्तागण को गाँव सभा या राज्य सरकार से पट्टा की कार्यवाही होती और उसके लिए आवंटन पत्रावली का सृजन किया जाता। अपीलकर्तागण को राज्य सरकार व गाँव सभा की ओर से कोई विवादित भूमि का पट्टा नही किया गया क्योंकि इस सम्बन्ध में अपीलकर्तागण द्वारा कोई साक्ष्य प्रस्तुत नहीं किया गया। इससे स्पष्ट है कि विवादित भूमि का पट्टा अपीलकर्तागण को जमीदार से पट्टे के रूप में प्राप्त हुई थी जिस पर अपीलकर्तागण जिमन-8 मौरुसी काश्तकार के रूप में दर्ज चले आ रहे हैं। इससे स्पष्ट है कि 01 जुलाई 1961 को विवादित भूमि कृषि योग्य नही थी बल्कि जमीदारी भूमि थी, जिसके आधार पर भूमि राजस्व अभिलेखों में नान जेड० एरिया की खतौनी में दर्ज है। यदि विवादित भूमि की जमीदारी समाप्त हो गयी होती तो प्रश्नगत भूमि जेड० एरिया की खतौनी में दर्ज की जाती। अधीनस्थ न्यायालय में संलग्न राजस्व परिषद, उ०प्र० लखनऊ के परिषदादेश दिनांक 15 जून 2012 में स्पष्ट किया गया है कि नान० जेड एरिया की जमीदारी समाप्त किये जाने के फलस्वरूप अरबो रूपया प्रतिकर के रूप में दिया जाना होगा। इसी दृष्टि को ध्यान में रखते हुए नगर क्षेत्रों की जमीदारी न तोडे जाने का निर्णय लिया गया है।.....''

48. The findings recorded by the Board of Revenue in the Second Appeal as to the abolition of zamindari and applicability of the U.P. Tenancy Act 1939 are as under:

''..... अतः पक्षो के मध्य मूल विवाद इस आशय का है कि प्रश्नगत सम्पत्ति पर उत्तर प्रदेश काश्तकारी

अधिनियम, 1939 के प्राविधान वर्तमान में लागू है अथवा नहीं। यद्यपि उक्त प्रश्न एक तथ्यात्मक प्रश्न है और तथ्यात्मक प्रश्नो पर द्वितीय अपीलीय न्यायालय द्वारा सामान्यतः विचार नही किया जाता है, परन्तु वर्तमान प्रकरण में उक्त तथ्यात्मक प्रश्न का विश्लेषण इस न्यायालय द्वारा किया जाना न्यायहित में आवश्यक प्रतीत होता है।

उत्तर प्रदेश शहरी क्षेत्र जमीदारी विनाश एवं भूमि व्यवस्था अधिनियम, 1956 में दिये गये प्राविधानों के अनुसार अधिनियम की धारा 8 के अन्तर्गत कृषि क्षेत्र का चिन्हांकन स्थल पर करने के उपरान्त उसे धारा 5 में आयुक्त द्वारा पुष्ट किया जायेगा जिसके उपरान्त राज्य सरकार द्वारा अधिकारिक गजट में प्रकाशन किये जाने की तिथि से हर वह क्षेत्र जो कि धारा 5 के अन्तर्गत पूर्व में प्रकाशित हो चुका हो, से जमीदारी समाप्त होकर सम्बन्धित कृषि क्षेत्र सभी अधिभारो से मुक्त होकर राज्य सरकार में निहित माना जायेगा। अधिनियम की धारा 8 यह स्पष्ट रूप से प्राविधानित करती है कि अधिनियम, 1956 के प्राविधान सिर्फ उन्ही भूमियों पर लागू होगे जो कि स्थल पर कृषि क्षेत्र के रूप में विमान हो तथा भूमि का चिन्हांकन धारा 4 में किये जाने के उपरान्त सम्बन्धित कृषि क्षेत्र का प्रकाशन धारा 5 में आपत्तियों के निस्तारण के उपरान्त किया गया हो। अधिनियम, 1956 की धारा 3 से 5 तक में किसी भी शहरी सम्पत्ति, जो कि उक्त अधिनियम प्रकाशित होने की तिथि पर कृषि क्षेत्र रही हो और उस सम्पत्ति के ऊपर उत्तर प्रदेश काश्तकारी अधिनियम, 1939 के प्राविधान लागू रहे हो, के निर्धारण, चिन्हांकन, सीमांकन एवं प्रकाशन की निम्न प्रकिया बतायी गयी है।

अधिनियम 1956 की धारा 3 के अन्तर्गत राज्य सरकार द्वारा गजट में प्रकाशित किये जाने के उपरान्त सर्वप्रथम सीमांकन (डीमार्केशन) अधिकारी निर्धारित प्रकिया के अनुसार शहरी क्षेत्र की सम्पूर्ण भूमि का परीक्षण करने के उपरान्त उन भूमियों का चिन्हांकन / निर्धारण करेगा जो कि कृषि भूमि के रूप में उपलब्ध हो और धारा 2(1) (स) के प्रथम परन्तुक तथा धारा 2(1) (द) से आच्छादित ना हो। तदोपरान्त सीमांकन (डीमार्केशन) अधिकारी धारा 3 की उपधारा 1 के अधीन, अधिसूचना प्रकाशित होने की तिथि से 3 महीने के अन्दर, अथवा ऐसी बढाई गयी अवधि के भीतर जिसे राजय सरकार किसी मामले में निश्चित करे, कारण बताते हुए अपने सीमांकन प्रस्तावो को आयुक्त के समक्ष प्रस्तुत करेगा। धारा 4(1) के अधीन प्राप्त उक्त प्रस्ताव पर आवश्यक संशोधनोपरान्त आयुक्त द्वारा विहित प्रारूप पर शासकीय राज्य पत्र में अथवा किसी अन्य रीति से जो राज्य सरकार निश्चित करें, इस प्रारूप में प्रकाशित कराएगा कि सीमांकन अधिकारी द्वारा दिया गया प्रस्ताव जिस कृषि क्षेत्र के सीमांकन से सम्बन्धित है एवं जिस कृषि क्षेत्र के सीमांकन पश्चात भूमियों को सूचित किया गया हो, उक्त नोटिस में निर्दिष्ट स्थानो पर निरीक्षण हेतु उपलब्ध कराया जायेगा। उक्त नोटिस प्रकाशित होने पर अधिनियम, 1956 की धारा 4 उपधारा (3) के अन्तर्गत सूत्रित सम्पत्ति में हित रखने वाला कोई भी व्यक्ति अथवा स्थानीय प्राधिकारी उपधारा (2) के अधीन नोटिस प्रकाशित होने की तिथि से 3 मास के भीतर ऐसे अधिकारी अथवा प्राधिकारी के समक्ष, और ऐसी रीति से जो विहित की जाये, उक्त प्रकाशित प्रस्ताव पर आपत्ति प्रस्तुत कर सकेगा। तदोपरान्त अधिनियम की धारा 4(3) के अन्तर्गत प्रस्तुत आपत्तियों का यथोचित निस्तारण किये जाने के उपरान्त चिन्हान्कित क्षेत्रो का अन्तिम प्रकाशन अधिनियम, 1956 की धारा 5 की उपधारा (2) के अन्तर्गत आयुक्त द्वारा शासकीय राज पत्र में अथवा ऐसी रीति से जो विहित की जाये, इस आशय की नोटिस का प्रकाशन किया जायेगा कि सूत्रित कृषि क्षेत्रो का अन्तिम रूप से सीमांकन हो गया है। आयुक्त द्वारा किये गये अन्तिम निर्धारण / प्रकाशन के बिरूद्व राजस्व परिषद में अपील योजित किये जाने की व्यवस्था दी गयी है और चिन्हान्तन / सीमांकन सम्बन्धी आपत्तियों के आधार पर राजस्व परिषद द्वारा आयुक्त के निर्णय का न्यायिक विवेचन किये जाने के उपरान्त चिन्हांकन / सीमाकन के सम्बन्ध में आयुक्त द्वारा किया गया निर्णय अन्तिम माना जायेगा। अधिनियन की धारा 8 के अन्तर्गत सम्बन्धित जिले का प्रकाशन हो जाने के उपरान्त आयुक्त द्वारा किया गया चिन्हाकन सभी पर बाध्यकारी प्रभाव रखेगा और इस प्रकार सम्बन्धित क्षेत्र की उन भूमियों से जिनका चिन्हाकंन अन्तिम रूप से धारा 5 की उपधारा (2) के अन्तर्गत हो चुका हो, के सम्बन्ध में उत्तर प्रदेश काश्तकारी अधिनियम, 1939 निरसित होकर प्रभावहीन माना जायेगा।

वर्तमान प्रकरण में अपीलार्थीद्वारा अपने स्वत्व को अधिनियम 1956 के अन्तर्गत परिपक्व होना बताया जा रहा है जबकि पत्रावली पर उपलब्ध प्रश्नगत सम्पतित से सम्बन्धित राजस्व अभिलेखों में उक्त सम्पत्ति नॉन जेड ए० के रूप में दर्ज है अतः प्रश्नगत सम्पत्ति से सम्बन्धित चिन्हांकन / सीमांकन की कार्यवाही 1961 में किये गये धारा 8 के प्रकाशन के पूर्व अमल में लाया जाना साबित करने का भार प्रतिवादी/ अपीलार्थीगण पर माना जायेगा। इस सम्बन्ध में विधि का यह सुस्थापित सिद्धान्त है कि साक्ष्य प्रस्तुत करने का भार उस व्यक्ति के कंधो पर होता है जो कि किसी बात अथवा तथ्य के अस्तित्व में होने का कथन करता है। इसी तरह न्यायालय के क्षेत्राधिकार के सम्बन्ध में कोई आपत्ति के बावत् माननीय उच्चतम न्यायालय द्वारा (ए०आई०आर०, 1966 सुप्रीम कोर्ट पृष्ठ 1718) में यह स्पष्ट रूप से अवधारित किया गया है कि साक्ष्य प्रस्तुत करने का भार उस पक्ष पर धारित होता है जो कि किसी अधिनियम में प्राविधानित न्यायिक विश्लेषण की प्रकिया के लागू न होने के सम्बन्ध में अथवा किसी न्यायालय के क्षेत्राधिकार उपलब्ध न होने के सम्बन्ध में कथन करता है। वर्तमान प्रकरण में

अपीलार्थी द्वारा प्रश्नगत सम्पत्ति पर अधिनियम, 1956 के लागू होने के आधार पर अवर न्यायालय को क्षेत्राधिकार प्राप्त न होने का कथन किया जा रहा है अतः यह अपीलार्थी के लिए आवश्यक है कि वहअधिनियम 1956 की धारा 3 से धारा 5 तक अपनायी गयी प्रकिया में प्रश्नगत सम्पत्ति सम्मिलित होने सम्बन्धी साक्ष्य न्यायालय के समक्ष प्रस्तुत करते परन्तु अपीलार्थी द्वारा ऐसा कोई भी अभिलेखीय साक्ष्य अवर न्यायालय के समक्ष पत्रावली पर उपलब्ध नहीं कराया गया है। इस सन्दर्भ में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधिक सिद्वान्त " महन्त दुजदास बनाम उदासीन पंचायती बड़ा अखाड़ा (ए०आई०आर० 2008 (सप्ली०) सुप्रीम कोर्ट पृष्ठ 1867) का सन्दर्भ आवश्यक हो जाता है जिसमें समान विषय वस्तु के सम्बन्ध में पारित निर्णय के प्रस्तर 15 में माननीय उच्चतम न्यायालय द्वारा निम्न विधिक मत अवधारित किया गया है-

15- ....."

अतः माननीय उच्चतम न्यायालय द्वारा दी गई उक्त न्यायिक व्यवस्था के अनुक्रम में प्रश्नगत सम्पत्ति को अधिनियम 1956 से आच्छादित नही माना जा सकता। इस प्रकार अपीलार्थी का यह कथन कि उनके अधिकार जमीदारी टूटने के फलस्वरूप परिपक्व हो चुके है, अर्थहीन हो जाता है और अपीलार्थी द्वारा इस न्यायालय के समक्ष प्रस्तावित किये गये सारवान विधिक प्रश्न स्वयं में ही अर्थहीन हो जाते है। चूँकि अभिलेखो से यह सिद्ध है कि प्रश्नगत सम्पत्ति पर उत्तर प्रदेश काश्तकारी अधिनियम 1939 के प्राविधान पूरी तरह लागू होते है अतः अपीलार्थी के अधिकार श्रेणी 8 के मौरूसी काश्तकार से अधिक नही माने जा सकते हैं। उत्तर प्रदेश काश्तकारी अधिनियम के सुसंगत प्राविधानो के अन्तर्गत अधीनस्थ न्यायालय द्वारा दिये गये निर्णयों में किसी प्रकार की तथ्यात्मक अथवा विधिक त्रुटि परिलक्षित नही होती है. और वर्तमान द्वितीय अपील में किसी अन्य सारवान विधिक बिन्दु का निहित होना प्रतीत नही होता है अतः वर्तमान द्वितीय अपील बलहीन होने के कारण निरस्त होने योग्य प्रतीत होती है।....."

49. It would be appropriate to refer to the judgement passed by the Hon'ble Supreme Court in the case of **Mahant Dooj Das versus Udasin Panchayati Bara Akhara,** reported in **(2008) 12 SCC 181** wherein the Hon'ble Apex Court has been pleased to hold that for application of the provisions of Section 331 of the 1950 Act which has been incorporated in the 1956 Act, it was incumbent upon the defendants to lead evidence to prove that the suit lands had been demarcated under Section 5 of the Act of 1956. In the absence of proof, it cannot be said that the suit area is a demarcated area and thus vested in the State by issuance of the notification under Section 8 of the Act of 1956. For a ready reference the relevant paragraphs are reproduced below:

"……23.By virtue of Section 8 after the agricultural area has been demarcated under Section 5, the State Government would issue a notification in the Official Gazette declaring that from specified date all demarcated areas situated in the urban area shall vest with the State Government and from the date so specified all such agricultural areas shall be transferred to and vest, except otherwise provided in the State free from all encumbrances. The purport of Section 8 is very clear that the agricultural land falling in the urban area has to be demarcated under Section 5 and thereafter the notification shall be issued by the State Government in regard to the demarcated area in the urban area to have been vested in the State.

29.In the present case, there is no evidence led by the defendants that the suit land had been declared as a demarcated area and the suit area being declared to be such has vested with the State Government under Section 8 of the 1956 Act. The notification issued under Section 8 says that in exercise of powers under Section 8 of the 1956 Act, the Governor of U.P. declared that from 1-7-1963 all agricultural areas in the following urban areas (which admittedly fall within Haridwar Union, District Saharanpur) of the then State of U.P. which have been demarcated under Section 5 of the Act shall stand vested with the State of U.P., and as from that day onwards all such agricultural areas shall stand transferred to, and vested,

except as provided in the 1956 Act, in the State free from all encumbrances. It is clear from this notification under Section 8 that the land which has been demarcated under Section 5 in Haridwar Union shall be vested in the State free from all encumbrances. Unless and until it is shown that the land in suit has been declared as a demarcated area or falls within the demarcated area, exercising the powers under Section 5, it cannot be said that it has been vested in the State by virtue of the Notification issued under Section 8 on 20-6-1963. By 20-6-1963 notification, it is only the demarcated area under Section 5 which has been vested in the State. That does not necessarily mean that the suit lands have been vested in the State. In the absence of proof, it cannot be said that the suit area is a demarcated area and thus vested in the State by issuance of the notification under Section 8 of the Act.

36. For application of the provisions of Section 331 of the 1950 Act which has been incorporated in the 1956 Act, it was necessary for the defendants to prove that the suit lands had been demarcated by the State Government by taking necessary steps as contemplated under Sections 3, 4 and 5 of the 1956 Act. Sections 3, 4 and 5, as already held by us, provide a complete code for demarcation of the agricultural area after giving appropriate hearing to the party affected by following the procedure laid down therein. It also provides for an appeal to the Board of Revenue. It is only after the area is declared as demarcated area, that Section 8 will be attracted and the notification to that effect would be issued in regard to and in respect of such declared demarcated area to be vested in the State Government. Unless the land is vested in the State Government, the provisions of Section 331 of the 1956 (sic1950) Act would have no application to oust the jurisdiction of the civil court.

50. Taking into consideration, the facts and law as narrated herein above it is apparent that the Trial Court, the First Appellate Court as well as the Board of Revenue in deciding the Second Appeal have diligently considered the issues involved in the case, and have returned concurrent findings particularly with regard to the issue of abolition of zamindari in the area in question as also with regard to the issue of demarcation of the land in dispute as per Section 5 of the U.P. Act of 1956 as agricultural area for the purpose of enforcement of the U.P. Urban Areas Zamindari Abolition and Land reforms Act, 1956.

51. In view of the deliberations and observation made herein above this Court finds, no manifest error of law or perversity in concurrent findings recorded by the Courts below on the issues involved in the case. The impugned orders passed by the learned Courts below, do not suffer from any such procedural irregularity or illegality that warrants interference by this Court in exercise of its' Writ jurisdiction under Article 226 of the Constitution of India. The Writ Petition is liable to be **dismissed.** It is accordingly dismissed. However, the parties shall bear their own costs.

(2024) 3 ILRA 814
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2024

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 4137 of 2023

Reshma Bi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava III

Counsel for the Respondents:
Sri Arun Kumar Pandey, C.S.C., Sri Rajesh Singh Rathore, Sri Vikas Mishra

Civil Law - U.P. Consolidation of Holdings Act, 1953 – Sections 19, 19-A, 20, 21, 23, 24, 28, 42-A, 48(3) & 52 – Writ petition challenging reference order dated 29.09.2023 passed by Deputy Director of Consolidation (DDC) under Section 48(3) disturbing petitioner's chak No. 273 – Held, DDC exceeded jurisdiction by amending petitioner's finalized chak to adjust valuation shortfall of Rs.178.51 paisa in respondent No. 5's chak No. 80 – No provision under law permits altering finalized chak post-notification under Section 24 or denotification under Section 52, except in cases of excess allocation, incorrect record, mutual consent, or compliance with legal provisions – Shortfall in respondent No. 5's chak could be addressed from bachat or gaon sabha land – Order dated 29.09.2023 partly quashed regarding petitioner's chak valuation of Rs.96.11 paisa – Matter remitted to DDC for fresh decision to adjust respondent No. 5's shortfall from bachat/gaon sabha land within three months, followed by demarcation and possession delivery within two months. (Para 8-12)

Writ petition allowed in part.

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for the State respondents, learned counsel for the private respondent no.5 and perused the record.

2. In view of the peculiar facts and circumstances of the present case, and order proposed to be passed hereinunder, this Court proceeds to decide the present matter finally at admission stage itself without calling for the respective affidavits of the parties, with the consent of the learned counsel for the parties present.

3. Petitioner is aggrieved with the reference order dated 29.9.2023 passed by the Deputy Director of Consolidation (in brevity 'DDC') in Case No.0170 of 2023 under Section 48 (3) of U.P. Consolidation of Holdings Act, 1953 (in brevity 'UPCH Act'), by which chak no.273 belongs to the petitioner has been disturbed.

4. Facts culled out from the record are that in provisional Consolidation Scheme present petitioner had been proposed chak No. 273, however, respondent No. 5 had been proposed chak No.80. At the time of preparation of final consolidation record, owing to some discrepancy, area having valuation of Rs.178.51 paisa has been left to be recorded in the chak of the respondent no.5. Meaning thereby area having valuation of Rs.178.51 paisa was short in his chak. Having aggrieved with the lesser valuation of Rs.178.51 paisa in his chak, respondent no.5 has moved miscellaneous application to complete the aforesaid valuation in his chak. After chequered history of litigation between the parties upto the Hon'ble High Court, finally Settlement Officer of Consolidation (in

brevity 'SOC') has referred the matter, vide order dated 30.8.2023, before DDC to allow the reference, which has been approved/accepted by DDC vide its order impugned dated 29.9.2023. Consequent to the reference order passed by DDC, chak of the petitioner has been affected to the extent of the valuation of Rs.96.11 paisa which has been shifted/allocated in the chak of the respondent no.5. Having been aggrieved with the aforesaid change in his chak, the instant petition has been filed by the petitioner.

5. Assailing the order passed by DDC, learned counsel for the petitioner has submitted two-fold submissions; first, regarding maintainability of the application moved by the contesting respondent no.5 under Section 42 A of U.P. Consolidation of Holdings Act, 1953 (in brevity 'UPCH Act'), that too, after after de-notification under Section 52 of UPCH Act and second submission has been advanced with respect to the jurisdiction of the consolidation courts to make any modification in the chak of the petitioner, while exercising their power in reference proceedings. It is submitted that the Consolidation Authorities have got no jurisdiction to amend the chak of any tenure holder which has attained finality before completion of the consolidation operation, thus, the instant writ petition may be allowed and the order impugned passed by DDC, being illegal, unwarranted under the law and cryptic, be quashed.

6. Per contra, learned counsel for the respondent no.5 has contended that respondent no.5 has, in fact, moved misc. application to correct the area of his chak which is short in the final consolidation record, therefore, same can not be treated to be filed under Section 42 A of UPCH Act. It is next contended that while passing the reference order, the DDC has considered the version of the present petitioner as well and, accordingly, shifted the chak of the petitioner on the partial area of plot no.286/1 Mi which was initially his original holding. It is further contended that, in fact, no grievance caused to the petitioner who has been compensated with the equal valuation of the area which has been taken out from his chak. It is next contended that grievance of the petitioner is imaginary, therefore, instant writ petition may be dismissed being misconceived and devoid of merits.

7. Learned standing counsel, on the basis of the instructions dated 02.01.2024 duly signed by the SOC, which is taken on record, contended that Consolidation Authorities have got right to correct the error in the consolidation record, therefore, there is no illegality in rectifying the area of chak No. 80 belongs to respondent no. 5. It is further contended that incorrect entry in land record was rectified under Section 48(3) of UPCH Act, therefore, there is no error or illegality in the reference order passed by the DDC.

8. Having considered the rival submissions advanced by the learned counsel for the parties and perusal of record, it is manifested that owing to clerical error in the final consolidation record area having valuation of Rs.178.51 paisa was left to be included/recorded in the chak of the respondent no.5. To rectify such error, he has moved a misc. application. As per case of the petitioner, aforesaid misc. application was moved under Section 42 A of UPCH Act after the denotification of village under Section 52 of UPCH Act, therefore, the said application filed on behalf of respondent

No. 5 was not maintainable in the eye of law. Learned counel for contesting respondent no.5 as well as the learned standing counsel have refuted the filing of said application for correction of record under Section 42 A of the UPCH Act and contended that misc. application moved on behalf of the respondent no.5 has been entertained under Section 48(3) of UPCH Act and, accordingly, error in the consolidation record is rectified by way of reference. Perusal of record, prima faice, it appears that reference was finally decided by DDC in exercise of his power under Section 48(3) of UPCH Act. There is nothing on the record to demonstrate that final order has been passed by Consolidation Officer or SOC under Section 42-A of UPCH Act.

9. Second submission advanced by learned counsel for the petitioner, with regard to the jurisdiction of the consolidation courts to amend the chak allotted to the parties while deciding the reference proceedings, is of paramount consideration in the instant matter. The record evinces that to complete the valuation in chak of the respondent no.5, which is short by Rs.178.51 paisa, reference has been made by the Consolidation Officer which was forwarded by the SOC, vide order dated 30.8.2023. The DDC, after affording opportunity of hearing to the parties concerned, has approved the aforesaid reference in exercise of its power under Section 48(3) of UPCH Act with an observation that short area having valuation of Rs.178.51 paisa in the chak of respondent no.5 shall be completed with equal valuation of area from the bachat land and the chak no.273 belongs to the petitioner. Accordingly, the petitioner has been given area having valuation of Rs.82.40 paisa (19.18 + 12.68+21.14+19.40) from the bachat land and the area having valuation of Rs.96.11 paisa from chak no.273 total area having valuation of Rs.178.51 paisa (82-40 + 96-11). Thus, it is evident that area having valuation of Rs.96.11 paisa has been shifted from the chak of the petitioner and allotted in the chak of the respondent no.5. Consequently, in lieu thereof, present petitioner has been allotted chak over plot no.286/1Mi of equal valuation i.e. Rs.96.11 paisa. The learned DDC has observed that plot no.286/1 Mi is the original holding of the present petitioner, whereon his guava trees and boundary wall exists. However, same has been earmarked as bachat land, therefore, allotting chak over there will not cause prejudice to the petitioner. It is evident that plot no.286/1 Mi which has been allotted to the petitioner is in fact recorded as a bachat land, therefore, chak of petitioner, for the valuation taken out, has been proposed over the bachat land.

10. In my considered opinion, in given circumstances of the present case, while deciding the reference proceedings under Section 48(3) of UPCH Act, the DDC has exceeded its jurisdiction to amend the chak of the petitioner which has already been finalised before the completion of the consolidation operation, during the chak allotment proceedings under the UPCH Act. There is no provision under the law to change/amend the chak of any chak holder except the provisions as enunciated under Sections 20 and 21 of UPCH Act. Any change in the chak of the chak holder without fulfilling legal formalities as required under the law would amount extra-judicial work which is unsustainable in the eye of law. The chak allotment proceedings under Sections 20 and 21 of the UPCH Act amounts judicial proceedings as enunciated under Section 40

of the UPCH Act. The preparation of provisional Consolidation scheme under Section 19-A of UPCH Act, as per conditions enunciated under Section 19 of UPCH Act, confirmed under Section 23 of UPCH Act after chak allotment proceedings under Sections 20 and 21 of the UPCH Act and, accordingly, allotment orders are being passed. Once the provisional consolidation scheme confirmed and parties came into the possession under Section 28 of UPCH Act, and final consolidation scheme came into force by promulgation of notification under Section 24 of UPCH Act there is no justification to make any change in the chak of any chak holder which has attained finality. There is no finding returned by the consolidation courts that the present petitioner was allotted excess area than that of the original area held by him. Therefore, there was no occasion to alter/amend the chak of the petitioner. The chak finalised before notification under Section 24 of the UPCH Act and denotification under Section 52 of the UPCH Act can not be altered/modified at subsequent stage merely in order to compensate the other chak holder whose chak has been found short of area/valuation for which he was entitled.

11. In the given circumstances of the present case it is not disputed that chak of the petitioner was short of area having valuation of Rs.178.51 paisa. However, said short valuation could be completed from the bachat land. Disturbing/amending the chak of the petitioner which had attained finality before the denotification under Section 52 of UPCH Act is unsustainable in the eye of law. The Consolidation Authorities are not expected to amend/alter the area/valuation of any chak at later stage, that too, after denotification under Section 52 of UPCH Act except in the eventuality that excess area/valuation has illegally been allotted in that chak or composition of said chak has incorrectly been endorsed/mentioned in final consolidation record or parties concerned are agreed upon to such amendment/alteration, or any chak is required to be amended/altered in compliance/pursuance of any provision under the UPCH Act/Rules or order passed by court competent.

12. In this conspectus, as above, the order passed by DDC under Section 48(3) of UPCH Act, proposing amendment in the chak of the petitioner, is liable to be quashed and the grievance of the respondent no.5, to complete the area of his chak no.80 having valuation of Rs.178.51 paisa, could be ventilated by adjusting his chak over the bachat land or any other gaon sabha land. As such the instant writ petition succeeds and is allowed in part. The order dated 29.9.2023 passed by the DDC in revision no.0170 of 2023 under Section 48(3) of UPCH Act (Kallan and others Vs. State of U.P. and others) is hereby partly quashed, so far as it relates to the valuation of Rs. 96.11 paise of chak No. 273, on the following conditions:

(i) Revision filed on behalf of Kallan (respondent no.5) is restored to its original number and parties are relegated before the DDC, who shall decide the revision afresh after affording proper opportunity of hearing to the parties concerned.

(ii) The DDC shall make endeavour to complete the short area having valuation of Rs.178.51 paisa in the chak No. 80 of the respondent No. 5 from the bachat land or other gaon sabha land/public land, as may be justified,

having area of equal valuation, as far as possible, nearer/in the vicinity to his remaining chak. It is made clear that for better compliance of this condition No. 2, learned DDC would revisit his reference order dated 29.9.2023, partly quash by the order of date, and pass fresh order so as to do complete justice in favour of respondent No. 5, who is running from pillar to post since last several years.

(iv) Having completed the short area having valuation of Rs.178.51 paisa in the chak of respondent No. 5, learned DDC shall make all sincere endeavour to demarcate the said allotted land in chak No. 80 and deliver the possession thereof to respondent no.5 after removing obstruction/hindrance, if any, over there. He can take police protection/help as well for the purpose, if required.

(v) The DDC shall make a sincere endeavour to decide the revision, in accordance with law, expeditiously, preferably, within a period of three months from the date of production of a certified copy of this order and, thereafter, ensure the demarcation and delivery of possession thereof as directed above within a period of two months.

(2024) 3 ILRA 818
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ B No. 22489 of 2019

Smt. Nandini Devi ...Petitioner
Versus
Deputy Director of Consolidation Ayodhya & Ors. ...Respondents

Counsel for the Petitioner:
Saryu Prasad Tiwari, U.S. Sahai (Amicus)

Counsel for the Respondents:
C.S.C., IM Pandey, Krishna Kumar Dubey

Civil Law - Land Acquisition – U.P. Zamindari Abolition and Land Reforms Act, 1950 – Section 171 – U.P. Consolidation of Holdings Act, 1953 – Section 9-A, 9-B, 11, 12 & 48 – Rule 25-A of U.P. Consolidation of Holdings Rules –

Succession – Unregistered Will – Validity of Compromise – Dispute over Land Title

The petitioner challenged the orders dated 05.09.2016 (Settlement Officer of Consolidation, Ayodhya) and 05.04.2019 (Deputy Director of Consolidation, Ayodhya), which rejected her claim over disputed land (Gata No. 76, new No. 66) based on an unregistered Will dated 03.12.1991 and a compromise dated 24.02.1992. The land was originally recorded in the name of Bhagwan Bux Singh, and after his death on 04.12.1991, his widow Rajeshwari Devi's name was recorded under Section 171 of the 1950 Act. The petitioner, Nandini Devi, daughter of Bhagwan Bux Singh, claimed rights based on the Will and a compromise during consolidation proceedings. Held: The unregistered Will was not proved as per law before the authorities under the 1953 Act, rendering the petitioner's claim baseless. The compromise was invalid as it violated Rule 25-A of the U.P. Consolidation of Holdings Rules, lacking signatures of Consolidation Committee members and conferring rights not recognized by statute. Under Section 171(2) of the 1950 Act, Rajeshwari Devi, as the widow, was the sole legal heir, and the petitioner, a married daughter, had no statutory right during her mother's lifetime. The orders of the SOC and DDC were upheld, and the petition was dismissed.

Case Law Cited:

1. Shiv Prasad Vs Deputy Director of Consolidation, Ghazipur, 2006 SCC OnLine All 1485

2. Babu Vs Abdul Shakoor, 2018 (139) R.D. 36

3. Smt. Basmati Vs Deputy Director of Consolidation, 2019 (145) R.D. 832

4. Budh Lal Vs Deputy Director of Consolidation, 1982 AWC 447 (DB)

5. Kale Vs Deputy Director of Consolidation, 1976 (2) R.D. 69 (SC)

6. Rana Sheo Ambar Singh Vs Allahabad Bank Ltd., AIR 1961 SC 1790

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned Counsel for the petitioner, Sri Hemant Pandey, learned State Counsel and Sri Krishna Kumar Dubey, learned Counsel for the side opposite.

2. By means of the present petition, the petitioner has assailed the order dated 05.09.2016 passed by opposite party no.2/Settlement Officer of Consolidation, Ayodhya (in short 'SOC') passed in Appeal No. 797/1866/1737 (Rajeshwari Devi Versus Nandini Devi), as also the order dated 05.04.2019 passed by opposite party no.1/Deputy Director of Consolidation, District Ayodhya (in short 'DDC') in Revision No. 859 (Nandini Devi Versus Rajeshwari Devi).

3. Brief facts of the case, are to the effect that the land in dispute i.e. Gata No. 76 (new number 66) situated at Village-Moradabad, Tehsil-Rudauli, District-Faizabad now Ayodhya, was recorded in the name of one Bhagwan Bux Singh. The Bhagwan Bux Singh expired on 04.12.1991, thereafter the name of his wife namely Rajeshwari Devi (opposite party no.3) was recorded in the revenue records in terms of ***Section 171 of U.P.Z.A. & L.R. Act, 1950*** (in short 'Act of 1950') as applicable at relevant point of time. Section 171 of the Act of 1950, applicable at relevant point of time reads as under:-

"[171. General order of succession -

Subject to the provisions of Section 169, when a bhumidhar [**] or asami being a male dies, his interest in his holding shall devolve in accordance with the order of succes sion given below-

(a) the male lineal descendant in the line of descent in equal shares per strips:

Provided first that, the son of a pre-deceased son how low-so-over shall inherit the share which would have devolved upon the predeceased son, had he been alive:

Provided secondly that, subject to the provisions of the first proviso, the share of a predeceased male lineal descendant will devolve upon his widow who has not remarried, and

Provided thirdly that if no male lineal descendant in male line of descent is alive the inheritance shall be governed by clause (b);

(b) <u>widow and widowed mother and widow of a pre-deceased male lineal descendant in the male line of descent, who have not remarried:</u>

Provided first that co-widows will together get one share, and

Provided secondly that the widow of a nearer descendant will exclude that of a remoter one in the same branch;

(c) [Deleted.]

(d) father;

(e) [Deleted.]

(ee) unmarried daughter;

(f) brother, being the son of the same father as the deceased;

(ff) unmarried sister;

(g) married daughter;

(h) daughter's son;

(i) brother's son, the brother having been son of the same father as the deceased;

(j) father's father;

(k) father's mother, who has not remarried;

(1) son's daughter;

(m) married sister;

(n) half-sister being the daughter of the same father as the deceased;

(o) sister's son;

(00) half-sister's son, the sister having been the daughter of the same father as the deceased;

(p) brother's son's son;

(q) father's father's son ;

(r) father's father's son's son.]"

4. After the aforesaid, during consolidation proceedings, the petitioner namely Smt. Nandini Devi wife of Devendra Kumar Singh daughter of (Bhagwan Bux Singh and Rajeshwari Devi) raised her claim over the property in dispute i.e. Gata No. 76 (new number 66), detailed above.

5. It would be apt to indicate that the claim of the petitioner before the authorities under the Act of 1953 as also before this Court is based upon the unregistered 'Will' dated 03.12.1991.

6. During the consolidation proceedings in a chak, Appeal No. 1418 of 2023 (Munni Devi Versus Bhagwan Bux Singh and Others), the statement(s) of attesting witnesse(s) of 'Will' dated 03.12.1991 were recorded and based upon the same the petitioner (Smt. Nandini Devi) and opposite party no. 3 (Rajeshwari Devi) were substituted in place of Bhagwan Bux Singh (died during the pendency of appeal on 04.12.1991) and a compromise was also filed in the said appeal and therefore appellate authority namely SOC, referred the matter to Assistant Consolidation Officer concerned.

7. The copies of the statement(s) of attesting witnesses have been placed on record by means of filing supplementary affidavit dated 07.03.2024 and perusal thereof, would show that these witnesses were not cross examined and at this stage, on being asked as to whether these statements can be considered, learned Counsel for the petitioner very fairly stated that these statements cannot be considered, as per law.

8. After the order passed by the SOC dated 20.01.1992, the ACO proceeded in the matter and passed the order dated 24.02.1992. This order dated 24.02.1992 was passed in case no. 125 under Section 12 of the Act of 1953 (Rajeshwari Devi Versus Bagwan Bux Singh (since died). The order dated 24.02.1992 passed by Assistant Consolidation Officer, Ayodhya, on reproduction reads as under:-

"पत्रावली पेश हुई। पक्ष हाजिर आये। निम्न शर्तवार किया। हस्तहार जारी कराया गया, मियाद अन्दर इस्तहार के विरूद्ध कोई आपत्ति नहीं आयी तथा दिनांक 24.2.92 को दोनों पक्षों के बीच समझौता प्रस्तुत किया गया। ग्राम प्रधान मु0 वसीम ने दस्तीक किया। ग्राम मुरादाबाद की आकार पत्र 23 भाग–1 के क्रमांक 73, 89 तथा 76 के सेक्टर नं0 2 प्रथम चक व सेक्टर नं0 5 द्वितीय चक मृतक भगवान बक्श सिंह पुत्र छंग्गा सिंह निवासी मुरादाबाद का नाम खारिज करके मु0 राजेश्वरी देवी बेवा भगवान बख्श सिंह नि0 मुरादाबाद का नाम बतौर वारिस दर्ज करने की मांग की गई है तथा क्रमांक 76 के सेक्टर नं06 तृतीय चक से मृतक भगवान बख्श सिंह पुत्र छंग्गा सिंह का नाम खारिज करके श्रीमी नन्दिनी पत्नी देवेन्द्र कुमार सिंह नि0 मुरादाबाद का नाम बतौर समझौता द्वारा दर्ज करने की मांग की गई है।

समझौता पढ़कर सुनाने के बाद मु0 वसीम प्रधान ने तसदीक किया।"

9. Being aggrieved by the order dated 24.02.1992 passed by ACO, opposite party no.3/Rajeshwari Devi wife of Bhagwan

Bux Singh, mother of present petitioner namely Nandini Devi, preferred an appeal under Section 11(1) of the Act of 1953. The appeal was filed with some delay. After considering the facts and material available on record, the SOC condoned the delay and decide the appeal no. 797/1866/1737 filed by opposite party no.3/Rajeshwari Devi, challenging the order dated 24.02.1992, on merits vide order dated 05.09.2016.

10. The SOC after considering the entire facts and circumstances of the case including the signature over the compromise in issue, as also ***Section 171(2) of the Act of 1950***, decided the case in favour of opposite party no.3/Rajeshwari Devi and rejected the claim of the petitioner by impugned order dated 05.09.2016. The relevant portion of the same reads as under:-

"जहां तक इस मामले मे गुणदोष पर विवेचना का प्रश्न है, चूंकि अपीलार्थिनी के विद्वान अधिवक्ता द्वारा गुणदोष पर अपनी बहस की गई है परन्तु प्रतिपक्षी द्वारा पर्याप्त अवसर देने के बाद भी अपील के गुणदोष पर अपना कथन प्रस्तुत नहीं किया गया है इसलिए पत्रावली पर उपलब्ध उनके प्रतिवाद पत्र में किये गये कथन तथा पत्रावली पर उपलब्ध साक्ष्यों के आधार पर इस अपील में गुणदोष पर निर्णय किया जा रहा है। अवर न्यायालय की वाद पत्रावली वाद सं0 125 अन्तर्गत धारा 12 जो0च0अ0 समझौता व आदेश दिनांक 24.02.92 के अवलोकन से ज्ञात होता है कि स0च0अ0 न्यायालय पर प्रस्तुत वाद पत्र के स्तम्भ 6 में नामान्तरण का आधार ''वजरिये वरासत'' अंकित है तथा स्तम्भ 7 में वादी/प्रतिवादी का नाम व पता अंकित है। जिसमें वादी के रूप में राजेश्वरी देवी व प्रतिवादी के रूप में भगवान बक्श सिंह पुत्र छंगा सिंह का नाम अंकित करके वादी के रूप में सबसे नीचे राजेश्वरी देवी विधवा भगवान बक्श सिंह का नाम व निशानी अंगूठा अंकित है। उक्त वाद पत्र पर वाद में भिन्न कलम व हस्तलिपि में कमांक 2 डालकर नन्दिनी पत्नी देवेन्द्र कुमार का नाम स्तम्भ 8 में अंकित किया गया है, जिसके इस सम्बन्ध में थाना पटरंगा जिला फैजाबाद में प्राथमिकी दर्ज है जिसकी विवेचना श्री सुनील कुमार उप निरीक्षक द्वारा की जा रही है, इसलिए इस बिन्दु पर अलग से कोई मत अंकित किया जाना विधि संगत नहीं प्रतीत होता है क्योंकि इससे पुलिस द्वारा की जा रही अपराधिक विवेचना प्रभावित हो सकती है। अवर न्यायालय की पत्रावली में दिनांक रहित एक समझौता पत्र दाखिल है जिसमें कहा गया है कि विवादित भूमि जमींदारी उन्मूलन के पूर्व से ही वादिनी सं0 2 के पिता भगवान बक्श सिंह के नाम दर्ज रही है जिसमें उनके पिता ने पूर्व चकबन्दी में मु0नं0 11/1 तारीख फैसला 11.7.57 से उसके पक्ष में विभाजन कर दिया जो आराजी नं0 35, 113, 141, 148/1, 307 व 352 धारा 210 के अन्तर्गत वह सीरदार घोषित कर दी गयी। इसके बाद भी विवादित नम्बरान प्रतिवादी के नाम दर्ज चला आ रहा है इसलिए आपसी समझौता के आधार पर चक सं0 73 व 89 तथा चक सं0 76 के प्रथम व द्वितीय चक पर मु0 राजेश्वरी देवी तथा तृतीय चक पर नन्दिनी पत्नी देवेन्द्र कुमार का नाम दर्ज किया जाये। इस सुलहनामा को मु0 वसीम प्रधान ने तस्दीक किया है जिस पर स0च0अ0 का सूक्ष्म हस्ताक्षर व दिनांक 24.7.92 अंकित है। इसी सुलहनामा का उल्लेख करके स0च0अ0 द्वारा समझौता व आदेश दिनांक 24.2.92 पारित किया गया है जिस पर मु0 वसीम प्रधान का हस्ताक्षर तथा राजेश्वरी देवी व नन्दिनी का अंगूठा चिन्ह अंकित किया गया है। अवर न्यायालय की पत्रावली में अथवा अपीलीय कार्यवाही के दौरान नन्दिनी देवी पत्नी देवेन्द्र कुमार द्वारा ऐसा कोई अभिलेखीय साक्ष्य नहीं दाखिल किया गया है जो उनके पूर्व चकबन्दी में विवादित भूमि के सम्बन्ध में आदेश होने सम्बन्धी कथन को पुष्ट करता हो। उ0प्र0 जोत चकबन्दी अधिनियम की धारा 12 की व्यवस्था के अनुसार धारा 10 के प्रकाशन के बाद उत्पन्न कार्य कारण के निस्तारण हेतु नामान्तरण आदेश पारित किया जाता है जिसमें किसी प्रकार स्वत्व का निर्धारण नहीं किया जाता है अपितु स्वत्व की मांग के लिए जो च0अ0 की धारा 9क के अन्तर्गत आपत्ति प्रस्तुत किये जाने का विधान है परन्तु प्रतिपक्षी नन्दिनी की ओर से ऐसी कोई आपत्ति प्रस्तुत की गई हो इसका न तो पत्रावली पर कोई साक्ष्य है और न ही उनके द्वारा ऐसा कोई कथन प्रस्तुत किया गया है। ऐसी स्थिति में उनके द्वारा अपील स्तर पर दाखिल छायाप्रति कागजात का कोई लाभ नहीं मिल सकता है। जो0च0अ0 की धारा 12 के अन्तर्गत योजित प्रश्नगत वाद में अवर न्यायालय को केवल मृतक भगवान बक्श सिंह पुत्र छंगा सिंह की वरासत सम्बन्धी आदेश पारित करने का अधिकार प्राप्त था। तत्समय प्रभावी उ0प्र0 एवं भूमि व्यवस्था अधिनियम की धारा 171 उपधारा (2) मे वर्णित व्यवस्था के अनुसार अपीलार्थिनी राजेश्वरी देवी मृतक भगवान बक्श सिंह पुत्र छंगा सिंह जो पुंजातीय वंशज न होने के कारण कमांक क पर वर्णित एक मात्र विधवा होने के कारण एक अकेली जायज वारिस होती है। तत्समय उ0प्र0ज0वि0 एवं भू0व0 अधिनियम 1950 की धारा 171 की उपधारा (1) के खण्ड (11) में यह भी स्पष्ट किया गया है कि उपधारा (2) के किसी पूर्ववर्ती खण्ड विनिर्दिष्ट

उत्तराधिकारी उत्तरवर्ती खण्डों में विनिर्दिष्ट उत्तराधिकारियों को वर्जित कर लेंगे, अर्थात खण्ड (1) के उत्तराधिकारियों को खण्ड (ख) के उत्तराधिकारियों पर अधिमान दिया जायेगा और इसी प्रकार उत्तरवर्ती क्रम जारी रहेगा। प्रतिपक्षी नन्दिनी देवी विवाहित पुत्री होने के नाते उत्तराधिकार क्रमांक घ पर है इसलिए उपर वर्णित व्यवस्था के अनुसार वह मृतक भगवान बक्श सिंह की जायज वारिस नहीं हो सकती है और न ही उन्हें जो0च0अ0 की धारा 12 के तहत कोई स्वत्व प्रदान किया जा सकता है। उपर्युक्त विवेचन के परिप्रेक्ष्य में जो0च0अ0 की धारा 12 के अन्तर्गत स0च0अ0 द्वारा समझौता के आधार पर चक सं0 76 के तृतीय चक पर प्रतिपक्षी नन्दिनी पत्नी देवेन्द्र कुमार के पक्ष में पारित आदेश क्षेत्राधिकार से परे एवं इस धारा के अन्तर्गत विचारणीय न होने के कारण खण्डित होने योग्य है तथा विवादित भूमि पर मृतक भगवान बक्श सिंह पुत्र छंगा सिंह के स्थान पर राजेश्वरी देवी पत्नी भगवान बक्श सिंह ग्रामवासी का नाम बतौर वारिस दर्ज किया जाना विधि संगत प्रतीत होता है। तदनुसार यह अपील स्वीकार होने योग्य है।

आदेश

अतः उपर्युक्त विवेचना के परिप्रेक्ष्य में प्रश्नगत अपील स्वीकार की जाती है तथा अवर न्यायालय द्वारा पारित समझौता/आदेश दिनांक 24.2.92 क्षेत्राधिकार से बाहर होने के कारण खण्डित किया जाता है। ग्राम मुरादाबाद, परगना व तहसील रूदौली जिला फैजाबाद की चक सं0 73, 76 तथा 89 से मृतक भगवान बक्श सिंह पुत्र छंगा सिंह ग्रामवासी का नाम खारिज करके राजेश्वरी देवी विधवा भगवान बक्श सिंह ग्रामवासी का नाम बतौर विधिक वारिस दर्ज हो। पक्षकार सूचित हों तथा अग्रेतर कार्यवाही के उपरान्त पत्रावली दाखिल दफ्तर हो।"

11. Being aggrieved by the order dated 05.09.2016, the petitioner instituted a revision being Revision No.859/2016530423000049 (Nandini Devi Versus Rajeshwari Devi), under Section 48 of the Act of 1953.

12. By the impugned order dated 05.04.2019, the opposite party no.1/D.D.C. Ayodhya, rejected the revision and affirmed the order dated 05.09.2016 passed by opposite party no.2/SOC. The relevant portion of order dated 05.04.2019, reads as under:-

"निगरानीकर्ती की ओर से प्रस्तुत किये गये तर्को में मुख्य रुप से यह कहा गया है कि राजेश्वरी देवी ने दिनांक 15.11.16 को प्रार्थना पत्र प्रस्तुत करके कहा है कि मैने कोई अपील दाखिल नहीं किया है। किसी अन्य व्यक्ति ने अपील दाखिल किया है। जब नोटिस प्राप्त हुयी तब उक्त वाद की जानकारी हुयी है। इनका तर्क है कि वाद संख्या 125 में धारा–12 जोत चकबन्दी अधिनियम के अन्तर्गत सहायक चकबन्दी अधिकारी द्वारा दिनांक 24.02.92 को समझौते के आधार पर आदेश पारित किया गया है। भगवानबक्श मृतक की वरासत का विवाद था। इनका तर्क है कि प्रथम चक चकबन्दी के खाता संख्या 55 भगवान बक्श के नाम खाता था। इसी खाते पर आदेश दिनांक 11.07.57 के द्वारा नन्दिनी देवी का नाम बतौर सीरदार अंकित होने का आदेश हुआ है किन्तु इसका अनुपालन अग्रिम अभिलेखों में नही हुआ था किन्तु उसका चक अलग बना हुआ था। गलती से अग्रिम अभिलेखों में भगवानबक्श का नाम दर्ज हो गया था। दिनांक 03.12.91 को भगवान बक्श सिंह ने अपंजीकृत वसीयतनामा अपनी पत्नी के पक्ष में तहरीर किया तथा उल्लेख किया गया कि इन्हें बेचने व ऋण लेने का अधिकार नहीं होगा तथा राजेश्वरी देवी की मृत्यु के बाद उत्तराधिकारिणी नन्दिनी देवी होगीं। दिनांक 04.12.91 को भगवानबक्श मर गये। दिनांक 20.01.92 को राजेश्वरी देवी व नन्दिनी देवी के मध्य सुलह हुयी। इसी सुलहनामें के आधार पर दिनांक 24.02.92 को आदेश पारित हुआ है। इनका तर्क है कि आदेश दिनांक 24.02.92 की जानकारी राजेश्वरी देवी को है एवं उसके द्वारा वर्ष 1998 में बैनामा किया गया है। राजेश्वरी देवी द्वारा बन्दोबस्त अधिकारी चकबन्दी के समक्ष कोई अपील संस्थित नहीं की गयी है। सुबुद्ध अधिवक्ता का तर्क है कि वाद धारा–9क(2) के अन्तर्गत होना चाहिए था जो धारा–12 में हुआ है। यह अधिवक्ता की सलाह पर है। इनका तर्क है कि अपीलीय न्यायालय द्वारा गलत रुप से अपील को स्वीकार करके वाद भूमि पर राजेश्वरी देवी का नाम अंकित किया गया है। यह भी तर्क प्रस्तुत किया कि निगरानी स्वीकार की जाय तथा अपीलीय न्यायालय का आदेश निरस्त करके पत्रावली पुनः गुणदोष पर निस्तारण हेतु अपीलीय न्यायालय को प्रतिप्रेषित की जाय। इनकी ओर से इस न्यायालय का ध्यान आर0जे0 1991 पेज 335 की ओर आकृष्ट कराया गया है।

उत्तरवादी की ओर से प्रस्तुत किये गये तर्को में मुख्य रुप से कहा गया है कि दिनांक 24.02.92 को पारित आदेश के अनुपालन में जोत चकबन्दी आकार पत्र–41 व 45 में राजेश्वरी का नाम आया। इसी आदेश में जालसाजी की गयी। इसी जालसाजी के आधार पर धारा–33/39 भू–राजस्व अधिनियम में वाद दाखिल किया गया। जिस पर उप जिलाधिकारी ने आदेश दिनांक 31.12.2014 पारित किया है। इनका तर्क है कि

उसके विरुद्ध प्रार्थना पत्र दिया गया। आदेश स्थगित हुआ तथा खारिज हो गया। पुर्नस्थापन प्रार्थना पत्र दिया गया जो चल रहा है। दिनांक 29.4.2015 को अपील दाखिल हुयी है। सुबुद्ध अधिवक्ता का यह भी तर्क है कि 1957 में नन्दिनी की आयु 07 वर्ष थी इसलिए इतने कम उम्र में सीरदार कैसे हुयी?। जो समझौता दाखिल हुआ उसे बन्दोबस्त अधिकारी चकबन्दी के समक्ष नही रखा गया। सुबुद्ध अधिवक्ता का यह भी तर्क है कि चकबन्दी में पारित आदेश के अनुपालन हेतु नियम 109 में कार्यवाही नहीं की गयी, बल्कि चकबन्दी के आदेश के अनुपालन हेतु धारा–33/39 के अन्तर्गत वाद प्रस्तुत किया गया। सुबुद्ध अधिवक्ता का तर्क है कि वर्ष 1957 में यदि कोई आदेश था तो द्वितीय चक चकबन्दी में उसे क्यो नहीं उठाया गया। कोई भी पंजीकृत अभिलेख नहीं है। सुबुद्ध अधिवक्ता का तर्क है कि भगवान बक्श सिंह मृतक के स्थान पर उनकी विधवा राजेश्वरी देवी का नाम सहायक चकबन्दी अधिकारी द्वारा अंकित किया गया था और उसी अनुसार अभिलेख भी निर्मित हुये थे। नन्दिनी देवी द्वारा अभिलेखों में जालसाजी कराकर अपना नाम अंकित करा लिया गया था जिसे अपीलीय न्यायालय द्वारा कूटरचना के आधार पर अंकित पाते हुए निरस्त कर दिया गया है तथा मृतक भगवान सिंह के स्थान पर उनकी विधवा राजेश्वरी देवी का नाम उचित रुप से अंकित किया गया है। अपीलीय न्यायालय के आदेश में कोई त्रुटि नहीं है निगरानी निराधार है एवं निरस्त की जाय।

मैनें अवर न्यायालयो की पत्रावली पर उपलब्ध आदेश, सभी संगत साक्ष्यो का विधि के आलोक में विहंगम परिशीलन एवं परीक्षण किया। इसके अतिरिक्त दोनो पक्षों के अधिवक्ता द्वय की तर्कपूर्ण बहस सुना। स्पष्ट है कि ग्राम मुरादाबाद में चकबन्दी प्रकिया प्रचलित रहते ही खातेदार भगवानबक्श सिंह पुत्र छंगा सिंह का देहान्त हो गया। राजेश्वरी देवी द्वारा धारा–12 के अन्तर्गत चक संख्या 89, 73, व 76 पर मृतक भगवान सिंह के स्थान पर विधवा के रुप में नाम अंकित करने हेतु नामान्तरण वाद प्रस्तुत किया गया एवं स्तम्भ 06 में नामान्तरण का आधार बजरिये वरासत अंकित है। स्तम्भ 7 में वादी व प्रतिवादी का नाम व पता अंकित है। वादी के रुप में राजेश्वरी देवी विधवा भगवानबक्श सिंह तथा प्रतिवादी के रुप में भगवानबक्श सिंह पुत्र छंगा सिंह अंकित है तथा इसके नीचे राजेश्वरी देवी विधवा भगवानबक्श सिंह का नाम व निशानी अंगूठा लगा है। उक्त वाद पत्र पर विशेष विवरण के कालम में नन्दिनी पत्नी देवेन्द्र कुमार निवासी ग्राम मुरादाबाद परगना व तहसील रुदौली जिला बाराबंकी भिन्न कलम से भिन्न लेख में लिखा गया है एवं राजेश्वरी के नाम के ऊपर कोष्ठक बनाकर एक एवं नन्दिनी के नाम के ऊपर कोष्ठक बनाकर दो लिखा गया है। इस कूटरचना के सम्बन्ध में थाना पटरंगा जिला फैजाबाद में प्राथमिकी दर्ज है, जिसकी विवेचना की जा रही है। इस बिन्दु पर अलग से कोई मत व्यक्त किया जाना विधिसंगत नही है। अवर न्यायालय की पत्रावली में दिनांक रहित एक समझौता पत्र दाखिल है जिसमें उल्लेख है कि मुकदमा नं0 11/1 तारीख फैसला 11.07.57 के द्वारा भगवानबक्श सिंह के नाम अंकित भूमि, भूमि संख्या 35, 113, 141, 148/1, 307 व 352 नन्दिनी देवी सीरदार घोषित कर दी गयी। इसके बाद भी विवादित भूमि पर प्रतिवादी का नाम दर्ज चला आ रहा है। इसलिए आपसी समझौता के आधार पर चक संख्या 73,89 तथा 76 के प्रथम व द्वितीय चक पर मु0 राजेश्वरी देवी तथा तृतीय चक पर नन्दिनी देवी पत्नी देवेन्द्र कुमार का नाम दर्ज किया जाय। इस सुलहनामा को मो0 वसीम प्रधान ने तस्दीक किया है। निगरानीकर्ता द्वारा ऐसा कोई साक्ष्य प्रस्तुत नही किया गया है जो पूर्व चकबन्दी में विवादित भूमि के सम्बन्ध में पारित किये गये आदेश की पुष्टि करता हो। यहॉ यह भी उल्लेखनीय है कि चकबन्दी क्रियाओ के अन्तर्गत ग्राम में धारा–10 के प्रकाशन के पश्चात उत्पन्न वाद कारण के निस्तारण हेतु उ0प्र0 जोत चकबन्दी अधिनियम की धारा–12 की व्यवस्था है। इस प्रकरण में निगरानीकर्ता द्वारा प्रथम चक चकबन्दी के जिस आदेश के अनुसार सुलहनामे के आधार पर आदेश का होना कहा गया है, उक्त कार्यवाही हेतु नियमानुसार ग्राम में धारा–9 के प्रकाशन के पूर्व सत्यापन खतौनी के समय तत्सम्बन्धी विवाद निर्मित होना चाहिए था एवं धारा–9 के प्रकाशन के उपरान्त तत्सम्बन्धी आपत्ति भी प्रस्तुत होकर नियमानुसार साक्ष्यों के आधार पर प्रकरण का गुणदोष पर निस्तारण होना चाहिए था। इस प्रकरण में ग्राम में सत्यापन खतौनी के समय ऐसा कोई तनाजा निर्मित हुआ और न ही वाद भूमि पर निगरानीकर्ती के कब्जे का ही कोई तनाजा निर्मित हुआ और न, ही निगरानीकर्ती की ओर से प्रथम चक चकबन्दी में पारित आदेश का अनुपालन नियम 109 के अन्तर्गत कराया गया और न ही द्वितीय चक चकबन्दी प्रारम्भ होने के उपरान्त धारा–9 के अन्तर्गत ऐसा कोई आपत्ति ही प्रस्तुत की गयी।

पत्रावली पर उपलब्ध द्वितीय चक चकबन्दी के जोत चकबन्दी आकार पत्र–41 व 45 के अवलोकन से स्पष्ट है कि भगवान बक्श सिंह पुत्र छंगा सिंह के देहान्त के उपरान्त राजेश्वरी देवी द्वारा धारा–12 के अन्तर्गत प्रस्तुत नामान्तरण वाद में पारित आदेश के अनुसार चक संख्या 89, 73, व 76 के सभी चको से निर्मित जोत चकबन्दी आकार पत्र–41 व 45 में भगवानबक्श सिंह पुत्र छंगा सिंह के स्थान पर श्रीमती राजेश्वरी देवी विधवा भगवानबक्श सिंह ग्रामवासी का नाम अंकित हुआ है।

यहॉ यह भी उल्लेखनीय है कि यदि धारा–12 के अन्तर्गत प्रस्तुत वाद संख्या 125 में पारित सहायक चकबन्दी अधिकारी के आदेश दिनांक 24.02.92

के द्वारा चक संख्या 73, 89, व 76 के सेक्टर नं0 02 प्रथम चक व सेक्टर नम्बर 05 द्वितीय चक पर मु0 राजेश्वरी देवी बेवा भगवान बक्श सिंह एवं क्रमांक 76 के सेक्टर नं0 6 के तृतीय चक पर श्रीमती नन्दिनी देवी पत्नी देवेन्द्र कुमार सिंह का नाम अंकित हुआ होता तो तत्समय ग्राम के अन्तिम अभिलेख निर्मित करते समय जोत चकबन्दी आकार पत्र–41 व 45 पर आदेश दिनांक 24.02.92 के अनुपालन में चक संख्या 76 के तृतीय चक गाटा संख्या 71मि0 आदि कुल 06 किता क्षेत्रफल 2.929 हे0 से निर्मित नवीन गाटा संख्या 66/2.929हे0 श्रीमती राजेश्वरी देवी बेवा भगवानबक्श सिंह के नाम अंकित न होकर श्रीमती नन्दिनी देवी पत्नी देवेन्द्र कुमार सिंह के नाम अंकित हुआ होता किन्तु नवीन गाटा संख्या 66/2. 929हे0 जोत चकबन्दी आकार पत्र–45 की खाता संख्या 100 में चक संख्या 76 प्रथम व द्वितीय के नवीन गाटा संख्या 47 व 49 के साथ राजेश्वरी देवी का अकेले नाम अंकित होना स्पष्ट करता है कि सहायक चकबन्दी अधिकारी द्वारा धारा–12 के अन्तर्गत मृतक भगवानबक्श सिंह के स्थान पर वरासतन उनकी विधवा श्रीमती राजेश्वरी देवी का नाम ही अंकित किया गया था और उसी अनुसार ग्राम के अन्तिम अभिलेख निर्मित किये गये थे।

सहायक चकबन्दी अधिकारी की वाद पत्रावली संख्या 125 अन्तर्गत धारा–12 के साथ संलग्न नामान्तरण वाद पत्र में विशेष विवरण के स्तम्भ 8 में भिन्न कलम व भिन्न लेख से नन्दिनी देवी पत्नी देवेन्द्र कुमार बढ़ाया जाना तथा पत्रावली में संधिपत्र संलग्न करके उसके आधार पर आदेश निर्मित किया जाना स्पष्ट करता है कि कूटरचना के आधार पर पूर्व पारित आदेश हटाकर नवीन आदेश रखा गया है क्योंकि यदि वस्तुतः यही आदेश पारित हुआ होता तो ग्राम के अन्तिम अभिलेख इसी अनुसार निर्मित किये जाते।

यहॉ पर यह भी स्पष्ट करना समीचीन है कि चकबन्दी प्राधिकारियों द्वारा पारित आदेश यदि जोत चकबन्दी आकार पत्र– 41 व 45 में क्रियान्वित करने से छूट भी गया है तो भी इसका क्रियान्वयन लैण्ड रेवेन्यू ऐक्ट की धारा–33/39 में नहीं हो सकता। ऐसे आदेशों को प्रथमतः जोत चकबन्दी अधिनियम की धारा–48(3) में परीक्षित करने के बाद नियम 109ए(1) में अनुपालित किया जाना चाहिए। लैण्ड रेवेन्यू ऐक्ट की धारा–33/39 की परिधि मात्र खतौनी की लिपिकीय एंव अंकगणितीय त्रुटि को शुद्ध करने की है जो धारा–52(1) जोत चकबन्दी अधिनियम में प्रख्यापन के बाद तहसील में हो जाती है।

एक महत्वपूर्ण बिन्दु यह भी है कि किसी भी न्यायालय में उत्तराधिकार का सामान्य क्रम परिवर्तित नहीं होता है। सहायक चकबन्दी अधिकारी के समक्ष भगवानबक्श सिंह पुत्र छंगा सिंह के उत्तराधिकार के विषय में प्रार्थना पत्र दिया गया। जब भगवानबक्श सिंह की विधवा राजेश्वरी देवी जीवित थी तो नन्दिनी देवी भी भगवानबक्श सिंह की उत्तराधिकारिणी राजेश्वरी देवी (मां) के जीवनकाल में कैसे हो सकती थी?। इस विषय में भले ही कोई संधि मॉ–बेटी में हुयी हो, परन्तु कोई भी संधि प्रचलित विधि के विरुद्ध स्वीकार नहीं हो सकती है।

यह भी उल्लेखनीय है कि राजेश्वरी देवी व भगवानबक्श सिंह की तीन पुत्रियॉ है। सभी अपने–अपने पक्ष में वसीयतनामा की बात करती है। चूँकि ग्राम में धारा–52(1) का प्रख्यापन हो चुका है, इसलिए वाद कारण अब चकबन्दी न्यायालयों की परिधि में नहीं है। इसका सही परीक्षण राजस्व न्यायालय से ही हो सकता है। इतना अवश्य है कि जब भगवानबक्श सिंह के द्वारा उनके जीवनकाल में ही निष्पादित एक तथाकथित अपंजीकृत वसीयतनामा दिनांक 03.12.91 था, जिसमें यह स्पष्ट था कि राजेश्वरी देवी, भगवानबक्श सिंह से प्राप्त भूमि को विक्रय नहीं कर सकती और राजेश्वरी देवी की मृत्यु के बाद उनकी मात्र एक पुत्री नन्दिनी देवी ही उत्तराधिकारिणी होगीं तब राजेश्वरी देवी द्वारा वर्ष 1998 में भूमि विक्रय करने पर नन्दिनी देवी द्वारा विरोध क्यों नहीं किया गया?। दूसरे यह कि जब राजेश्वरी देवी के बाद उक्त वसीयतनामें के आधार पर नन्दिनी देवी उत्तराधिकारिणी बनती, तब भगवानबक्श की मृत्यु के बाद उन्हें राजेश्वरी देवी के साथ ही एक अंश पर सहभूमिधर बनने की क्या आवश्यकता थी?। निगरानीकर्ता के सुबुद्ध अधिवक्ता इन प्रश्नों का कोई संतोषजनक उत्तर नहीं दे पाये।

जहॉ तक निगरानीकर्ता के सुबुद्ध अधिवक्ता का यह कथन कि राजेश्वरी देवी द्वारा कोई अपील नहीं की गयी, स्वीकान नहीं किया जा सकता, क्योंकि अपीलीय स्तर पर दो बाद नन्दिनी देवी ने माननीय उच्च न्यायालय में याचिका संस्थित की थी। याचिका संख्या 17883/2016 श्रीमती नन्दिनी देवी बनाम डी0डी0सी0 फैजाबाद व अन्य में माननीय उच्च न्यायालय ने आदेश दिनांक 19.08.2016 में स्पष्ट कर दिया है कि बन्दोबस्त अधिकारी चकबन्दी वाद का निस्तारण गुणदोष पर करेगें। उन्हें वाद को निस्तारित करने का पूर्ण अधिकार प्राप्त है। माननीय उच्च न्यायालय के आदेश का प्रवर्ती अंश निम्नवत् है :–

"Without commenting anything on the merit of the case, this court directs that the matter pending before the settlement officer of Consolidation, Faizabad shall be decided by settlement officer of Consolidation Faizabad on merit also. However, so far the jurisdiction is concerned, the settlement officer of

consolidation shall have all the jurisdiction to decide the matter."

जब अपीलीय स्तर पर ही माननीय उच्च न्यायालय ने प्रकरण को गुणदोष पर निस्तारित करने का आदेश दे दिया और यह भी स्पष्ट कर दिया कि बन्दोबस्त अधिकारी चकबन्दी को इस वाद को निस्तारित करने का पूर्ण क्षेत्राधिकार प्राप्त है, तब निगरानी स्तर पर यह तकनीकी बिन्दु उठाना कि अपील राजेश्वरी देवी द्वारा नही दाखिल थी अथवा अपील अतिशय कालबाधित थी, स्वीकार नही किया जा सकता। इस प्रकार निगरानीकर्ता के सुबुद्ध अधिवक्ता द्वारा प्रस्तुत विधि व्यवस्था आर0जे0 1991 पेज 335 इस प्रकरण पर लागू नहीं है।

प्रकरण में मुख्य बिन्दु सहायक चकबन्दी अधिकारी के आदेश दिनांक 24.02.92 में की गयी कूटरचना से था। इस पर ऊपर विवेचित किए अंश के अनुसार न तो सहायक चकबन्दी अधिकारी को संधि पत्र के आधार पर माता के जीवित रहते, पिता कि भू–सम्पति में, तीन में से मात्र एक पुत्री नन्दिनी देवी का नाम अंकित करने का अधिकार ही था और न, ही ऐसे किसी आदेश का कियान्वयन लैण्ड रेवेन्यू ऐक्ट की धारा–33/39 में ही किया जा सकता है। क्योंकि चकबन्दी में जो अन्तिम अभिलेख निर्मित हुए, उसमें भगवानबक्श पुत्र छंगा सिंह के स्थान पर मात्र उनकी विधवा पत्नी राजेश्वरी देवी पत्नी भगवानबक्श का ही नाम अभिलिखित किया गया, इससे स्पष्ट है कि सहायक चकबन्दी अधिकारी का आदेश मात्र उतने अंश तक ही था। कोई कारण विद्यमान नहीं है कि आधे आदेश का पालन हो और आधा छूट जाय।

ऐसी स्थिति में, मैं बन्दोबस्त अधिकारी चकबन्दी के आदेश में किसी प्रकार की त्रुटि या अनियमितता नहीं पाता हूँ। निगरानी बलहीन है और निरस्त किये जाने योग्य है।

आदेश

उपरोक्त विवेचन के आधार पर यह निगरानी निरस्त किया जाता है। पत्रावली अग्रेतर कार्यवाही के उपरान्त राजस्व अभिलेखालय में संचित हो।"

13. Learned Counsel for the petitioner assailing the impugned order(s) stated that in view of recitals of the 'Will' dated 03.12.1991, the testator Raj Bux Singh, has provided life time interest to the Rajeshwari Devi and as such the petitioner is entitled to rights over the property in dispute i.e. Gata No. 66, detailed above on the basis of 'Will' dated 03.12.1991 and also the compromise filed before ACO, the basis of order dated 24.02.1992 of A.C.O.

14. Per contra, the learned Counsel for the side opposite submitted that the claim of the petitioner is liable to be rejected and the present petition is liable to be dismissed for the reasons that 'Will' dated 03.12.1991 the basis of claim of the petitioner, was not proved before the authorities under the Act of 1953 and this is undisputed fact and also that alleged compromise was in violation of law.

15. Considered the aforesaid and perused the records.

16. So far as the claim of the petitioner based upon the undisputed 'Will' dated 03.12.1991 is concerned, the same has no force. It is for the reason that undisputedly the unregistered 'Will' dated 03.12.1991, the basis of the claim of the petitioner, was not proved, as per law, before the authorities under the Act of 1953.

17. In regard to claim based upon the compromise, this Court finds it appropriate to refer some pronouncements.

18. In the case of ***Shiv Prasad Versus Deputy Director of Consolidation, Ghazipur and Ors***. reported in ***2006 SCC OnLine All 1485***, this Court observed as under:-

"7. On the basis of pleadings and arguments of the parties, the first question that arises for consideration is whether under the U.P. Consolidation of Holdings Act a compromise could be entered into between the parties as contemplated under the C.P.C. at any stage in proceedings arising out of Section 9-A(2)/Section 11/Section 12/Section

21/Section 48 of the U.P. Consolidation of Holdings Act, secondly, whether title of the parties in the land which is creation of a statute could be determined on the basis of a compromise for exclusive title or for determination of share in a joint holding and, thirdly, whether a person could be declared as Bhumidhar, Sirdar or Asami on the basis of a compromise in the proceeding under the U.P. Consolidation of Holdings Act or any other proceeding under the U.P. Zamindari Abolition and Land Reforms Act without any title in law.

8. Before delving into this question, I feel called to advert to certain provisions of U.P. Consolidation of Holdings Act. Section 3(4-C) of the U.P. Consolidation of Holdings Act defines land, same is being reproduced as under:—

"3(4-C) 'Holding' means a parcel or parcels of land held under one tenure by a tenure-holder singly or jointly with other tenure-holders."

Section 3(11) defines tenure-holder which runs as under:—

"3(11) 'Tenure-holder' means a (bhumidhar with transferable rights or bhumidhar with non-transferable rights), and includes—

(a) an asami,

(b) a Government lessee or Government grantee, or

(c) a co-operative farming society satisfying such conditions as may be prescribed."

9. Definition in Section 3(12) also makes it clear that "Words and expressions not defined in this Act but (used or) defined in the U.P. Land Revenue Act, 1901, but (used or) in the U.P. Zamindari Abolition and Land Reforms Act, 1950 shall have the meaning assigned to them in the Act in which they are so (used or) defined."

10. Under the U.P. Consolidation of Holdings Act, the procedure prescribed is that after spot verification, as required under the Act and the Rules, Consolidation Officer shall prepare a statement of principles under Section 8-A as well as statement under Section 8 of the U.P. Consolidation of Holdings Act on verification of map and land record, thereafter, record shall be published and the statement showing the mistakes (undisputed cases of succession) and disputes discovered during the test and verification of the record of right during the course of the field to field portal shall be published in the village. Any objection to that shall be filed on publication of record under Section. 9 of the U.P. Consolidation of Holdings Act before Assistant Consolidation Officer disputing the correctness and nature of the entries in the record or in the extract furnished therefrom or in the statement of principles, or the need for partition. At the stage of Assistant Consolidation Officer, the only provision under which a compromise, by way of conciliation, could be entered into is Rule 25-A of the U.P. Consolidation of Holdings Rules which is being reproduced below:—

"25-A. Sections 9-A, 9-B and 9-C.—(1) The Assistant Consolidation Officer shall, as far as possible, deal with all the objections filed by a tenure-holder with regard to matters referred to in clause (i) of sub-section (1) of Section 9-A and sub-section (1) of Section 9-B in village itself. In decided dispute on the basis of conciliation in terms of sub-section (1) of Section 9-A, he shall record the terms of conciliation in the presence of at least two members of the Consolidation Committee of the village. These terms shall then be read over to the parties concerned and their signatures or thumb impressions obtained. The members of the Consolidation

Committee present shall also sign the terms of conciliation specifying the precise entries to be made in the records. Details of the operative part of the orders passed by the Assistant Consolidation Officer shall be noted in the Misiband register. No ex-parte order or orders in default shall be passed by the Assistant Consolidation Officer.

(2) In all cases in which the Assistant Consolidation Officer sends a report, under the provisions of sub-section (2) of Section 9-A, or sub-section (1) of Section 9-B to the Consolidation Officer for disposal, he may fix a date and place for the disposal of the cases by the Consolidation Officer and communicate the same to the parties present before him and issue notices in C.H. Form 6-A to the parties not so present. The report of the Assistant Consolidation Officer in such cases clearly brings out the points in dispute between the parties and the efforts made by him to reconcile them."

11. The quintessence of the above rule i.e. Rule 25-A of the U.P. Consolidation of Holdings Rules at the risk of repetition is that at the stage of Assistant Consolidation Officer conciliation may take place in terms of sub-section (1) of Section 9-A and sub-section (1) of Section 9-B and Assistant Consolidation Officer shall record terms of conciliation in the presence of two members of Consolidation Committee. The terms shall then be read over to the parties concerned and their signature and thumb impression shall be obtained. The members of Consolidation Committee shall also sign the terms of conciliation and then Assistant Consolidation Officer shall pass orders deciding dispute in terms of conciliation. The details of the operative part of the order passed by the Assistant Consolidation Officer, it is further envisaged in the Rule, shall be noted in the Misiband Register. No ex parte order or order in default shall be passed by the Assistant Consolidation Officer. All disputed cases received from the Assistant Consolidation Officer shall be entered in the Misiband Register in the office of the Consolidation Officer and the Consolidation Officer shall hear the parties, frame issues on the points in issue and take evidence and then decide the dispute. In the case of partition in case any objection is filed, the Consolidation Officer shall proceed with the partition, only after recording reasons in writing if he considers it in the interest of better consolidation.

12. There is no provision under the U.P. Consolidation of Holdings Act or Rules framed thereunder by which provisions of O. XXIII, R. 3 of C.P.C. have been made applicable to consolidation proceedings. The intention of the Legislature while enacting U.P. Consolidation of Holdings Act was development of agriculture land as is eloquent from the preamble of the Act.

13. As stated supra, the only provision under the U.P. Consolidation of Holdings Act and the Rules framed thereunder for conciliation is Rule 25-A. Rule 25-A of the U.P. Consolidation of Holdings Rules, as discussed above, provides that a person could get his rights settled through conciliation in case his rights are recognised by a statute. A person cannot get any right settled or declared in conciliation proceedings under Rule 25-A of the U.P. Consolidations of Holdings Rules if his rights are not recognised by statute. The intention of Legislature while framing Rule 25-A of the U.P. Consolidation of Holdings Rules clearly is that the parties may not be drawn into avoidable and unnecessary litigation relating to their legitimate rights created under U.P. Zamindari Abolition and Land Reforms Act and for correction of the entries in the revenue records. Intention of

Legislature while enacting Rule 25-A of the U.P. Consolidation of Holdings Rules is clear and a person cannot get any right under Rule 25-A of the U.P. Consolidation of Holdings Rules which was never created and recognised by the statute under the U.P. Zamindari Abolition and Land Reforms Act on abolition of Zamindari or under any other subsequent amendment of U.P. Zamindari Abolition & Land Reforms Act. A tenure-holder could get his legitimate right of co-tenancy in case land was acquired by common ancestors or jointly by way of reconciliation. Similarly, if an entry in the joint name of a number of tenure-holders is incorrectly recorded, parties may get the entry corrected by conciliation under Rule 25-A of the U.P. Consolidation of Holdings Rules setting the matter/rights by mutual partition or by recognising family settlement already taken place and already acted upon by the parties to get the entry corrected accordingly. But a tenure-holder cannot get any exclusive right in a proceeding under Section 25-A of the U.P. Consolidation of Holdings Rules unless such Rules are recognised by statute.

14. In 1976 (2) R.D. 69, Kale v. Deputy Director of Consolidation, it has been held by the Supreme Court that family arrangements acted upon by parties could be recognised by the consolidation authorities as family arrangement operates as estoppels against parties having taken benefit thereunder.

15. There is no provision under the U.P. Consolidation of Holdings Act for compromise at any of the stage of consolidation proceedings either under Sections 9-A, 9-B, 11, 20, 21 or Section 48 of the U.P. Consolidation of Holdings Act. Though under the U.P. Zamindari Abolition and Land Reforms Act, the provisions of C.P.C. are made applicable by virtue of Section 341 of the U.P. Zamindari Abolition and Land Reforms Act and in appropriate cases in the suits arising out of U.P. Zamindari Abolition and Land Reforms Act, a compromise could be entered into.

16. Under the U.P. Consolidation of Holdings Act, provisions of C.P.C. are not made applicable like Section 341 of the U.P. Zamindari Abolition and Land Reforms Act and as such there is no provision of compromise under the U.P. Consolidation of Holdings Act, but in order to secure interest of justice and cut short litigation, rights recognised by statute may be settled by mutual agreement before any Consolidation authority other than Assistant Consolidation Officer. Procedure prescribed under the C.P.C. are not applicable to consolidation proceedings, but if an agreement was entered into which was not contrary to the rights conferred by the U.P. Zamindari Abolition and Land Reforms Act, such agreement in which all the parties including State joined may be legitimately relied upon by the Consolidation authorities. Thus, a tenure-holder who did not have any right under the statute could not get any right by way of compromise or settlement.

17. Order XXIII, Rule 3 of the C.P.C. is being reproduced below:—

"3. Compromise of suit.— Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith (so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or

satisfaction is the same as the subject-matter of the suit).

(Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reason to be recorded, thinks fit to grant such adjournment.)

Explanation— An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.)"

18. Since right of a tenure-holder in land is a creation of statute under the U.P. Zamindari Abolition and Land Reforms Act and these rights are declared or adjudicated by the Consolidation authorities for the area where the notification under S. 4 of the U.P. Consolidation of Holdings Act is made, only such statutory rights already in existence in favour of a person could be recognised through a lawful agreement or compromise in consolidation proceedings. A right which does not accrue to a person under the provisions of the U.P. Zamindari Abolition and Land Reforms Act or any other provision of law could not be recognised by any agreement or compromise in the consolidation proceedings. Thus, it is held that if a person had no right under the statute any such right could not be recognised or admitted by a compromise or a new right could not be created through compromise or conciliation.

19. It is clear from the law laid down by the Supreme Court in AIR 1961 SC 1790, Rana Sheo Ambar Singh v. The Allahabad Bank Ltd., Allahabad that Bhumidhari rights in all the estates vested in the State is a new statutory right under the U.P. Zamindari Abolition and Land Reforms Act. Relevant portion of the judgment is being reproduced below:—

"(7)…… We are of opinion that the proprietary rights in sir and khudkashat land and in grove land have vested in the State and what is conferred on the intermediary by S. 18 is a new right altogether which he never had and which could not therefore have been mortgaged in 1914."

20. In view of the discussions made above, as in the present case there is no such family arrangement acted upon between the parties in which parties have taken benefit as claimed by the petitioners, the Deputy Director of Consolidation rightly set aside the compromise and orders passed by the Consolidation Officer and the Assistant Settlement Officer, Consolidation. Finding recorded by the Deputy Director of Consolidation does not suffer from any error of law apparent on the face of record in holding that the compromise relied upon by petitioner was not lawful. Impugned order was rightly passed in accordance with law. The questions framed above are decided accordingly."

19. In the cases of ***Babu vs. Abdul Shakoor, MANU/UP/1922/2018 : 2018 (139) R.D. 36 and Smt. Basmati vs. Deputy Director of Consolidation and others, MANU/UP/4072/2019 : 2019 (145) RD 832,*** this Court observed that compromise will not be treated valid, in case, it takes place in violation of provisions under Rule 25-A of the U.P.C.H. Rules.

20. In the case of ***Budh Lal and Anr. v. Dy. Director of Consolidation and ors., MANU/UP/0688/1982 : 1982 AWC 447***

(DB), this Court observed that co-option under U.P.Z.A. and L.R. Act is not permissible.

21. Considered the observations made in the above referred judgments and the compromise on record, annexed as annexure no. 6, which does not bear signature of members of Consolidation Committee though the same is required as per Rule 25A of the Rules of 1954 also that a tenure holder/person could get his/her rights settled by way of conciliation in case his/her rights are recognized by a statute and cannot get any right settled or declared in conciliation proceedings under Rule 25-A of the Rules of 1954, if his/her rights are not recognized by statute and Section 171(2) of the Act of 1950.

22. Upon due consideration of aforesaid, this Court finds no force in claim of the petitioner based upon the compromise.

23. For the reasons aforesaid, this Court is of the view that the present petition is liable to be dismissed. Accordingly, the present petition is ***dismissed***. No order as to costs.

(2024) 3 ILRA 830
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 67947 of 2006

Zakir Hasan & Ors. ...Petitioners
Versus
Board of Revenue, U.P. Lucknow & Ors. ...Respondents

Counsel for the Petitioners:
Dr. Madhu Tandon, Sri Ajit Kumar, Sri G.N. Verma, Sri Neeraj Srivastava, Sri Mohit Kumar

Counsel for the Respondents:
C.S.C. Sri C.K. Parekh, Sri C.S. Singh, Sri Mukhtar Alam, Sri Vivek Mishra

Civil Law - U.P. Land Revenue Act, 1901 - Sections 210, 219 - Mutation Proceedings - U.P. Tenancy Act, 1939 - U.P. Urban Area Zamindari Abolition Act, 1956 - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Civil Court Decree - Perpetual Injunction - Petitioners' mutation order dated 27.8.1990 in their favor as legal heirs of deceased tenure holder upheld, having attained finality. Subsequent mutation proceedings initiated by Nagar Palika Parishad (now Nagar Nigam Saharanpur) based on alleged sale deed of 7.5.1963, without challenging earlier mutation order, unsustainable. Civil Court decree in Suit No. 276 of 1993, affirmed up to Supreme Court, rejected Nagar Palika's claim under alleged sale deed, confirming petitioners' title and possession. Substantial delay of 28 years in initiating mutation by Nagar Palika casts doubt on validity of sale deed. Impugned orders dated 30.10.2006 (Board of Revenue), 30.9.1993 (Additional Commissioner), and 7.7.1993 (Tehsildar) set aside as they ignored prior final mutation order and civil court findings. (Paras 10-14)

Writ Petition Allowed.

Case Law Cited:

1. Shardul Ranjan & ors. Vs Deputy Director of Consolidation & ors., 2015 (129) RD 495 (Para 14)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Mohit Kumar holding the brief of Mr. Ajit Kumar, learned counsel for the petitioners, Mr. Rajesh Kumar Tiwari, learned Additional Chief Standing

Counsel for the State-respondents and Mr. Vivek Mishra, learned counsel appearing for respondent no.2-Nagar Palika Parishad now Nagar Nigam Saharanpur.

2. Brief facts of the case are that petitioners' father Tahir Hasan was the Zamindar of the plot situated in Khewat No.6/1 and 6/2 Mahalgar Daiyan, Village-Khan Alampura, Pergana, Tehsil and District Saharanpur. The aforementioned plots were situated initially under Nagar Palika Parisahd Saharanpur now Nagar Nigam Saharanpur. In the khatauni of 1371 fasli (1963-64) the plots were recorded as khudcast of petitioners' father Tahir Hasan and entry continued till the death of Tahir Hasan which took place on 15.12.1977. Petitioners being son of Tahir Hasan (recorded tenure holder) applied for mutation and Tehsildar passed an order for mutation on 19.9.1981 for recording the names of petitioners in the place of deceased Tahir Hasan. Against the order of mutation dated 19.9.1981 Nagar Palika Parisahd Saharanpur filed a restoration application which was allowed on 13.6.1984 and mutation case was restored on 13.6.1984 for fresh adjudication on merit. Tehsildar again heard the matter in presence of Nagar Palika who set up his case on the basis of sale deed alleged to be executed on 7.5.1963 in favour of Nagar Palika by Tahir Hasan and vide detailed order dated 27.8.1990 directed that petitioners are entitled to be recorded in the place of their father Tahir Hasan as petitioners are in possession over the plots in dispute and Nagar Palika Parisahd has not taken any steps for recording his name on the basis of sale deed executed long back in the year 1963. Appeal filed by Nagar Palika Parisahd under Section 210 of U.P. Land Revenue Act was dismissed on 14.8.1991 by Sub Divisional Officer. Revision under Section 219 of U.P. Land Revenue Act filed by Nagar Palika Parisahd was dismissed on 6.2.1992 by Additional Commissioner Meerut Division Meerut. Nagar Palika Parisahd applied for fresh mutation of his name in the year 1991 after 29 years on the basis of sale deed alleged to be executed by Tahir Hasan on 7.5.1963 which was allowed by Tehsildar vide order dated 22.12.1992 in arbitrary manner without affording opportunity of hearing to the petitioners as well as without setting aside the earlier mutation order passed in favour of petitioners as earlier mutation order passed in favour of petitioners had attained finality. Petitioners applied for restoration against the order dated 22.12.1992 which was set aside on 17.3.1993 and the case was restored for fresh decision. Tehsildar vide subsequent order dated 7.7.1993 again allowed the application of Nagar Palika Parisahd filed on 7.7.1993 and restored the earlier exparte mutation order dated 22.12.1992. Petitioners challenged the order dated 7.7.1993 through revision before Commissioner which was dismissed on 30.9.1993 by Additional Commissioner. A revision under Section 219 of U.P. Land Revenue Act was filed on behalf of petitioners before Board of Revenue which was entertained on 20.10.1993 and interim was also granted. Board of Revenue finally heard the revision filed by petitioners and dismissed the same vide order dated 30.10.2006, hence, this writ petition on behalf of the petitioners challenging the impugned order dated 30.10.2006, 30.9.1993 and 7.7.1993.

3. This court entertained the matter on 20.12.2006 and granted interim order which runs as follows :-

"Hon'ble Anjani Kumar, J.

Heard learned counsel for the petitioners and learned standing counsel for respondent nos.1, 3, 4, 5 and 6 as well as Sri C.K. Parekh, learned counsel for the respondent no.2. Sri Parekh prays for and is granted three weeks time to file a counter affidavit. The petitioner will have two weeks thereafter to file rejoinder affidavit.

List thereafter.

Till the next date of listing, if the petitioners are in possession of the land in dispute, shall not be dispossessed."

4. In pursuance of the order dated 20.12.2006 respondent no.2 has filed his counter affidavit and petitioners filed their rejoinder affidavit also.

5. Mr. Vivek Mishra, advocate, has filed his vakalatnama on 25.3.2022 signed by U.P. Nagar Ayukt Nagar Nigam Saharanpur as the plot in dispute has came under Nagar Nigam.

6. On behalf of petitioners a supplementary affidavit dated 15.5.2023 annexing the judgment passed by civil court dated 15.2.2007 and 24.5.2009, High Court dated 24.5.2011 as well as Hon'ble Supreme Court dated 8.5.2020 in which the civil court has passed injunction decree in favour of petitioners in respect of the same property considering the case set up by Nagar Palika on the basis of sale deed alleged to be executed on 7.5.1963. In respect of civil proceeding the facts are that petitioner no.1 Jakir Hasan filed a Suit No.276 of 1993 impleading Nagar Palika Parisahd and others as defendants for decree of of perpetual injunction, mandatory injunction as well as for damages in respect to same Khasra No.25 area 1.577 hectare which was decreed by trial court after framing issues and giving parties to lead evidence. In the aforementioned suit Nagar Palika Parisahd has set up his plea on the basis of alleged sale deed dated 7.5.1963 which was not accepted by trial court. The Civil Appeal No.10 of 2007 filed by Nagar Palika Parisahd was dismissed with cost by well reasoned judgment and decree dated 25.4.2009. The Second Appeal No.759 of 2009 filed by Nagar Palika Parisahd before this court was also dismissed by detailed judgment dated 24.5.2011 considering the various provisions of U.P. Tenancy Act, 1939, U.P. Urban Area Zamindari Abolition Act and U.P. Zamindari Abolition 1956 and Land Reforms Act, 1950. The special leave to appeal (civil) No(s)26210 of 2011 filed by Nagar Palika Parisahd before Hon'ble Apex Court was dismissed as withdrawn vide order dated 30.9.2011 with liberty to file review application before High Court. Review Application No.356417 of 2011 filed by Nagar Palika Parisahd now Nagar Nigam Saharanpur was rejected by this Court vide order dated 4.2.2013. Nagar Nigam further Special Leave to Appeal (C) No.25602-25603 of 2013 before Hon'ble Apex Court which was dismissed vide order dated 24.8.2016. Nagar Nigam further filed a Review Petition (C) No.3844-3845 of 2016 before Hon'ble Apex Court which was dismissed on 17.1.2017 and Curative Petition filed by Nagar Nigam was also dismissed on 8.5.2020.

7. Learned counsel for the petitioners submitted that petitioner was ordered to be recorded in place of his father on 27.08.1990. He further submitted that the appeal filed by the respondent no.2/Nagar Palika Parisahd against the mutation order dated 27.08.1990, was dismissed by appellate Court on 14.08.1991. He further submitted that revision filed under Section 219 of U.P Land Revenue Act against the

appellate order was also dismissed on 06.02.1992. He further submitted that order of mutation was passed in favour of the petitioner has attained finality. He further submitted that respondent no.2-Nagar Palika Parisahd initiated a separate mutation proceeding on the basis of sale-deed alleged to be executed on 7.5.1963 by the petitioners' father and without affording proper opportunity of hearing to the petitioners, the mutation order was passed in favour of respondent no.2-Nagar Palika Parisahd. Counsel for the petitioner applied for restoration, appeal as well as revision, which have been dismissed by the Court concerned without considering the fact that earlier mutation order passed in respect to the property in question has not been challenged by anybody, as such, the subsequent mutation proceeding in respect to the same property cannot be entertained and allowed. He further submitted that civil suit for injunction filed by the petitioners being Suit No.276 of 1993 impleading the Nagar Palika Parisahd and others was decreed by trial Court, vide judgment and decree dated 15.02.2007, restraining the defendants from interfering in the peaceful possession of the petitioners, in any manner. He further placed issues framed in the suit in order to demonstrate that title of the plaintiffs-petitioners was examined and considering the title of the petitioners in respect to the plot in question, the decree was passed by the Civil Court. He further submitted that Nagar Palika Parisahd challenged the judgment and decree dated 15.02.2007 in appeal and ultimately special leave to appeal filed by Nagar Palika Parisahd before the Hon'ble Apex Court was dismissed affirming the judgment and decree passed by the Civil Court in Civil Suit No.276 of 1993. He further submitted that in view of the adjudication of the dispute by the Civil Court, the impugned order of mutation passed in favour of respondent no.2-Nagar Palika Parisahd be set aside and petitioners' mutation order dated 27.08.1990, be maintained.

8. On the other hand, Mr. Vivek Mishra appearing for Nagar Nigam/NagarPalika Parisahd and Mr. Rajesh Kumar Tiwari, learned Additional Chief Standing Counsel for the State-respondents, submitted that writ petition arises out of mutation proceeding, as such, the same is not maintainable. They further submitted that civil suit was filed for perpetual and mandatory injunction but the sale-deed of Nagar Palika Parisahd has not been cancelled, as such, mutation order passed in favour of respondent no.2 cannot be set aside. They further submitted that petitioners should file a suit for declaration of their right before appropriate Court.

9. I have considered the arguments advanced by learned counsel for the parties and perused the record.

10. There is no dispute about the fact that after the death of Tahir Hussain, petitioners were ordered to be recorded being legal heirs of deceased on 27.08.1990 and the mutation order was maintained in appeal as well as revision. There is also no dispute about the fact that separate mutation proceeding was initiated by respondent no.2-Nagar Palika Parisahd, which was decided in favour of Nagar Palika Parisahd but there was no challenge to the mutation order passed in favour of the petitioners. There is also no dispute about the fact that civil suit for perpetual injunction, mandatory injunction and damages filed by the petitioners in respect to the same property in dispute was decreed by the trial Court and the decree has been maintained up to the Hon'ble Apex Court.

11. In order to appreciate the controversy involved in the matter, the perusal of the relevant portion of the decree passed in Civil Suit No.276 of 1993 will be necessary, which is being produced as under :-

"मूलवाद संख्या 276/1993

जाकिर हसन बनाम नगर पालिका व अन्य

बाद बिन्दु संख्या-1

यह वाद बिन्दु इस आशय का है कि क्या वादी विवादग्रस्त भूमि का भूमिधर तथा उस पर अध्यासीन है?

निष्कर्ष.....

.....

.....उपरोक्त विवेचना से यह सिद्ध होता है कि वादी ही वादग्रस्त भूमि का दर्ज संक्रमणीय भूमिधर है और विवादग्रस्त भूमि उसके अध्यासन में भी है।

आदेश

वाद, सव्यय आज्ञप्त किया जाता है।

प्रतिवादी को एतद्वारा शासवत निषेधाज्ञा से निषिद्ध किया जाता है कि वह विवादग्रस्त भूमि में वादी के कब्जा दखल में प्रत्यक्ष व अप्रत्यक्ष रूप से किसी प्रकार का हस्तक्षेप न करें एवं वादग्रस्त भूमि पर अपने द्वारा डाली गयी मिट्टी एवं बनाये गये मल्वे को निर्णय के दिनांक से 30 दिन के अन्दर अपने व्यय पर हटा लें। प्रतिवादी द्वारा अपने मिट्टी और मलवे को न हटाये जाने पर वादी, वद अपील अवधि, स्वयं हटा ले तथा उस पर हुए युक्तियुक्त व्यय को प्रतिवादी से निष्पादन की कार्यवाही से प्राप्त करें। तद्नुसार आज्ञप्ति बनायी जायें।

दिनांक 15.02.2007

ह०अ० 15.02.07

(आदिल आफताब अहमद)

लघुवाद न्यायाधीश/सिविल जज (सी०डी०) सहारनपुर।

निर्णय उपरोक्त आज मेरे द्वारा हस्ताक्षरित व दिनांकित होकर खुले

न्यायालय में पढ़कर सुना गया।

दिनाक 15.02.2007

ह०अ० 15.02.07

(आदिल आफताब अहमद)

लघुवाद न्यायाधीश/सिविल जज (सी०डी०)

सहारनपुर।"

12. It is very material that Civil Court has considered the case set up by Nagar Palika Parisahd on the basis of sale deed alleged to be executed on 7.5.1963 and recorded finding of fact that no right will accrue to Nagar Palika Parisahd on the basis of alleged sale deed considering the provisions contained under U.P. Tenancy ACt 1939, U.P. Urban Area Zamindari Abolition Act 1956, U.P. Zamindari Abolition Act, 1950. The judgment of trial court has been further maintained in appeal as well as second appeal by well reasoned and well considered judgement on every issues i.e. title as well as possession etc. The Hon'ble Apex Court has also maintained the judgment of all the three courts.

13. It is also material that Nagar Palika Parisahd has not taken any steps to record his name in the revenue record till 1991 on the basis of sale deed alleged to be executed on 7.5.1963, in favour of Nagar Palika Parisahd by petitioner's father. Tahir Hasan, petitioner's father expired on 15.12.1977 but Nagar Palika Parisahd has not applied for mutation till 1991 i.e. for about 28 years. In the mutation proceeding initiated by petitioners Nagar Palika Parisahd contested the matter but Tehsildar has ordered to record the name of petitioners being legal heir of deceased tenure holder Tahir Hasan vide order dated 27.8.1990 which has attained finality as such Tehsildar can not further order of mutation in respect to same property without setting aside the earlier order of mutation.

14. It also relevant to mention that although there is no limitation for filing mutation application but substantial delay

of 28 years in initiating the proceeding for mutation on the basis of sale deed creates doubt about the document in question as held by this court in the case reported in 2015 (129) RD 495 Shardul Ranjan and others vs. Deputy Director of Consolidation and others. Court of Tehsildar as sell as Civil Court has considered the case set up by Nagar Palika Parisahd on the basis of alleged sale deed which requires no further interference by this Court.

15. Considering the entire facts and circumstances of the case the impugned orders dated 30.10.2006 passed by respondent no.1/Board of Revenue, 30.9.1993 paased by Additional Commissioner, Meerut Division Meerut and 7.7.1993 passed by respondent no.5/Tehsildar Sadar, Saharanpur are liable to be set aside and the same are hereby set aside.

16. The writ petition stands allowed.

17. The mutation order dated 27.8.1990 passed by Tehsildar in favour of petitioners is hereby affirmed.

(2024) 3 ILRA 835
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2024
BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, A.C.J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ C No. 18397 of 2018

Chandrabhan Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Nath Sharma, Sri Indresh Kumar

Counsel for the Respondents:
C.S.C.

Land Acquisition – Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Sections 24(1)(a) & 64 – Land Acquisition Act, 1894 – Sections 11 & 17 – Applicability of 2013 Act for Compensation – Award made after 01.01.2014 – Dispute Reference to Authority

The petitioner challenged the Collector's order dated 08.07.2018, rejecting the application for referring a dispute over enhanced compensation to the Authority under Section 64 of the 2013 Act, and the award dated 26.12.2014. The land was acquired under the 1894 Act, with possession taken on 06.06.2012 and the award made on 26.12.2014, after the 2013 Act came into force. Held: As per Section 24(1)(a) of the 2013 Act, if no award was made under Section 11 of the 1894 Act before 01.01.2014, the 2013 Act's compensation provisions apply, irrespective of possession date. The Collector's rejection, based on possession under the 1894 Act, was erroneous. The prior writ court's order allowing reference under Section 64 had attained finality. The deposit of 80% estimated compensation under Section 17(3A) of the 1894 Act did not affect the petitioner's right to seek reference. The impugned order was quashed, and the Collector was directed to refer the dispute to the Authority within three weeks for expeditious adjudication.

Case Law Cited:
1. Sabita Sharma Vs St. of U.P., 2023 (3) AWC 3062

2. Chandrabhan Yadav Vs St. of U.P. & Ors., (2024) 3 ILRA, Writ C No. 18397 of 2018, decided on 25.01.2024 (All. HC, Lucknow Bench)

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

1. The instant petition is directed against the order dated 08.07.2018 passed by respondent No. 2, i.e., Collector/District Magistate, Sant Kabir Nagar rejecting the application of the petitioner dated 15.09.2017 for referring the dispute relating to enhancement of compensation to the Authority in terms of Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The petitioner has also challenged the award of the Collector dated 26.12.2014.

2. The facts which are not in dispute are that the subject land of the petitioner bearing plot No. 530 situated at Village-Khalilabad, District-Sant Kabir Nagar was acquired under the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act of 1894"). The possession of the land was taken on 06.06.2012 followed by award dated 26.12.2014. The petitioner challenged the award in Writ - C No. 7555 of 2016 on the ground that while making the award, the principles contained in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the Act of 2013") had not been followed. The said contention was not accepted as the award did make reference to the provisions of the Act of 2013, however, it was left open to the petitioner to seek reference under Section 64 of the Act of 2013. The petitioner, therefore, by means of application dated 15.09.2017, applied for the enhancement as per provisions of Section 64 of the Act of 2013. The said application has been rejected by the impugned order.

3. Indisputably, after the filing of the said application by the petitioner, a report was submitted by A.D.M. Finance and Revenue dated 16.12.2017 that at the relevant time, the Authority was not in existence, having not been constituted as per provisions of the Act. Therefore, it would not be possible to make the reference. It is evident from the said report that the State-respondents, at the relevant time, had no objection in referring the dispute to the Authority, but for the fact that it had not been constituted by that time.

4. However, by the impugned order, the District Magistrate has rejected the application observing that possession of the subject land was taken on 06.06.2012 and award was made on 26.12.2014. As possession was taken under the Act of 1894 and when the Act of 2013 was not applicable, therefore, the application for redetermining the compensation on the basis of new Act of 2013 is without any merits.

5. Learned counsel for the petitioner submitted that the impugned order suffers from manifest error of law inasmuch as the provisions of the Act of 2013 were fully applicable regard being had to the fact that no award was made until 01.01.2014. He further submits that even as per the observations made by this Court while deciding the previous writ petition of the petitioner, the respondents were under obligation to refer the dispute to the Authority as per Section 64 of the Act of 2013. It is also urged that the Collector wrongly treated the application filed by the petitioner as an application to redetermine the compensation, although, it was for making reference to the Authority as per provisions of Section 64 of the Act of 2013.

6. Learned counsel for the petitioner has placed reliance on a Division Bench

judgment of this Court in **Sabita Sharma vs. State of U.P.,** 2023 (3) AWC 3062, wherein it is held that even in case of acquisition under the Act of 1894, in case award has not been made under Section 11 of the Act of 2013, then all the provisions of the Act of 2013 relating to determination of the compensation would become applicable. He submits that it is also the mandate of Section 24(1)(a) of the Act of 2013.

7. Learned Standing Counsel appearing on behalf of the State-respondents submits that for the acquisition in question, the estimated amount of compensation was duly deposited by the Government much before the award was made. He submits that a notice was given to the petitioner to withdraw the said amount and all other affected persons, therefore, the provisions of the new Act would not apply.

8. Section 24(1) of the new Act stipulates as follows:

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases. *- (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), -*

(a) where no award under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said Section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed."

9. Clause (a) of Sub-section (1) of Section 24 clearly mandates that where no award under Section 11 of the Act of 1894 has been made, then, all provisions of the new Act of 2013 relating to determination of compensation would apply. The applicability of the said provision is not dependent upon the fact as to whether possession has been taken or not under the provisions of the old Act. The new Act became effective from 01.01.2014. In the instant case, the award having been made on 26.12.2014, i.e., after the new Act of 2013 came into force, the provisions of Section 24(1)(a) would be applicable and the respondents were to make the award as per the principles relating to award of compensation contained in the Act of 2013.

10. Additionally, while disposing of the previous writ petition of the petitioner, this Court permitted the petitioner to seek reference under Section 64 of the Act of 2013. The previous order of the Writ Court has attained finality and, therefore, it is not open to the State respondents to contend that the reference under Section 64 of the Act of 2013 is not maintainable.

11. As far as the contention of learned State counsel that 80% of the estimated amount of compensation was deposited by the Government and the affected persons were given notices to withdraw the said amount, the same, in our opinion, will be of no consequence in so far as the right of the petitioner to seek reference is concerned. In the instant case, the respondents while issuing notification under Section 6 of the Act also invoked the power under Section 17 (1) of the Act, 1984 entitling them to take possession even before award is made. It is in view thereof that possession was taken on 6.6.2012 even before making of the award. In such an eventuality, Section

17 (3A) makes it imperative that 80% of the estimated amount of compensation is tendered to the persons interested. The said amount is taken into account while determining the amount of compensation required to be tendered under Section 31 in pursuance of the award made under Section 11 of the Act of 1894. Therefore, even if the State had deposited/tendered 80% of the estimated amount of compensation as per provisions of old Act, it would have no effect on the right of the petitioner to seek reference under Section 64 of the Act of 2013.

12. Consequently, the impugned order declining to refer the application of the petitioner relating to enhancement of compensation to the Authority on the ground that possession had been taken under the old Act is not sustainable and is hereby quashed. The Collector, i.e., respondent No. 2 is directed to refer the dispute to the Authority within three weeks from the date of communication of the instant order. The Authority will proceed to decide the reference, in accordance with law, as expeditiously as possible.

13. In the result, the petition stands allowed to the extent indicated above.

(2024) 3 ILRA 838
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2024
BEFORE

THE HON'BLE ANJANI KUMAR MISHRA.J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 25244 of 2017

Ramesh Chandra Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajiv Kumar Singh

Counsel for the Respondents:
Sri Ajit Singh, Sri Aijaz Ahmad Khan, S.C.

Arbitration Law - – U.P. Cooperative Societies Act, 1965 – Section 70 – Arbitration and Conciliation Act, 1996 – Applicability of Arbitration Clause – Non-Member of Cooperative Society – Jurisdiction of Arbitrator – Wrongful Application of Statutory Provision

The petitioner challenged the arbitrator's award dated 06.02.2017, which held the arbitration non-maintainable under Section 70 of the U.P. Cooperative Societies Act, 1965, as the petitioner was not a member of the cooperative society. The dispute arose from an agreement with an arbitration clause (Clause 36) between the petitioner and the fourth respondent, a cooperative society, and was referred to arbitration following a prior court order in Writ C No. 48497 of 2015. Held: Section 70 of the 1965 Act applies only to disputes involving members or cooperative societies, and thus was inapplicable to the petitioner, a non-member. The arbitration clause in the agreement mandated resolution under the Arbitration and Conciliation Act, 1996, as it lacked any stipulation tying it to the 1965 Act. The arbitrator's reliance on Section 70 was erroneous, and the mention of a wrong provision in the petitioner's application did not bar the exercise of jurisdiction under the correct law. The award was set aside, and the Registrar, Fisheries Cooperative Societies, U.P., was directed to appoint a fresh arbitrator within four weeks to resolve the dispute expeditiously under the 1996 Act.

(Delivered by Hon'ble Anjani Kumar Mishra, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard learned counsel for the petitioner, Mr. Aijaz Ahmad Khan, learned counsel for the fourth respondent and learned Standing Counsel for the State.

2. Challenge in the writ petition is to the order dated 06.02.2017 passed by the third respondent in a dispute which was referred for arbitration, consequent to an arbitration clause in the agreement, entered into between the petitioner and fourth respondent as also consequent to order dated 11.09.2015 passed by this Court in Writ C No. 48497 of 2015 Ramesh Chandra Yadav v. Managing Director Matsya Jivi Sahkari Samiti and three others.

3. It appears that an application was filed by the petitioner seeking a reference for arbitration and for appointment of an arbitrator relying upon para graph 26 of the agreement between the parties aforesaid, as also sections 71 of the U.P. Cooperative Societies Act read with Section 229 of the U.P. Cooperative Societies Rules, 1968.

4. The arbitrator by his Award held that the arbitration itself was not maintainable in view of Section 70 of the U.P. Cooperative Societies Act, 1965 as he was admittedly not a member of the cooperative societies.

5. The issue that arises for consideration before this Court is as to whether invocation of Section 70 of the U.P. Cooperative Societies Act, 1965 by the arbitrator was justified. There is nothing in the arbitration agreement which provides that the arbitration clause was to be invoked in accordance with the provisions of the U.P. Cooperative Societies Act. In the absence of such stipulation any arbitration between the petitioner who is admittedly not a member of co-operative society and would necessarily be governed by the provisions of Arbitration and Conciliation Act, 1996.

6. The other illegality pointed out by learned counsel for the petitioner is that under Clause 36 of the agreement of the parties, which is the arbitration clause, the arbitrator was required to be appointed by the Registrar, Matsya Zivi Sahkari Sangh, Lucknow. The arbitration has been resorted to by the third respondent officiating Director Fisheries, ostensibly relying upon Section 23 of the U.P. Cooperative Societies Act which provides for delegation of the authorities of the Registrar of the Cooperative Societies Act for State. Moreover, the term Registrar is defined in Section 2 sub-section (r) of the Act which reads as follows:

"Registrar means the person for the time being appointed as Registrar of Cooperative Societies Act Under sub section 1 of the Section 3 Rules and includes any person appointed under sub-section (2) of that Act when exercising all or any of the power of the Registrar".

7. The contract between the parties which contains the arbitration clause has been entered into between the petitioner and the fourth respondent and that the very same authority has acted as the arbitrator.

8. This argument prima facie does not appear to be correct because the arbitration agreement has been signed by the Manager, U.P. Matsya Zivi Sahkari Sangh, Lucknow and the agreement itself does not stipulate as to whether the manager was acting on behalf of any statutory authority.

9. The litigation between the parties appears to be a long drawn out litigation. Initially, the petitioner would come up before this Court by means of Writ Petition No. 48497 of 2015 which petition was dismissed on the ground of an alternative

remedy relegating the petitioner to approach the arbitrator in view of Clause 36 of the agreement between the parties.

10. These arbitration initiated after the order of the court proceedings have been culminated in the order impugned.

11. The petition itself is of the year 2017 has remained pending before this Court for 05 years at least, the litigation from its inception being more than 09 years old.

12. Under the circumstances, we do not consider it appropriate to relegate the petitioner to the alternative remedy of Section 97 of the Act for two reasons. First, due to the long drawn out litigation which has already taken place between the parties and secondly because, in our considered opinion, the arbitrator has misdirected himself ostensibly on account of wrong provision having been mentioned in the application filed by the petitioner.

13. Admittedly, the petitioner is not a member of a cooperative Society. Therefore, Section 70 of the Act was not attracted as the same applies only for arbitration of disputes among members, past members and persons claiming through members, past members and deceased members; or between a co-operative society and any other co-operative society or societies.

14. Under the circumstances, Section 70 of the U.P. Cooperative Societies had no application to the arbitration and the same has wrongly been applied and the Award has been given against the petitioner holding the arbitration proceedings to be, not maintainable.

15. In our considered opinion, any two parties can, by a prior agreement, opt to get any dispute between them, decided by an arbitrator. This is precisely the position of the case at hand. Therefore, we are constrained to hold that the arbitration proceedings should have been resorted to in accordance with provisions of Arbitration and Conciliation Act, 1960 and not in accordance with Section 70 of the U.P Co-operative Societies Act.

16. It is no doubt true that the petitioner in his application for arbitration has invoked the provisions of the U.P. Cooperative Societies Act. However, it is settled law that mere mention of a wrong provision is not a fetter to the exercise of a jurisdiction/power which otherwise, exists.

17. In view of the above, we set aside the Award on the ground that arbitrator has completely misdirected himself and has applied provisions, namely Section 70 of the U.P. Cooperative Societies Act, which in the facts and circumstances of the case, had no application at all.

18. We issue a further direction to the second respondent, Registrar, Fishries Cooperative Societies, U.P. at Lucknow, to appoint a fresh arbitrator within a period of four weeks from the date of certified copy of this order is filed before him, who may thereafter

proceed to decide the dispute between the parties, as expeditiously, as possible.

(2024) 3 ILRA 841
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.03.2024

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Application U/S 482. No. 1604 of 2024

Brij Bhushan Sharan Singh ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sachin Upadhyay, Amandeep Singh, Shivendra S Singh Rathore, Tajdar Ahmad

Counsel for the Respondents:
G.A., Arvind Kumar Tewari, Ashish Kumar Mishra, Gaurav Tewari, Pramod Kumar Shukla

Criminal Law - Indian Penal Code, 1860 - Section 500 - Against summoning order - Complainant alleges that applicant addressed two letters to Chief Minister and Chief Secretary, containing defamatory imputations regarding his character and conduct - Copies of letters, newspaper clippings and social media printouts have been filed - St.ments u/s 200 and 202 Cr.P.C., along with depositions of two witnesses, support allegation that accused circulated letters through social media and newspapers with intent to tarnish complainant's reputation - Held, impugned letters were neither addressed nor communicated to complainant, these letters appears to be confidential, no material on record, which may suggest even remotely that it is applicant, who had caused these letters published in print media or on social media platforms and constitute privileged communication between two constitutional authorities - Essential ingredients of Section 499 IPC are absent - Complainant's and witnesses' St.ments u/s 200 and 202 Cr.P.C. are vague and do not disclose offence - Letters, fall within Eighth Exception to Section 499 IPC - Trial court failed to examine statutory ingredients, did not adhere to amended provision of Section 202 Cr.P.C. and conducted no proper inquiry - In absence of sufficient grounds, issuance of process u/s 500 IPC was unwarranted - Case falls within Guideline Nos. 1 and 7 of Bhajan Lal (infra) and continuation of criminal proceedings would amount to abuse of process of law, warranting interference - Thus, summoning order and entire proceedings, quashed. (Para 21, 39)

Application allowed. (E-13)

List of Cases cited:

1. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr.MANU/SC/1655/2016 : (2017) 3 SCC 528, (Paras 23 to 26)

2. Bansilal S. Kabra Vs Global Trade Finance Limited & anr., passed by Bombay High Court in Criminal Application No.1344 of 2010, dated 16.1.2024

3. M/S Iveco Magirus Brandschutztechnik GMBH Vs Nirmal Kishore Bhartiya & Anr. 2023 LiveLaw (SC) 860, (Paras 32.1, 33.1, 33.2)

4. National Bank of Oman Vs Barakara Abdul Aziz & anr.MANU/SC/1123/2012 : (2013) 2 SCC 488, (Para 8)

5. Vijay Bharadwaj & ors..Vs St. of U.P., Application U/s 482 No.2430 of 2021, dated 03.01.2023

6. ShivJee Singh Vs Nagendra Tiwary & ors.., Criminal Appeal No.1158 of 2010 decided on 06.07.2010 arising out of SLP (Crl.) No. 1416 of 2009, (Paras 7, 8)

7. Rameshbhai Pandurao Hedau Vs St. of Gujarat (2010) 4 SCC 185, (Paras 20 to 23)

8. G.H.C.L. Employees Stock Option Trust Vs India Infalin Ltd. 2013 (4) SCC 505

9. M/s. Pepsi Foods Ltd. & anr. Vs Special Judicial Magistrate & ors.., AIR 1998 S. C . 128

10. Bhushan Kumar and Anr Vs St. (NCT of Delhi) & anr.AIR 2012 Supreme Court 1747

11. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi & others, AIR 1976 Supreme Court 1947

12. Sunil Bharti Mittal Vs Central Bureau of Investigation (Three Judges Bench), AIR 2015 Supreme Court 923

13. Birla Corporation Limited & ors.Vs Adventz Investments and Holdings Limited & ors.., MANU/SC/0714/2019, (Paras 26 to 29, 33, 36 to 38)

14. Ahmad Ali Quraishi & ors.Vs The St. of U.P.& ors.(2020) 13 SCC 435, (Paras 10 to 16)

15. Google India Pvt. Ltd. Vs Visakha Industries & ors..MANU/SC/1708/2019

16. Rajendra Kumar Sitaram Pande Vs Uttam, MANU/SC/0093/1999, (Para 7)

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Shri Purnendu Chakraborty assisted by Shri Shivendra Shivam Singh Rathore and Shri Sachin Upadhyay, learned counsels for the applicant, Shri Rajesh Kumar Singh, learned A.G.A.-I for the State as well as Shri Pramod Kumar Shukla, learned counsel for the informant/ complainant and perused the record.

2. This application has been filed under Section 482 Cr.P.C. by the applicant-Brij ***Bhushan Sharan Singh*** for quashing of the order dated 10.01.2024, passed by the learned Additional Chief Judicial Magistrate-III (MP/ MLA), Lucknow in Complaint Case No. 80654/ 2023 (Dr. Mohd. Kamran Vs. Brij Bhushan Sharan Singh), whereby the applicant has been summoned to face trial U/S 500 I.P.C.

3. Learned counsel for the applicant submits that the trial Court has passed the impugned order without application of mind and simply on the basis of recording of the statement of the complainant under Section 200 Cr.P.C. and of his witnesses recorded under Section 202 Cr.P.C., the applicant/ accused person has been summoned to face trial for committing offence under Section 500 I.P.C.

4. It is vehemently submitted that while summoning an accused person to face trial under Section 204 Cr.P.C., the trial Court was obliged to record sufficient grounds for proceeding further and the impugned order passed by the trial Court has been passed so carelessly that the trial Court has failed to record any reasons, which may even remotely describe the sufficiency of grounds.

5. It is further submitted the trial Court has also not considered the amended provision of Section 202 Cr.P.C. whereby it is obligatory on the part of the trial Court to either enquire into the case himself or direct an investigation to be made by a police officer or by any other person for the purpose of deciding whether or not there is sufficient grounds for proceeding as the applicant/ accused was a resident of another district. Thus, the trial Court has failed in ascertaining the facts and circumstances of the case as well as the sufficiency of material which may warrant the summoning of the applicant for committing the offence under Section 500 I.P.C.

6. It is also submitted that letters, which are stated to have been written by the applicant are confidential documents and there is no iota of evidence or material which may even remotely suggest that it

was the applicant who had leaked these papers in the media and there is also no material or evidence which may suggest that on the basis of these letters, the recognition of the newspaper of the complainant was cancelled.

7. While drawing the attention of this Court towards the two newspapers cuttings, which have been placed on record, it is submitted that two other defamation complaint cases were filed by the applicant and the summoning order passed in both these complaints was challenged by filing application under Section 482 Cr.P.C. No.7123 of 2023 and 8636 of 2023 and vide orders dated 25.07.2023 and 29.08.2023, the proceedings of one case were stayed and in another case, the order pertaining to taking no coercive action was passed.

8. It is further submitted that the complainant/ opposite party No.2 is in a habit of filing frivolous complaints and in this regard when he filed a writ petition bearing Misc. Bench No.1303 of 2014, the same was dismissed by this Court with the cost of Rs. 1 lakh. It is also highlighted that applicant is also in a habit of blackmailing people and a criminal case against him was also lodged at police station- Hazaratganj.

9. It is further submitted that even if the case of the complainant is taken on its face, the same is covered under 8th Exception of Section 499 of I.P.C., as the applicant is a public representative and is duty bound to bring in knowledge any accusation against any person in the knowledge of those who are having lawful authority over the person with regard to subject matter of accusation.

10. It is further submitted that the summoning of the applicant has been passed in disregard to the settled principles of summoning an accused person to face trial and is an abuse of process of law and the same be set aside and proceedings of the Court below be quashed.

11. Reliance has been placed in this regard has been placed on the law laid down by Hon'ble Supreme Court in ***Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr. MANU/SC/1655/2016 : (2017) 3 SCC 528, Bansilal S. Kabra Vs. Global Trade Finance Limited and Anr.*** Passed by Bombay High Court in Criminal Application No.1344 of 2010 of date 16.1.2024, ***M/S Iveco Magirus Brandschutztechnik GMBH Vs. Nirmal Kishore Bhartiya & Anr. 2023 LiveLaw (SC) 860, National Bank of Oman v. Barakara Abdul Aziz and Anr. MANU/SC/1123/2012 : (2013) 2 SCC 488*** as well as a single Judge judgment of this Court passed in leading application U/s 482 No. 6048 of 2019 of dated 22.12.2023 and ***Vijay Bharadwaj and Others Vs. State of U.P.*** passed by a Coordinate Bench of this Court in Application U/S 482 No.2430 of 2021 of date 03.01.2023.

12. Learned AGA on the other hand submits that since it is a complaint case, it is for this Court to assess the propriety of the order passed by the trial Court.

13. Shri Pramod Kumar Shukla, learned counsel appearing for the informant/ complainant vehemently submits that complainant is enrolled on the rolls of Bar Council of Uttar Pradesh and regularly appears as an Advocate before this Court as well as before the District and Sessions Court, Central Administrative Tribunal and is also a member of Oudh Bar Association, Lucknow and in the light of Rule 51 of Bar Council of India, he is also

having the status of a freelance journalist and is engaged in the profession for about 25 years and performing his duties with utmost honesty, sincerity, devotion and dedication.

14. It is further submitted that three criminal cases have been filed against the applicant on the instance of one Dayashankar, who happens to be a PCS Officer and applicant has highlighted his misdeeds with regard to official embezzlement and corrupt practices committed by him in his service tenure and due to this reason, three criminal cases have been lodged against him and the criminal history of the applicant has been explained in para No.6 of the counter affidavit.

15. It is vehemently submitted that applicant/ accused through various letters written to the Hon'ble Chief Minister and Chief Secretary of Uttar Pradesh and by circulating these letters in print media and digital media platforms harmed and tarnished the reputation of the complainant.

16. It is further submitted that the applicant/ accused in his letter as termed the complainant/ opposite party No.2 as a blackmailer and has also written letters to the aforesaid authorities whereby the reputation of the complainant/ opposite party No.2 has been spoiled in the eyes of his well wishers, family members, relatives and friends.

17. It is also submitted that these letters written by the accused/ applicant were also printed in some newspapers, which has caused serious harm, loss and damage to his reputation and the same has spoiled his name and reputation in the eyes of his friends, relatives and general public as these allegations of blackmailing were totally false.

18. It is also submitted that these defamatory letters were published on digital media i.e. *Bhadasformedia.com* and in support of the complaint, the complainant has produced a copy of these letters along with complaint and also testified himself and two of his witnesses, namely, Anil Kumar Singh and Ajai Kumar and the trial Court after considering the sufficient grounds had summoned the applicant to face trail and thus, no illegality has been committed therein by the trial Court.

19. It is further submitted that at the stage of summoning, only a prima facie case and sufficient grounds are required to be seen and meticulous exercise of appreciation of evidence is required to be done.

20. Reliance in this regard has been placed on the law laid down by Hon'ble Supreme Court in ***ShivJee Singh Vs. Nagendra Tiwary and others*** passed in *Criminal Appeal No.1158 of 2010 decided on 06.07.2010 arising out of SLP (Crl.) No. 1416 of 2009 and* ***Rameshbhai Pandurao Hedau Vs. State of Gujarat (2010) 4 SCC 185.***

21. Having heard learned counsel for the parties and having perused the record, it is relevant to have a glance on the factual matrix of the case. The case of the complainant appears to be that two letters of date 25.09.2022 were written by the applicant/ accused persons to the Hon'ble Chief Minister and Chief Secretary of Uttar Pradesh and the language used therein is defamatory so far as the applicant is concerned. A copy of the complaint has

been placed on record, which would demonstrate that the substance of both these letters have been placed in the complaint itself in para no.9 of the complaint wherein it is stated that various criminal cases pertaining to hatching conspiracy of exhortation, intimidation, theft and of molestation are registered against the complainant in different police stations and various newspapers have been registered by complainant giving different addresses and also that while he was pursuing his LLB, he was acting as a full fledged freelance journalist. It is also written in one of the letter described in para No.9 of the complaint, a copy of which has also been enclosed with the complaint that the complainant is making frivolous complaints against Veena Traders and also spreading false news against above Veena Traders on different whatsapp groups and an Officer, namely, Dayashankar had lodged an F.I.R. against him pertaining to blackmailing and the complainant by taking bribe money from the competitors of Veena Traders is placing wrong facts before local administration. The complainant in support of the allegations apart from producing the copy of the letters has also placed on record, the photocopy of two newspapers as well as print out of social media platforms and got his statement recorded under Section 200 Cr.P.C. as also of his witnesses under Section 202 Cr.P.C. The complainant/ opposite party No.2 in his statement recorded under Section 200 Cr.P.C. has stated that the applicant Brij Bhushan Sharan Singh in his various letters has addressed him as a conspirator, thief and have also circulated these letter in different social media platforms and newspapers and by doing this, an attempt has been made to tarnish his image and reputation. The opposite party No.2/ complainant has also produced two witnesses, namely, Anil Kumar Singh and Ajai Kumar, who had stated that they have seen these letters on social medial platforms and these letters were written with the intention of tarnishing the image and reputation of the complainant / opposite party No.2.

22. The trial Court by passing a short order of one page has summoned the applicant/ accused to face trial for committing offence under Section 500 I.P.C. It is also important at this stage to have a glance on the relevant provision of Section 499 I.P.C.:-

" Section 499:- Defamation

Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

First Exception.— ***Imputation of truth which public good requires to be made or published.****— It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*

Second Exception.— ***Public conduct of public servants.—*** *It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.*

Third Exception.— ***Conduct of any person touching any public question****.— It is not defamation to express*

in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth Exception.— ***Publication of reports of proceedings of Courts****.— It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.*

Fifth Exception.— ***Merits of case decided in Court or conduct of witnesses and others concerned.****— It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.*

Sixth Exception.— ***Merits of public performance****.— It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.*

Seventh Exception.— ***Censure passed in good faith by person having lawful authority over another****.— It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.*

Eighth Exception.— ***Accusation preferred in good faith to authorised person.****— It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.*

Ninth Exception.— ***Imputation made in good faith by person for protection of his or other's interests****.— It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.*

Tenth Exception.— ***Caution intended for good of person to whom conveyed or for public good****.— It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good."*

23. The law with regard to the fact as to what is responsibility of the Trial Court while summoning a proposed accused in a complaint case, is now no more res integra and the same has been settled by the Hon'ble Supreme Court in the following cases:-

"9. In ***G.H.C.L. Employees Stock Option Trust VS. India Infalin Ltd. 2013 (4) SCC 505,*** *it was emphasized by the Hon'ble Supreme Court that "summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the*

existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record."

10. In ***AIR 1998 S. C . 128 , M/s. Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others*** *it was held as under:-*

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

11. In ***AIR 2012 SUPREME COURT 1747 "Bhushan Kumar and Anr v. State (NCT of Delhi) and Anr"*** *Hon'ble Apex Court has held that:-*

"10. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued."

12. In ***AIR 1976 SUPREME COURT 1947, Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi & others****, it is held by The Apex Court that:-*

"It is well settled by a long catena of decisions of this Court that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceedings against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merit or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one."

"4.It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited - limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the

question whether the process should be issued against him or not."

"It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a primafacie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry under Section 202 which culminates into an order under Section 204. Thus in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statement of the witness recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

13. In ***AIR 2015 SUPREME COURT 923, Sunil Bharti Mittal v. Central Bureau of Investigation (Three Judges Bench),*** *Hon,ble Apex Court held as under:*

"45. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

46. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense

importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad-in-law if the reason given turns out to be ex facie incorrect.""

24. Learned counsel for the complainant has relied on the law laid down by Hon'ble Supreme Court in ***Abhijit Pawar (supra)*** and the relevant paragraphs of the same is reproduced as under:-

"23. Admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an enquiry or investigation before issuing the process. Section 202 CrPC was amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 22-6-2006 by adding the words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction". There is a vital purpose or objective behind this amendment, namely, to ward off false complaints against such persons residing at a far-off places in order to save them from unnecessary harassment. Thus, the amended provision casts an obligation on the Magistrate to conduct enquiry or direct investigation before issuing the process, so that false complaints are filtered and rejected. The aforesaid purpose is specifically mentioned in the note appended to the Bill proposing the said amendment.

24. The essence and purpose of this amendment has been captured by this Court in Vijay Dhanuka v. Najima Mamtaj [Vijay Dhanuka v. Najima Mamtaj, (2014) 14 SCC 638 : (2015) 1 SCC (Cri) 479] in the following words: (SCC p. 644, paras 11-12)

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process 'in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words 'and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far-off places in order to harass them. The note for the amendment reads as follows:

'False complaints are filed against persons residing at far-off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such

other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.'

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

25. For this reason, the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment Mehmood Ul Rehman v. Khazir Mohammad Tunda [Mehmood Ul Rehman v. Khazir Mohammad Tunda, (2015) 12 SCC 420 : (2016) 1 SCC (Cri) 124] in the following words: (SCC pp. 429-30, paras 20 & 22)

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. v. Judicial Magistrate [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter.

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22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied

that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

26. The requirement of conducting enquiry or directing investigation before issuing process is, therefore, not an empty formality. What kind of "enquiry" is needed under this provision has also been explained in Vijay Dhanuka case [Vijay Dhanuka v. Najima Mamtaj, (2014) 14 SCC 638 : (2015) 1 SCC (Cri) 479] , which is reproduced hereunder: (SCC p. 645, para 14)

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(g) of the Code, the same reads as follows:

***'2. (g) "inquiry"** means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;'*

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

25. Relevant paragraphs of ***M/S Iveco Magirus Brandschutztechnik GMBH (supra),*** which has been relied by applicant is also reproduced for convenience as under:-

"32.1 The question that arose before this Court was, whether the High Court of Bombay was right in its view that when a Magistrate directs an enquiry under section 202 of the CrPC for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, is it not open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer? Must the Magistrate, as a matter of law, issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial?

33.1 We consider it appropriate to quote certain pertinent observations from such decision, hereinbelow:

It seems to us clear from the entire scheme of Chapter XVI of the Code

of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate He may remain present either in person or through a counsel or agent with a view to of what is going on. But since the very question for consideration being whether he should be be informed called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would hot be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued, nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go No doubt, one of the objects behind the provisions of Section 202 CrPC is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under Section 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry.

33.2 Considering the decision in Vadilal Panchal (supra), what was said therein was explained in the following words:

13. we may point out that since the object of an enquiry under Section 202 is to ascertain whether the allegations made in the complaint are intrinsically true, the Magistrate acting under Section 203 has to satisfy himself that there is sufficient ground for proceeding. In order to come to this conclusion, he is entitled to consider the evidence taken by him or recorded in an enquiry under Section 202, or statements made in an investigation under that section, as the case may be. He is not entitled to rely upon any material besides this. **"*

26. In ***National Bank of Oman v. Barakara Abdul Aziz (supra),*** hon'ble Supreme Court has highlighted as under:-

"8. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is

different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is. therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court,

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have."

27. The complainant/ opposite party No.2 has relied on the law laid down by Hon'ble Supreme Court in ***Shivjee Singh (supra)*** and para No.7 and 8 of that report appears to be important and relevant part of which is reproduced as under:-

"7. .....By amending Act 25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the Magistrate concerned. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session or where the complaint has not been made by a court unless the complainant and the witnesses have been examined on oath under Section 200. Under Section 202(2) the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Session then in terms of the proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath. Section 203 empowers the Magistrate to dismiss the complaint if, after considering the statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any, made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the Magistrate should record brief reasons for dismissing the complaint. Section 204, which talks of issue of process lays down that if the Magistrate taking cognizance of an offence is of the view that there is sufficient ground for proceeding then he may issue summons for attendance of the accused in a summons case. If it is a warrant case, then the Magistrate can issue warrant for causing attendance of the accused. Section 207 casts a duty on the Magistrate to supply to the accused, copies of the police report, the first information report recorded under Section 154, the statements recorded under Section 161(3), the confessions and statements, if any, recorded under Section 164 and any other document or relevant extract thereof, which is forwarded to the Magistrate along with the police report. Section 208 provides for supply of copies of statement and documents to the accused in the cases triable by the Court of Session. It lays down that if the case, instituted otherwise than on a police report, is triable exclusively by the Court of Session, the Magistrate shall furnish to the accused, free of cost, copies of the statements recorded under Section 200 or Section 202, statements and confessions recorded under Section 161 or Section 164 and any other document on which prosecution proposes to rely. Section

209 speaks of commitment of a case to the Court of Session when offence is triable exclusively by it. This section casts a duty on the Magistrate to commit the case to the Court of Session after complying with the provisions of Section 208. Once the case is committed, the trial is to be conducted by the Court of Session in accordance with the provisions contained in Chapter XVIII.

8. The object of examining the complainant and the witnesses is to ascertain the truth or falsehood of the complaint and determine whether there is a prima facie case against the person who, according to the complainant has committed an offence. If upon examination of the complainant and/or witnesses, the Magistrate is prima facie satisfied that a case is made out against the person accused of committing an offence then he is required to issue process. Section 202 empowers the Magistrate to postpone the issue of process and either inquire into the case himself or direct an investigation to be made by a police officer or such other person as he may think fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 203, the Magistrate can dismiss the complaint if, after taking into consideration the statements of the complainant and his witnesses and the result of the inquiry/investigation, if any, done under Section 202, he is of the view that there does not exist sufficient ground for proceeding. On the other hand, Section 204 provides for issue of process if the Magistrate is satisfied that there is sufficient ground for doing so. The expression "sufficient ground" used in Sections 203, 204 and 209 means the satisfaction that a prima facie case is made out against the person accused of committing an offence and not sufficient ground for the purpose of conviction. This interpretation of the provisions contained in Chapters XV and XVI CrPC finds adequate support from the judgments of this Court in ***Ramgopal Ganpatrai Ruia v. State of Bombay*** *[AIR 1958 SC 97 : 1958 Cri LJ 244 : 1958 SCR 618] ,* ***Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar*** *[AIR 1960 SC 1113 : 1960 Cri LJ 1499 : (1961) 1 SCR 1]* ***, Chandra Deo Singh v. Prokash ChandraBose*** *[AIR 1963 SC 1430 : (1963) 2 Cri LJ 397 : (1964) 1 SCR 639]* ***, Nirmaljit Singh Hoon v. State of W.B.*** *[(1973) 3 SCC 753 : 1973 SCC (Cri) 521] ,* ***Kewal Krishan v. Suraj Bhan*** *[1980 Supp SCC 499 : 1981 SCC (Cri) 438]* ***, Mohinder Singh v. Gulwant Singh*** *[(1992) 2 SCC 213 : 1992 SCC (Cri) 361] and* ***Chief Enforcement Officer v. Videocon International Ltd.*** *[(2008) 2 SCC 492 : (2008) 1 SCC (Cri) 471]."*

28. Learned counsel for the complainant has also relied on ***Rameshbhai Pandurao Hedau (supra)*** and the relevant paragraphs are reproduced here as under:-

"20. The settled legal position has been enunciated by this Court in several decisions to which we shall refer presently. The courts are ad idem on the question that the powers under Section 156(3) can be invoked by a learned Magistrate at a pre-cognizance stage, whereas powers under Section 202 of the Code are to be invoked after cognizance is taken on a complaint but before issuance of process. Such a view has been expressed in Suresh Chand Jain case as well as in Dharmeshbhai Vasudevbhai case and in Devarapalli Lakshminarayana Reddy case.

21. The three aforesaid cases have been cited on behalf of the parties. We may also refer to the decision of this Court in Dilawar Singh v. State of Delhi where the difference in the investigative

procedure in Chapters XII and XV of the Code has been recognised and in that case this Court also appears to have taken the view that any Judicial Magistrate, before taking cognizance of an offence, can order investigation under Section 156(3) of the Code and in doing so, he is not required to examine the complainant since he was not taking cognizance of any offence therein for the purpose of enabling the police to start investigation. Reference has been made to the decision of this Court in Suresh Chand Jain case. In other words, as indicated in the decisions referred to hereinabove, once a Magistrate takes cognizance of the offence, he is, thereafter, precluded from ordering an investigation under Section 156(3) of the Code.

22. It is now well settled that in ordering an investigation under Section 156(3) of the Code, the Magistrate is not empowered to take cognizance of the offence and such cognizance is taken only on the basis of the complaint of the facts received by him which includes a police report of such facts or information received from any person, other than a police officer, under Section 190 of the Code. Section 200 which falls in Chapter XV, indicates the manner in which the cognizance has to be taken and that the Magistrate may also inquire into the case himself or direct an investigation to be made by a police officer before issuing process.

23. Reference was also made to the decision of this Court in Mohd. Yousuf v. Afaq Jahan where it has been held that when a Magistrate orders investigation under Chapter XII of the Code, he does so before he takes cognizance of the offence. Once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV of the Code. The inquiry contemplated under Section 202(1) or investigation by a police officer or by any other person is only to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further on account of the fact that cognizance had already been taken by him of the offence disclosed in the complaint but issuance of process had been postponed."

29. The perusal of the above noted case laws would sufficiently demonstrate that summoning in a criminal matter is a serious business and the Magistrate or the Trial Court, as the case may be, is obliged to go through the allegations levelled in the complaint in order to ascertain as to whether there are sufficient grounds for proceedings are existing and these sufficient grounds for proceeding further must be distinguished from sufficient ground for conviction, as the duty of the Magistrate is to assess the sufficiency of grounds only for moving further and not for conviction. Having regard to the amendment made under Section 202 Cr.P.C., it is incumbent on the Magistrate or the Trial Court, as the case may be, to either make an enquiry himself or to refer an investigation under Section 202 Cr.P.C., if the proposed accused person is resident of another district. The purpose of this inquiry or investigation, as the case may be, is to safeguard the interest of a proposed accused, who may be arrayed as an accused only on the basis of rivalry or for any other ulterior motive. Thus, this provision has been added in order to put the Magistrate or the Trial Court, as the case may be, on guard that if the material provided by the complainant/ informant is not sufficient enough, he is required to collect the material by ordering an investigation under Section 202 Cr.P.C. It is also not res-integra that the investigation as contemplated under Section 202 Cr.P.C. is

different from the investigation, which may be ordered under Section 156 (3) Cr.P.C., as under Section 156 (3) Cr.P.C., the Magistrate can order investigation before taking cognizance while under Section 202 Cr.P.C., the Magistrate can order investigation after taking cognizance in order to satisfy himself that there are sufficient material or grounds exist for summoning a proposed accused person.

30. In ***Birla Corporation Limited and Ors. Vs. Adventz Investments and Holdings Limited and Ors., MANU/SC/0714/2019,*** Hon'ble Supreme Court held as under;-

"26. Complaint filed Under Section 200 Code of Criminal Procedure and enquiry contemplated Under Section 202 Code of Criminal Procedure and issuance of process:- Under Section 200 of the Criminal Procedure Code, on presentation of the complaint by an individual, the Magistrate is required to examine the Complainant and the witnesses present, if any. Thereafter, on perusal of the allegations made in the complaint, the statement of the Complainant on solemn affirmation and the witnesses examined, the Magistrate has to get himself satisfied that there are sufficient grounds for proceeding against the Accused and on such satisfaction, the Magistrate may direct for issuance of process as contemplated Under Section 204 Code of Criminal Procedure The purpose of the enquiry Under Section 202 Code of Criminal Procedure is to determine whether a prima facie case is made out and whether there is sufficient ground for proceeding against the Accused.

27. The scope of enquiry under this Section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not Under Section 204 Code of Criminal Procedure or whether the complaint should be dismissed by resorting to Section 203 Code of Criminal Procedure on the footing that there is no sufficient ground for proceeding on the basis of the statements of the Complainant and of his witnesses, if any. At the stage of enquiry Under Section 202 Code of Criminal Procedure, the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the Accused.

28. In ***National Bank of Oman v. Barakara Abdul Aziz and Anr. MANU/SC/1123/2012 : (2013) 2 SCC 488****, the Supreme Court explained the scope of enquiry and held as under:-*

9. The duty of a Magistrate receiving a complaint is set out in Section 202 Code of Criminal Procedure and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this Section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation Under Section 202 Code of Criminal Procedure is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry Under Section 202 Code of Criminal Procedure is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the Complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the Complainant without at all adverting to any defence that the Accused may have.

29. In ***Mehmood Ul Rehman v. Khazir Mohammad Tunda and Ors. MANU/SC/0374/2015 : (2015) 12 SCC 420,*** *the scope of enquiry Under Section 202 Code of Criminal Procedure and the satisfaction of the Magistrate for issuance of process has been considered and held as under:-*

2. Chapter XV Code of Criminal Procedure deals with the further procedure for dealing with Complaints to Magistrate. Under Section 200 Code of Criminal Procedure, the Magistrate, taking cognizance of an offence on a complaint, shall examine upon oath the Complainant and the witnesses, if any, present and the substance of such examination should be reduced to writing and the same shall be signed by the Complainant, the witnesses and the Magistrate. Under Section 202 Code of Criminal Procedure, the Magistrate, if required, is empowered to either inquire into the case himself or direct an investigation to be made by a competent person for the purpose of deciding whether or not there is sufficient ground for proceeding. If, after considering the statements recorded Under Section 200 Code of Criminal Procedure and the result of the inquiry or investigation Under Section 202 Code of Criminal Procedure, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he should dismiss the complaint, after briefly recording the reasons for doing so.

3 . Chapter XVI Code of Criminal Procedure deals with Commencement of Proceedings before Magistrate. If, in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, the Magistrate has to issue process Under Section 204(1) Code of Criminal Procedure for attendance of the Accused."

While discussing the amended section of 202 Crpc the Court highlighted the duty of the summoning Court in following words:-

"31. Under the amended Sub-section (1) to Section 202 Code of Criminal Procedure, it is obligatory upon the Magistrate that before summoning the Accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the Accused.

32. By Code of Criminal Procedure (Amendment) Act, 2005, in Section 202 Code of Criminal Procedure of the Principal Act with effect from 23.06.2006, in Sub-section (1), the words "...and shall, in a case where Accused is residing at a place beyond the area in which he exercises jurisdiction..." were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act, 2005. In the opinion of the legislature, such amendment was necessary as false complaints are filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire. Notes on Clause 19 reads as under:-

False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by

unscrupulous persons, this Clause seeks to amend Sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the Accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the Accused.

33. Considering the scope of amendment to Section 202 Code of Criminal Procedure, in ***Vijay Dhanuka and Ors. v. Najima Mamtaj and Ors.MANU/SC/0251/2014 : (2014) 14 SCC 638,*** *it was held as under:-*

12. The use of the expression shall prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the Accused living beyond the territorial jurisdiction of the Magistrate.

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in ***Abhijit Pawar v. Hemant Madhukar Nimbalkar and Anr.MANU/SC/1655/2016 : (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Anr. MANU/SC/1123/2012 : (2013) 2 SCC 488.***

36. To be summoned/to appear before the Criminal Court as an Accused is a serious matter affecting one's dignity and reputation in the society. In taking recourse to such a serious matter in summoning the Accused in a case filed on a complaint otherwise than on a police report, there has to be application of mind as to whether the allegations in the complaint constitute essential ingredients of the offence and whether there are sufficient grounds for proceeding against the Accused. In ***Punjab National Bank and Ors. v. Surendra Prasad SinhaMANU/SC/0345/1992 : 1993 Supp (1) SCC 499****, it was held that the issuance of process should not be mechanical nor should be made an instrument of oppression or needless harassment.*

37. At the stage of issuance of process to the Accused, the Magistrate is not required to record detailed orders. But based on the allegations made in the complaint or the evidence led in support of the same, the Magistrate is to be prima facie satisfied that there are sufficient grounds for proceeding against the Accused. In ***Jagdish Ram v. State of Rajasthan and Anr. MANU/SC/0196/2004 : (2004) 4 SCC 432,*** *it was held as under:-*

10. ...The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing

the process to the Accused, the Magistrate is not required to record reasons.

38. Extensive reference to the case law would clearly show that the allegations in the complaint and Complainant's statement and other materials must show that there are sufficient grounds for proceeding against the Accused. In the light of the above principles, let us consider the present case whether the allegations in the complaint and the statement of the Complainant and other materials before the Magistrate were sufficient enough to constitute prima-facie case to justify the Magistrate's satisfaction that there were sufficient grounds for proceeding against the Respondents-Accused and whether there was application of mind by the learned Magistrate in taking cognizance of the offences and issuing process to the Respondents."

While ordering issuance of process against the Accused, the Magistrate must take into consideration the averments in the complaint, statement of the Complainant examined on oath and the statement of witnesses examined. As held in ***Mehmood Ul Rehman (supra)****, since it is a process of taking a judicial notice of certain facts which constitute an offence, there has to be application of mind whether the materials brought before the court would constitute the offence and whether there are sufficient grounds for proceeding against the Accused. It is not a mechanical process.*

As held in ***Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose and Anr. MANU/SC/0053/1963 : AIR 1963 SC*** *the object of an enquiry Under Section 202 Code of Criminal Procedure is for the Magistrate to scrutinize the material produced by the Complainant to satisfy himself that the complaint is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process Under Section 204 Code of Criminal Procedure It is the duty of the Magistrate to elicit every fact that would establish the bona fides of the complaint and the Complainant.*

The Magistrate who is conducting an investigation Under Section 202 Code of Criminal Procedure has full power in collecting the evidence and examining the matter. We are conscious that once the Magistrate is exercised his discretion, it is not for the Sessions Court or the High Court to substitute its own discretion for that of the Magistrate to examine the case on merits. The Magistrate may not embark upon detailed enquiry or discussion of the merits/demerits of the case. But the Magistrate is required to consider whether a prima case has been made out or not and apply the mind to the materials before satisfying himself that there are sufficient grounds for proceeding against the Accused. In the case in hand i do not find that the satisfaction of the Magistrate for issuance of summons is well founded.

The object of investigation Under Section 202 Code of Criminal Procedure is"for the purpose of deciding whether or not there is sufficient ground for proceeding". The enquiry Under Section 202 Code of Criminal Procedure is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the Accused. The issuance of process should not be mechanical nor should be made as an instrument of harassment to the Accused. As discussed

earlier, issuance of process to the Accused calling upon them to appear in the criminal case is a serious matter and lack of material particulars and non-application of mind as to the materials cannot be brushed lightly. In the present case, the satisfaction of the Magistrate in ordering issuance of process to the Respondents is not well founded and the order summoning the Accused cannot be sustained and is liable to be set aside.

It is well settled that the inherent jurisdiction Under Section 482 Code of Criminal Procedure is designed to achieve a salutary purpose and that the criminal proceedings ought not to be permitted to degenerate into a weapon of harassment. When the Court is satisfied that the criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon the Accused, in exercise of the inherent powers, such proceedings can be quashed."

31. When we consider the factual matrix of this case in the background of above mentioned legal position, it would be evident that the applicant has written two letters, one to the Chief Minister and another to the Chief Secretary of the State of U.P. and writing of these letters have not been denied by the applicant. It appears to be an admitted situation that applicant is a public representative (Member of Parliament) and apart from the usual duties attached with a public representative, his duty may also include writing of grievances of the persons, to whom he is representing and in this scenario, if he has written some letters, which appear to be of confidential nature to some constitutional authorities, the same itself may not amount to any defamation. The complainant/ opposite party No.2 in his counter affidavit has himself mentioned criminal history of three cases lodged against him. The penal sections, pertaining to which these cases have been lodged, have not been mentioned, however, these three criminal cases are shown to have been registered at Police Station- Hazaratganj, Lucknow, Police Station- Wazirganj, Lucknow and at Police Station- Bithoor, Kanpur. In one of the letter written to the Chief Secretary of the State, the applicant has mentioned these three cases against the complainant/ opposite party No.2. One of the fact, which has been mentioned by the applicant in this letter is pertaining to the fine imposed by the Division Bench of this Court in Writ Petition No.1303 of 2014 and the same is fortified by a copy of the judgment of Writ Petition M/B No. 1303 of 2014 of date 18.02.2014 available on record, whereby the cost of Rs.1 lac was imposed on the complainant.

32. It is also to be recalled that as a public representative, certain issues are brought in the knowledge of the public representatives and the same may be based on the perception of the applicant in the mind of those, who have made the complaint about the complainant to the public representatives and it is in this regard, it cannot be said that the letters which have been written by the applicant have been written intentionally with a motive to tarnish the image of the complainant/ opposite party No.2 and these letters appear to have been written, so that public authorities may be made aware of the grievances of the persons, to whom applicant is representing. Moreover, there is no iota of evidence, which may suggest that these letters which appears to be of confidential nature, has been published in the newspapers or in the social media platforms by the applicant himself and therefore, so far as the publication of these

letters is concerned, the same cannot be associated with the applicant.

33. Coming to the merits of the impugned judgment/ order, whereby the applicant has been summoned to face trial, this Court is having no hesitation in observing that the trial Court has not taken pains even to consider the prima facie case or sufficiency of grounds for further proceedings of the case or even the ingredients of the offence have not been considered. Initiation of criminal proceedings against any person may not be based only on the statement of the complainant and his two witnesses and no accused should be summoned in a mechanical manner, without there being any sufficient material available in support of these accusations.

34. It is to be recalled that summoning in a criminal case is a very serious business as even after acquittal of an accused person after lengthy legal struggle, the same may leave a scar on his/ her reputation, apart from the mental pain and suffering, with which the proposed accused person would have to remain during the course of trial. Therefore, the duty of the trial Court was/ is to ascertain the sufficiency of grounds by sifting the evidence and material in order to assess the same. Though, it is not obligatory on the part of the Trial Court/ Magistrate to order for investigation under Section 202 Cr.P.C. in each and every case, but where it becomes necessary for the trial Court, the same must be ordered and the inquiry as contemplated under Section 202 Cr.P.C., clearly denotes the duty of the Court/ Magistrate in taking into account the material which has been placed on record and in proper case to order investigation as contemplated under Section 202 Cr.P.C.

35. Thus, the trial Court in this case appears to have not even considered the ingredients of the offences in order to assess as to whether the alleged statement made by the applicant is falling under any of the exceptions of Section 499 I.P.C. and also that whether the communication between the applicant and Chief Minister or the Chief Secretary of the State is a privileged communication or even as to whether there is any material or evidence at all available on record which may suggest that it was the applicant who had leaked the letter into the print media or social media and in absence of the same, the order of the trial Court may not stand the scrutiny of law.

36. Hon'ble Supreme Court in ***Ahmad Ali Quraishi and Ors. Vs. The State of Uttar Pradesh and Ors. (2020) 13 SCC 435,*** while considering the scope of 482 Cr.P.C., has opined as under:-

"10. Before we enter into facts of the present case and submissions made by the learned counsel for the parties, it is necessary to look into the scope and ambit of inherent jurisdiction which is exercised by the High Court under Section 482 CrPC. This Court had the occasion to consider the scope and jurisdiction of Section 482 CrPC. This Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , had elaborately considered the scope and ambit of Section 482 CrPC/Article 226 of the Constitution in the context of quashing the criminal proceedings. In para 102, this Court enumerated seven categories of cases where power can be exercised under Article 226 of the Constitution/Section 482 CrPC by the High Court for quashing the

criminal proceedings. Para 102 is as follows :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. This Court in Vineet Kumar v. State of U.P. [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , had considered the jurisdiction of the High Court under Section 482 CrPC. In the above case also, the Additional Civil Judicial Magistrate had summoned the accused for offences under Sections 452, 376 and 323 IPC and the criminal revision against the said order was dismissed by the District Judge.

12. This Court time and again has examined the scope of jurisdiction of the High Court under Section 482 CrPC and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 CrPC. A three-Judge Bench of this Court in State of Karnataka v. L. Muniswamy [State of

Karnataka v. L. Muniswamy, (1977) 2 SCC 699 : 1977 SCC (Cri) 404] , held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated : (SCC p. 703)

"7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

(emphasis supplied)

13. A three-Judge Bench in State of Karnataka v. M. Devendrappa [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , had the occasion to consider the ambit of Section 482 CrPC. By analysing the scope of Section 482 CrPC, this Court laid down that authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It further held that court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. The following was laid down in para 6 : (SCC p. 94)

"6. ... All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent

promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

14. Further in para 8 the following was stated : (Devendrappa case [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , SCC p. 95)

"8. ... Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] ."

15. In Sunder Babu v. State of T.N. [Sunder Babu v. State of T.N., (2009) 14 SCC 244 : (2010) 1 SCC (Cri) 1349] , this Court was considering the challenge to the order of the Madras High Court where application was under Section 482 CrPC to quash criminal proceedings under Section 498-A IPC and Section 4 of the Dowry Prohibition Act, 1961. It was contended before this Court that the complaint filed was nothing but an abuse of the process of law and allegations were unfounded. The prosecuting agency contested the petition filed under Section 482 CrPC taking the stand that a bare perusal of the complaint discloses commission of alleged offences and, therefore, it is not a case which needed to be allowed. The High Court accepted the case of the prosecution and dismissed the application. This Court referred to the judgment in Bhajan Lal case [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and held that the case fell within Category 7. The Supreme Court relying on Category 7 has held that the application under Section 482 deserved to be allowed and it quashed the proceedings.

16. After considering the earlier several judgments of this Court including the case of State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , in Vineet Kumar [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , this Court laid down following in para 41 : (Vineet Kumar case [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , SCC p. 387)

"41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the

case falls in one of the categories as illustratively enumerated by this Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding under Category 7 as enumerated in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , which is to the following effect : (SCC p. 379, para 102)

'102. ... (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.'

Above Category 7 is clearly attracted in the facts of the present case. Although, the High Court [Vineet Kumar v. State of U.P., 2016 SCC OnLine All 1445] has noted the judgment of State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , but did not advert to the relevant facts of the present case, materials on which final report was submitted by the IO. We, thus, are fully satisfied that the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."

37. The definition of defamation as enshrined in Section 499 of the I.P.C. would demonstrate evidently that no imputation is said to harm a person's reputation, unless that imputation directly or indirectly lowers the moral of intellectual character of that person in the estimating of other. The definition makes it amply clear that the accused must either intend to harm the reputation of a particular person or reasonably know that his conduct could cause such harm. Having regard to the fact that complainant has produced only two witnesses, who have given shaky evidence pertaining to the loss of reputation of applicant and no investigation is ordered by the trial Court under Section 202 Cr.P.C. and the language used in the letters coupled with the fact that these letters appear to be confidential letters, there appears neither any intent on the part of applicant to cause harm to the reputation of the complainant nor any actual harm appears to have been caused to the reputation of complainant. In short, both the elements i.e. mens rea and actus reas appears to be missing in this case.

38. Hon'ble Supreme Court in ***Google India Pvt. Ltd. Vs. Visakha Industries & Ors. MANU/SC/1708/2019*** has held that criminal offence of defamation is committed when a person makes a defamatory statement, which would consist of the imputation, being conveyed to the person about whom imputation has been made. A publication on the other hand is made when the imputation is communicated to the person other than the person, about whom the defamatory statement is made. A person who makes defamatory imputation could also publish the same and then could be maker and publisher, both, on the other hand a person may be liable though, he may not have made the statement but he has published it.

39. In view of the facts and circumstance of the case, the impugned

letters appears to have not been written or communicated to complainant and as stated earlier, these letters appears to be confidential and privileged communication and there is no material on record, which may suggest even remotely that it is applicant, who had caused these letters published in the print media or digital media or on social media platforms. Thus, ingredients of Section 499 I.P.C. are not attracting in this case and in the facts and circumstances of the present case, I am satisfied that proceedings of the case have been initiated without there being any sufficient grounds. The trial Court fails in not discussing the ingredients of the offence and there appears no evidence which may suggest even prima facie that it was the applicant, who has published or provided the impugned letters for publication in the newspapers or social media platforms. The letters appear to be privileged communication between two constitutional authorities. Applicant himself is having criminal history of three cases. The statements of complainant and his witnesses recorded under Sections 200 and 202 Cr.P.C. are cryptic and are not attracting ingredients of offence under Section 499 I.P.C. The letters also appear to have fallen in 8th Exception of Section 499 I.P.C. The trial Court has also not followed the procedure laid down in amended provision of Section 202 Cr.P.C. and the exercise done by it may not be termed as inquiry. The trial Court has not directed any investigation under 202 Cr.P.C. even when the material available before it was not sufficient to summon the applicant to face trial under Section 500 I.P.C. Thus, the instant case appears to be covered by guideline No.1 and 7 of ***Bhajan Lal (supra)*** and Exception Eighth of Section 499 I.P.C. Thus, I am of the considered view that permitting these criminal proceedings to continue against the applicant, would be nothing but abuse of process of law/ Court and requires interference of this Court.

40. The question whether Exception provided under Section 499 Cr.P.C. may be considered at this stage of proceedings, has been considered by Hon'ble Supreme Court in ***Rajendra Kumar Sitaram Pande Vs. Uttam, MANU/SC/0093/1999*** in following words:-

"7.... Under such circumstances the fact that the Accused persons had made a report to the superior officer of the complainant alleging that he had abused the Treasury Officer in a drunken state which is the gravamen of the present complaint and nothing more, would be covered by Exception 8 to Section 499 of the Penal Code, 1860. By perusing the allegations made in the complaint petition, we are also satisfied that no case of defamation has been made out. In this view of the matter, requiring the Accused persons to face trial or even to approach the Magistrate afresh for reconsideration of the question of issuance of process would not be in the interest of justice. On the other hand, in our considered opinion, this is a fit case for quashing the order of issuance of process and the proceedings itself...."

41. In result, the summoning order dated 10.01.2024 passed by the trial Court in Complaint Case No. 80654/ 2023 ***(Dr. Mohd. Kamran Vs. Brij Bhushan Sharan Singh)*** is set aside and all the proceedings of the above case are quashed. In result, the application filed by applicant, U/s 482 Cr.P.C., is hereby **allowed**.

(2024) 3 ILRA 867
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 1684 of 2024

Rahul Kumar Pandey ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
P.K. Singh Bisen

Counsel for the Respondents:
G.A., Pankaj Kumar Shukla

आपराधिक विधि : भारतीय दंड संहिता, 1860 – धारा 419, 420, 467, 468, 471 – पुनः विवेचना के आदेश के विरुद्ध - वैधता - प्रस्तुत प्रकरण में आरोप है कि प्रार्थी ने शिकायतकर्ता लेखपाल की मिलीभगत से गाटा संख्या 2411 की भूमि के अंश को कूट-रचना कर राजस्व अभिलेखों में गाटा संख्या 2412 में मिला लिया - विपक्षी संख्या 2 स्वयं को गाटा संख्या 2411 का सहखातेदार बताता है, जिसे प्रार्थी द्वारा विवादित किया गया, किन्तु न्यायालय ने यह माना कि कथित आरोप निश्चित रूप से विपक्षी संख्या 2 के अधिकारों पर विपरीत प्रभाव डालते हैं और वह पीड़ित व्यक्ति है - अतः प्रार्थी की आपत्ति निरस्त की गई - प्रार्थी का यह तर्क कि राजस्व निरीक्षक की आख्या से आरोप असत्य सिद्ध होते हैं तथा घटना वर्ष 2020 की कही गई है जबकि एफ.आई.आर. वर्ष 2021 में दर्ज हुई है, न्यायालय ने अस्वीकार किया, क्योंकि अभिलेखों से यह स्पष्ट नहीं होता कि कूट-रचना की घटना वर्ष 2020 में ही घटित हुई थी - न्यायालय ने यह भी उल्लेख किया कि विवेचना में कई पहलुओं की उपेक्षा की गई है - नक्शे में काट-पीट के संबंध में कोई आदेश पारित नहीं हुआ, गाटा संख्या 2411 के अन्य खातेदारों, कानूनगो, तहसीलदार व परगनाधिकारी के बयान दर्ज नहीं हुए और अभिलेखागार के अभिलेखों का मूल्यांकन नहीं हुआ - ऐसी परिस्थिति में विचारण न्यायालय द्वारा पुनः विवेचना के आदेश में कोई वैधानिक त्रुटि प्रतीत नहीं होती हैं। (पैरा 14 से 19)

आवेदन निरस्त **I** (E-13)

<u>प्रोद्धृत मामलों की सूची:</u>

1. अयूब खान नूरखान पठान बनाम महाराष्ट्र राज्य, एआईआर 2013 एससी पृष्ठ 58

2. रवि यशवंत भ्योर (Bhoir) बनाम जिला कलेक्टर रायगढ़ तथा अन्य (2012) 4 एससीसी 407

3. भगवंत सिंह बनाम कमिशनर ऑफ पुलिस (1985) 2 एससीसी 587

4. जगजीत सिंह बनाम आशीष मिश्रा (2022) 9 एससीसी 321

5. मल्लिकार्जुन कोडागिल बनाम कर्नाटका राज्य (2019) 2 एससीसी 752

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

1. प्रार्थी के विद्वान अधिवक्ता श्री प्रदीप कुमार सिंह बिसेन, विद्वान अतिरिक्त शासकीय अधिवक्ता श्री अनंत प्रताप सिंह एवं विपक्षी संख्या 3 के विद्वान अधिवक्ता श्री पंकज कुमार सिंह को सुना तथा पत्रावली का अवलोकन किया।

2. प्रार्थी की तरफ से एक पूरक शपथ-पत्र प्रस्तुत किया गया, जिसे अभिलेख पर लिया जाय।

3. धारा 482 दण्ड प्रक्रिया संहिता के अंतर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थी ने विद्वान अपर मुख्य न्यायिक मजिस्ट्रेट, कुण्डा, प्रतापगढ़ द्वारा पारित आदेश दिनांक 21.06.2023 जिसके द्वारा मुकदमा अपराध संख्या 407 सन 2021 अंतर्गत धारा 419, 420, 467, 468, 471 भा०दं०सं० थाना कुण्डा जनपद प्रतापगढ़ के संबंध में प्रस्तुत अंतिम आख्या संख्या 210 सन 2022 निरस्त करते

हुए पुनः विवेचना का आदेश दिया, की वैधता को चुनौती दी है।

4. शिकायतकर्ता एक लेखपाल है और दिनांक 07.12.2021 को लिखाई गई प्रथम सूचना रिपोर्ट संख्या 407 सन 2021 में उसने कहा है कि जिलाधिकारी, प्रतापगढ़ ने अपने आदेश द्वारा प्रार्थी के विरुद्ध राजस्व अभिलेखों में काट-पीट व छेड़खानी करते हुए धोखाधड़ी करने के संबंध में नियमसंगत कार्यवाही हेतु निर्देशित किया गया है। लेखपाल ने प्रथम सूचना रिपोर्ट में कहा कि प्रार्थी ने गाटा संख्या 2412 ग्राम जमेठी में पेट्रोल पंप खोलने हेतु दिनांक 14.02.2020 को क्रय किया था। प्रार्थी ने शिकायतकर्ता से लेखपाल कक्ष में मिलकर नक्शा लेकर देखने के बहाने शिकायतकर्ता की व्यवस्ता के कारण गाटा संख्या 2411 में लाइन खींचकर अपने खुद के गाटा संख्या 2412 में मिला लिया, जिसकी जानकारी काश्तकारों की भीड़ के कारण नहीं हुई।

5. विवेचक ने राजस्व निरीक्षक की आख्या के आधार पर कथित आरोपों को गलत पाते हुए अंतिम रिपोर्ट दिनांक 10.04.2022 को प्रस्तुत कर दी जिसमें यह कहा गया कि काट-छाँट के समयावधि से काफी पूर्व ही राजस्व निरीक्षक व लेखपाल द्वारा नक्शा नजरी व रिपोर्ट प्रार्थी के पक्ष में जारी किया जा चुका है।

6. अंतिम आख्या के विरुद्ध आपत्ति विपक्षी संख्या 2 कृपाशंकर मिश्र ने प्रस्तुत की, जिनका कथन है कि वह गाटा संख्या 2411 के सह-खातेदार हैं तथा उन्होंने यह आरोप लगाया कि बन्दोबस्ती नक्शा लेखपाल की अभिरक्षा में था और नक्शे में छेड़छाड़ लेखपाल की मिलीभगत से की गयी है। तत्कालीन मुख्य राजस्व अधिकारी, प्रतापगढ़ ने प्रकरण की जांच कर आवश्यक कार्यवाही हेतु निर्देशित किया था तथा जांच के उपरान्त राजस्व अभिलेखपाल कलेक्ट्रेट व सहायक प्रभारी अधिकारी अभिलेखागार, प्रतापगढ़ ने जांच आख्या दिनांक 26.07.2021 में कहा कि नक्शे में की गयी कूट रचना के संबंध में प्राथमिकी दर्ज करायी जाय। इसके उपरान्त दिनांक 13.8.2021 को जिलाधिकारी, प्रतापगढ़ ने प्रथम सूचना रिपोर्ट दर्ज कराने के आदेश दिये हैं। लेखपाल ने प्रथम सूचना रिपोर्ट जिलाधिकारी के आदेश के अनुसार प्रस्तुत की, जबकि जिन अभिलेखों में छेड़खानी हुई, वह स्वयं लेखपाल की अभिरक्षा में थे तथा बिना उनकी मिलीभगत के अभिलेखों में कूट-रचना होना संभव नहीं था।

7. आलोच्य आदेश दिनांक 21.6.2023 में विद्वान अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट, कुण्डा, प्रतापगढ़ ने उक्त तथ्यों को ध्यान में रखते हुए यह पाया कि विवेचना के दौरान विवेचक ने गाटा संख्या 2411 के अन्य खातेदारान, कानूनगो दिलीप

कुमार, तहसीलदार कुण्डा व परगनाधिकारी, कुण्डा के बयान अंकित नहीं किये हैं तथा अभिलेखागार के अभिलेखों का मूल्यांकन नहीं किया है। विवेचक ने शिकायतकर्ता कृपा शंकर मिश्र व राजस्व निरीक्षक की प्रकरण में भूमिका की विवेचना भी सम्यक रूप से नहीं की है। विवेचना में बहुत सी रिक्तियां छोड़ दी गयी हैं जिस कारण मामले की संपूर्ण परिस्थितियां न्यायालय के समक्ष प्रस्तुत नहीं की गयी। ऐसे में अंतिम रिपोर्ट निरस्त किये जाने योग्य है।

8. उपरोक्त आदेश की वैधता को चुनौती देते हुए प्रार्थी के विद्वान अधिवक्ता ने पहला तर्क यह किया कि अंतिम रिपोर्ट के विरुद्ध आपत्ति कृपा शंकर मिश्र ने की है, जो मामले के शिकायतकर्ता नहीं थे तथा उनको अंतिम आख्या के विरुद्ध आपत्ति प्रस्तुत करने का कोई अधिकार नहीं था। इस तर्क के समर्थन में प्रार्थी के विद्वान अधिवक्ता ने **अयूब खान नूरखान पठान बनाम महाराष्ट्र राज्य, AIR 2013 SC Page 58** के निर्णय का आश्रय लिया जिसमें माननीय उच्चतम न्यायालय ने अवधारित किया है कि एक अजनबी व्यक्ति आपराधिक कार्यवाही में हस्तक्षेप नहीं कर सकता है, जब तक वह न्यायालय को यह संतुष्ट न कर दे कि वह एक व्यथित व्यक्ति है। उक्त निर्णय में माननीय उच्चतम न्यायालय ने **रवि यशवंत भ्योर (Bhoir) बनाम जिला कलेक्टर रायगढ़ तथा अन्य (2012) 4 SCC 407** के एक निर्णय पर आश्रय लिया, जिसमें यह सिद्धान्त प्रतिपादित किया गया कि एक शिकायतकर्ता को यह सिद्ध करना होगा कि उसके किसी विधिक अधिकार का हनन हुआ है अथवा उसको कोई विधिक उपहति कारित हुई है।

9. धारा 2 (बक) दं०प्र०सं० में पीड़ित की परिभाषा निम्न प्रकार से दी गयी है;- ""पीड़ित' से वह व्यक्ति अभिप्रेत है, जिसे कार्य या लोप के कारण कारित कोई हानि या क्षति हुयी है, जिसके लिये अभियुक्त व्यक्ति आरोपित किया गया है और पद 'पीडित' में उसका संरक्षक या विधिक उत्तराधिकारी शामिल है।

10**. भगवंत सिंह बनाम कमिश्नर ऑफ पुलिस 1985 2 SCC 587** में माननीय उच्चतम न्यायालय ने यह सिद्धान्त प्रतिपादित किया कि पीड़ित व्यक्ति को मजिस्ट्रेट द्वारा पुलिस रिपोर्ट पर विचार किये जाने के समय उपस्थित होकर अपना पक्ष रखने का अधिकार है तथा यदि वह अपना पक्ष रखना चाहे तो मजिस्ट्रेट उनको सुनने के लिए बाध्य हैं।

11. **जगजीत सिंह बनाम आशीष मिश्रा (2022) 9 SCC 321** के निर्णय में माननीय उच्चतम न्यायालय ने कहा कि कुछ समय पूर्व तक आपराधिक विधि व्यवस्था में न्यायालय मात्र अभियुक्त तथा राज्य के

बीच निर्णय करते थे। पीड़ित व्यक्ति, जिसने अपराध के दुष्प्रभाव को सहन किया है, को निर्णय प्रक्रिया में सहभागिता करने का कोई अधिकार नहीं था। किन्तु अब पीड़ित व्यक्ति के सुनवाई के अधिकार तथा आपराधिक प्रक्रिया में सहभागिता के अधिकार के संबंध में न्यायशास्त्र के सिद्धान्तों में सुधार हो रहा है। विधायिका ने बहुत सोच-समझकर "पीड़ित की परिभाषा व्यापक और वृहद बनायी है, जिसके अनुसार पीड़ित से तात्पर्य ऐसे व्यक्ति से है जिसने अभियुक्त द्वारा कारित अपकृत्य के कारण कोई हानि या क्षति सहन की है।"

12. आशीष मिश्रा के उपरोक्त निर्णय में माननीय उच्चतम न्यायालय ने **मल्लिकार्जुन कोडागिल बनाम कर्नाटक राज्य (2019) 2 SCC 752** के निर्णय को उद्धृत किया, जिसमें कहा गया कि न्यायपालिका पीड़ित के अधिकारों की रक्षा करने के लिए एक सक्रिया भूमिका निभा रही है किन्तु अभी भी बहुत कुछ किया जाना बाकी है। वर्तमान में एक अभियुक्त के अधिकार कई मायनों में अपराध के पीड़ित के अधिकारों से कहीं अधिक प्रभावशाली हैं। उनके अधिकारों में संतुलन स्थापित करने की आवश्यकता है जिससे कि आपराधिक प्रक्रिया दोनों की तरफ न्यायोचित हो सके। पीड़ित व्यक्ति के अधिकार अथवा पीड़ित शास्त्र का एक उभरता हुआ क्षेत्र है तथा इस क्षेत्र में सुधार के लिए आगे बढ़ना अत्यन्त आवश्यक है। पीड़ित व्यक्ति को अपराध होने के पश्चात इस स्तर पर सुनवाई के निहित अधिकार प्राप्त हैं तथा उसके अधिकारो पर कोई अंकुश नहीं लगाया जा सकता। माननीय उच्चतम न्यायालय यह स्पष्ट किया कि "पीड़ित" तथा "शिकायतकर्ता" आपराधिक न्यायशास्त्र में दो अलग-अलग अर्थ रखते हैं। यह अनिवार्य नहीं है कि शिकायतकर्ता स्वयं पीड़ित ही हो क्योंकि एक अजनबी व्यक्ति भी अपराध की शिकायत कर सकता है। इसी प्रकार पीड़ित को अपराध का शिकायतकर्ता होना अनिवार्य नहीं है।

13. उपरोक्त विधिक सिद्धान्तों से यह स्पष्ट है कि कोई भी पीड़ित व्यक्ति न्यायिक प्रक्रिया में किसी भी स्तर पर हस्तक्षेप कर सकता है।

14. प्रस्तुत प्रकरण में आरोप यह है कि प्रार्थी ने शिकायतकर्ता लेखपाल की मिलीभगत से गाटा संख्या 2411 की भूमि राजस्व अभिलेखों में छेड़छाड़ करते हुए गलत तरह से गाटा संख्या 2412 में मिला लिया। आपत्तिकर्ता- विपक्षी संख्या 2 स्वयं के गाटा संख्या 2411 का सहखातेदार होना कहता है, जिस तथ्य को प्रार्थी के विद्वान अधिवक्ता द्वारा विवादित किया जा रहा है।

15. जबकि विपक्षी संख्या 2 अपने को गाटा संख्या 2411 का सहखातेदार होना

कहता है तथा प्रथम सूचना रिपोर्ट का कथन है कि गाटा संख्या 2411 की भूमि के अंश को राजस्व अभिलेखों में कूट-रचना करके गाटा संख्या 2412 में मिला दिया गया, निश्चित रूप से कथित आरोप विपक्षी संख्या 2 के अधिकारों पर विपरीत प्रभाव डालते हैं तथा वह एक पीड़ित व्यक्ति है। इस कारण से प्रार्थी के विद्वान अधिवक्ता की उपरोक्त आपत्ति में बल नहीं है और आपत्ति निरस्त की जाती है।

16. प्रार्थी के विद्वान अधिवक्ता ने अगला तर्क यह दिया कि राजस्व निरीक्षक की आख्या से यह स्पष्ट है कि लगाये गये आरोप असत्य हैं। अगला तर्क यह दिया कि प्रथम सूचना रिपोर्ट में घटना वर्ष 2020 में होना कही गयी है, जबकि प्रथम सूचना रिपोर्ट दिनांक 07.12.2021 को लिखाई गई। प्रथम सूचना रिपोर्ट में दिनांक 14.02.2020 को प्रार्थी द्वारा गाटा संख्या 2412 की भूमि क्रय किया जाना कहा गया है किन्तु अभिलेखों में कूट-रचना करके गाटा संख्या 2411 के अंश को 2412 में मिला देने के कृत्य की कोई तिथि का कथन प्रथम सूचना रिपोर्ट में नहीं किया है। अतः प्रार्थी के विद्वान अधिवक्ता का यह कथन कि कथित आरोप वर्ष 2020 में घटित हुआ, अभिलेखों से समर्थित नहीं है और बलहीन है।

17. प्रार्थी के विद्वान अधिवक्ता ने इसके बाद यह तर्क प्रस्तुत किया कि प्रथम सूचना रिपोर्ट में कहे गये कथन असत्य हैं और इस कारण विवेचना के दौरान उनकी पुष्टि न होने पर विवेचक ने सही प्रकार से अंतिम आख्या प्रस्तुत की थी और ऐसी परिस्थिति में पुनः विवेचना का कोई आधार नहीं है।

18. इस संबंध में विद्वान विचारण न्यायालय ने आलोच्य आदेश दिनांक 21.6.2023 में समस्त तथ्यों की समीक्षा करते हुए आदेश पारित किया है जिसमें यह तथ्य भी सम्मिलित है कि नक्शे में काट-पीट के संबंध में कोई आदेश पारित नहीं किया गया है। गाटा संख्या 2411 के अन्य खातेदार, कानूनगो, तहसीलदार व परगनाधिकारी के बयान अंकित नहीं किये गये हैं और अभिलेखागार के अभिलेखों का मूल्यांकन भी नहीं किया गया है।

19. ऐसी परिस्थिति में विद्वान विचारण न्यायालय ने यह संतोष अंकित करने में कोई त्रुटि कारित नहीं की है कि विवेचना में कई चीजें छूट गीं हैं और ऐसी परिस्थिति में पुनः विवेचना के आदेश में कोई वैधानिक त्रुटि प्रतीत नहीं होती है।

20. प्रार्थना-पत्र बलहीन है और तदनुसार **निरस्त** किया जाता है।

(2024) 3 ILRA 872
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 1687 of 2024

Executive Officer, Nagar Palika Parishad, Balrampur Rakesh Kumar Jaiswal & Anr. ...Applicant

Versus

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

Counsel for the Applicant:
Ankit Mishra, Mohd. Ali

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 156(3), 197, 197(1), 200, 202 & 482 – Indian Penal Code, 1860 - Sections 323, 504 & 506 - Application under Section 482 Cr.P.C. – for quashing the Chief Judicial Magistrate's order by which took cognizance of offences under Sections 323, 504, and 506 IPC – complaint case - alleging abuse and threats during a dispute over property mutation – St.ment recorded u/s 200 & 202 of Cr.P.C. – trial court summoned the applicant to face trial – Applicants contested the summoning order by filing criminal revision – dismissed – revision court upheld the summoning order – hence the instant application u/s 482 Cr.P.C. - applicants argued that the Magistrate failed to comply with a 2007 circular requiring St.ments under Section 200 Cr.P.C. to be recorded in the Magistrate's handwriting and that prior government sanction under Section 197 Cr.P.C. was necessary – court observed that, prima facie trial court's satisfaction were deemed sufficient, and the revision was dismissed as lacking merit - Court held that, the mere violation of any executive instruction by a Magistrate will not vitiate the validity of the criminal proceedings, unless there is violation of any provision of Cr.P.C. in conducting the proceedings – and - there is absolutely no requirement of obtaining a prior sanction for prosecuting the applicants for such offences and Section 197 Cr.P.C. would not apply in such a situation - consequently, application under section 482 Cr.P.C. is dismissed being found no illegality in lower court orders.
(Para – 9, 13, 17, 18)

Application Dismissed. (E-11)

List of referred Cases: -

1. Hamid Ali Vs St. of U.P., 2020 SCC OnLine All 1567,

2. St. of Gujarat Vs Afroz Mohammed Hasanfatta: (2019) 20 SCC 539,

3. Shambhu Nath Misra [(1997) 5 SCC 336,

4. St. of Orissa Vs Ganesh Chandra Jew, (2004) 8 SCC 40,

5. Shadakshari Vs St. of Karn., 2024 SCC OnLine SC 48.

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

1. Heard Sri Mohd. Ali, the learned counsel appearing for the applicants and Sri Anant Pratap Singh, the learned AGA for the State and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have challenged the validity of the order dated 10.05.2022 passed by the Chief Judicial Magistrate, Balrampur in Complaint No. 678 of 2021, whereby the Magistrate has taken cognizance of offences under Sections 323, 504, 506 IPC on the basis of a complaint filed by the opposite party no. 2. The applicant has also challenged the validity of the judgment and order dated 25.01.2024 passed by the Sessions Judge, Balrampur dismissing

Criminal Revision No. 67 of 2022 filed against the aforesaid order dated 10.05.2022 and affirming the order.

3. The opposite party no. 2 filed an application under Section 156(3) Cr.P.C. alleging that his father had died on 04.10.2012 and he had applied for mutation of his name in the record of Nagar Palika Parishad, Balrampur and had deposited house-tax and water-tax on 22.01.2015 and he had also deposited Rs. 500/- towards mutation charges. He had submitted all the relevant documents to the Nagar Palika Parishad, Balrampur on 10.09.2015, which included a recommendation made by the corporator. Even after it, on 28.09.2016, the Executive Officer of Nagar Palika Parishad (the applicant no. 1) uploaded information on the web portal that recommendation of corporator was not attached to the application.

4. When the complainant sought information under the Right to Information Act, 2005, on 18.12.2020 he was informed that a final order had been passed on his application, whereas the house continued to be recorded in the name of the complainant's deceased father. When the complainant contacted the applicants to know the cause of the aforesaid fact, both of them abused him and threatened to assault him and pushed him outside the office.

5. The magistrate registered the application as a complaint by means of an order dated 20.03.2021. Thereafter statement of the complainant was recorded under Section 200 Cr.P.C. on 27.09.2021 and statements under Section 202 Cr.P.C. were recorded on 08.10.2021 and 22.10.2021 and thereafter the Magistrate has passed an order summoning the applicants to face the trial. It is recorded in the order dated 10.05.2022 that a perusal of the record prima facie indicates commission of offences under Section 323, 504, 506 IPC and summoned the applicants to face the trial.

6. In Criminal Revision No. 67 of 2022 filed by the applicant against the summoning order dated 10.05.2022, it was argued that the trial court could not have taken cognizance of the offences without previous sanction of the Government as provided under Section 197 Cr.P.C. The Session Judge held that the offences alleged were not committed by the applicants while exercising their official duties and, therefore, no previous sanction was required in respect of those offences. The learned Sessions Judge further held that at the stage of taking cognizance of the offences and summoning the accused persons merely a prima facie satisfaction is required to be recorded for trial of the accused persons and a thorough scrutiny of the offences is not required to arrive at a satisfaction that there is sufficient material for conviction of the accused person. Accordingly, the Sessions Judge dismissed the revision.

7. While assailing the validity of both the aforesaid orders, the learned counsel for the applicants has submitted that C.L. No. 53/2007Admin(G):Dated: 13.12.2007 issued by this Court mandates that all the Magistrates to record statements under Section 200 Cr.P.C. in their own handwriting, whereas in the present case the statement has been transcribed by the reader of the Court.

8. C.L. No. 53/2007Admin(G):Dated: 13.12.2007 reads as follows: -

"The Hon'ble Court has been pleased to observed that section 200

Cr.P.C. mandates that the substance of the information/statement only is required to be recorded by the magistrate which should be done by him in his handwriting as that should facilitate in pinpointing the controversy and check frivolous complaints.

Therefore, in continuation of earlier Circular letter no. 6 Admin. (B) dated 1st May 1971, I have been directed to say that all the Magistrate working under your administrative control may please be directed to record statements under Section 200 Cr.P.C. in their own handwriting.

I am, further, to request you to kindly bring the contents of this Circular letter to all the Judicial Officers working under your administrative control for strict compliance"

9. From a bare reading of the aforesaid circular letter, it is not clear as to whom the aforesaid communication was addressed and there is nothing on record to indicate as to whether the authority to whom this communication was addressed, had actually issued any such direction to the Magistrate or not and whether in fact such direction was communicated to the Magistrate who has recorded the statement in question or not. Moreover, the mere violation of any executive instruction by a Magistrate will not vitiate the validity of the criminal proceedings, unless there is violation of any provision of Cr.P.C. in conducting the proceedings.

10. The Court cannot ignore the ground reality that all the Magistrates are working under immense work pressure and, in these circumstances, making it mandatory for all the Magistrates to record all statements under Section 200 Cr.P.C. in their own handwriting and not to take the assistance of a stenographer, will create unnecessary hurdles in expeditious dispensation of justice, which is the ultimate goal of all the courts and other persons acting in aid and assistance of the courts. Therefore, I am of the considered view that the proceedings cannot be vitiated on the ground that the statement under Section 200 Cr.P.C. was transcribed by the reader of the Court on the dictation of the Magistrate.

11. The learned counsel for the applicant next submitted that the Magistrate has not conducted an inquiry as mandated by Section 202 Cr.P.C. and in support of this contention, he has relied upon a judgment rendered by a coordinate Bench of this Court in **Hamid Ali v. State of U.P.,** 2020 SCC OnLine All 1567, wherein it was held that: -

"12. It is settled principle that while summoning an accused, the court has to see prima facie evidence. The "prima facie evidence' means the evidence sufficient for summoning the accused and not the evidence sufficient to warrant conviction. The enquiry u/s 202 CrPC is limited only to ascertain of truth or falsehood of allegations made in the complaint and whether on the material placed by the complainant a prima facie case was made out for summoning the accused or not.

13. As held by the Courts as above, the passing of order of summoning any person as accused is a very important matter, which initiates criminal proceeding against him. Such orders cannot be passed summarily or without applying judicial mind."

12. However, in **State of Gujarat v. Afroz Mohammed Hasanfatta:** (2019) 20 SCC 539, the Hon'ble Supreme Court has held that: -

"19. Section 190(1)(a) CrPC provides for cognizance of complaint. Section 190(1)(b) CrPC deals with taking cognizance of any offence on the basis of police report under Section 173(2) CrPC. "Complaint" is defined in Section 2(d) CrPC which reads as under:

"2. ***Definitions****.—(a)-(c) * * **

*(d) "****complaint****" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."*

The procedure for taking cognizance upon complaint has been provided under Chapter XV — Complaints to Magistrates under Sections 200 to 203 CrPC. A complaint filed before the Magistrate may be dismissed under Section 203 CrPC if the Magistrate is of the opinion that there is no sufficient ground for proceeding and in every such case, he shall briefly record his reasons for so doing. If a complaint is not dismissed under Section 203 CrPC, the Magistrate issues process under Section 204 CrPC. Section 204 CrPC is in a separate chapter i.e. Chapter XVI — Commencement of Proceedings before Magistrates. A combined reading of Sections 203 and 204 CrPC shows that for dismissal of a complaint, reasons should be recorded. The procedure for trial of warrant cases is provided in Chapter XIX — Trial of Warrant Cases by the Magistrates. Chapter XIX deals with two types of cases — A-Cases instituted on a police report and B-Cases instituted otherwise than on police report. In the present case, cognizance has been taken on the basis of police report.

* * *

22. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 CrPC is not the same at the time of framing the charge. For issuance of summons under Section 204 CrPC, the expression used is "there is sufficient ground for proceeding…"; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is "there is ground for presuming that the accused has committed an offence…".

13. The Magistrate after recording statement of the complainant under Section 200 Cr.P.C. has recorded statements of two witnesses of the complaint under Section 202 Cr.P.C., who stated that they were accompanying the complainant at the time of the incident. The Magistrate has made a mention of these statements, which were available on record, in the order dated 10.05.2022, wherein he has recorded that he has perused the record. In view of the law laid down by the Hon'ble Supreme Court in **Afroz Mohammed Hasanfatta** (Supra) the aforesaid enquiry is sufficient for the Magistrate to arrive at a conclusion that there is sufficient ground for proceeding. At this stage, the Magistrate is not required to evaluate the evidence and its merits. Therefore, I find no merit in this submission of the learned Counsel for the applicants.

14. The learned Counsel for the applicants next submitted that the applicants are public servants and, therefore, the Court could not have taken cognizance of offences allegedly committed by them without prior sanction of the State Government.

15. Section 197 (1) Cr.P.C. reads as under: -

***197. Prosecution of Judges and public servants**.—(1) When any person who is or was a Judge or Magistrate or a public servant **not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty**, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013—*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that…"

16. In **Shadakshari v. State of Karnataka**, 2024 SCC OnLine SC 48, the Hon'ble Supreme Court held that: -

*"21. The ambit, scope and effect of Section 197 Cr. P.C. has received considerable attention of this court. It is not necessary to advert to and dilate on all such decisions. Suffice it to say that **the object of such sanction for prosecution is to protect a public servant discharging official duties and functions from undue harassment by initiation of frivolous criminal proceedings.***

*22. In **State of Orissa v. Ganesh Chandra Jew,** (2004) 8 SCC 40, this court explained the underlying concept of protection under Section 197 and held as follows:*

*"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. **This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act.** If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. **The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity.** Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it.*

The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. *There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule.* ***One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."***

23. This aspect was also examined by this court in ***Shambhu Nath Misra*** *[(1997) 5 SCC 336]. Posing the question as to whether a public servant who allegedly commits the offence of fabrication of records or misappropriation of public funds can be said to have acted in the discharge of his official duties. Observing that it is not the official duty to fabricate records or to misappropriate public funds, this court held as under:*

"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction,"

24. Even in ***D. Devaraja*** *[(2020) 7 SCC 695] relied upon by learned counsel for respondent No. 2, this court referred to Ganesh Chandra Jew (supra) and held as follows:*

"35. In State of Orissa v. Ganesh Chandra Jew this Court interpreted the use of the expression "official duty" to imply that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. Section 197 of the Code of Criminal Procedure does not extend its protective cover to every act or omission done by a public servant while in service. The scope of operation of the section is restricted to only those acts or omissions which are done by a public servant in discharge of official duty."

25. Thus, this court has been consistent in holding that Section 197 Cr. P.C. does not extend its protective cover to every act or omission of a public servant while in service. It is restricted to only those acts or omissions which are done by public servants in the discharge of official duties."

17. The act allegedly committed by the applicants, i.e. abusing, threatening and manhandling the complainant, was in no way connected with the discharge of public duty of the applicants and in view of the law propounded by the Hon'ble Supreme Court in the above mentioned cases, there

is absolutely no requirement of obtaining a prior sanction for prosecuting the applicants for such offences and Section 197 Cr.P.C. would not apply in such a situation.

18. In view of the aforesaid discussion, there appears to be no illegality in the order dated 10.05.2022 taking cognizance of the offence and the summoning the accused to face the trial and in the judgment and order dated 25.01.2024 passed by the Sessions Judge, Balrampur in Criminal revision No. 67 of 2022, affirming the aforesaid order dated 10.05.2022.

19. The revision lacks merit and the same is accordingly ***dismissed***.

(2024) 3 ILRA 878
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 1712 of 2024

Murari Kumar @ Murari Kumar Yadav ...Applicant

Versus

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

Counsel for the Applicant:
Dr. Pooja Singh, Digvijay Singh

Counsel for the Respondents:
G.A.

आपराधिक विधि : भारतीय दंड संहिता, 1860 – धारा 419, 420, 120ख – दंड प्रक्रिया संहिता, 1973 – धारा 204 - गैर जमानती वारंट के विरुद्ध – वैधता - प्रस्तुत प्रकरण विपक्षी सं. 2 की प्राथमिकी पर संस्थित हुआ, जिसमें संज्ञेय अपराध का आरोप था - विवेचना उपरांत अपराध सिद्ध पाए जाने पर विवेचक ने आरोप पत्र प्रस्तुत किया - विचारण न्यायालय ने आरोप पत्र एवं संकलित सामग्री का अवलोकन कर अपराध का संज्ञान लेने हेतु पर्याप्त आधार पाकर संज्ञान लिया - माननीय उच्चतम न्यायालय ने स्टेट ऑफ गुजरात बनाम अफरोज मोहम्मद हसनफत्ता (नीचे) में प्रतिपादित किया कि समन जारी करते समय मजिस्ट्रेट को केवल शिकायत एवं सहायक साक्ष्यों के आधार पर यह संतोष करना होता है कि अभियुक्त के विरुद्ध कार्यवाही हेतु आधार है, आदेश में कारण अंकित करना आवश्यक नहीं है – इसके अलावा जहाँ पुलिस विवेचना के उपरांत आरोप पत्र प्रस्तुत करती है, वहाँ न्यायालय को आरोप पत्र, गवाहों के बयान एवं संकलित साक्ष्यों का परिशीलन करने का अवसर प्राप्त होता है। अतः पुलिस रिपोर्ट पर आधारित मामलों में आदेशिका जारी करते समय न्यायालय को कारण दर्शाने की आवश्यकता नहीं होती – अभिनिर्धारित, इस परिप्रेक्ष्य में, आलोच्य आदेश दिनांक 07.09.2016 विधिसम्मत है तथा अभियुक्त की अनुपस्थिति में गैर-जमानती वारंट जारी करने में भी कोई अवैधानिकता नहीं है - अतः प्रार्थना पत्र बलहीन है। (पैरा 3, 5, 8, 9)

आवेदन निस्तारित I (E-13)

प्रोद्धृत मामलों की सूची:

1. स्टेट ऑफ गुजरात राज्य बनाम अफरोज मोहम्मद हसनफत्ता 2019 20 एससीसी. 539

2. सतेन्द्र कुमार अंतिल बनाम सी.बी.आई. (2021) 10 एस.सी.सी. 773

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

1. प्रार्थी के विद्वान अधिवक्ता डा. पूजा सिंह तथा राज्य सरकार के विद्वान अधिवक्ता श्री पुनीत कुमार यादव को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थी ने प्रथम सूचना रिपोर्ट संख्या 559 सन 2015 अन्तर्गत धारा 420 भा०दं०सं० एवं आरोप पत्र के अन्तर्गत धारा 419, 120B भा०दं० सं०, थाना मडियाव जनपद लखनऊ के अनुक्रम में प्रस्तुत आरोप पत्र

दिनांकित 30.05.2016 तथा विद्वान ट्रायल कोर्ट, लखनऊ द्वारा पारित आदेश दिनांक 07.09.2016 जिसके द्वारा उपरोक्त अपराध का संज्ञान लिया तथा प्रार्थी को विचारण हेतु तलब किया गया एवं गैर जमानती वारंट दिनांकित 26.10.2018, की वैधता को इस आधार पर चुनौती दी है कि आदेश के परिशीलन से न्यायालय द्वारा प्रकरण के तथ्यों की समीक्षा किया जाना प्रतीत नहीं होता है।

3. प्रस्तुत प्रकरण विपक्षी सं. 2 द्वारा लिखाई गई प्रथम सूचना रिपोर्ट के आधार पर संस्थित हुआ, जिसमें उसने संज्ञेय अपराध होने का आरोप लगाया। विवेचना में अपराधों का होना पाया गया तथा तदनुसार विवेचक ने आरोप पत्र प्रस्तुत किया। विद्वान विचारण न्यायालय ने आरोप पत्र पर अंकित किया है कि आरोप पत्र का अवलोकन किया गया जिससे यह प्रतीत होता है कि विवेचक द्वारा संकलित सामग्री का अवलोकन करने के बाद न्यायालय ने यह संतोष व्यक्ति किया है कि अपराध का संज्ञान लिये जाने का पर्याप्त आधार हैं।

4. धारा 190 आपराधिक प्रक्रिया संहिता के प्राविधान निम्नवत है:-

(1) इस अध्याय के उपबन्धों के अधीन रहते हुए, कोई प्रथम वर्ग मजिस्ट्रेट और उपधारा (2) के अधीन विशेषतया सशक्त किया गया कोई द्वितीय वर्ग मजिस्ट्रेट, किसी भी अपराध का संज्ञान निम्नलिखित दशाओं में कर सकता है:-

(क) उन तथ्यों का, जिनसे ऐसा अपराध बनता है, परिवाद प्राप्त होने पर,

(ख) ऐसे तथ्यों के बारे में पुलिस रिपोर्ट पर;

(ग) पुलिस अधिकारी से भिन्न किसी व्यक्ति से प्राप्त इस इत्तिला पर या स्वयं अपनी इस जानकारी पर कि ऐसा अपराध किया गया है।

(2) मुख्य न्यायिक मजिस्ट्रेट किसी द्वितीय वर्ग मजिस्ट्रेट को ऐसे अपराधों का, जिनकी जांच या विचारण करना उसकी क्षमता के अन्दर है, उपधारा (1) के अधीन संज्ञान करने के लिए सशक्त कर सकता है।

5. **स्टेट ऑफ गुजरात राज्य बनाम अफरोज मोहम्मद हसनफत्ता 2019 20 SCC 539** में माननीय उच्चतम न्यायालय ने यह अवधारित किया कि यह विधि का एक सुस्थापित सिद्धांत है कि अभियुक्त को विचारण के लिए आहूत करते समय न्यायालय को मात्र शिकायत में कहे गए तथ्यों और उसके समर्थन में दिए गए साक्ष्यों पर विचार करके यह संतोष करना होता है कि अभियुक्त के विरुद्ध कार्यवाही चलाने के लिए समुचित आधार हैं। समन जारी करते समय मजिस्ट्रेट को इस संतोष के आधारों को स्पष्ट रूप से वर्णित करना अनिवार्य नहीं है।

6. माननीय उच्चतम न्यायालय ने उपरोक्त निर्णय में यह भी अवधारित किया कि अभियुक्त को विचारण हेतु आहूत करते समय न्यायालय को मामले के गुण-दोष पर विचार करना आवश्यक नहीं है तथा यह निश्चित करना भी आवश्यक नहीं है कि संकलित सामग्री अभियुक्त को दोषी सिद्ध करने के लिए पर्याप्त है अथवा नहीं।

7. धारा 204 दण्ड प्रक्रिया संहिता के अन्तर्गत आदेशिका जारी करते समय न्यायालय को मात्र इतनी राय बनानी होती है कि 'कार्यवाही करने के लिए पर्याप्त आधार हैं। यह संतोष भारतीय दण्ड संहिता की धारा 240 के अन्तर्गत आरोप विरचित करते समय ऐसी उपधारणा करने का आधार कि अभियुक्त ने कोई ऐसा अपराध किया है, जिसका विचारण करने के लिए मजिस्ट्रेट सक्षम है और जो उसके द्वारा पर्याप्त रूप से दण्डित किया जा सकता है, के स्तर का संतोष नहीं है। अपितु उससे काफी निम्न स्तर का ही संतोष होगा।

8. माननीय उच्चतम न्यायालय ने अग्रेतर यह भी अवधारित किया कि जहाँ पर पुलिस ने विवेचना के उपरांत एक आरोप पत्र प्रस्तुत कर दिया है, न्यायालय को पुलिस द्वारा आरोप पत्र, गवाहों के बयान तथा पुलिस द्वारा विवेचना के द्वारा संकलित अन्य साक्ष्य का परिशीलन करने का भी लाभप्रद अवसर उपलब्ध है। विवेचक विवेचना के दौरान संकलित किए गए सामग्री की छानबीन पहले ही कर चुका होता है तथा इसके बाद आरोप पत्र प्रस्तुत होता है। अतः पुलिस रिपोर्ट के आधार पर आरोप का संज्ञान लेते समय न्यायालय को आदेशिका जारी करने के लिए कोई भी कारण दर्शाने की आवश्यकता नहीं है। पुलिस रिपोर्ट के आधार पर संस्थित वादों में न्यायालय को मात्र अभियुक्त को आदेशिका जारी करने की आवश्यकता है। अभियुक्त को आदेशिका जारी करने का ऐसा आदेश न्यायालय द्वारा पुलिस रिपोर्ट तथा उसके साथ प्रस्तुत अन्य अभिलेखों के आधार पर आधारित संतोष कि अभियुक्त के विरुद्ध अग्रेतर कार्यवाही चलाने का समुचित आधार है, पर आधारित होता है। अतः पुलिस रिपोर्ट पर संस्थित प्रकरण में आदेशिका जारी करने के स्तर पर न्यायालय को आदेश में कोई कारण अंकित करने की आवश्यकता नहीं है।

9. तदनुसार आलोच्य आदेश दिनांक 07.09.2016 में कोई विधिक त्रुटि प्रतीत नहीं होती है। प्रार्थी की अनुपस्थिति के कारण उसके विरुद्ध गैर जमानती वारंट जारी करने के आदेश में भी कोई अवैधानिकता नहीं है। तदनुसार, प्रार्थना पत्र बलहीन है।

10. इस स्तर पर प्रार्थी की विद्वान अधिवक्ता ने यह कथन किया कि प्रार्थी जमानत कराने को तत्पर है।

11. तदनुसार, प्रार्थना पत्र इस निर्देश के साथ **निस्तारित** किया जाता है कि यदि प्रार्थी विचारण न्यायालय के समक्ष उपस्थित होकर जमानत हेतु प्रार्थना पत्र प्रस्तुत करें तो उसे इस आदेश से प्रभावित हुए बिना शीघ्रतापूर्वक विधिनुसार, **सतेंद्र कुमार अंतिल बनाम सी.बी.आई.**, (2021) 10 **एससीसी** 773 के प्रकरण में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था के आलोक में **निस्तारित** किया जाए।

(2024) 3 ILRA 881
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 1754 of 2024

Navin Chandra Dwivedi & Ors....Applicants
Versus
State of U.P. ...Respondent

Counsel for the Applicants:
Purnendu Chakravarty, Shivanshu Goswami

Counsel for the Respondent:
G.A.

आपराधिक विधि : दंड प्रक्रिया संहिता, 1973 – धारा 311 – गवाह के रूप में परीक्षित करने के प्रार्थना – पत्र के निरस्त करने के विरूद्ध - वैधता - प्रकरण में आरोप है कि सहकारी आवास समिति के सचिव पद से शिकायतकर्ता को हटाए जाने एवं समिति के विवाद के कारण शिकायतकर्ता तथा उसके पुत्र को निरन्तर प्राणघातक धमकियाँ मिलती रहीं - पूर्व में दिनांक 08.07.2016 को अभियुक्तगण द्वारा की गई फायरिंग में शिकायतकर्ता का पुत्र घायल हुआ था - दिनांक 17.08.2016 को अभियुक्त प्रेम शंकर द्विवेदी ने प्राथमिकी वापस लेने हेतु शिकायतकर्ता पर दबाव डाला - तत्पश्चात् दिनांक 21.08.2016 को रात्रि में अभियुक्तगण द्वारा पुनः फायरिंग की गई, जिससे शिकायतकर्ता का पुत्र गंभीर रूप से घायल हुआ और उपचार के दौरान उसकी मृत्यु हो गई - घटना के संबंध में प्राथमिकी सात नामजद अभियुक्तगण तथा एक अज्ञात व्यक्ति के विरुद्ध पंजीकृत की गई – 08.12.2023 को अभियुक्तगण द्वारा दं.प्र.सं की धारा 311 के अंतर्गत प्रार्थना–पत्र प्रस्तुत किया गया, जिसमें कहा किया गया कि घटना भगोले कबाब पराठा दुकान के मालिक वसीउद्दीन के सामने घटित हुई हैं, जो घायल को अपने वाहन से अस्पताल ले गए थे तथा घटना के प्रत्यक्षदर्शी है और उनको अब तक गवाह के रूप में प्रस्तुत नहीं किया गया है - अतः वसीउद्दीन को न्यायालय में तलब कराना न्यायहित में आवश्यक है - 22.12.2023 के आदेश द्वारा विचारण न्यायालय ने पाया कि नकल तहरीर एवं केस डायरी में वसीउद्दीन के घटना का प्रत्यक्षदर्शी अथवा किसी तात्त्विक तथ्य का साक्षी होने का उल्लेख नहीं है - तहरीर के अनुसार घटना स्थल भगोले कबाब पराठा दुकान के पीछे वाली सड़क पर है, न कि दुकान के सामने - अभियोजन साक्ष्यों में भी वसीउद्दीन की उपस्थिति का कोई उल्लेख नहीं पाया गया – अभिनिर्धारित, प्रकरण की समीक्षा से स्पष्ट हुआ कि अभियोजन ने किसी भी स्तर पर घटना वसीउद्दीन की दुकान के सामने अथवा उसकी उपस्थिति में घटित होने का उल्लेख नहीं किया - न तो प्राथमिकी में और न ही किसी साक्षी के बयान में ऐसा कथन है। जिस अनुज द्विवेदी के बयान पर अभियुक्तगण निर्भर हैं, उसने स्वयं स्वीकार किया कि घटना के समय वह उपस्थित नहीं था और उसने भी वसीउद्दीन की उपस्थिति का उल्लेख नहीं किया। फलस्वरूप, वसीउद्दीन को गवाह के रूप में तलब करने हेतु दिया गया प्रार्थना-पत्र असत्य एवं निराधार पाया गया। (पैरा 3, 5, 7, 19)

आवेदन निरस्त **I** (E-13)

<u>प्रोद्धृत मामलों की सूची:</u>

1. पी. संजीव राव बनाम आंध्र प्रदेश राज्य 2012 (7) SCC 56

2. दादरा एवं नागर हवेली का संघ राज्य क्षेत्र एवं अन्य बनाम फतेहसिंह मोहनसिंह चौहान, 2006 (7) एससीसी. 529

3. स्वपन कुमार चटर्जी बनाम केन्द्रीय अन्वेषण ब्यूरो (2019) 14 एस.सी.सी. 328

4. वी एन पाटिल बनाम के निरंजन कुमार (2021) 3 एस.सी.सी. 661

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

1. प्रार्थीगण के विद्वान अधिवक्ता श्री पूर्णेन्दु चक्रवर्ती तथा विद्वान अतिरिक्त शासकीय अधिवक्ता श्री अनंत प्रताप सिंह

को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अंतर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थीगण ने विद्वान अपर जिला एवं सत्र न्यायाधीश कक्ष संख्या 15, लखनऊ द्वारा सत्र परीक्षण संख्या 479 सन 2017 में पारित आदेश दिनांक 22.12.2023 की वैधता को चुनौती दी है, जिसके द्वारा सत्र न्यायालय ने अभियुक्तगण की तरफ से धारा 311 दं०प्र०सं० के अंतर्गत एक व्यक्ति वसीउद्दीन को गवाह के रूप में परीक्षित करने के प्रार्थना-पत्र को निरस्त कर दिया।

3. मामले के संक्षिप्त तथ्य इस प्रकार हैं कि दिनांक 21.08.2016 को समय 23:50 बजे प्रथम सूचना रिपोर्ट संख्या 0416 सन 2018 सात नामित व्यक्तियों तथा एक अज्ञात व्यक्ति के विरुद्ध लिखाते हुए यह कहा गया कि एक सहकारी आवास समिति, जिसका सचिव एवं पत्नी अध्यक्ष है, द्वारा औरंगाबाद खालसा, लखनऊ में लगभग 12 बीघे जमीन खरीदी गयी थी। शिकायतकर्ता को समिति के सचिव पद से हटाते हुए एक अन्य व्यक्ति को सचिव बना दिया गया। उक्त समिति के विवाद के संबंध में शिकायतकर्ता और उसके पुत्र को जान से मारने की धमकियां मिल रही थी। दिनांक 08.07.20216 को अन्नू द्विवेदी उर्फ शिवम, मन्नू द्विवेदी उर्फ अक्षय एवं सुजल सिंह ने फायरिंग करके शिकायतकर्ता के पुत्र सचिन शुक्ला एवं एक अन्य व्यक्ति अनुज द्विवेदी को घायल कर दिया था, जिसकी प्रथम सूचना रिपोर्ट संख्या 339 सन 2014 थाना आशियाना में दिनांक 09.07.2016 को अंकित की गयी थी। उपरोक्त तीनों अपराधी फरार थे तथा उनकी गिरफ्तारी के लिए शिकायतकर्ता तथा उसके पुत्र द्वारा उच्चाधिकारियों से अनुरोध भी किया गया था। दिनांक 17.08.2026 को प्रार्थी संख्या 5 प्रेम शंकर द्विवेदी ने शिकायतकर्ता के घर आकर प्रथम सूचना रिपोर्ट की वापसी हेतु दबाव बनाया तथा धमकी देकर चले गये। दिनांक 21.08.2016 को रात्रि 9 बजे अभियुक्तगण ने असलहे से फायर किया जिससे शिकायतकर्ता के पुत्र को चोटें आयीं। यहाँ मौजूद लोग उसे सिविल अस्पताल ले गये, जहाँ से ट्रामा सेण्टर, के.जी.एम.यू. भेजा गया तथा वहाँ शिकायतकर्ता के पुत्र की मृत्यु हो गयी। प्रथम सूचना रिपोर्ट में कहा गया है कि घटना भगोले कबाब पराठा वाले की दुकान के पीछे वाली रोड पर भदरुख क्षेत्र की है।

4. विवेचना के उपरान्त प्रस्तुत आरोप-पत्र की प्रति प्रार्थना-पत्र के साथ संलग्न नहीं की गयी है।

5. दिनांक 08.12.2023 को अभियुक्तगण की तरफ से धारा 311 दं०प्र०सं० के अंतर्गत प्रार्थना-पत्र प्रस्तुत करके कहा गया किः-

"उपरोक्त प्रकरण से संबंधित घटना जिस भगोले कबाब पराठे वाले की दुकान के सामने घटित हुई उस भगोले कबाब पराठे की दुकान के मालिक वसीउद्दीन पुत्र ननकू निवासी 108 भखौरी माफी तहसील कैसरगंज जिला बहराइच (उ०प्र०) को जो कि उक्त घटना का अहम गवाह है उसको न्यायालय के समक्ष गवाही हेतु प्रस्तुत नहीं किया गया है तथा उक्त मुख्य गवाह के वैन से चोटहिल को अस्पताल भेजा गया था। उक्त प्रकरण में "वसीउद्दीन पुत्र ननकू निवासी उपरोक्त को धारा 311 दं०प्र०सं० के तहत तलब कर उक्त प्रकरण में गवाही हेतु तलब किया जाना न्यायहित में आवश्यक है।"

6. इसी प्रार्थना-पत्र पर विद्वान अतिरिक्त शासकीय अधिवक्ता ने अपनी आपत्ति अंकित की "उपरोक्त पत्रावली में अभियोजन की बहस हो चुकी है, पत्रावली बचाव पक्ष की शेष बहस पर लगी है। इस स्तर पर 311 दं०प्र०सं० का प्रार्थना-पत्र बचाव पक्ष द्वारा मुकदमें को विलंबित करने के लिए दिया जा रहा है। प्रार्थना पत्र का घोर विरोध किया जाता है।"

7. दिनांक 22.12.2023 के आलोच्य आदेश द्वारा विद्वान विचारण न्यायालय ने अंकित किया कि नकल तहरीर में कहीं भी वसीउद्दीन के घटना के किसी तात्विक तथ्य का साक्षी होने का उल्लेख नहीं है। तहरीर के अनुसार घटना भगोले कबाब पराठा वाले की दुकान के पीछे वाली रोड, भदरुख क्षेत्र की है, न कि उसके दुकान के सामने की है। विद्वान विचारण न्यायालय ने संपूर्ण केस डायरी तथा अभियोजन साक्षियों के साक्ष्य का अवलोकन करके यह पाया कि यह कहीं भी उल्लिखित नहीं है कि भगोले कबाब पराठा के दुकान के मालिक वसीउद्दीन घटना के समय उपस्थित थे।

8. अभियुक्त की तरफ से **पी. संजीव राव बनाम आंध्र प्रदेश राज्य 2012 (7) SCC 56** के निर्णय का आश्रय लिया गया जिसमें विद्वान सत्र न्यायालय ने पाया कि उक्त प्रकरण के तथ्य प्रस्तुत प्रकरण के तथ्यों से भिन्न होने के कारण उक्त निर्णय प्रस्तुत प्रकरण पर लागू नहीं होते हैं। इस न्यायालय के समक्ष प्रार्थीगण के विद्वान अधिवक्ता ने भी यह स्वीकार किया कि **पी. संजीव राव** प्रकरण का निर्णय प्रस्तुत मामले के लिए संगत नहीं है।

9. प्रार्थी के विद्वान अधिवक्ता ने तर्क दिया कि अभियोजन साक्षी संख्या 2 अनुज द्विवेदी ने अपने बयान में कहा है कि घटना के दिन लगभग रात्रि 9 बजे वह सचिन के साथ खड़ा था, उसने एक लड़के से बियर मंगाई तब तक सचिन का फोन आ गया और वह फोन पर बात करते हुए भगोले कबाब पराठा की दुकान के पीछे

चला गया। गवाह अनुज द्विवेदी मोबाइल पर गेम खेलते हुए फुरकान की दुकान (भांग की) पर चला गया, वहाँ मेरे दोस्त बैठे थे उनसे बाते करने लगा तभी गोली चलने की आवाज आयी कुछ सेकण्ड तक कुछ समझ में नहीं आया कि क्या हुआ फिर कई लोगों की आवाज आयी "गोली मार दी" "गोली मार दी" वह दौड़कर गया तो देखा सचिन लिंक रोड पर घायल पड़ा था कई लोग खड़े थे तब उसने भगेलू कबाब पराठा की वैन में लेटा कर सचिन को लेकर तुरन्त सिविल अस्पताल पहुंचा साथ में उसके भगेलू कबाब पराठा वाला और एक लड़का प्रवीन शुक्ला मौजूद थे। सिविल अस्पताल से ट्रामा सेण्टर मेडिकल कालेज रेफर कर दिया गया। वह वहाँ भी साथ गया। जहाँ सचिन को मृत घोषित कर दिया गया। इससे पूर्व भी उसके व सचिन के साथ 307 की घटना हुई थी जिसमें उसकी अंगुली घायल हो गयी थी। घटना के बाद दरोगा जी ने उससे पूछताछ की थी।"

10. गवाह अनुज द्विवेदी ने अपने बयान में न तो स्वयं को घटना का चक्षुदर्शी साक्षी होना कहा है और न उसने यह कहा है कि कथित गवाह वसीउद्दीन घटना का चक्षुदर्शी साक्षी था। गवाह ने यह भी नहीं कहा है कि घटना वसीउद्दीन की दुकान के सामने घटित हुई।

11. विद्वान विचारण न्यायालय ने आलोच्य आदेश में यह सही ही अंकित किया है कि संपूर्ण केस डायरी का अवलोकन एवं अभियोजन साक्षियों के साक्ष्य का अवलोकन करने पर यह पाया गया कि यह कहीं भी उल्लिखित नहीं है कि भगोले कबाब पराठा के दुकान के मालिक वसीउद्दीन घटना के समय उपस्थित थे।

12. वसीउद्दीन का नाम आरोप-पत्र में अभियोजन साक्षी के रूप में अंकित नहीं है। अभियोजन साक्ष्य पूर्ण होने के उपरान्त अभियुक्तगण ने भी वसीउद्दीन को अपने साक्षी के रूप में परीक्षित करना उचित नहीं समझा। जब प्रकरण में सम्पूर्ण साक्ष्य अंकित होने के उपरान्त अभियोजन पक्ष की बहस पूर्ण हो चुकी तथा अभियुक्त की बहस भी आंशिक रूप से सुनी जा चुकी थी, उस स्तर पर अभियुक्तगण ने धारा 311 भा०दं०सं० के अंतर्गत वसीउद्दीन को साक्षी के रूप में बुलाने की इस आधार पर प्रस्तुत की कि घटना भगोले कबाब पराठे वाले के सामने घटित हुई थी तथा दुकान का मालिक वसीउद्दीन घटना का अहम गवाह है।

13. पत्रावली ऐसी कोई भी सामग्री उपलब्ध नहीं है जिससे धारा 311 दं०प्र०सं० में किये गये उपरोक्त कथन कि घटना वसीउद्दीन की दुकान के सामने हुई और वसीउद्दीन घटना का अहम गवाह है, समर्थित हो सके।

14. प्रार्थी के विद्वान अधिवक्ता ने तर्क दिया कि धारा 311 दं०प्र०सं० के

अंतर्गत न्यायालय किसी भी साक्षी को किसी भी स्तर पर बुला सकता है और तर्क के समर्थन में उन्होंने **U. T. of Dadra & Haveli & Anr Vs. Fatehsinh Mohansinh Chauhan 2006 (7) SCC 529** के निर्णय का आश्रय लिया, जिसमें कई पूर्व न्यायिक निर्णयों का संदर्भ देते हुए माननीय उच्चतम न्यायालय ने अवधारित किया कि धारा 311 दं०प्र०सं० के अंतर्गत न्यायालय विवेचना अथवा विचारण के किसी भी स्तर पर किसी व्यक्ति को गवाह के रूप में तलब कर सकती है तथा न्यायालय किसी भी ऐसे व्यक्ति को साक्ष्य के लिए अवश्य ही तलब करेगी जिसका साक्ष्य एक न्यायपूर्ण निर्णय के लिए अपरिहार्य हो।

15. उपरोक्त विधि व्यवस्था के संदर्भ में कोई संशय नहीं है तथा निश्चय ही धारा 311 दं०प्र०सं० न्यायालय को इस संबंध में न्यायहित में किसी भी साक्षी को किसी भी स्तर पर तलब करने की असीमित शक्ति प्राप्त है किन्तु ऐसी असीमित शक्ति का प्रयोग सावधानीपूर्वक करना चाहिए तथा न्यायालय को यह सुनिश्चित करना चाहिए कि इन शक्तियों का दुरुपयोग अभियुक्त विचारण में देरी कारित करने के लिए न कर पाये।

16. **स्वपन कुमार चैटर्जी बनाम केंद्रीय अन्वेषण ब्यूरो** (2019) **14 एस सी सी 328,** के निर्णय में माननीय उच्चतम न्यायालय ने यह अवधारणा किया कि यह विधि का एक सुस्थापित सिद्धान्त है कि धारा 311 दंड प्रक्रिया संहिता की शक्तियां न्यायालय द्वारा मात्र न्याय के उद्देश्यों की पूर्ति के लिए ही प्रयोग की जानी चाहिए। इन शक्तियों का प्रयोग अत्यंत सावधानीपूर्वक, मात्र प्रबल और वैध कारणों से ही किया जाना चाहिए। इस धारा के अंतर्गत न्यायालय को न्याय हित में साक्षी को बुलाए जाने की व्यापक शक्तियां प्राप्त है किन्तु इनका प्रयोग प्रकरण के समस्त तथ्यों एवं परिस्थितियों को ध्यान में रखते हुए ही करना चाहिए। यदि न्यायालय का मत है कि धारा 311 के अंतर्गत प्रार्थना पत्र विधिक प्रक्रिया का दुरुपयोग करने के लिए दिया गया है तो न्यायालय को इन शक्तियों का प्रयोग नहीं करना चाहिए ।

17. **स्वपन कुमार चैटर्जी** के निर्णय में माननीय उच्चतम न्यायालय ने यह भी कहा कि हर न्यायालय का उद्देश्य सत्य की खोज करना है। धारा 311 दंड प्रक्रिया संहिता ऐसे अनेक प्रावधानों में से एक है, जो विधि द्वारा स्थापित प्रक्रिया के अनुसार सत्य की खोज के न्यायालय के प्रयासों में उसको बल प्रदान करते हैं, किंतु न्यायालय को धारा 311 दन्ड प्रक्रिया संहिता के अंतर्गत प्राप्त विवेकाधीन शक्तियों का प्रयोग प्रबल और वैध कारणों से सावधानीपूर्वक न्याय के उद्देश्यों की पूर्ति के लिए ही करना चाहिए।

18. **वी एन पाटिल बनाम के निरंजन कुमार (2021) 3 एस सी सी 661**, में

माननीय उच्चतम न्यायालय ने यह सिद्धांत प्रतिपादित किया कि धारा 311 दंड प्रक्रिया संहिता का अंतर्निहित उद्देश्य यह है कि किसी भी पक्षकार द्वारा मूल्यवान साक्ष्य को अभिलेख पर लाने में हुई त्रुटि अथवा किसी गवाह के साक्ष्य में अस्पष्टता न होने के कारण से न्याय का उद्देश्य विफल न हो जाए। निर्णायक बिंदु यह है कि क्या ऐसा करना प्रकरण के न्यायपूर्ण निर्णय के लिए अपरिहार्य है। इस धारा में अभिव्यक्ति कि "किसी जाँच विचारण या अन्य कार्यवाही के किसी प्रक्रम में" भी अत्यंत महत्वपूर्ण है, किन्तु यह ध्यान में रखना चाहिए की धारा 311 दंड प्रक्रिया संहिता द्वारा प्रदत्त विवेकाधीन शक्तियों का प्रयोग न्यायपूर्ण ढंग से किया जाना चाहिए। जैसा कि सदा ही कहा जाता है कि शक्तियां जितनी व्यापक हों, उनके इस संबंध में विवेक का प्रयोग न्याय पूर्वक करने में सावधानी की अनिवार्यता उतनी अधिक बढ़ जाती है।

19. जब उपरोक्त विधि व्यवस्थाओं के आलोक में प्रस्तुत प्रकरण के तथ्यों की समीक्षा की जाय तो यह स्पष्ट होता है कि अभियोजन ने कभी भी किसी भी स्तर पर यह नहीं कहा कि घटना वसीउद्दीन की दुकान के सामने अथवा उसकी उपस्थिति में घटित हुई। पत्रावली बचाव की बहस के स्तर पर पहुंचने पर अभियुक्त गण ने वसीउद्दीन को इस आधार पर साक्षी के रूप में तलब करने का प्रार्थना-पत्र दिया कि घटना उसकी दुकान के सामने घटित हुई थी और वह घटना का अहम गवाह है, जबकि ऐसा कथन न तो प्रथम सूचना रिपोर्ट में और न ही किसी भी साक्षी के बयान में है तथा जिस साक्षी अनुज द्विवेदी के बयान का आश्रय अभियुक्तगण ले रहे हैं उसने स्वयं यह कहा कि घटना के समय वह स्वयं भी उपस्थित नहीं था और उसने भी वसीउद्दीन की दुकान के सामने अथवा वसीउद्दीन की उपस्थिति में घटना होने का कथन नहीं किया है। अतः प्रार्थना-पत्र में वसीउद्दीन को गवाह के रूप में तलब किये जाने का दर्शाया गया कारण असत्य एवं निराधार है।

20. उपरोक्त समीक्षा के आलोक में विद्वान विचारण न्यायालय द्वारा धारा 311 दं०प्र०सं० का प्रार्थना-पत्र निरस्त किये जाने में कोई अवैधानिकता अथवा त्रुटि कारित नहीं की गयी है। धारा 482 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत प्रार्थना-पत्र बलहीन है और तद्नुसार निरस्त किया जाता है।

(2024) 3 ILRA 886
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.03.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 1872 of 2011

Ramesh Iyer ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
B.K. Singh, Aishwarya Pratap Singh, Sandeep Kumar (Trivedi)

Counsel for the Respondents:
G.A., Apoorv

Criminal Law – Criminal Procedure Code, 1973 - Sections 165(3), 200, 202, 202(1) & 482 – Indian Penal Code, 1860 - Sections 406, 409, 419, 420, 467 & 468 - Negotiable Instruments Act, 1881 - Section 138 - Application u/s 482 – assailing the summoning order and the entire criminal proceedings - the petitioner, serving as Managing Director of a financial company, had no involvement in the routine operations of its branch offices - A criminal case arose from a 2006 vehicle financing transaction concerning a vehicle – financed through the company – which was later surrendered following default in payment - The vehicle was subsequently re-sold to opposite party no. 2, who issued four post-dated cheques, two of which were dishonoured - Opposite party no. 2 fraudulently re-sold the vehicle using forged documents and impersonated company personnel – offence of dishonour of cheques - Company initiated proceedings under the N.I. Act, - a summoning order issued to the opposite party no. 2 - In retaliation, opposite party no. 2 filed a complaint under Section 156(3) Cr.P.C., alleging misappropriation against three individuals, including the petitioner - FIR was registered – but during investigation, police exonerated all accused - and filed charge-sheet against the opposite party no. 2 under various sections of the IPC - Despite this, opposite party no. 2 lodged another complaint with unfounded allegations, implicating even the investigating officer and the vehicle's purchaser – wherein petitioner was named with vague and general accusations - St.ment recorded u/s 200 Cr.P.C. – impugned summoning order - the applicant pleaded that summoning order was passed in violation of settled legal principles - the court observed that, the Magistrate failed to conduct the mandatory inquiry under Section 202(1) Cr.P.C., despite the petitioner residing outside the jurisdiction and furthermore, fact that the complaint pertained to the same transaction for which a charge-sheet had already been filed against the complainant - court held that, the complaint was a retaliatory move, lacking substance and driven by malafide intent, falling squarely within the parameters laid out in *Bhajan Lal's case* - Consequently, the complaint case, the summoning order and the bailable warrant were quashed – Application is allowed. (Para – 28, 29, 30)

Application Allowed. (E-11)

List of referred Cases: -

1. Pepsi Foods Ltd. Vs Special Judicial Magistrate (1998) 5 SCC 749;

2. Ravindranatha Bajpe Vs Mangalore 6. Special Economic Zone Ltd., (2022) 15 SCC 430;

3. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426,

4. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr."(2017) 3 SCC 528.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Naresh Kaushik, learned Senior Advocate assisted by Sri Aishwarya Pratap Singh, learned counsel for the petitioner, Sri Nirmal Kumar Pandey, learned AGA for the State and Sri Gyanendra Kumar Pandey, Advocate who has filed his 'Vakalatnama' along with counter affidavit on behalf of opposite party no. 2, the same are taken on record.

2. Learned counsel for the petitioner has submitted that he will not file rejoinder affidavit and has requested that the matter may be heard finally on the basis of material available on record.

3. This petition has been filed under section 482 Cr.P.C. by the petitioner for setting aside / quashing the impugned summoning order dated 15.10.2010 passed

by the learned C.J.M., Bahraich against the petitioner and 6 others u/s 406, 419, 420 IPC in Complaint Case No. 4383 of 2010 (Ramesh Chandra Mishra vs. Ramesh Iyer and others) contained as Annexure no. 1.

4. By means of this petition the petitioner has prayed following relief :

"Wherefore, for the facts and reasons stated in the by an petition supported by affidavit, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the impugned summoning orders dated 15.10.2010 passed by learned Chief Judicial Magistrate Bahriach as well as Order dated 10.02.2011 by which the bailable warrant has been issued against the petitioner in complaint case no. 4383/2010 Ramesh Chandra Mishra Vs Ramesh Iyer & others contained as Annexure no 1 & 2 to this petition It is further prayed that this Hon'ble Court may kindly be pleased to stay the proceedings of complaint case no.4383/2010 Ramesh Chandra Mishra Vs. Ramesh lyer & others pending before Chief Judicial Magistrate Bahraich, during pendency of the petition."

5. That the petitioner is working as Managing Director of Mahindra & Mahindra Financial Services Ltd. (referred as 'MMFSL' hereinafter), having his office at Mumbai and having no concern with day-to-day affairs of the Branches.

6. Learned Counsel for the petitioner submits that the facts of the case, in brief, are that in the year 2006 a Bolero vehicle was financed to one Durgesh Kumar Vaishya by MMFSL, which was surrendered by him after default of installment. The said Vehicle was thereafter sold to opposite party no. 2, Ramesh Chandra Mishra for Rs. 3,50,000/-, who issued 4 post-dated cheques bearing Cheque No. 881607 dated 26.12.2007 for Rs. 1,00,000/- Cheque No. 881608 dated 28.12.2007 for Rs. 1,00,000/-, Cheque No. 881609 dated 31.12.2007 for Rs. 50,000/- and Cheque No. 881615 dated 31.01.2008 for Rs. 1,00,000/-.

7. That the opposite party no. 2 unauthorizedly sold the said Vehicle to one Mehtab Gori for an amount of Rs, 3,51,000/- showing himself to be Authorized Representative and employee of MMFSL, he fabricated a payment receipt dated 28.11.2007 on a Rs. 20/- Judicial Stamp Paper Impersonating as Recovery Officer of the company. The opposite party no. 2 also managed to transfer the vehicle from the R.T.O. on the basis of forged and fabricated documents and got issued a temporary authorization of registration from the R.T.O. in the name of his Purchaser Mehtab Ahmad. In the meantime 2 out of 4 cheques provided by the opposite party no. 2 to MMFSL got dishonored due to insufficient funds, against which the MMFSL filed a complaint case on 16.06.2008 u/s 138 of Negotiable Instruments Act bearing Case No. 713/2008 (later changed to Case No. 300 of 2010 after transfer), the 2nd Additional Civil Judge, (SD), Faizabad summoned the opposite party no. 2 in the said case.

8. That the opposite party no. 2 coming to know about the summoning under Negotiable instruments Act, filed a complaint / application u/s 156 (3) Cr.P.C. in the court of C.J.M., Bahraich against three persons only including the present applicant alleging that the MMFSL has taken Rs. 1,00,000/- cash and Rs. 1,50,000/- through cheque, but has not

handed over the vehicle, instead sold it to some third person and misappropriated the money given by the opposite party no. 2.

9. That the said application u/s 156 (3) Cr.P.C. was allowed by the C.J.M., Bahraich on 18.10.2008 and direction was issued to lodge an FIR, the concerned police lodged FIR No. 72/2008 u/s 406, 409 IPC, P.S. Kotwali Bahraich, District Bahraich (Annexure-6). The concerned Police after detailed investigation, expunged the name of all the three persons in the FIR, and filed charge-sheet on 19.03.2009 against the opposite party no. 2, Ramesh Chandra Mishra itself U/s 406/409/419/420/467/468 IPC. The person Mehtab Gori to whom the opposite party no. 2 has sold the said vehicle also gave statement against the said opposite party no. 2.

10. That the opposite party no. 2 Ramesh Chandra Mishra, when came to know about the charge-sheet against him, he filed a complaint case before C.J.M., Bahraich on 24.09.2010 on totally false and concocted facts and arrayed even the Investigation officer of the case as well as the purchaser of the vehicle as accused. There are general allegations against the present petitioner and no specific role has been assigned.

11. That on the same day i.e. 24.09.2010, the statement under section 200 Cr.P.C. of the complainant has also been recorded by the learned C.J.M., the complainant (opposite party no. 2) in this petition repeated the contents of his complaint.

12. That on 12.10.2010 the complainant got the statement of two chance witnesses recorded u/s section 202 Cr.P.C., the said witnesses namely, Santosh Yadav and Mohammad Ahmad, who claimed that they were present in the Branch office of MMFSI, at Bahraich for some loan inquiries when alleged scuffle between the complainant and branch officials took place, but they have not whispered a word about the present petitioner. On the basis of these statements the learned C.J.M., Bahraich issued summons to the petitioner and 6 other persons for facing trial us 406,419,420 IPC, on a proforma summoning order, without any application of the judicial mind.

13. While appreciating the aforesaid facts this Court on the first date of admission granted confirmed interim order on 21.4.2011 which reads as under :

"Issue notice to respondent no. 2.
List after service report.
Upon perusal of the record, it is apparent that for the same subject matter as respondent no. 2 is himself as an accused on the basis of charge-sheet dated 19th of March, 2009. Therefore, prima facie, I am of the view that the complaint lodged by him is unsustainable. Under this circumstance, I hereby stay the proceeding of Complaint Case No. 4383 of 2010 pending before the court of Chief Judicial Magistrate, Bahraich till further order of this Court."

14. Learned counsel for the petitioner has further submitted that the impugned summoning order issued by the Learned Magistrate is bad in law and against the settled principles of law, as despite noting the fact that the petitioner and some other persons who have been made accused in the alleged complaint does not reside in the territorial jurisdiction of learned magistrate, he proceeded to issue summons without

complying the mandatory provisions of section 202 (1) Cr.P.C. in this regard the Hon'ble Supreme Court in the case of ***Abhijit Pawar vs. Hemant Madhukar Nimbalkar & Anr "(2017) 3 SCC 528"*** has categorically held that "...Thus in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the magistrate to conduct an enquiry or investigation before issuing the process, so that false complaints are filtered and rejected."

15. It has been submitted that the applicant is Managing Director of the MMFSL, under whom, thousands of branches across India functions, it is impossible for a person sitting at Mumbai to interfere or monitor day to day functions of a Branch, the petitioner in his entire career never visited Bahraich. Even for the sake of arguments, even if entire material on record is taken on its face value, then also by no stretch of imagination, it discloses any cognizable offence by the present petitioner/applicant.

16. In the light of the aforesaid submission the learned counsel for the petitioner has submitted that the learned Magistrate has not applied his judicial mind while issuing the summons. The Learned Magistrate failed to comply with the mandatory provisions of Section 202 (1) Cr.P.C. as settled by the Hon'ble Supreme Court in the catena of Judgments. That Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. There is absolutely non-application of judicial mind while issuing the summons and it appears that the Learned Magistrate is swayed away on the basis of concocted statements without any substance on record. The learned Magistrate totally failed to consider that the opposite party no. 2, Ramesh Chandra Mishra himself has been made an accused in the same case and Police has filed charge-sheet against him in heinous offences. The principles of vicarious liability is inapplicable in the present set of facts and circumstances.

17. Learned counsel for the petitioner has submitted that now these days there is very high tendency to implicate higher officials of the company in criminal cases to exert pressure.

18. In support of his submissions, learned counsel for the petitioner has placed reliance on the following judgments of Hon'ble Apex Court in re : ***Pepsi Foods Ltd. vs. Special Judicial Magistrate (1998) 5 SCC 749; Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd., (2022) 15 SCC 430; and State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426.***

19. Learned AGA has, however, tried to defend the impugned summoning order as well as order to issue bailable warrant but could not dispute the aforesaid factual and legal submissions of learned counsel for the petitioner.

20. Learned counsel for the private opposite party has also tried to defend the impugned orders but could not convince the court as to how for the same subject matter where the opposite party no. 2 himself is an accused on the basis of charge-sheet dated 19.3.2009, the complaint can be lodged against him after

filing the aforesaid charge-sheet on 24.9.2010.

21. In the counter affidavit which has been filed on 19.2.2024, Sri Gyanendra Kumar Pandey could not demonstrate any material justifying the complaint of opposite party no. 2 and aforesaid impugned orders. Sri Pandey has stated that when the complaint has been filed; statement u/s 200 and 202 Cr.P.C. has been recorded; summoning order has been issued against the petitioner and on account of non-cooperation of the petitioner the Bailable Warrant has been issued, then this Court may not interfere in the aforesaid proceedings and the direction may be issued to the petitioner to appear before the court concerned and participated in the proceedings. Therefore, Sri Pandey has requested that the instant petition may be dismissed.

22. Heard learned counsel for the parties, perused the material available on record as well as decisions of the Apex Court, so referred by the parties at the very outset, I am of the considered opinion that while taking cognizance of the allegations of the complaint where the opposite party / alleged accused person is residing at a place beyond the area in which the Magistrate exercises his jurisdiction and the allegations are not related to the offences triable by the sessions it would be mandatory on the part of the Magistrate to conduct the inquiry or investigation before issuing the process in terms of section 202(1) Cr.P.C., so that false complaints are filtered and rejected.

23. The Apex Court in re: ***Abhijit Pawar (supra)*** vide para 23 has held as under :

"23. Admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an enquiry or investigation before issuing the process. Section 202 CrPC was amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 22-6- 2006 by adding the words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his Jurisdiction". There is a vital purpose or objective behind this amendment, namely, to ward off false complaints against such persons residing at a far-off places in order to save them from unnecessary harassment. Thus, the amended provision casts an obligation on the Magistrate to conduct enquiry or direct investigation before issuing the process, so that false complaints are filtered and rejected. The aforesaid purpose is specifically mentioned in the note appended to the Bill proposing the said amendment.

24. Though at the time of issuing summons the mini trial is not required by the court concerned but, at least, the Magistrate must apply its judicious mind appreciating and perusing carefully the material available on record to be satisfied as to whether the allegations are prima facie convincing to summon the person. The law is trite that summoning of an accused in a criminal case is a serious matter, therefore, the order of the Magistrate summoning the accused must reflect that he has applied the mind to facts and circumstances and law applicable thereto.

25. The Apex Court in re: ***Pepsi Foods Ltd. (supra)*** vide para 28 has held as under :

"28. Summoning of an accused in a criminal case is a serious matter.

Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

26. Similarly in re: ***Ravindranatha (supra),*** vide para 8.3 it has been observed that :

"8.3. As held by this Court in India Infoline Ltd. [GHCL Employees Stock Option Trust v. India Infoline Ltd., (2013) 4 SCC 505: (2013) 2 SCC (Cri) 414), in the order issuing summons, the learned Magistrate has to record his satisfaction about a prima facie case against the accused who are Managing Director, the Company Secretary and the Directors of the Company and the role played by them in their respective capacities which is sine qua non for initiating criminal proceedings against them. Looking to the averments and the allegations in the complaint, there are no specific allegations and/or averments with respect to role played by them in their capacity as Chairman, Managing Director, Executive Director, Deputy General Manager and Planner & Executor. Merely because they are Chairman, Managing Director/Executive Director and/or Deputy General Manager and/or Planner / Supervisor of A-1 and A-6, without any specific role attributed and the role played by them in their capacity, they cannot be arrayed as an accused, more particularly they cannot be held vicariously liable for the offences committed by A-1 and A-6."

27. The present case is also covered by para. 102 of the judgment of the Apex Court in re: ***Bhajan Lal (supra),*** which reads as under :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do

not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently Improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code of the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and / or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

28. In the present case the learned court concerned has not undertaken the required exercise u/s 202(1) Cr.P.C. and has not applied its judicial mind to peruse carefully the relevant fact that the complainant / opposite party has filed the complaint against the petitioner on 24.9.2010 in the same subject matter where the charge-sheet has already been filed against him before the competent court of law on 19.3.2009. If the magistrate had perused carefully the allegations and material available on record by applying its judicious mind the very fact would have been cleared that the present complaint is nothing but a counter-blast and by filing the aforesaid complaint the opposite party no. 2 has misused the process of law / court.

29. The facts and circumstances of the present case are squarely covered in para 102 (5) and 102(7) of ***Bhajan Lal (supra)*** inasmuch as the allegation made in the complaint are so absurd and inherently improbable inasmuch as the allegations, so leveled against the petitioner, are not only baseless and misconceived but those allegations have been leveled on account of malafide intention and ulterior motive prosecuting the petitioner maliciously for wreaking vengeance. Therefore, in view of the aforesaid facts and circumstances, I have no hesitation to quash the impugned complaint bearing Complaint Case no. 4383/2010 (Ramesh Chandra Mishra Vs Ramesh Iyer & others) as well as impugned summoning order dated 15.10.2010 and Bailable Warrant dated 10.2.2011 passed by the C.J.M., Bahraich.

30. Accordingly, I hereby ***quash*** the impugned complaint bearing Complaint

Case no. 4383/2010 (Ramesh Chandra Mishra Vs Ramesh Iyer & others) as well as impugned summoning orders dated 15.10.2010 passed by learned Chief Judicial Magistrate Bahraich as well as Order dated 10.02.2011 by which the bailable warrant has been issued against the petitioner in Complaint Case no. 4383/2010 (Ramesh Chandra Mishra Vs Ramesh Iyer & others) contained as Annexure no 1 & 2 to the writ petition.

31. Petition is ***allowed***.

32. No order as to costs.

(2024) 3 ILRA 894
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 1926 of 2024

Mohd. Rashid Khan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Chandan Srivastava, Rajneesh Kumar Singh, Yogesh Somvanshi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 171H & 188 - Code of Criminal Procedure, 1973 - Sections 155(2), 190 & 195(1) - Counsel for applicant submitted that during Urban Local Bodies Election, FIR lodged by Sub-Inspector alleging that applicant, as candidate from Ward No. 21 affixed poster on pole in front of house of Ashok Jaiswal, constituting offences u/s 171-H and 188 IPC - Further submitted that charge sheet and cognizance taken are without jurisdiction, as Section 171-H IPC is non-cognizable and Section 195(1) Cr.P.C. bars cognizance of offences u/s 172-188 IPC except on written complaint by competent public servant - Held, both offences are non-cognizable, hence, u/s 155(2) Cr.P.C., police have no right to investigate matter, without permission of Magistrate, who has jurisdiction to try those offences - Thus, rendering charge sheet vitiated by incurable defects and procedural irregularities - Neither FIR nor charge sheet discloses any cognizable offence, enabling police to investigate both cognizable and non-cognizable offences together and to file charge sheet, hence, charge sheet and criminal case liable to be quashed - Thus, entire criminal proceedings, quashed. (Para 3 to 6, 28, 29)

Application allowed. (E-13)

List of Cases cited:

1. Sachida Nand Singh & anr. Vs St. of Bihar & anr.; (1998) 2 SCC 493, (Para 7)

2. Daulat Ram Vs St. of Punj.; AIR 1962 SC 1206, (Para 4)

3. M.S. Ahlawat Vs St. of Haryana & anr.; AIR 2000 SC 168, (Para 5)

4. Inder Mohan Goswami Vs St. of Uttaranchal (2007)12 SCC 1, (Para 23)

5. Lalankumar Singh & ors..Vs St. of Maharashtra reported in 2022 SCC Online SC 1383, (Para 38)

6. St. of Haryana Vs Bhajan Lal reported in 1992 Supp (1) SCC 335, (Para 102)

7. R.P. Kapoor Vs St. of Punj., AIR 1960 S.C. 866

8. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.) 192

9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283

10. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra, AIR 2021 SC 1918

11. S.W. Palankattkar & ors.Vs St. of Bihar, 2002 (44) ACC 168

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

1. Heard learned counsel for the parties.

2. The instant application under Section 482 Cr.P.C. has been filed on behalf of the applicant, namely, Mohd. Rashid Khan with a prayer to quash the impugned charge sheet dated 20.11.2017 alongwith impugned cognizance/summoning order dated 26.02.2019 passed by learned Additional Chief Judicial Magistrate-Ist, Faizabad in Case No.551 of 2019 (State Vs. Mohd. Rashid Khan), arising out of Case Crime No.0395 of 2017, under Sections 171 H and 188 of I.P.C., Police Station Cantt., District Faizabad as well as to quash the entire criminal proceedings in pursuance thereof.

3. Learned counsel for the applicant submitted that the applicant was contesting on the post of Councilor in Urban Local Bodies Election, 2017. During that period on 17.11.2017, an F.I.R. was lodged by the opposite party no.2, namely, Sub Inspector Sri Avnish Kumar Chauhan, the then Chowki In-charge Sahadatganj, Police Station Cantt., District Ayodhya/Faizabad against the applicant alleging therein that one poster was put on a pole situated in front of house of Ashok Jaiswal. Further allegation in the F.I.R. was that the applicant was a candidate from Ward No.21 i.e. Sardar Bhagat Singh Ward and the aforesaid act of the applicant is an offence under Section 171 H / 188 of I.P.C.

4. Learned counsel for the applicant further submitted that on 19.11.2017, the Investigating Officer recorded the statement of the applicant, wherein he denied the allegations. On 20.11.2017, the Investigating Officer recorded the statement of Opposite Party No.2 and one witness, namely, Constable Narendra Singh, under Section 161 Cr.P.C., wherein they supported the version of F.I.R.

5. Learned counsel for the applicant further submitted that on 20.11.2017, the Investigating Officer prepared the impugned charge sheet dated 20.11.2017 and on 26.02.2019, the learned trial court without applying its judicial mind, took cognizance of the offence on police report.

6. Learned counsel for the applicant further submitted that the F.I.R. was registered under Sections 171 H and 188 I.P.C., which is without jurisdiction as Section 171 H of I.P.C. is described as non cognizable offence in the penal code and Section 195(1) Cr.P.C. specifically provides that no court shall take cognizance of any offence under Sections 172 to 188 except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Thus, taking cognizance under Section 188 I.P.C. is also without jurisdiction.

7. Learned counsel for the applicant further submitted that as per Section 2(d) Cr.P.C., the opposite party no.2 had no right to lodge the F.I.R. for offences as mentioned above rather he had to file the complaint only before the concerned court. He further submitted that not only the F.I.R. was registered but also the investigation was carried out and charge sheet was submitted without any jurisdiction.

8. Learned counsel for the applicant further submitted that even if the entire story of the prosecution is accepted as true (only for the sake of argument though not admitted), Section 171 H of I.P.C. is not made out against the applicant in the instant case as only a person other than the candidate of an election can be made accused under Section 171 H of I.P.C.

9. Learned counsel for the applicant further submitted that as per Section 190 Cr.P.C., it is evident that the concerned Magistrate can take cognizance of any offence on three conditions i.e. (i) Upon receiving a complaint of facts, (ii) Upon a police report, and (iii) Suo-moto.

10. Learned counsel for the applicant further submitted that the impugned order dated 26.02.2019 passed by the learned Additional Chief Judicial Magistrate-Ist, Faizabad, by which the applicant was summoned, is also non speaking as the Magistrate has not considered any material available before him while summoning the applicant to face the trial. As such, the impugned order dated 26.02.2019 on the face of record appears to be unjustified, arbitrary, illegal and is passed without application of judicial mind, therefore, the same is liable to be set aside by this Court and the present application under Section 482 Cr.P.C. is liable to be allowed.

11. On the other hand, learned A.G.A. for the State opposed the argument advanced by learned counsel for the applicant and submitted that the impugned summoning order dated 26.02.2019 is rightly passed and no interference by this Court is required in the instant matter, therefore, the instant application is liable to be dismissed at this stage only.

12. On careful perusal of the averments made in this application under Section 482 Cr.P.C. as well as after hearing the learned counsel for the parties, the factual matrix disclose that the opposite party no.2 i.e. Sub Inspector Sri Avnish Kumar Chauhan, the then Chowki In-charge Sahadatganj, Police Station Cantt., District Ayodhya/Faizabad had lodged an F.I.R. against the applicant alleging therein that one poster was put on a pole situated in front of house of Ashok Jaiswal as the applicant was a candidate from Ward No.21 i.e. Sardar Bhagat Singh Ward contesting on the post of Councilor in Urban Local Bodies Election, 2017.

13. First of all, it would be relevant to quote Section 195(1) Cr.P.C., which is being reproduced hereunder:-

"195(1) Cr.P.C. :- *No Court shall take cognizance -*

(a)

(I) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or other public servant to whom he is administratively subordinate;

(b)

(I) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section

471, section 475 or section 476 of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.] [Substituted by Act 2 of 2006, Section 3 for "except on the complaint in writing of that Court, of of some other Court to which that Court is subordinate" (w.e.f. 16-4-2006).]"

14. From perusal of the aforesaid Section 195 (1) Cr.P.C., it is clear that the F.I.R. was registered without jurisdiction as Section 171 H of I.P.C. is described as a non-cognizable offence in the penal code whereas it is specifically mentioned that no Court shall take cognizance of any offence under Sections 172 to 188 I.P.C. except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Thus, taking cognizance under Section 188 I.P.C. is also without jurisdiction.

15. It would further be relevant to quote Section 2(d) Cr.P.C. which is being reproduced hereunder: -

""complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

16. From perusal of the aforesaid Section 2(d) Cr.P.C., it is clear that the opposite party no.2 had no right to lodge the F.I.R. for offences as mentioned above rather he had to file the complaint only before the concerned Magistrate.

17. It would also be relevant to quote Section 171 H of IPC, which is being reproduced hereunder:-

"171H. *Illegal payments in connection with an election "Whoever without the general or special authority in writing of candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees.*

PROVIDED that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate."

18. From perusal of the aforesaid Section 171 H of I.P.C., it is clear that only a person other than the candidate of an election, can be made accused under Section 171 H of I.P.C. Therefore, there is substantial merit in the contention of the learned counsel for the applicant that the offence under Section 171 H of I.P.C. as made out would not lie.

19. It would also be relevant to quote Section 190 Cr.P.C., which is being reproduced hereunder:-

*"**190**. Cognizance of offences by Magistrates.*

(1)Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a)upon receiving a complaint of facts which constitute such offence;

(b)upon a police report of such facts;

(c)upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed.

(2)The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

20. From perusal of the aforesaid Section 190 Cr.P.C., it is clear that the concerned magistrate can take cognizance of any offence on three condidtions i.e. (i) Upon receiving a complaint of facts, (ii) Upon a police report, and (iii) Suo-moto.

21. Hon'ble the Supreme Court in the case of **Sachida Nand Singh and Another Vs. State of Bihar and Another; (1998) 2 SCC 493** was pleased to observe at para 7 as under:-

"Even if the clause is capable of two interpretation we are inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the Court with a complaint is to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise."

22. Further, Hon'ble the Supreme Court in the case of **Daulat Ram Vs. State of Punjab; AIR 1962 SC 1206** was pleased to observe at para 4 as under:-

"Now the offence under s. 182 of the Penal Code, if any, was undoubtedly complete when the appellant had moved the Tehsildar for action. Section 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken. In making his report to the Tehsildar therefore, if the appellant believed that some action would be taken (and he had no reason to doubt that it would not) the offence under that section was complete. It was therefore incumbent, if the prosecution was to be launched, that the complaint in writing should be made by the Tehsildar as the public servant concerned in this case. On the other hand what we find is that a complaint by the Tehsildar was not filed at all, but a charge sheet was put in by the Station House Officer. The learned counsel for the State Government tries to support the action by submitting that s. 195 had been complied with inasmuch as when the allegations had been disproved, the letter of the Superintendent of Police was forwarded to the Tehsildar and he asked for "a calendar". This paper was flied along with the charge sheet and it is stated that this satisfies the requirements of s. 195. In our opinion, this is not a due compliance with the provisions of that

section. What the section comtemplates is that the complaint must be in writing by the public servant concerned and there is no such compliance in the present case. The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant namely the Tehsildar in this case. The trial was thus without jurisdiction ab inito and the conviction cannot be maintained."

23. Further, Hon'ble the Supreme Court in the case of **M.S. Ahlawat Vs. State of Haryana and Another; AIR 2000 SC 168** was pleased to observe at para 5 as under:-

"Chapter XI of IPC deals with false evidence and offences against public justice' and Section 193 occurring therein provides for punishment for giving or fabricating false evidence in a judicial proceeding. Section 195 of the Criminal Procedure Code (Cr.P.C.) provides that where an act amounts to an offence of contempt of the lawful authority of public servants or to an offence against public justice such as giving false evidence under Section 193 IPC, etc. or to an offence relating to documents actually used in a court, private prosecutions are barred absolutely and only the court in relation to which the offence was committed may initiate proceedings. Provisions of Section 195 Cr.P.C. are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that Section. It is settled law that every incorrect or false statement does not make it incumbent upon the court to order prosecution, but to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice."

24. Now coming to the provision of first schedule of Cr.P.C., Section 171 H of Indian Penal Code is covered under the said provision which is declared as non-cognizable and bailable offence, and triable by the Magistrate of the First Class. Like wise classification of offence against other laws in Cr.P.C., it also describes, if any offence under any other law, if punishable for less than three years or with fine which shall be considered as non- cognizable, bailable and triable by the Magistrate of First Class.

25. On perusal of the above said provisions, it is abundantly clear that the offence registered against the applicant under Section 171H of IPC is non-cognizable in nature. Now, coming to Section 155(2) of Cr.P.C. which reads as follows:

"No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial"

26. Particularly, Section 155(2) mandates the police concerned that such police officer shall investigate the non-cognizable offence with the permission of the Magistrate only. This Section describes that no Police Officer shall investigate a non- cognizable case without the order of the Magistrate having power to try such case for trial.

27. The provision in sub Section (2) of Section 155 of Cr.P.C., for asking permission of the Court to investigate a non-cognizable offence is mandatory in nature. Therefore, the investigation of non-cognizable offence by the police without prior permission of the competent Magistrate is illegal. Even mere accepting

the charge sheet by the Magistrate and taking the cognizance of the offence does not validate the proceeding. Even subsequent permission by the Magistrate also cannot cure the illegality. As could be seen from Section 460 of Cr.P.C. these defects of non- taking permission before investigating a non- cognizable offence is also not curable. Though the charge sheet is filed after due investigation without prior permission of the Court and that the Magistrate has accepted the charge sheet and taken the cognizance, it does not mean to show permission is granted by the Magistrate to investigate such non-cognizable offence. Therefore, investigation into the non-cognizable offence without written order of the Magistrate is strictly contrary to the provision of this Section.

28. **This Court further finds that the above said two offences are non-cognizable offences. Therefore, as per Section 155(2) of Cr.P.C., the police have no right or jurisdiction to investigate the matter, without prior permission of the Magistrate, who has got jurisdiction to try those offences. Therefore, the entire charge sheet filed by the police is vitiated by serious incurable defects and procedural irregularities.**

29. This Court further finds that the F.I.R. as well as the charge sheet, do not disclose that there was any cognizable offence made by the applicant, so as to enable the police to investigate both the cognizable and non- cognizable offences together and to file the charge sheet. Therefore, the entire charge sheet papers and on the basis of which the criminal case is registered is liable to be quashed.

30. **This Court also finds that the trial court while summoning the applicant by impugned order has totally failed to appreciate the factual and legal aspect of the matter. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.**

31. Further, the Hon'ble Supreme Court of India in the case **Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1** has held that it would be relevant to keep into mind the scope and ambit of section 482 Cr.PC and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Cr.P.C. can be exercised, para 23 is being quoted here under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of

the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice."

32. Further, Hon'ble the Supreme Court of India in the case of **Lalankumar Singh and Others vs. State of Maharashtra** reported in **2022 SCC Online SC 1383** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 of **Lalankumar Singh and Others (supra)** is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

33. Further, Hon'ble the Supreme Court of India has provided guidelines in case of **State of Haryana Vs. Bhajan Lal** reported in **1992 Supp (1) SCC 335** for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in following conditions:-

"102.(1) Where the allegations made in the first information report or the

complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

34. Further the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- **(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.**

35. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168,** it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

36. In view of the above said facts and circumstances of the case, the investigation done by the police in this case is without jurisdiction and based on such invalid investigation report, the cognizance taken by the learned Magistrate is also illegal. Secondly, the entire proceeding before the learned Magistrate is vitiated by serious incurable defects.

37. Thus, in view of the law laid down by the Hon'ble Apex Court and the

facts and circumstances, as narrated above and from the perusal of the record, the impugned charge sheet dated 20.11.2017 alongwith impugned cognizance/summoning order dated 26.02.2019 passed by learned Additional Chief Judicial Magistrate-Ist, Faizabad in Case No.551 of 2019 (State Vs. Mohd. Rashid Khan), arising out of Case Crime No.0395 of 2017, under Sections 171 H and 188 of I.P.C., Police Station Cantt., District Faizabad as well as the entire criminal proceedings in pursuance thereof are against the spirit and directions issued by the Hon'ble Apex Court and are liable to be set aside.

38. Accordingly, the impugned charge sheet dated 20.11.2017 alongwith impugned cognizance/summoning order dated 26.02.2019 passed by learned Additional Chief Judicial Magistrate-Ist, Faizabad in Case No.551 of 2019 (State Vs. Mohd. Rashid Khan), arising out of Case Crime No.0395 of 2017, under Sections 171 H and 188 of I.P.C., Police Station Cantt., District Faizabad as well as the entire criminal proceedings in pursuance thereof are hereby **quashed**.

39. For the reasons discussed above, the instant application under Section 482 Cr.P.C. is **allowed** in respect of the instant applicant.

40. Learned Senior Registrar of this Court is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

(2024) 3 ILRA 903
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 1958 of 2024

Sanjeev Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Aman Kumar Srivastava

Counsel for the Respondents:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 311 - Against rejection of summoning order - Validity of - Impugned order records that incident occurred on 06.04.2006, final report submitted on 20.06.2006, thereafter, protest petition filed by complainant on 27.07.2007, allowed, and applicants summoned to face trial - During trial, five prosecution witnesses examined, but Investigating Officer not examined - Application u/s 311 Cr.P.C. moved by applicants seeking his examination as witness - Rejected - Held, accused moved application u/s 311 Cr.P.C. at stage of final arguments seeking to summon Investigating Officer, who belongs to prosecution - Prosecution, however, chose not to examine him, and accused, having led defence evidence, also did not opt to summon him as defence witness - Application, filed belatedly on ground that officer submitted final report, is untenable as submission of final report is not in dispute, and no necessity arises for his examination to prove this fact - Apart from bald St.ment that examination of Investigating Officer would serve interest of justice, no reasons shown to establish its necessity for just decision of case - Application lacks merit, rejected. (Para 3, 4, 17,18)
Application rejected. (E-13)

List of Cases cited:

1. Manu Devi Vs St. of Raj. & Anr: (2019) 6 SCC 203

2. Harendra Rai Vs St. of Bihar & ors. 2023 SCC OnLine SC 1023

3. St. (NCT of Delhi) Vs Shiv Kumar Yadav : (2016) 2 SCC 402

4. Ratanlal Vs Prahlad Jat, (2017) 9 SCC 340, (Para 17)

5. Manju Devi Vs St. of Raj.: (2019) 6 SCC 203

6. Swapan Kumar Chatterjee Vs CBI, (2019) 14 SCC 328, (Paras 10, 11)

7. V. N. Patil Vs K. Niranjan Kumar, (2021) 3 SCC 661, (Paras 14, 17)

8. Harendra Rai Vs St. of Bihar 2023 SCC OnLine SC 1023

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

1. Heard Sri Aman Kumar Shrivastav, learned counsel appearing for the applicants and Sri Akhilesh Kumar Vyas, learned Additional Government Advocate and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have challenged the validity of the order dated 31.01.2024 passed by the Additional District and Sessions Judge, outlying Court, Mohammadi, Lakhimpur Kheri whereby an application filed under Section 311 Cr.P.C. for summoning the investigating officer as a witness has been rejected.

3. It has been stated in the impugned order dated 31.01.2024 that the incident in question occurred on 06.04.2006. After investigation a final report was submitted on 20.06.2006. Thereafter, the complainant filed a protest petition on 27.07.2007, which was allowed and the applicants were summoned to face trial.

4. During trial, prosecution examined as many as 5 witnesses but the investigating officer Jai Prakash Yadav was not examined. The application under Section 311 Cr.P.C. was filed when the trial had reached at the stage of arguments and it was stated therein that it would be in the interest of justice that the investigating officer to be examined as a witness.

5. Trial court has stated in the impugned order that prosecution evidence was closed on 03.03.2023. Statement of the accused under Section 313 Cr.P.C. was recorded on 05.04.2023 and thereafter the matter was fixed for defence evidence.

6. After examination of the defence witnesses, the matter was fixed for argument and at this stage, the accused has filed an application under Section 311 Cr.P.C. for summoning the investigating officer, who has submitted the final report as a witness.

7. Trial court held that it is for the prosecution to decide as to which its witnesses the prosecution desires to produce. The application was filed when the trial had reached the stage of arguments in order to cause delay in disposal of the trial.

8. The learned counsel for the applicant has submitted that an application under Section 311 Cr.P.C. can be filed at any stage of trial, even before delivery of final judgement. In support of this submission he has relied upon a judgement of the Hon'ble Supreme court in the case of **Manu Devi vs State of Rajasthan & Anr:** (2019) 6 SCC 203 wherein the Hon'ble Supreme Court has held that the discretionary powers like those under Section 311 CrPC are essentially intended

to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone.

9. The learned counsel for the applicants has also relied on the judgment of the Supreme Court in the case of **Harendra Rai vs State of Bihar & Ors** 2023 SCC OnLine SC 1023 the Hon'ble Supreme Court has held that *Section 311 CrPC confers wide powers on any court at any stage of any inquiry, trial or other proceeding under this Code to summon material witness or examine person present. Such person may not be a person summoned as a witness. Power to recall and re-examine is also vested. The concept is that it should be essential for the just decision of the case.*

10. The investigating officer is an officer of the prosecution and the prosecution chose not to produce him as its witness. In case the accused persons felt that evidence of the investigating officer was essential, the accused could have summoned him as a defence witness but the accused did not choose to summon him as a defence witness. The application for summoning the investigating officer has been filed when the trial reached at the stage of final arguments.

11. In **State (NCT of Delhi) vs. Shiv Kumar Yadav :** (2016) 2 SCC 402, it has been held that: -

"Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including un-called for hardship to the witnesses and un-called for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined."

12. In **Ratanlal vs. Prahlad Jat,** (2017) 9 SCC 340, it was held that: -

"17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the

reasons for exercising this power should be spelt out in the order."

13. In **Manju Devi vs. State of Rajasthan**: (2019) 6 SCC 203, the Hon'ble Court emphasized that a discretionary power like Section 311 CrPC is to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, whilst also ensuring no prejudice is caused to anyone.

14. In **Swapan Kumar Chatterjee vs CBI,** (2019) 14 SCC 328, it was held that: -

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

15. In **V. N. Patil v. K. Niranjan Kumar,** (2021) 3 SCC 661, it was held that: -

"14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

xxxx

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

16. In **Harendra Rai vs. State of Bihar** 2023 SCC OnLine SC 1023, a three Judge Bench of the Hon'ble Court was held that Section 311, CrPC should be invoked when it is essential for the just decision of the case.

17. In the present case, the application under Section 311 Cr.P.C. was moved by

the accused persons when trial reached the stage of hearing final submissions, for summoning the investigating officer, who is an officer of the prosecution. The prosecution could have produced the investigating officer as its witness, but it chose not to examine him. The accused also examined his witnesses but he chose not to examine the investigating officer as a defence witness. When the trial reached the stage of submissions, the application has been moved for summoning the investigating officer as a witness on the ground that he had submitted a final report. Submission of the final report is not a disputed question of fact and there does not appear to be any necessity for examination of the investigating officer to prove this fact.

18. Besides making a bald statement that it would be in the interest of justice to examine the investigating officer, nothing has been stated as to why his examination is essential for a just decision of the case.

19. From the aforesaid discussion calling of the investigating officer to be examined a witness at this stage does not appear to be essential for a just decision of a case. The application has been moved apparently to cause delay in conclusion of the trial and it has rightly been rejected by the trial court.

20. As there is no illegality in the order of the trial court, the application under Section 482 Cr.P.C. lacks merit and the same is hereby rejected.

(2024) 3 ILRA 907
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2038 of 2024

Romit Saini ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Bhupendra Nath Tripathi

Counsel for the Respondents:
G.A., Prateek Tewari

Criminal Law - Indian Penal Code, 1860 - Sections 107 & 306 - Code of Criminal Code, 1973 - Section 227 - Against rejection of discharge application - - Opposite party no.2 lodged FIR alleging that her husband, Section Officer, was found hanging from ceiling inside a closed room - It was St.d that deceased had informed her of harassment by applicant and left suicide note attributing responsibility for his death to applicant - Upon investigation, charge sheet filed against applicant, where after trial court took cognizance, summoned applicant to face trial - Applicant contends that suicide note does not disclose any act of instigation by applicant and apart from note, no evidence exists to establish abetment of suicide - During pendency, applicant filed discharge application u/s 227 Cr.P.C., rejected - Applicant filed present application challenging said order - Held, suicide note records that deceased paid ₹35 lakhs to applicant, who was unable to repay amount - It does not allege deliberate non-payment or any specific act of applicant, apart from bare assertion of responsibility for suicide - There is no allegation of any direct or indirect act of incitement to commit suicide - A mere assertion that applicant responsible due to inability to repay amount does not constitute abetment of suicide - Impugned order, quashed, applicant stands discharged. (Para 3, 5, 6, 7, 16, 17)

Application allowed. (E-13)

List of Cases cited:

1. M. Mohan Vs St., (2011) 3 SCC 626, (Paras 44, 45), **(Followed)**

2. Prabhat Kumar Mishra Vs St. of U.P., 2024 SCC OnLine SC 232

3. Mahendra Singh Vs St. of M.P., 1995 Supp (3) SCC 731, (Para 2)

4. Ramesh Kumar Vs St. of Chhattisgarh, (2001) 9 SCC 618, (Paras 19, 20)

5. Geo Varghese Vs St. of Raj., (2021) 19 SCC 144, (Para 22)

6. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335, (Para 102)

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

1. Heard Sri Bhupendra Nath Tripathi, the learned counsel for the applicant, Sri Anurag Verma, the learned A.G.A-I for the State and Sri. Prateek Tewari, the learned counsel for the opposite party no.2.

2. In application filed under Section 482 Cr.P.C- 8898 of 2024, the applicant has challenged the validity of an order dated 07.06.2023 passed by the Special Additional Chief Judicial Magistrate, C.B.I. (A.P.), Lucknow in Criminal Case No. 64083 of 2023 (State Vs. Romit Soni) and the charge sheet dated 03.06.2022 arising out of Case rime No. 085 of 2021 under Section 306 I.P.C, P.S Mahangar, District Lucknow and in application filed under Section 482 Cr.P.C- 2038 of 2024, the applicant has challenged the validity of an order dated 15.02.2024 passed by the learned Additional District and Session Judge, Court No.15, Lucknow in Session Trial No. 170 of 2024 (State of U.P. Vs. Romit Soni), arising out of Case rime No. 85 of 2021 under Section 306 I.P.C, P.S Mahangar, District Lucknow North (Commissionerate Lucknow), whereby an application filed by the applicant under Section 227 Cr.P.C for his discharge has been rejected.

3. Briefly stated the facts of the case are that the opposite party no.2 had lodged an F.I.R on 20.03.2021. stating that his husband was working as a Section Officer in the Civil Secretariat, U.P. He was found dead hanging from the ceiling inside a closed room of the house. The complainant stated in the F.I.R that her husband used to tell her that the applicant was harassing her. He had left a suicide note wherein he had held that the applicant is responsible for his suicide.

4. In the suicide note, the deceased wrote that he had paid Rs. 35 lakhs to the applicant, which he is unable to party. He wrote that the applicant was responsible for his suicide.

5. After investigation, the investigating office has submitted a charge sheet on 03.09.2022 against the applicant under Section 306 I.P.C and the trial court took cognizance of the offence by means of an order dated 07.06.2023 and summoned the applicant to face the trial.

6. The submission of the learned counsel of the applicant is that from the contents of the suicide note, no case of instigation for suicide is made out against the applicant. Besides the suicide note there is no other evidence to establish that the applicant had instigated the deceased to commit suicide.

7. During pendency of the application, the applicant had filed an

application for discharge under Section 227 Cr.P.C which was rejected by means of an order dated 15.02.2024 passed by the trial court and the applicant has filed an application under Section 482 Cr.P.C No. 2038 of 2024 challenging the validity of an order dated 15.02.2024 passed by the learned Additional District and Session Judge, Court No.15, Lucknow.

8. Per contra, the learned A.G.A-I as well as the learned counsel for the opposite party no.2 have submitted that the deceased has clearly written in the suicide note that he had committed becasue of the applicant and the applicant is responsible for the same. Therefore, a case for trial of the applicant is made out and the prosecution should not be scuttle at the threshold without trial of the applicant.

9. I have considered the submission of the learned counsel for the parties.

10. Abetment of suicide is defined in Section 306 I.P.C. as follows: -

"306.Abetment of suicide.—*If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

"Abetment of a thing" has been defined under Section 107 of the Code, which reads as under:

107. Abetment of a thing.—*A person abets the doing of a thing, who—*

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

11. In **M. Mohan v. State**, (2011) 3 SCC 626, the Hon'ble Supreme Court held that: -

"44. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

45. The intention of the legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the

deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide."

12. The aforesaid judgment in **M. Mohan** (Supra) has recently been followed in **Prabhat Kumar Mishra v. State of U.P.,** 2024 SCC OnLine SC 232.

13. In Mahendra Singh v. State of M.P., 1995 Supp (3) SCC 731, the three appellants were convicted under Section 306 IPC based on the following dying declaration of the deceased:

"My mother-in-law and husband and sister-in-law harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

Allowing the appeal and setting aside conviction, the Hon'ble Supreme Court held that: -

"2. ... The dying declaration, per se, could not involve the appellants in offence punishable under Section 306 IPC, because it provides for abetment of suicide. Whoever abets the commission of suicide, and if any person commits suicide due to that reason, he shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Abetment has been defined in Section 107 IPC to mean that a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. Neither of the ingredients of abetment are attracted on the statement of the deceased. The conviction of the appellants under Section 306 IPC merely on the allegation of harassment to the deceased is not sustainable."

14. In **Ramesh Kumar v. State of Chhattisgarh,** (2001) 9 SCC 618, the dying declaration was as under: -

"Q. What is your name? What is the name of husband? Marriage when done?

Ans. Seema Bai. Name of husband — Ramesh Dubey. Marriage performed in June 1985.

Q. What happened with you?

Ans. Today in the morning I poured kerosene on me and set fire.

Q. Why you set fire?

Ans. Today in the morning quarrel had occurred between me and my husband.

Q. Previously also quarrel had occurred at any time?

Ans. No. From being aggrieved by the quarrel of today, I set fire.

Q. What happened in today's quarrel?

Ans. In the morning he told me that you are free. You go wherever you want to go.

Q. Whether you want to say anything more?

Ans. No."

The Hon'ble Supreme Court held that: -

"19. The picture which emerges from a cumulative reading and assessment of the material available is this: presumably because of disinclination on the part of the accused to drop the

deceased at her sister's residence the deceased felt disappointed, frustrated and depressed. She was overtaken by a feeling of shortcomings which she attributed to herself. She was overcome by a forceful feeling generating within her that in the assessment of her husband she did not deserve to be his life partner. The accused Ramesh may or must have told the deceased that she was free to go anywhere she liked. Maybe that was in a fit of anger as contrary to his wish and immediate convenience the deceased was emphatic on being dropped at her sister's residence to see her. Presumably the accused may have said some such thing — you are free to do whatever you wish and go wherever you like. The deceased being a pious Hindu wife felt that having being given in marriage by her parents to her husband, she had no other place to go excepting the house of her husband and if the husband had "freed" her she thought impulsively that the only thing which she could do was to kill herself, die peacefully and thus free herself according to her understanding of the husband's wish. Can this be called an abetment of suicide? Unfortunately, the trial court misspelt out the meaning of the expression attributed by the deceased to her husband as suggesting that the accused had made her free to commit suicide. Making the deceased free — to go wherever she liked and to do whatever she wished, does not and cannot mean even by stretching that the accused had made the deceased free "to commit suicide" as held by the trial court and upheld by the High Court.

20. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

15. In **Geo Varghese v. State of Rajasthan,** (2021) 19 SCC 144, the suicide note consisted of three pages with following written on each separate paper: -

01st page — 'my all things goes to my dear bro kairn even my love bye buddy & sorry'

02nd page — 'needed justice'

03rd page — 'thanks geo (pti) of my school'

The Hon'ble Supreme Court referred to various precedents on the point and held that: -

"22. What is required to constitute an alleged abetment of suicide under Section 306IPC is there must be an allegation of either direct or indirect act of incitement to the commission of offence of suicide and mere allegations of harassment of the deceased by another person would not be sufficient in itself, unless, there are allegations of such actions on the part of the accused which compelled the commission of suicide. Further, if the person committing suicide is hypersensitive and the allegations attributed to the accused are otherwise not ordinarily expected to induce a similarly situated person to take the extreme step of

committing suicide, it would be unsafe to hold the accused guilty of abetment of suicide. Thus, what is required is an examination of every case on its own facts and circumstances and keeping in consideration the surrounding circumstances as well, which may have bearing on the alleged action of the accused and the psyche of the deceased."

16. When this court examines the facts of the present case in the light of the law laid down in the aforesaid cases, it appears that the deceased had written in the suicide note that he had paid rupees thirty five lacs to the applicant and the applicant was unable to repay the amount. He did not allege that the applicant was not repaying the amount deliberately. Besides stating that the applicant was unable to repay the amount and that the applicant was responsible for his suicide note, the deceased did not alleged commission of any act by the applicant.

17. Therefore, there is no allegation of either direct or indirect act of incitement to the commission of offence of suicide. By merely stating that the applicant was responsible for suicide of the deceased as he was unable to repay the money taken from the deceased, no case for abetment of suicide is made out against the applicant.

18. In the case of ***State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335,*** the Hon'ble Supreme Court considered the law laid down in various precedents regarding scope of interference under Section 482 Cr.P.C. and summarized the law in the following words:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

19. The present case falls within the categories of (1) and (3) as from the allegations levelled in the F.I.R. and the material collected during investigation, no case of abetment of suicide is made out against the applicant.

20. In these circumstances, the continuance of criminal proceedings against the applicant would not be in the interest of justice. Accordingly, the application is ***allowed*** and the order dated 07.06.2023 passed by the Special Additional Chief Judicial Magistrate, C.B.I. (A.P.), Lucknow in Criminal Case No. 64083 of 2023 (State Vs. Romit Soni) and the charge sheet dated 03.06.2022 arising out of Case Crime No. 085 of 2021 under Section 306 I.P.C, P.S Mahangar, District Lucknow and the order dated 15.02.2024 passed by the learned Additional District and Session Judge, Court No.15, Lucknow in Session Trial No. 170 of 2024 (State of U.P. Vs. Romit Soni), arising out of Case rime No. 85 of 2021 under Section 306 I.P.C, P.S Mahangar, District Lucknow North (Commissionerate Lucknow) are hereby quashed and the applicant stands discharged.

(2024) 3 ILRA 913
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2042 of 2024

Mohammad Waseem ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Amar Singh

Counsel for the Respondents:
G.A.

Criminal Law - Prevention of Damage to Public Property Act, 1984 - Section 2/3 - As regards submission of counsel for applicant that co-accused granted interim relief by order dated 09.01.2024 in Munshi Lal & Anr. (infra), it is sufficient to observe that grant of interim relief by coordinate Bench, based on judgment not holding as good law, cannot persuade Court from examining merits of present application - On consideration of facts and law laid down, it emerges that Lekhpal, in FIR, alleged that co-accused Aqueel Ahmad @ Beeka had taken into possession of government land earmarked as chakroad and nali, and that applicant, proprietor of Sherehind Infracon Pvt. Ltd., was carving out residential plots thereon, including on government land - In these circumstances, case for prosecution of

application u/s 2/3 of Prevention of Damage to Public Property Act, 1984 is made out - Application lacks merit, dismissed. (Para 12, 13)

Application Dismissed. (E-13)

List of Cases cited:

1. Munshi Lal & Anr Vs St. of U.P. & Anr, Application u/s 482 No.9964 of 2020 decided on 06.08.2020

2. Devnath Yadav Vs St. of U.P. & ors., Criminal Misc Writ Petition No.1131 of 2021 decided on 03.03.2021

3. Ramnarayan Pandey Vs St. of U.P.: 2023 (125) ACC 224

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

1. Heard Sri Amar Singh, learned counsel appearing for the applicant and Sri Anurag Verma, learned Additional Government Advocate and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of the proceedings of Criminal Case No.22848 of 2023: State vs Aqeel Ahmad & Ors arising out of Charge-sheet No.176 of 2022 dated 22.05.2022 in pursuance of Case Crime No.46 of 2022, under Section 2/3 Prevention of Damages to Public Property Act, Police Station Shivgarh, Raebareli.

3. Opposite party No.2- Lekhpal has lodged FIR No.46 of 2022 on 02.02.2022 against three named persons, Aqeel Ahmad Khan @ Beeka, Arshad and Sherehind Infracon Pvt Ltd., of which the applicant is a proprietor stating that upon demarcation of certain land, including the land of chakroad and nali, it was found that the accused Aqeel Ahmad Khan @ Beeka had entered into possession of the land. The applicant's firm Sherehind Infracon Pvt Ltd., is carving out plots of the land of which Bika has taken possession.

4. During investigation, statement of the Lekhpal has been recorded, who has supported the FIR allegations.

5. The learned counsel for the applicant states that the allegations leveled are false and the applicant has not taken into possession the land of chakrod and nali. This is a factual contention, which cannot be gone into by this Court while deciding the application under Section 482 Cr.P.C.

6. The learned counsel for the applicant has next submitted that the no proceedings under Section 67 of the U.P. Revenue Code have been initiated against the applicant.

7. The learned counsel for the applicant has placed reliance a decision of coordinate bench of this Court in the case of **Munshi Lal & Anr vs State of U.P. & Anr :** Application u/s 482 No.9964 of 2020 decided on 06.08.2020 wherein it was held that Prevention of Damage to Public Property Act, 1984 is confined to restriction and damage of public property during the course of riots or public demonstrations only. Relying the aforesaid decision another coordinate Bench of this Court vide order dated 09.01.2024 stayed proceedings of criminal case in respect of the co-accused Aqueel Ahmad @ Beeka vs State of U.P.: Application u/s 482 No.121 of 2024.

8. Per contra, the learned A.G.A.-I has submitted that the decision in Munshi

Lal (supra) is no longer hold good law, as in a subsequent decision in the case of **Devnath Yadav vs State of U.P. & Ors :** Criminal Misc Writ Petition No.1131 of 2021 decided on 03.03.2021, a Division Bench of this Court held that

"Upon a careful perusal of the Prevention of Damage to Public Property Act, 1984, we find that Section 2(a) of the Act provides that the word "mischief" occurring in the Act shall have the same meaning as in Section 425 of the Indian Penal Code, which is quoted below -

"Section 425 :Mischief : Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Admittedly, the land in question is public utility land having been reserved during consolidation operations for use as pasture land for grazing cattle. Any encroachment thereon, as is admitted by the petitioner, means that the same cannot be used as pasture land. As such the situation of the property has been changed by the petitioner by construction of a boundary wall. Such construction prevents the use of the land encroached upon as pasture land and has diminished its value or utility. The act of the petitioner is therefore, covered by Section 425 of the Indian Penal Code.Therefore, there is no doubt that the encroachment by the petitioner over public utility land, reserved as pasture land, amounts to a mischief within the meaning of the term under Section 425 IPC.

Section 3(1) of the Prevention of Damage to Public Property Act, 1984 provides that who ever commits mischief in respect of any public property shall be punished with imprisonment for a term upto five years with fine.

Land reserved for its use as pasture land is land reserved for a public purpose. It is, therefore, public utility land. It is also land covered by Section 67 of the Revenue Code, 2006 wherein no right can accrue in favour of any person. It is also not disputed that the land in question has been reserved for a public purposes, namely, for its use as pasture land.

It is no doubt true that Section 67 of the Revenue Code, 2006 provides a complete procedure for eviction of unauthorized occupants of Gaon Sabha land, which may or may not be public utility land. The said provision is only for eviction and for recovery of damages on account of such unauthorized occupation and user of land belonging to the State under the management of the Gaon Sabha. It is a purely civil remedy with no criminality, attached. The same encroachment, of public utility land, under the Prevention of Damage to Public Property Act, is a criminal offence, visited by penal consequences, namely, imprisonment and fine. Besides, no order for eviction of an unauthorized occupant can be passed under the Prevention of Damage to Public Property Act. Therefore, in our considered opinion, the two provisions, namely, 67 of the Revenue Code and Sections 2,3 and 5 of the Prevention of Damage to Public Property Act operate in different fields. In case the legislature in its wisdom, considered it fit to declare any action to be also a criminal act, the same, does not require to be read down or its scope to be narrowed down. Since, the two provisions operate in different spheres, it cannot be accepted that there is any overlap. There is no bar for the institution and prosecution of Civil and Criminal

proceedings regarding an act, if both have the mandate of law. In any case, an act can given rise to both criminal and civil liability and therefore, both civil and criminal proceedings can be resorted to simultaneously."

9. Therefore, aforesaid submission of the learned counsel for the applicant on the decision of *Munshi Lal (supra),* has no force and the same is rejected.

10. Regarding *Munshi Lal (supra)* relied upon by the learned counsel for the applicant, the Division Bench in Devnath Yadav (supra) dealt with the same in following words:-

"Coming to the judgement in the case of Munshi Lal (supra), we find that the learned Single Judge, proceeded on the premise that Prevention of Damage to Public Property Act, 1984 was enacted to curb vandalism and damage to pubic property. The first sentence of its Statement of Objects and Reasons reads as follows -

"With a view to curb acts of vandalism and damage to public property, including destruction and damage caused during riots and public commotion, a need was felt to strengthen the law to enable the authorities to deal effectively with cases of damage to public property."

The use of the word "including" has been given a restrictive interpretation in the judgment cited. We are of the opinion that the said word is illustrative rather that bringing also within its ambit, "destruction and damage caused during riots and public commotion" as stated in the Statement of Objects and Reasons. The use of word "including" therefore, cannot be read to mean that the Prevention of Damage to Public Property Act can be invoked only where damage to public property is occasioned by vandalism, riots or public commotion.

In our considered opinion, the learned Single Judge has taken a narrow view of Section 3(1) of the Act and has primarily relied upon Sections 3(2) of the Act as also upon Section 4 of the Act for arriving at the final conclusion, in the judgement cited."

11. Learned A.G.A.-I has placed reliance on a decision rendered by a coordinate Bench of this Court in Ramnarayan Pandey vs State of U.P.: 2023 (125) ACC 224 wherein it was held that "The scope of proceedings under the PDPP Act is, therefore entirely different from that of proceedings of eviction, which might be initiated in respect of wrongful occupation of Gram Panchayat properties under Section 67 of the Revenue Code. The saving clause under Section 6 of the PDPP Act makes it clear that the provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force, and that the proceedings under any other enactment may also be instituted or taken without there being any bar in respect of the same."

12. So far as the submission of the learned counsel for the applicant that a co-accused has been granted interim relief by means of an order dated 09.01.2024 passed in Application u/s 482 Cr.P.C. No.9964 of 2020 is concerned, suffice it to say that merely because a coordinate Bench has granted interim order to an accused person relying on a judgment which does not hold good law, this Court cannot persuade from examination of the merit of the application and decide the application and when I examine the facts of the case in law and the law laid down in the aforesaid case, it appears that the Lekhpal has alleged in the

FIR that co-accused Aqueel Ahmad @ Beeka has taken into possession of the government land meant to be used as chakroad and nali and the applicant is carving out residential plots on the land including the Government land.

13. In these circumstances, a case for prosecution of the application under Sections 2/3 of the Prevention of Damage to Public Property Act, 1984 is made out. The application lacks merit and is hereby ***dismissed***.

(2024) 3 ILRA 917
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2062 of 2024

Sitaram & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Jalaj Kumar Gupta

Counsel for the Opposite Parties:
G.A.

आपराधिक विधि : भारतीय दंड संहिता, 1860 – धारा 323, 506, 325 - दंड प्रक्रिया संहिता, 1973 – धारा 156(3) – आपराधिक कार्यवाही के विरुद्ध – वैधता - विपक्षी सं. 2 ने दिनांक 22.10.2018 को धारा 156(3) दं0प्र0सं0 के अंतर्गत प्रार्थना पत्र देकर कहा कि दिनांक 24.09.2018 को जब वह अपने मुकदमे की पैरवी करके वापस लौट रहा था, रात 9:30 बजे रास्ते में सभी अभियुक्तगण ने उसको मारा-पीटा, गालियाँ दी और जान से मारने की धमकी दी तथा प्रार्थी सं. 3 ने उसकी जेब से रु०1220/- जबरन निकाल लिए - प्रार्थना पत्र को परिवाद रूप में पंजीकृत किया गया - विपक्षी सं. 2 ने धारा 200 दं.प्र.सं. के अंतर्गत दिए गए बयान में आरोपों का समर्थन करते हुए बताया कि प्रार्थी सं. 3 के साथ मारपीट से उसका बायाँ हाथ टूट गया था - चक्षुदर्शी साक्षी ने धारा 202 दं.प्र.सं. के अंतर्गत अपने बयान दर्ज कराकर घटना की पुष्टि की - प्रार्थी के अधिवक्ता ने तर्क दिया कि विपक्षी सं. 2 द्वारा दायर वर्तमान परिवाद प्रतिशोधवश प्रस्तुत है, क्योंकि पूर्व में प्रार्थी सं. 2 द्वारा दायर परिवाद में ए.सी.जे.एम. ने दिनांक 27.07.2017 को विपक्षी सं. 2 व उसके पिता को धारा 323, 498क भा.दं.सं. एवं 3/4 दहेज प्रतिषेध अधिनियम के आरोपों पर विचारण हेतु आहूत किया था – अभिनिर्धारित, पत्रावली के अवलोकन से स्पष्ट है कि विचारण न्यायालय ने धारा 202 दं०प्र०सं० के अन्तर्गत गवाहों के बयान अंकित करके प्रार्थन पत्र को विचारण हेतु आहूत करने का निर्णय लिया है - गवाहों के बयान अंकित करना धारा 202 दं०प्र०सं० के अन्तर्गत ही की गई जाँच की कार्यवाही है और आलोच्य आदेश में इस आधार पर कोई त्रुटि नहीं है कि विचारण न्यायालय ने धारा 202 दं०प्र०सं० के अन्तर्गत जाँच नहीं की है - धारा 156(3) दं.प्र.सं. के अंतर्गत परिवाद; मारपीट, गाली-गलौज, धमकी व धन की जबरन वसूली का आरोप हैं, धारा 200 व 202 दं.प्र.सं. के बयानों से आरोप का समर्थन होता हैं - प्रतिशोध का तर्क अस्वीकार - विचारण योग्य मामला बनता है, कार्यवाही को निरस्त करने का आधार नहीं। (पैरा 3 से 5, 12, 16)

आवेदन निरस्त **I** (E-13)

प्रोद्धृत मामलों की सूची:

1. कृष्ण लाल चावला तथा अन्य बनाम उत्तर प्रदेश राज्य तथा एक अन्य 2021 5 एस.सी.सी. 435

2. विजय धानुका आदि बनाम नजीमा मोहताज (2014) 14 एस.सी.सी. 638

3. केन्द्रीय जांच ब्यरो बनाम आर्यन सिंह आदि, 2023 एसएससी ऑनलाइन एससी 379

4. राजीव कौरव बनाम बाई साहब तथा अन्य, (2020) 3 एसएससी 317

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

1. प्रार्थी के विद्वान अधिवक्ता श्री जलज कुमार गुप्ता तथा राज्य सरकार के विद्वान अधिवक्ता श्री पुनीत कुमार यादव को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा

प्रार्थी ने विद्वान अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट प्रथम, कक्ष सं. 7, गोण्डा द्वारा परिवाद सं. 311/2021 में पारित आदेश दिनांक 01.02.2023, जिसके द्वारा प्रार्थी सं. 1 व 4 को धारा 323 भा०दं०सं०, प्रार्थी सं. 3 को धारा 323, 325 भा०दं०सं० एवं प्रार्थी सं. 2 को धारा 506 भा०दं०सं० के अपराध के विचारण के लिए आहूत किया, की वैधता को चुनौती दी है।

3. विपक्षी सं. 2 ने दिनांक 22.10.2018 को धारा 156 (3) दं०प्र०सं० के अन्तर्गत एक प्रार्थना पत्र देकर कहा कि दिनांक 24.09.2018 को जब वह अपने मुकदमे की पैरवी करके वापस लौट रहा था, रात 9:30 बजे रास्ते में सभी अभियुक्तगण ने उसको मारा-पीटा, गालियां दी और जान से मारने की धमकी दी तथा प्रार्थी सं. 3 ने उसकी जेब से रु० 1220/- जबरन निकाल लिए।

4. उक्त प्रार्थना पत्र को न्यायालय ने एक परिवाद के रूप में पंजीकृत किया है। विपक्षी सं. 2 ने धारा 200 दं०प्र०सं० के अन्तर्गत लिखाए गए अपने बयान में परिवाद के कथनों का समर्थन किया तथा यह भी कहा कि प्रार्थी सं. 3 के मारने से उसके बाएं हाथ की हड्डी टूट गई थी। अर्जुन दुबे तथा इंद्रपाल, जो घटना के चक्षुदर्शी साक्षी कहे गए हैं, उन्होंने धारा 202 दं०प्र०सं० के अन्तर्गत अपने बयान अंकित कराके घटना का समर्थन किया।

5. आलोच्य आदेश की वैधता को चुनौती देते हुए प्रार्थी के विद्वान अधिवक्ता ने तर्क दिया कि इसके पूर्व में प्रार्थी सं 2 ने विपक्षी सं. 2 के विरुद्ध एक परिवाद प्रस्तुत किया था। परिवाद की प्रति अथवा परिवाद प्रस्तुत करने की तिथि प्रार्थना पत्र में अभिकथित नहीं की गई है। उक्त परिवाद के आधार पर संस्थित वाद सं. 626 सन 2016 में विद्वान अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट कक्ष सं. 13 जौनपुर द्वारा पारित आदेश दिनांक 27.07.2017 की प्रति प्रार्थना पत्र के साथ संलग्न है, जिसके द्वारा विपक्षी सं. 2 तथा उसके पिता घुरऊ को धारा 323, 498 (A) भा०दं०सं० एवं 3/4 दहेज प्रतिषेध अधिनियम के आरोप के विचारण हेतु आहूत किया गया। प्रार्थी के विद्वान अधिवक्ता का कथन है कि वर्ष 2017 में पारित उपरोक्त आदेश के प्रतिशोधस्वरूप यह परिवाद प्रस्तुत किया गया है।

6. प्रार्थी के विद्वान अधिवक्ता ने **कृष्ण लाल चावला तथा अन्य बनाम उत्तर प्रदेश राज्य तथा एक अन्य 20215 एस.सी.सी. 435** में माननीय उच्चतम न्यायालय द्वारा पारित निर्णय का आश्रय लिया, जिसमें यह अवधारित किया गया है कि विचारण न्यायालय को उचित मामलों में अभियोजन को प्रारंभ में ही निरस्त कर देना चाहिए, जिससे कि बहुमूल्य न्यायिक समय की बरबादी रुक सके।

7. **कृष्ण लाल चावला** के उपरोक्त प्रकरण के तथ्य इस प्रकार थे कि दिनांक 05.08.2012 को शिकायतकर्ता ने एक असंज्ञेय अपराध की सूचना दी जिसमें उसने कहा कि अभियुक्तगण ने उसके घर आकर उसे और उसकी पत्नी को लोहे की सरिया से मारा और जान से मारने की धमकी दी। अभियक्त की तरफ से भी उसी घटना की एक रिपोर्ट दिनांक 05.08.2012 को ही प्रस्तुत करके धारा 323, 504, 506 भा०दं०सं के अपराधों का आरोप शिकायतकर्ता और उसकी पत्नी के विरुद्ध लगाया गया। पक्षकारों के मध्य पहले से विवाद चला आ रहा था। घटना के पांच वर्ष के बाद दिनांक 27.04.2017 को अभियुक्तगण ने मजिस्ट्रेट के समक्ष धारा 155(2) दं०प्र०सं० के अन्तर्गत प्रार्थना पत्र देकर प्रकरण की विवेचना पुलिस से कराए जाने का अनुरोध किया, जिसके अनुक्रम में प्रथम सूचना रिपोर्ट पंजीकृत हुई तथा दिनांक 17.09.2017 को पुलिस ने धारा 323, 325, 504, 506 भा०दं०सं० के अन्तर्गत आरोपों के संबंध में आरोप पत्र प्रस्तुत किया तथा मजिस्ट्रेट ने अभियुक्तगण को आहूत कर आरोप विरचित कर दिया। आरोप विरचित करने के बाद कई वर्ष बीतने के उपरांत भी कोई साक्षी प्रस्तुत नहीं किया गया था। इसके उपरांत शिकायतकर्ता ने दिनांक 05.08.2012 को घटित हुई घटना के संबंध में ही वर्ष 2018 में एक परिवाद प्रस्तुत कर दिया, जिसमें कि घटना के संबंध में पूर्व में कहे गए कथनों में काफी फेर-बदल करके घटना को गंभीर दिखाया गया तथा कई नए आरोप भी लगा दिए गए। उपरोक्त तथ्यों के आलोक में माननीय उच्चतम न्यायालय ने उक्त निर्णय देते हुए यह कहा कि न्यायालयों को इस प्रकार के व्यर्थ के प्रकरणों द्वारा वादकारियों को न्यायिक प्रक्रिया का दुरुपयोग नहीं करने देना चाहिए। कृष्ण लाल चावला का उपरोक्त निर्णय उस वाद के तथ्यों पर आधारित था जबकि प्रस्तुत प्रकरण में ऐसा नहीं है।

8. प्रस्तुत प्रकरण में विपक्षी सं. 2 के विरुद्ध शिकायत वर्ष 2017 में प्रस्तुत की गई थी। यदि विपक्षी सं. 2 को बदले की भावना से कोई झूठी शिकायत करनी होती तो वह उस प्रकरण के पंजीकृत होने के तुरन्त बाद ऐसी कोई कार्यवाही करता। उक्त प्रकरण के लगभग 6 वर्ष के पश्चात एक अलग घटना दर्शाते हुए अंकित किए गए परिवाद को वर्ष 2016 की घटना से व्यथित होकर बदले में की गई कार्यवाही कहते हुए बिना विचारण के अपास्त नहीं किया जा सकता है।

9. प्रार्थी के विद्वान अधिवक्ता ने यह भी तर्क दिया कि प्रार्थीगण विचारण न्यायालय की परिसीमा से बाहर निवास करते हैं तथा ऐसे में विचारण न्यायालय को प्रार्थीगण को आहूत करने से पहले धारा 202 (1) दं०प्र०सं० के अन्तर्गत जाँच की कार्यवाही करनी चाहिए थी।

10. धारा 202 दण्ड प्रक्रिया संहिता के प्राविधान निम्न प्रकार हैं: -

(1) यदि कोई मजिस्ट्रेट ऐसे अपराध का परिवाद प्राप्त करने पर, जिसका संज्ञान करने के लिए वह प्राधिकृत है या जो धारा 192 के अधीन उसके हवाले किया गया है, ठीक समझता है तो और, ऐसे मामले में जहाँ अभियुक्त ऐसे किसी स्थान में निवास कर रहा है जो उस क्षेत्र से परे है जिसमें वह अपनी अधिकारिता का प्रयोग करता है। अभियुक्त के विरुद्ध आदेशिका का जारी किया जाना मुल्तवी कर सकता है और यह विनिश्चित करने के प्रयोजन से कि कार्यवाही करने के लिए पर्याप्त आधार है अथवा नहीं, या तो स्वयं ही मामले की जांच कर सकता है या किसी पुलिस अधिकारी द्वारा या अन्य ऐसे व्यक्ति द्वारा, जिसको वह ठीक समझे अन्वेषण किए जाने के लिए निर्देश दे सकता है:

परन्तु अन्वेषण के लिए ऐसा कोई निर्देश वहां नहीं दिया जाएगा-

(क) जहां मजिस्ट्रेट को यह प्रतीत होता है कि वह अपराध जिसका परिवाद किया गया है अनन्यतः सेशन न्यायालय द्वारा विचारणीय है; अन्यथा

(ख) जहां परिवाद किसी न्यायालय द्वारा नहीं किया गया है जब तक कि परिवादी की या उपस्थित साक्षियों की (यदि कोई हो) धारा 200 के अधीन शपथ पर परीक्षा नहीं कर ली जाती है।

(2) उपधारा (1) के अधीन किसी जांच में यदि मजिस्ट्रेट ठीक समझता है तो साक्षियों का शपथ पर साक्ष्य ले सकता है:

परन्तु यदि मजिस्ट्रेट को यह प्रतीत होता है कि वह अपराध जिसका परिवाद किया गया है अनन्यतः सेशन न्यायालय द्वारा विचारणीय है तो यह परिवादी से अपने सब साक्षियों को पेश करने की अपेक्षा करेगा और उनकी शपथ पर परीक्षा करेगा।

(3) यदि उपधारा (1) के अधीन अन्वेषण किसी ऐसे व्यक्ति द्वारा किया जाता है जो पुलिस अधिकारी नहीं है तो उस अन्वेषण के लिए उसे वारण्ट के बिना गिरफ्तार करने की शक्ति के सिवाय पुलिस थाने के भारसाधक अधिकारी को इस संहिता द्वारा प्रदत्त सभी शक्तियां होंगी।

11. **विजय धानुका आदि बनाम नजीमा मोहताज (2014) 14 एस.सी.सी. 638** आदि में माननीय उच्चतम न्यायालय ने यह सिद्धांत प्रतिपादित किया कि उपरोक्त प्रावधानों से यह स्पष्ट है कि विचारण के अतिरिक्त मजिस्ट्रेट अथवा न्यायालय द्वारा की गई कोई भी जाँच धारा 2 (छ) के अन्तर्गत जांच मानी जाएगी। धारा 202 दं०प्र०सं० जाँच का कोई विशिष्ट तरीका प्राविधानित नहीं करती है। धारा 202 दं०प्र०सं० की जाँच के अन्तर्गत गवाहों का परीक्षण सम्मिलित है, जबकि धारा 200 दं०प्र०सं० में मात्र परिवादी का साक्ष्य

अंकित किया जाना अनिवार्य है तथा धारा 200 दं०प्र०सं० के अन्तर्गत यदि कोई साक्षी उपस्थिति है तो उसका बयान भी अंकित किया जा सकता है। मजिस्ट्रेट द्वारा यह भी सुनिश्चित करने के लिए कि अभियुक्त के विरुद्ध कार्यवाही आगे चलाने के लिए पर्याप्त आधार है, की गई उपरोक्त कार्यवाही धारा 202 दं०प्र०सं० के अन्तर्गत की गई जाँच ही मानी जाएगी।

12. पत्रावली के अवलोकन से स्पष्ट है कि विचारण न्यायालय ने धारा 202 दं०प्र०सं० के अन्तर्गत दो गवाहों के बयान अंकित करके प्रार्थीगण को विचारण हेतु आहूत करने का निर्णय लिया है। गवाहों के बयान अंकित करना धारा 202 दं०प्र०सं० के अन्तर्गत ही की गई जाँच की कार्यवाही है और आलोच्य आदेश में इस आधार पर कोई त्रुटि नहीं है कि विचारण न्यायालय ने धारा 202 दं०प्र०सं० के अन्तर्गत जाँच नहीं की है।

13. प्रार्थी के विद्वान अधिवक्ता ने अगला तर्क दिया कि लगाए गए आरोप झूठे हैं और विपक्षी सं. 2 द्वारा परिवाद में तथा अपने बयान में कही गई घटना प्रथम दृष्टया सत्य नहीं प्रतीत होती है।

14. माननीय सर्वोच्च न्यायालय के निर्णय **केंद्रीय जांच ब्यूरो बनाम आर्यन सिंह आदि, 2023 एससीसी ऑनलाइन एससी 379** में अवधारित है कि धारा 482 दं०प्र०सं० के अंतर्गत शक्तियों का उपयोग करते हुए न्यायालय को लघु विचारण (मिनी ट्रायल) करने की आवश्यकता नहीं है। इसमें अभियोजन / जांच एजेंसी को आरोपों को साबित करने की आवश्यकता नहीं है। दं०प्र०सं० की धारा 482 के अंतर्गत शक्तियों का उपयोग करते समय न्यायालय के पास बहुत सीमित अधिकार क्षेत्र है और मात्र यह विचार करने की आवश्यकता है कि "क्या आरोपी के विरुद्ध आगे बढ़ने के लिए कोई पर्याप्त सामग्री उपलब्ध है, जिसके लिए आरोपी पर मुकदमा चलाने की आवश्यकता है या नहीं"।

15. **राजीव कौरव बनाम बाई साहब तथा अन्य, (2020) 3 एससीसी 317**, में माननीय उच्चतम न्यायालय ने यह कहा कि यह विधि का सुस्थापित सिद्धांत है कि धारा 482 दं०प्र०सं० के अन्तर्गत न्यायालय को अपनी अन्तर्निहित शक्तियों का प्रयोग मात्र न्यायालय की प्रक्रिया का दुरुपयोग रोकने अथवा अन्यथा न्याय के हितों की रक्षा करने के लिए ही करना चाहिए। इस स्तर पर अभियुक्त द्वारा अपने बचाव में प्रस्तुत किए गए साक्ष्य सामान्यतः नहीं देखे जा सकते। यदि अभियोजन कथानक तथा उसके समर्थन में प्रस्तुत सामग्री से अभियुक्त के विचारण के लिए प्रथम दृष्टया प्रकरण प्रतीत हो रहे है तो न्यायालय को धारा 482 दं०प्र०सं० के अन्तर्गत आपराधिक कार्यवाही को निरस्त नहीं करना चाहिए।

16. जब उपरोक्त विधि व्यवस्था के आलोक में प्रस्तुत प्रकरण के तथ्यों को देखा जाए तो यह प्रतीत होता है कि परिवाद में विपक्षी सं. 2 ने अभियुक्तगण द्वारा उसको मारने पीटने, गाली देने और धमकी देने का आरोप लगाया तथा यह भी कहा कि प्रार्थी सं. 3 ने उसकी जेब से रु० 1220/- जबरन निकाल लिए। परिवादी ने धारा 200 दं०प्र०सं. के अन्तर्गत अपना बयान अंकित कराके घटना का समर्थन किया है। दो साक्षियों ने धारा 202 दं०प्र०सं० के अन्तर्गत अपना बयान अंकित करके घटना का समर्थन किया है। परिवाद में कहे गए कथन तथा इसके समर्थन में प्रस्तुत साक्ष्य के आधार पर प्रार्थीगण के विचारण का मामला बन रहा है तथा बिना विचारण के प्रार्थीगण के विरुद्ध आपराधिक कार्यवाही को निरस्त किए जाने का कोई आधार प्रतीत नहीं होता है।

17. आलोच्य आदेश दिनांकित 01.02.2023 में कोई त्रुटि नहीं है। प्रार्थना पत्र बलहीन है, तदनुसार, **निरस्त** किया जाता है।

(2024) 3 ILRA 922
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2066 of 2024

Laxmi Narayan Soni @ Pintoo & Ors. ...Applicants

Versus

State of U.P. ...Opposite Party

Counsel for the Applicants:
Jai Narayan Pandey, Aprajita Tiwari

Counsel for the Opposite Party:
G.A.

आपराधिक विधि : भारतीय दंड संहिता, **1860** – धारा **323, 504, 506, 452** - दंड प्रक्रिया संहिता, **1973** – धारा **202(4)** – आपराधिक कार्यवाही के विरुद्ध – वैधता - प्रार्थी पक्ष का तर्क है कि परिवाद के साथ गवाहों की सूची प्रस्तुत न होने से धारा **202(4)** दं.प्र.सं. का उल्लंघन हुआ, जिससे संज्ञान एवं अभियुक्तों को आहूत करने का आदेश अवैध हो जाता है - साथ ही, धारा **204(2)** दं.प्र.सं. के अनुसार अभियोजन साक्ष्यों की सूची दिए बिना समन या वारंट जारी नहीं कर सकता - धारा **204(2)** दं.प्र.सं. का उद्देश्य अभियुक्त को गवाहों की प्रति-परीक्षा हेतु तैयारी का अवसर देना है - यह प्रावधान बाध्यकारी नहीं है तथा गवाहों की सूची समन जारी करने से पूर्व प्रस्तुत न होने पर भी बाद में प्रस्तुत की जा सकती है। केवल उल्लंघन मात्र से आपराधिक कार्यवाही निरस्त नहीं होती, जब तक अभियुक्त को कोई वास्तविक पूर्वाग्रह न हुआ हो - लक्ष्मी शंकर पाण्डेय व अन्य बनाम उत्तर प्रदेश राज्य (नीचे) में यही सिद्धांत प्रतिपादित किया गया है – धारा **204(2)** दं.प्र.सं. के अंतर्गत गवाहों की सूची न प्रस्तुत किया जाना केवल अनियमितता है, जो सुधार योग्य है और इससे आदेश की वैधता प्रभावित नहीं होती, अतः प्रार्थी का प्रथम तर्क अस्वीकार किया जाता है - प्रार्थी का अगला तर्क कि चूँकि वह मजिस्ट्रेट के क्षेत्राधिकार से बाहर निवास करते हैं, इसलिए विचारण न्यायालय को उन्हें आहूत करने से पूर्व धारा **202(1)** दं.प्र.सं. के अंतर्गत अनिवार्यतः जाँच करनी चाहिए थी - अभिनिर्धारित - पत्रावली से स्पष्ट है कि विचारण न्यायालय ने धारा **202** दं.प्र.सं. के अंतर्गत दो गवाहों के बयान दर्ज कर प्रार्थीगण को आहूत करने का आदेश दिया है - गवाहों के बयान दर्ज करना धारा **202** की जाँच की श्रेणी में आता है, अतः यह कहना कि न्यायालय ने धारा **202** के अंतर्गत जाँच नहीं की, निराधार है - केवल आरोप असत्य होने के आधार पर आपराधिक कार्यवाही निरस्त नहीं की जा सकती - प्रार्थी द्वारा विचारण न्यायालय में प्रस्तुत जमानत आवेदन पर सतेंद्र कुमार अंतिल (नीचे) के आलोक में शीघ्र निर्णय का निर्देश। (पैरा **3** से **7, 10, 13, 14)**

आवेदन निस्तारित **I** (E-13)

<u>प्रोद्धृत मामलों की सूची:</u>

1. लक्ष्मी शंकर पाण्डेय तथा अन्य बनाम उत्तर प्रदेश राज्य तथा अन्य, 2023 (123 ए.सी.सी. 579)

2. विजय धानुका आदि बनाम नजीमा मोहताज (2014) 14 एस.सी.सी. 638

3. केन्द्रीय जांच ब्यरों बनाम आर्यन सिंह आदि, 2023 एसएससी ऑनलाइन एससी 379

4. सतेंदर कुमार अंतिल बनाम सी.बी.आई., (2021) 10 एससीसी 773

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

1. प्रार्थीगण के विद्वान अधिवक्ता श्री जय नारायन पाण्डेय की तरफ से उपस्थिति विद्वान अधिवक्ता सुश्री शीतल शर्मा तथा राज्य सरकार के विद्वान अधिवक्ता श्री पुनीत कुमार यादव को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थीगण ने अपर मुख्य न्यायिक मजिस्ट्रेट, कुण्डा, प्रतापगढ़ द्वारा आपराधिक वाद सं. 4335/2022 में पारित आदेश दिनांक 12.07.2023 की वैधता को चुनौती दी है, जिसके द्वारा प्रार्थीगण को धारा 323, 504, 506, 452 भा०दं०सं० के अपराध के विचारण हेतु आहूत किया गया।

3. प्रार्थीगण की विद्वान अधिवक्ता ने तर्क दिया कि परिवाद के साथ गवाहों की सूची प्रस्तुत नहीं की गई थी, जैसा धारा 202(4) दं०प्र०सं० में प्राविधानित है और इस आधार पर संज्ञान तथा अभियुक्तगण को आहूत करने का आदेश अवैध हो जाता है।

4. धारा 204 (2) दं०प्र०सं० यह प्राविधानित करता है कि सभी अभियुक्त के विरुद्ध धारा (1) के अन्तर्गत तब तक कोई समन या वारंट जारी नहीं किया जाएगा, जब तक अभियोजन के साक्ष्यों की सूची जारी नहीं कर दी जाती।

5. धारा 204(2) दं०प्र०सं० के अन्तर्गत अभियुक्त को विचारण हेतु आहूत करने से पहले गवाहों की सूची प्रस्तुत करने का उद्देश्य यह है कि अभियुक्त उन गवाहों की प्रति परीक्षा के लिए तैयारी कर सके। धारा 204 दं०प्र०सं० यह नहीं कहता है कि यदि गवाहों की सूची समन जारी करने के पूर्व प्रस्तुत नहीं की गई तो इसे बाद में प्रस्तुत नहीं किया जा सकेगा। धारा 204(2) दं०प्र०सं० का उद्देश्य मात्र अभियुक्त को दुराशय से अभियोजन प्रस्तुत करने वाले वादकारियों द्वारा उत्पीड़न से बचाना है। धारा 204(2) का उल्लंघन आपराधिक कार्यवाही के निरस्तीकरण करने का वैध आधार प्रदान नहीं करता है। **लक्ष्मी शंकर पाण्डेय तथा अन्य बनाम उत्तर प्रदेश राज्य तथा अन्य, 2023 (123) ए.सी.सी. 579** में यह अवधारित किया गया है कि धारा 204(2) दण्ड प्रक्रिया संहिता के प्राविधान बाध्यकारी नहीं है तथा जब तक इस नियम के अन्तर्गत गवाहों की सूची प्रस्तुत न किए जाने तथा गवाहों की सूची प्रस्तुत करने में हुई देरी के कारण से उसे कोई पूर्वाग्रह कारित न हुआ हो, अभियुक्त को विचारण

हेतु आहूत करने का आदेश इस आधार पर निरस्त नहीं किया जा सकता है।

6. अतः यह स्पष्ट है कि धारा 204(2) के अन्तर्गत गवाहों की सूची न प्रस्तुत करना मात्र एक अनियमितता है, जिसको ठीक किया जा सकता है तथा यह ऐसी अवैधानिकता नहीं है जो आदेश की वैधता को विपरीत रूप से प्रभावित करे। प्रार्थी के विद्वान अधिवक्ता का प्रथम तर्क तदनुसार, निरस्त किया जाता है।

7. प्रार्थी के विद्वान अधिवक्ता ने अगला तर्क यह दिया कि प्रार्थीगण मजिस्ट्रेट के न्यायालय के क्षेत्राधिकार से परे निवास करते हैं और ऐसी परिस्थिति में मजिस्ट्रेट को धारा 202 दं०प्र०सं० के अन्तर्गत जाँच करना अनिवार्य था, ऐसे में विचारण न्यायालय को प्रार्थीगण को आहूत करने से पहले धारा 202(1) दं०प्र०सं० के अन्तर्गत जाँच की कार्यवाही करनी चाहिए थी।

8. दण्ड प्रक्रिया संहिता की धारा 2 (छ) के प्राविधान निम्न प्रकार हैं:-

'जाँच' से, अभिप्रेत है विचारण से भिन्न, ऐसी प्रत्येक जाँच जो इस संहिता के अधीन मजिस्ट्रेट या न्यायालय द्वारा की जाए।

9. **विजय धानुका आदि बनाम नजीमा मोहताज (2014) 14 एस.सी.सी. 638** आदि में माननीय उच्चतम न्यायालय ने यह सिद्धांत प्रतिपादित किया कि उपरोक्त प्रावधानों से यह स्पष्ट है कि विचारण के अतिरिक्त मजिस्ट्रेट अथवा न्यायालय द्वारा की गई कोई भी जाँच धारा 2 (छ) के अन्तर्गत जांच मानी जाएगी। धारा 202 दं०प्र०सं० जाँच का कोई विशिष्ट तरीका प्राविधानित नहीं करती है। धारा 202 दं०प्र०सं० की जाँच के अन्तर्गत गवाहों का परीक्षण सम्मिलित है, जबकि धारा 200 दं०प्र०सं० में मात्र परिवादी का साक्ष्य अंकित किया जाना अनिवार्य है तथा धारा 200 दं०प्र०सं० के अन्तर्गत यदि कोई साक्षी उपस्थित है तो उसका बयान भी अंकित किया जा सकता है। मजिस्ट्रेट द्वारा यह सुनिश्चित करने के लिए, कि अभियुक्त के विरुद्ध कार्यवाही आगे चलाने के लिए पर्याप्त आधार है, की गई उपरोक्त कार्यवाही धारा 202 दं०प्र०सं० के अन्तर्गत की गई जाँच ही मानी जाएगी।

10. पत्रावली के अवलोकन से स्पष्ट है कि विचारण न्यायालय ने धारा 202 दं०प्र०सं० के अन्तर्गत दो गवाहों के बयान अंकित करके प्रार्थीगण को विचारण हेतु आहूत करने का निर्णय लिया है। गवाहों के बयान अंकित करना धारा 202 दं०प्र०सं० के अन्तर्गत की गई जाँच की कार्यवाही ही है और आलोच्य आदेश में इस आधार पर कोई त्रुटि नहीं है कि विचारण न्यायालय ने धारा 202 दं०प्र०सं० के अन्तर्गत जाँच नहीं की है।

11. उपरोक्त आदेश की वैधता को चुनौती इस आधार पर भी दी गयी है कि प्रार्थी के विरुद्ध लगाये गये आरोप असत्य हैं।

12. माननीय सर्वोच्च न्यायालय के निर्णय **केंद्रीय जांच ब्यूरो बनाम आर्यन सिंह आदि, 2023 एससीसी ऑनलाइन एससी 379** में अवधारित है कि धारा 482 दं०प्र०सं० के अंतर्गत शक्तियों का उपयोग करते हुए न्यायालय को लघु विचारण (मिनी ट्रायल) करने की आवश्यकता नहीं है। इसमें अभियोजन / जांच एजेंसी को आरोपों को साबित करने की आवश्यकता नहीं है। दं०प्र०सं० की धारा 482 के अंतर्गत शक्तियों का उपयोग करते समय न्यायालय के पास बहुत सीमित अधिकार क्षेत्र है और मात्र यह विचार करने की आवश्यकता है कि "क्या आरोपी के विरुद्ध आगे बढ़ने के लिए कोई पर्याप्त सामग्री उपलब्ध है, जिसके लिए आरोपी पर मुकदमा चलाने की आवश्यकता है या नहीं"।

13. अतः प्रार्थी के विरुद्ध आपराधिक कार्यवाही बिना विचारण के इस स्तर पर इस आधार पर अपास्त नहीं की जा सकती है कि प्रार्थी के कथनानुसार उसके विरुद्ध लगाए गए आरोप असत्य हैं।

14. प्रार्थी के विरुद्ध आपराधिक कार्यवाही निरस्त करने का कोई आधार नहीं है और प्रार्थना पत्र बलहीन है, तदनुसार यह प्रार्थना-पत्र इस निर्देश के साथ निस्तारित किया जाता है कि यदि प्रार्थी विचारण न्यायलय के समक्ष उपस्थित होकर जमानत पर रिहाई हेतु प्रार्थना पत्र देता है तो उसे माननीय उच्चतम न्यायालय द्वारा **सतेंदर कुमार अंतिल बनाम सी.बी.आई. (2021) 10 एससीसी 773** में अवधारित विधिक सिद्धांतों के आलोक में शीघ्रतापूर्वक निर्णीत किया जायेगा।

(2024) 3 ILRA 925
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2138 of 2024

Harbhajan Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Amit Kumar Singh, Brijendra Pratap Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 504, 506, 307 & 302 - Code of Criminal Procedure, 1973 - Sections 311 & 319 - Recall of witness - Validity of - Application u/s 311, Cr.P.C. was moved by accused on ground that, upon summoning of accused Deependra Singh u/s 319 Cr.P.C., trial commenced de novo, entitling all accused to re-cross-examine PW-1 - Trial court without taking into consideration that PW-1 had already been examined by prosecution, further counsel for applicant and other co-accused Ram Nath Singh had also cross-

examined him - As Deependra Singh was summoned after PW-1's examination, no ground existed for his recall, application was accordingly rejected - Held, Section 319(4) Cr.P.C. makes clear that where person is summoned u/s 319(1), proceedings commenced afresh and witnesses re-heard only in respect of such person, and not all accused - Since applicant has been accused from inception of trial and has already cross-examined PW-1, he has no right to recall PW-1 for further cross-examination merely because prosecution re-examined him consequent to summoning of another accused u/s 319 Cr.P.C. - Thus, no illegality in impugned order, dismissed. (Para 3, 8, 10)

Application Dismissed. (E-13)

List of Cases cited:

1. St. represented by the Deputy Superintendent of Police Vs Tr. N. Seenivasagan: (2021) 14 SCC 1 : 2021 SCC OnLine SC 212, (Paras 12, 13, 15)

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

1. Heard Sri Amit Kumar Singh, the learned counsel for the applicant, Sri Anurag Verma, the learned A.G.A.-I appearing on behalf of the State and perused the records.

2. By means of the instant application the applicant has challenged the validity of an order dated 22.12.2023, passed by the learned Additional District and Sessions Judge/Special Judge, E.C. Act, Court No.4, Sultanpur in Sessions Trial No.467 of 2016, under Sections 147, 148, 149, 504, 506, 307, 302 I.P.C. Police Station Jamo, District Amethi, whereby the application filed by the applicant and another co-accused Ram Nath Singh under Section 311 Cr.P.C. for recall of PW-1 for being cross-examined by them has been rejected.

3. The application under Section 311 Cr.P.C. was filed on the ground that the accused Deependra Singh was summoned to face trial under Section 319 Cr.P.C. after PW-1 was reexamined and he was cross-examined on behalf of the newly added accused Deependra Singh. However, other accused person did not cross-examine the said witness after his recall. It was stated in the application that after a person is summoned as an accused under Section 319 Cr.P.C. the trial starts de novo and therefore all the accused persons have the right to cross-examine him. The learned trial court rejected the application without taking into consideration the fact that after PW-1 was examined by the prosecution the counsel for the applicant had cross-examined him and the record of cross examination runs into 17 pages. The said witness was cross-examined by other co-accused Ram Nath Singh also and that cross-examination runs into 7 pages. Deependra Singh was summoned to face trial under Section 319 Cr.P.C. after PW-1 had been examined. In these circumstances there is no ground for recalling the PW-1 for being cross-examined by the accused person, on whose behalf he has already been cross-examined extensively.

4. The learned trial court has also taken into consideration the fact that this court has issued a direction for expeditious disposal of the trial.

5. The learned counsel for the applicant has relied upon a decision of Hon'ble Supreme Court in the case of **State represented by the Deputy Superintendent of Police Vs. Tr. N. Seenivasagan:** (2021) 14 SCC 1 : 2021 SCC OnLine SC 212, wherein the Hon'ble Supreme Court has held as under: -

"12. In our view, having due regard to the nature and ambit of Section

311 of the CrPC, it was appropriate and proper that the applications filed by the prosecution ought to have been allowed. Section 311 provides that any court may, at any stage of any inquiry, trial or other proceedings under CrPC, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine any such person "if his evidence appears to it to be essential to the just decision of the case". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case.

13. In Manju Devi v. State of Rajasthan [(2019) 6 SCC 203] , a two-Judge Bench of this Court noted that an application under Section 311 could not be rejected on the sole ground that the case had been pending for an inordinate amount of time (ten years there). Rather, it noted that : (SCC p. 209, para 13)

"13. ... the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness".

Speaking for the Court, Dinesh Maheshwari J. expounded on the principles underlying Section 311 in the following terms :

"10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311CrPC and amplitude of the powers of the court thereunder have been explained by this Court in several decisions. In Natasha Singh v. CBI [(2013) 5 SCC 741] , though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under :

'8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined ***if his evidence appears to it, to be essential to the arrival of a just decision of the case.*** *Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.*

***

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not

capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

(emphasis in original)

6. Per contra, the learned A.G.A.-I has submitted that the PW-1 was recalled for being examined after the witness Deependra Singh was summoned to face trial under Section 319 Cr.P.C. As per the provisions contained in Section 319 (4) Cr.P.C. the proceedings can commence afresh only against the accused who has been summoned under Section 319 Cr.P.C. and not against all the accused persons. In these circumstances, only the accused who has been summoned under Section 319 Cr.P.C. has a right to cross-examine the witness and the persons who were accused since before and who had already availed opportunity of cross-examining the witness, have no right to cross-examine the witness again.

7. Section 319 (4) Cr.P.C. provides as follows: -

"319. Power to proceed against other persons appearing to be guilty of offence.—*(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

8. A bare reading of Section 319 (4) Cr.P.C. indicates that where a person is summoned under Section 319 (1) to face the trial, the proceedings shall be commenced afresh and the witnesses re-heard only in respect of such person and not in respect of all the accused persons. Therefore, the applicant having been an accused since inception of the tiral and he already having cross examined the witness PW-1, he has no right to recall PW-1 for cross examining him again after he was re-examined by the prosecution consequent to another accused being summoned under Section 319 Cr.P.C.

9. Although, it is correct that Section 311 Cr.P.C. confers wide powers on the court to summon any witness at any stage of the enquiry, trial or other proceeding but that power has to be exercised only when it is essential for just decision of the case.

10. In these circumstances, the applicant has no right to seek further cross-examination of PW-1 and such cross-examination is not at all essential for just decision of the case. There appears to be no illegality in the impugned order. The application lacks merit and the same is accordingly ***dismissed***.

(2024) 3 ILRA 929
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2173 of 2024

Ajay Singh @ Golu ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Annapurna Agnihotri

Counsel for the Opposite Parties:
G.A.

आपराधिक विधि : भारतीय दंड संहिता, 1860 – धारा 147, 406, 420, 504, 506 – दंड प्रक्रिया संहिता, 1973 – धारा 62, 64, 65, 87 – गैर जमानती वारंट के विरुद्ध – प्रार्थी द्वारा आदेश दिनांक 16.01.2024 की वैधता को चुनौती दी गई, जिसके अंतर्गत विचारण न्यायालय ने समन जारी किए जाने के उपरांत भी प्रार्थी की अनुपस्थिति के आधार पर उसके विरुद्ध गैर-जमानती वारंट जारी किया - न्यायालय ने रिकॉर्ड पर ऐसा कोई कारण नहीं दर्शाया कि प्रार्थी पर समन की सम्यक तामील हो चुकी थी और उसके उपरांत भी वह न्यायालय के समक्ष उपस्थित नहीं हुआ - बिना तामील की पुष्टि एवं बिना जमानती वारंट जारी किए सीधे गैर-जमानती वारंट पारित करना न्यायालय के अधिकारों का दुरुपयोग माना गया और ऐसा आदेश विधि में संधार्य नहीं पाया गया - प्रार्थी को निर्देशित किया गया कि वह न्यायिक मजिस्ट्रेट के समक्ष नियत तिथि को उपस्थित होकर धारा 88 दं.प्र.सं. के अंतर्गत निजी बंधपत्र एवं दो प्रतिभू निष्पादित करे तथा विचारण में सहयोग करे। (पैरा 5, 18, 21, 23)

आवेदन स्वीकार I (E-13)

<u>प्रोद्धृत मामलों की सूची:</u>

1. केन्द्रीय जांच ब्यरो बनाम आर्यन सिंह आदि, 2023 एसएससी ऑनलाइन एससी 379

2. इन्द्र मोहन गोस्वामी तथा एक अन्य बनाम उत्तरांचल राज्य तथा अन्य (2007) 12 एससीसी पृष्ठ 01

3. विकास बनाम राजस्थान राज्य (2014) 3 एससीसी पृष्ठ 321

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

1. प्रार्थी की विद्वान अधिवक्ता सुश्री अन्नपूर्णा अग्निहोत्री तथा विद्वान

अतिरिक्त शासकीय अधिवक्ता श्री राकेश कुमार सिंह को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अन्तर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थी ने प्रथम सूचना रिपोर्ट संख्या 0164 सन 2022 अन्तर्गत धारा 147, 406, 420, 504, 506 भा०दं०सं० थाना बिजनौर, जनपद लखनऊ मध्य के अनुक्रम में प्रस्तुत आरोप पत्र दिनांकित 20.11.2022 तथा उसके आधार पर विद्वान न्यायिक मजिस्ट्रेट तृतीय, लखनऊ द्वारा पारित आदेश दिनांकित 10.02.2023 जिसके द्वारा उपरोक्त अपराध का संज्ञान लिया तथा प्रार्थी को विचारण हेतु तलब किया एवं आदेश दिनांक 16.01.2024, जिसके द्वारा प्रार्थी के विरुद्ध गैर जमानती वारंट जारी किया गया, की वैधता को चुनौती दी।

3. उपरोक्त आदेश की वैधता को चुनौती इस आधार पर दी गयी है कि प्रार्थी के विरुद्ध लगाये गये आरोप असत्य हैं। माननीय सर्वोच्च न्यायालय के निर्णय **केंद्रीय जांच ब्यूरो बनाम आर्यन सिंह आदि, 2023 एससीसी ऑनलाइन एससी 379** में अवधारित है कि धारा 482 दं०प्र०सं० के अंतर्गत शक्तियों का उपयोग करते हुए न्यायालय को लघु विचारण (मिनी ट्रायल) करने की आवश्यकता नहीं है। इसमें अभियोजन / जांच एजेंसी को आरोपों को साबित करने की आवश्यकता नहीं है। दं०प्र०सं० की धारा 482 के अंतर्गत शक्तियों का उपयोग करते समय न्यायालय के पास बहुत सीमित अधिकार क्षेत्र है और मात्र यह विचार करने की आवश्यकता है कि "क्या आरोपी के विरुद्ध आगे बढ़ने के लिए कोई पर्याप्त सामग्री उपलब्ध है, जिसके लिए आरोपी पर मुकदमा चलाने की आवश्यकता है या नहीं"।

4. अतः धारा 482 दं०प्र०सं० के अन्तर्गत प्रदत्त शक्तियों का प्रयोग करते हुए इस स्तर पर प्रार्थी के विरुद्ध आपराधिक कार्यवाही इस आधार पर निरस्त नहीं की जा सकती कि उसके विरुद्ध लगाए गए आरोप असत्य हैं, क्योंकि इस स्तर पर यह न्यायालय आरोपों की सत्यता की जाँच नहीं कर सकता है।

5. प्रार्थी ने आदेश दिनांक 16.01.2024 की वैधता को भी चुनौती दी है, जिसके द्वारा विचारण न्यायालय ने समन जारी किए जाने के उपरांत भी प्रार्थी के उपस्थित न होने के कारण प्रार्थी के विरुद्ध गैर जमानती वारंट जारी करने का आदेश पारित किया।

6. प्रार्थी की विद्वान अधिवक्ता ने माननीय उच्चतम न्यायालय द्वारा **इंद्र मोहन गोस्वामी तथा एक अन्य बनाम उत्तरांचल राज्य तथा अन्य (2007) 12 SCC पृष्ठ 01** तथा **विकास बनाम राजस्थान**

राज्य (2014) 3 SCC पृष्ठ 321 के निर्णयों का आश्रय लिया।

7. विचारण न्यायालय के आदेश पत्र की प्रति प्रार्थना पत्र के साथ संलग्न है, जिससे यह परिलक्षित होता है कि दिनांक 10/2/23 को विचारण न्यायालय ने आरोप का प्रसंज्ञान लिया एवं अभियुक्तगण को विचारण हेतु समन जारी किया। दिनांक 10/04/2023 को पारित आदेश में विचारण न्यायालय ने अंकित किया कि 'अभि.गण गैर हा. हैं। वाद दि. 03/05/2023 को वास्ते ह.पेश हो। पूर्व आदेश का पालन हो।

8. दिनाक 3/5/23 को विचारण न्यायालय ने मात्र दो-चार शब्दों का एक आदेश पारित किया, जिसको पढ़ना और समझना संभव नहीं है।

9. दिनांक 9/8/23 में पारित आदेश में विचारण न्यायालय ने अंकित किया कि 'पुकारा गया अभियुक्त सचिन उपस्थित। दिनांक 5/10/23 को वास्ते हा. पेश हो।

10. दिनांक 5/10/23 को पारित आदेश में विचारण न्यायालय ने अंकित किया Case called out. Accused Sunil, Sachin and Rohit exempted. Put up on 16/11/23 for app.

11. दिनांक 16/11/23 का आदेश इस प्रकार है 'Case Called out accused. Sunil, Sachin & Rohit exempted. Rest accused Ajai absent. Put up on 16/1/24 for App. Repeat Process.

12. बिना यह संतोष अंकित किए हुए कि प्रार्थी अजय सिंह उर्फ गोलू की उपस्थिति हेतु न्यायालय से कोई समन भेजा गया है या नहीं अथवा यदि समन भेजा, तो वह प्रार्थी को प्राप्त हुआ है या नहीं तथा बिना यह संतुष्टि अंकित किए हुए कि समन प्राप्त होने के उपरांत भी प्रार्थी विचारण हेतु उपस्थित नहीं हो रहा है, न्यायालय ने दिनांक 16/1/24 को आदेश पारित किया कि 'पुकारा गया अभि रोहित उपस्थित, अभि. सचिन व सुनील की हा.मा. प्रस्तुत पत्रावली दि. 28/2/24 को पेश हो। अभि. अजय सिंह यादव उर्फ गोलू जरिए NBW तलब हो।

13. दण्ड प्रक्रिया संहिता के अध्याय छः में अभियुक्त की हाजिरी के लिए आदेशिकाएं जारी करने के प्राविधान है।

14. धारा 62 दं०प्र०सं० समन की तामील करने का तरीका निम्नवत प्राविधानित करता है:-

"समन की तामील कैसे की जाए

(1) प्रत्येक समन की तामील पुलिस अधिकारी द्वारा या ऐसे नियमों के अधीन जो राज्य सरकार इस निमित्त बनाए, उस न्यायालय के, जिसने वह समन जारी किया है, किसी अधिकारी द्वारा या अन्य लोक सेवक द्वारा की जाएगी।

(2) यदि साध्य हो तो समन किए गए व्यक्ति पर समन की तामील उसे उस

समन की दो प्रतियों में से एक का परिदान या निविदान करके वैयक्तिक रूप से की जाएगी।

(3) प्रत्येक व्यक्ति, जिस पर समन की ऐसे तामील की गई है, यदि तामील करने वाले अधिकार द्वारा ऐसी अपेक्षा की जाती है तो, दूसरी प्रति के पृष्ठ के भाग पर उसके लिए रसीद हस्ताक्षरित करेगा।"

15. धारा 64 दं०प्र०सं० में समन किए गए व्यक्ति के न मिलने पर समन तामील का तरीका निम्नवत दिया गया है:-

"जब समन किए गए व्यक्ति न मिल सकें तब तामील जहाँ समन किया गया व्यक्ति सम्यक तत्परता बरतने पर भी न मिल सके वहाँ समन की तामील दो प्रतियों में से एक को उसके कुटुम्ब के उसके साथ रहने वाले किसी वयस्क पुरुष सदस्य के पास उस व्यक्ति के लिए छोड़कर की जा सकती है और यदि तामील करने वाले अधिकारी द्वारा ऐसी अपेक्षा की जाती है तो, जिस व्यक्ति के पास समन ऐसे छोड़ा जाता है वह दूसरी प्रति के पृष्ठ भाग पर उसके लिए रसीद हस्ताक्षरित करेगा।

स्पष्टीकरण - सेवक, इस धारा के अर्थ में कुटुम्ब का सदस्य नहीं है।"

16. उपरोक्त प्रावधान में समन तामील न हो पाने पर धारा 65 दं०प्र०सं० के अन्तर्गत समन तामील की प्रक्रिया निम्न प्रकार दी गई है:-

"जब पूर्व उपबन्धित प्रकार से तामील न की जा सके तब प्रक्रिया - यदि धारा 62, धारा 63 या धारा 64 में उपबन्धित रूप से तामील सम्यक् तत्परता बरतने पर भी न की जा सके तो तामील करने वाला अधिकारी समन की दो प्रतियों में से एक को उस गृह या वासस्थान के, जिसमें समन किया गया व्यक्ति मामूली तौर पर निवास करता है, किसी सहजदृश्य भाग में लगाएगा; और तब न्यायालय ऐसी जांच करने के पश्चात् जैसी वह ठीक समझे या तो यह घोषित कर सकता है कि समन की सम्यक् तामील हो गई है या वह ऐसी रीति से नई तामील का आदेश दे सकता है जिसे वह उचित समझे।"

17. धारा 87 दं०प्र०सं० प्राविधानित करती है कि न्यायालय किसी भी ऐसे मामले में, जिसमें वह किसी व्यक्ति की हाजिरी के लिए समन जारी करने के लिए इस संहिता द्वारा सशक्त किया गया है, अपने कारणों को अभिलिखित करने के पश्चात उसकी गिरफ्तारी के लिए वारंट जारी कर सकता है:-

(क) यदि या तो ऐसा समन जारी किए जाने के पूर्व या पश्चात किन्तु उसकी हाजिरी के लिए नियत समय के पूर्व न्यायालय को यह विश्वास करने का कारण दिखाई पड़ता है कि वह फरार हो गया है या समन का पालन न करेगा, अथवा

(ख) यदि व ऐसे समय पर हाजिर होने में असफलत रहता है और यह साबित

कर दिया जाता है कि उस पर समन की तामील सम्यक् रूप से ऐसे समय में कर दी गई थी कि उसके तदनुसार हाजिर होने के लिए अवसर था और ऐसी असफलता के लिए कोई उचित प्रतिहेतु नहीं दिया जाता है।

18. प्रस्तुत प्रकरण में न्यायालय ने ऐसे विश्वास करने का कोई कारण नहीं दर्शाया है कि प्रार्थी पर समन की तामील सम्यक रूप से कर दी गई थी और इसके उपरांत भी वह न्यायालय के समक्ष उपस्थित नहीं हुआ।

19. **इंद्र मोहन गोस्वामी** के उपरोक्त निर्णय में माननीय उच्चतम न्यायालय ने प्रतिपादित किया कि न्यायालय को निजी स्वतंत्रता के अधिकार और समाज के हितों के बीच संतुलन बनाने का प्रयास करना चाहिए। वारंट जारी करने के संबंध में कोई नियम निर्धारित नहीं किए जा सकता हैं, किन्तु सामान्यतः जब तक अभियुक्त किसी जघन्य अपराध का दोषी न हो तथा ऐसी आशंका न हो कि वह साक्ष्य को नष्ट कर सकता है या विधिक प्रक्रिया से भाग सकता है, गैर जमानती वारंट जारी नहीं किए जाने चाहिए।

20. **विकास बनाम राजस्थान राज्य** के उपरोक्त निर्णय में माननीय उच्चतम न्यायालय ने कहा कि बिना समन की तामीली सुनिश्चित किए, तथा बिना जमानती वारंट जारी किए किसी अभियुक्त के विरुद्ध गैर जमानती वारंट जारी कर देना उसके निजी स्वतंत्रता के संवैधानिक अधिकार को बाधित करता है।

21. उपरोक्त तथ्यों के दृष्टिगत बिना प्रार्थी पर समन की तामीली के बारे में कोई संतोष अंकित किए बिना और प्रार्थी के विरुद्ध जमानती वारंट जारी किए बिना गैर जमानती वारंट जारी कर देना न्यायालय के अधिकारों का दुरुपयोग प्रतीत होता है और ऐसा आदेश विधि में संधार्य नहीं है।

22. तदनुसार, आलोच्य आदेश दिनांक 16.01.2024, जिसके द्वारा प्रार्थी के विरुद्ध गैर जमानती वारंट जारी किया गया, **अपास्त** किया जाता है।

23. प्रार्थी को निर्देशित किया जाता है कि वह न्यायालय विद्वान न्यायिक मजिस्ट्रेट तृतीय, लखनऊ के समक्ष नियत तिथि को उपस्थित होकर धारा 88 दं०प्र०स० के अन्तर्गत निजी बंधपत्र तथा दो प्रतिभू निष्पादित करे, तदुपरांत विचारण मे अपना पक्ष रखते हुए सहयोग करे।

24. आदेश समाप्त करने के पूर्व यह अंकित करना अनिवार्य प्रतीत होता है कि विचारण न्यायालय द्वारा विचारण के दौरान पारित आदेशों से पक्षकारों के अधिकारों पर प्रभाव पड़ता है। आदेशों को आदेश पत्र पर अंकित करना इसलिए भी

अनिवार्य है कि विचारण की कार्यवाही की वैधता को चुनौती देने पर कोई न्यायालय विचारण न्यायालय की कार्यवाही की वैधता की समीक्षा कर सके। विचारण न्यायालय द्वारा आदेश पत्र पर आदेश इस प्रकार अंकित करें कि उसको पढ़ा ही नहीं जा सके अथवा अपने आदेशों में पूरे शब्दों की जगह संक्षेपाक्षर का प्रयोग करना उचित नहीं है, क्योंकि इससे पक्षकारों तथा उच्च न्यायालय दोनों को ही आदेश को समझने में कठिनाई होती है।

25. पूर्व में भी विचारण न्यायालयों को अपने आदेश स्पष्टतया अंकित करने के निर्देश जारी किए गए हैं, किंतु प्रस्तुत प्रकरण में विचारण न्यायालय के आदेश पत्र की प्रमाणित छायाप्रति के अवलोकन से स्पष्ट है कि विचारण न्यायालय अभी भी आदेश अंकित करने में उक्त निर्देशों का ध्यान नहीं रखते हैं।

26. अतः यह निर्देश दिया जाता है कि समस्त विचारण न्यायालय तथा अपीलीय न्यायालय, पत्रावली के आदेश पत्र में अपने आदेश स्पष्ट रूप से अंकित करेंगे और उसमें संक्षेपाक्षर का प्रयोग करने से बचेंगे। यदि लंबे आदेश में कोई बड़ा शब्द अथवा शब्दों का समूह बार-बार प्रयोग हो रहा है तो ऐसी परिस्थिति में एक बार पूरा शब्द अथवा शब्दों का समूह प्रयोग करके और उसके साथ उसका संक्षेपाक्षर लिखकर आदेश / निर्णय में अन्य स्थानों पर बार-बार पूरा शब्द अथवा वाक्यांश के स्थान पर संक्षेपाक्षर का प्रयोग किया जा सकता है।

27. यह आदेश जनपद स्तर के समस्त न्यायालयों के संज्ञान में लाने के लिए उचित कार्यवाही की जाए।

(2024) 3 ILRA 934
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.03.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482. No. 2218 of 2024

Pradeep Agnihotri ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Shishir Pradhan

Counsel for the Respondents:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 82, 83 & 482 – Constitution of India,1950 – Article- 21, - Negotiable Instruments Act, 1881 - Sections 138, 138(C), 142 & 143(3) - Application U/s 482 Cr.P.C. – for quashing the impugned summoning order and non-bailable warrant orders - complaint case – offence of dishonour of cheque – petitioner taken plea that the complaint was prematurely filed before the statutory waiting period expired - and the legal notice was sent to an incorrect address, resulting in non-service and subsequent coercive actions including proclamation under Section 82 Cr.P.C. - Court finds that, that investigating agency seeks order of proclamations from the trial court to exert the pressure upon the person concern and the court concerned without taking

care of specific procedure issues proclamation under section 82/83 Cr.P.C. in a cursory and mechanical manner – court held that, compulsory statutory period has not been taken care of by the complainant itself nor by the court – complaint under the N.I. Act, should have been filed strictly in accordance with the mechanism so given under section 138 N.I. Act, - consequently, Application stands disposed of with direction to the petitioner to appear before the court concerned and to participate in the trial, which must proceed expeditiously till all coercive measures shall remain stayed and if he does not appear before the court concerned the benefit of this order would not be made available to him.
(Para – 9, 11, 12, 13)

Application Disposed of. (E-11)

List of referred Cases: -

1. Inder Mohan Goswami & anr.Vs St. of Uttaranchal & ors.reported in (2007) 12 SCC 1 ,

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shishir Pradhan, learned counsel for the petitioner and Sri Bishwa Nath Nishad, learned Additional Government Advocate for the State.

2. In view of the proposed order, the notice to opposite party No.2 is hereby dispensed with.

3. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed for the following reliefs: -

(i) Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to allow this petition under Section 482 Cr.P.C. and quash the impugned summoning order dated 28.03.2023 and N.B.W. order dated 15.02.2024 passed by the court of learned Third Additional Civil Judge (Junior Division)/ Judicial Magistrate, Raebareli in Complaint Case No.4645 of 2023 (Sarika Shukla vs. Pradeep Agnihotri), under Section 138 of Negotiable Instructions Act, Police Station-Kotwali, District-Raebareli, as contained in Annexure Nos.1 and 2 respectively to the affidavit.

(ii) Further, it is most humbly prayed from this Hon'ble Court that to stay the proceedings as pending against the present applicant in the learned court of Third Additional Civil Judge (Junior Division)/ Judicial Magistrate, Raebareli, during the pendency of present petition as under Section 482 Cr.P.C."

4. Sri Pradhan has assailed the aforesaid orders and the proceedings on the ground that the complaint in question has been filed in violation of Section 138 (c) of Negotiable Instruments Act (in short "N.I. Act") inasmuch as the private opposite party has preferred a legal notice on 06.01.2023 but the complaint has been filed on 10.02.2023, whereas after giving the legal notice and expiry of thirty days period the complainant will have to wait for fifteen days to get the payment which has been demanded by him and if such payment is not received within the aforesaid period, the complaint under Section 138 of N.I. Act may be filed. The aforesaid period would be expiring on 21.02.2023. Sri Pradhan has taken second ground by submitting that the legal notice has not been preferred on the correct address of the petitioner as the petitioner is a resident of Bhimganj, Police Station-Dalmau, District-Raebareli but on the tracking report it has been mentioned that the aforesaid legal notice has been delivered at Banapar BO though the petitioner is not residing at that place.

5. Sri Pradhan has therefore stated that since the legal notice has not been

served upon the petitioner, hence, he could not contact the complainant. Not only the above, when the complainant has filed the complaint before the court concerned. Further, the notice must have been issued to the petitioner on such address where he is residing, however, the notice has been issued at the address where the petitioner is not residing, resultant thereof, the notice could not be served upon the petitioner and he could not participate in the proceedings and the summons, bailable warrant and non-bailable warrant have been issued against him. However, when the proclamation under Section 82 Cr.P.C. has been issued against the petitioner, then the petitioner came to know about the aforesaid proceedings.

6. Sri Pradhan has also stated that before issuing the proclamation under Section 82 Cr.P.C. the court concerned must ensure on the fact as to whether the notice, summon, bailable warrant and non-bailable warrant are served upon the petitioner and as to whether he is deliberately avoiding those process, inasmuch as this is a trite law that the proclamation under Sections 82/83 Cr.P.C. should not be issued in a casual and cursory manner. As per Sri Pradhan, the impugned order dated 15.02.2024 does not reveal that the aforesaid satisfaction has been indicated in the impugned order itself. Therefore, as per Sri Pradhan, the impugned order dated 15.02.2024 issued under Section 82 Cr.P.C. is per se illegal and against the settled proposition of law.

7. Sri Pradhan has further submitted that the petitioner is ready to participate in the proceedings so that he could apprise the trial court about his bonafide but the petitioner is having apprehension that if he appears before the court concerned his liberty may be curtailed.

8. On the other hand, learned Additional Government Advocate has tired to defend the impugned order dated 15.02.2024 but could not dispute the aforesaid submission of learned counsel for the petitioner.

9. Having heard learned counsel for the petitioner and having perused the material available on the record, at the very outset, I must observe that before issuing proclamation under Sections 82/83 Cr.P.C. by any Subordinate Court, at least, satisfaction must be indicated in an order to the effect that despite the service of notice, summon, bailable warrant and non-bailable warrant the person concerned has deliberately avoided the proceedings. Further, any order of proclamation under Sections 82/83 Cr.P.C. must be passed on an application of a person concerned/ Investigating Officer etc. to the effect that after service of notice, summon, bailable warrant and non-bailable warrant upon the person concerned, he/ she is avoiding the proceedings so a proclamation may be issued and on such application, which must be supported with an affidavit, the court concerned may issue proclamation under Sections 82/ 83 Cr.P.C. indicating the subjective satisfaction on the aforesaid aspect in the order itself. If any order issuing proclamation under Sections 82/83 Cr.P.C. lacks the aforesaid procedure, the such order would be nullity in the eyes of law. Sometimes, it has been noted that the Investigating Agency seeks proclamation order from the court concerned so as to exert the pressure upon the person concerned and the court concerned without taking care of specific procedure issues

proclamation under Sections 82/83 Cr.P.C. in a cursory and mechanical manner.

10. The Apex Court in the case in re: ***Inder Mohan Goswami and another vs. State of Uttaranchal and others reported in (2007) 12 SCC 1*** has observed the mechanism as to how the liberty of any person may be curtailed inasmuch as every citizen has got fundamental right of his liberty under Article 21 of the Constitution of India. Such liberty may be curtailed by the court concerned if the court has got specific and cogent reason and that reason must be mentioned while issuing the proclamation order. The relevant paras-53, 54, 55, 56 & 57 of the aforesaid case are being reproduced here under:-

"When non-bailable warrants should be issued.

53. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

**it is reasonable to believe that the person will not voluntarily appear in court; or*

**the police authorities are unable to find the person to serve him with a summon; or*

**it is considered that the person could harm someone if not placed into custody immediately.*

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the courts proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

57. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant."

11. So far as the other grounds taken by Sri Padhan to the effect that the present complaint has been filed in violation of Section 138 (c) of N.I. Act and the notice has been issued on wrong address of the petitioner is concerned, I am also of the

considered opinion that any complaint under Section 138 of the N.I. Act should have been filed strictly in accordance with the mechanism so given under Section 138 of the N.I. Act. In the present case, it appears that the compulsory statutory period has not been taken care of by the complainant itself nor by the Court.

12. Notably, as per Section 143 (3) of N.I. Act, every trial under this Act shall be conduced and concluded expeditiously as possible and may be concluded within a maximum period of six months from the date of filing of such complaint. Therefore, I do not find it proper to keep this petition pending any longer, giving liberty to the petitioner appear before the court concerned on the date fixed i.e. 22.03.2024 and if the petitioner appears/ surrenders before the court concerned on the date fixed i.e. 22.03.2024, all coercive steps including the impugned summoning order dated 28.03.2023 and the proclamation order dated 15.02.2024 shall be kept in abeyance and liberty would be given to the petitioner to participate in the proceedings. Thereafter, the petitioner may file appropriate application before the court concerned and such proceedings may be conducted and concluded with expedition by fixing short dates and without giving unnecessary adjournment to any of the parties concerned. It is needless to say that ample opportunity of hearing should be afforded not only the petitioner but the complainant also.

13. It is made clear that if the petitioner does not appear before the court concerned on the date fixed in terms of this order, the benefit of this order would not be made available to him and the learned court below may take appropriate coercive steps, which are permissible under law, against the petitioner.

14. In view of the aforesaid observations and directions, the instant petition is ***disposed of finally.***

(2024) 3 ILRA 938
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2257 of 2024

Shamsher Bahadur & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Alok Srivastava

Counsel for the Respondents:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 190, 190(1)(b) & 482 – Indian Penal Code, 1860 - Section – 308, 323, 504 & 506 - Application under Section 482 Cr.P.C. – for quashing of the charge sheet, taking cognizance and the summoning order - FIR – offence of assault by the accused over a land boundary dispute – conflict - injuries - medical examination – investigation – St.ment u/s 161 Cr.P.C. - charge sheet - take cognizance under Section 308 IPC, noting the use of a sharp object and inadequacies in the investigation – court observed that the law requires that a Magistrate may take cognizance of any offence upon a police report of the facts constituting an offence – although the police report may not allege commission of any specific offence, in case the Magistrate is satisfied that the facts St.d in the report make out commission of any offence – therefore, court upheld the Magistrate's power under Section 190 Cr.P.C. to take cognizance of offences based on facts in the police report,

even if not explicitly mentioned, and found no illegality in the order – consequently, Application is dismissed with direction for further investigation and summoning the accused.
(Para – 16, 17, 18)

Application Dismissed. (E-11)

List of referred Cases: -

1. India Carat (P) Ltd. Vs St. of Karn. – 1989 vol. 2 SCC 132,

2. Nahar Singh Vs St. of U.P., 2022 (5) SCC 295.

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

1. Heard Sri Alok Srivastava-II, the learned counsel for the applicant and Ms. Charu Singh, the learned AGA for the State and perused the records.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of charge sheet no 1 of 2023 dated 01.04.2023, under Sections 323, 504, 506 IPC, submitted in furtherance of FIR No. 120/2023, the order dated 08.12.2023 passed by the Additional Chief Judicial Magistrate, Court No. 16, Barabanki, taking cognizance of offences under Sections 323, 504, 506 & 308 IPC and summoning the accused persons to face trial of the offence and at the same time issuing an order for further investigation and calling for an explanation from the Investigating Officer as to why recommendation be not made for initiating departmental inquiry and action against him for not conducting the investigation properly.

3. The opposite party no. 2 had lodged FIR No. 120/2023 on 28.03.2023 against the applicants, stating that the agricultural lands of the complainant and the accused persons are adjoining each others' land. The accused persons had damaged Med (boundary) dividing the two fields in the morning of 28.03.2023 and when the opposite party no. 2 objected against it, the accused persons attacked him with sticks and a spade causing injury on his hand and head.

4. The medico legal examination report of the victim mentions an incised wound on his head, contusions on left hand and left knee and an abrasion on chest and abdomen. The incised wound was opined to have been causes by some sharp object/weapon and the other injuries were caused by some hard and blunt object and the injuries were fresh.

5. The opposite party no. 2 reiterated the FIR allegations while recording her statement under Section 161 Cr.P.C.

6. The Investigating Officer recorded statements of two independent witnesses, both of whom stated that the accused persons had abused and assaulted the opposite party no. 2 and the accused persons had left threatening them after intervention of the witnesses.

7. After investigation, the Investigating Officer submitted a charge-sheet dated 01.04.2023 for offences under Sections 323, 504, 506 IPC only.

8. While assailing validity of the aforesaid order, the learned counsel for the applicant has submitted that in x-ray examination of the victim, no abnormality has been detected and, therefore, the offence under Section 308 IPC is not made out.

9. Section 308 IPC provides as follows:-

"308. Attempt to commit culpable homicide.—

Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration: A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section."

10. A bare perusal of Section 308 IPC indicates that there is absolutely no necessity of causing of any injury for making out an offence under Section 308 IPC and even in absence of any hurt having been caused, an offence to commit culpable homicide is made out and in such a case, it will be punishable with imprisonment which may extend to three years. In case hurt is caused in the incident, the offence becomes punishable with imprisonment which may extend to seven years, even if the hurt is not grievous, i.e. if the hurt is simple. Therefore, the submission of the learned counsel for the applicant that in absence of any abnormality having been reported in the x-ray examination of the opposite party no. 2, offence under Section 308 IPC is not made out, is absolutely misconceived and the same is rejected.

11. The learned counsel for the applicant next submitted that when the trial court has ordered further investigation, it had no jurisdiction to take cognizance of the offence.

12. Section 190 Cr.P.C. provides as follows: -

"190. Cognizance of offences by Magistrates.— *(1) Subject to the provisions of this Chapter,* ***any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—***

(a) upon receiving a complaint of facts which constitute such offence;

(b) ***upon a police report of such facts;***

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

(Emphasis supplied)

13. A bare reading of Section 190 (1) (b) Cr.P.C. indicates that a Magistrate is empowered to take cognizance of any offence upon a police report of facts which constitute such offence. Police report has to be of facts which constitute the offence and it need not mention the offence which is made out. Even if the police report mentions some offence and it omits to mention some other offence, in case the Magistrate is satisfied from facts stated in the police report that some other offence is also made out, the Magistrate can take cognizance of that offence also.

14. In ***India Carat (P) Ltd. v. State of Karnataka, (1989) 2 SCC 132,*** a Bench

consisting of three Hon'ble Judges of the Hon'ble Supreme Court held that: -

"11. ... On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

* * *

13....On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued."

15. In ***Nahar Singh versus State of U. P. and others,*** (2022) 5 SCC 295, after discussing various precedents on the point, the Hon'ble Supreme Court has held that the Magistrate has to apply his mind while taking cognizance of an offence and if it appears from the material placed before him and any person other than those arrayed as accused also needs to be summoned, the Magistrate can certainly summon him. On the same principle, in case the Magistrate is satisfied that there is sufficient material for trial of the accused for any other offence, he has the power to summon the accused person(s) for trial of that offence also. In case the Magistrate is satisfied by a perusal of the complaint and the material filed with it, that the accused persons appear to have violated any

direction, it can take cognizance of the offence under Section 31-A also.

16. Therefore, the law requires that a Magistrate may take cognizance of any offence upon a police report of the facts constituting an offence. Although the police report may not allege commission of any specific offence, in case the Magistrate is satisfied that the facts stated in the police report make out commission of any offence, the Magistrate can take cognizance of that offence.

17. A perusal of the impugned order indicates that from the material placed before the trial court it found that the material clearly established commission of offences under Section 323, 504, 506 & 308 IPC and, accordingly, the trial court has taken cognizance of the aforesaid offences. However, the trial court found that the Investigating Officer has recorded in the case diary that the injury no. 1 was caused by some sharp edged object but he did not make any effort to ascertain as to what was the object used and he did not make any attempt to recover the same. The Investigating Officer formed an opinion merely being influenced by the fact that no fracture was caused in the incident. The trial Court found that the Investigating Officer has submitted the charge sheet in respect of the offences which are less serious under influence of extraneous reasons. The trial court observed that it was necessary to make efforts for recovery of the sharp edged object used in the offence and has directed further investigation on this point only.

18. In these circumstances, the trial court has not committed any error in taking cognizance of the offence when from the material placed before the trial, a case for taking cognizance of offences was made out.

19. Therefore, there is no error or illegality in the impugned order dated 08.12.2023 passed by the trial court.

20. The application lacks merit and the same is ***dismissed***.

(2024) 3 ILRA 942
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482. No. 2274 of 2024

Dost Mohammad & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Dinesh Kumar Singh (D.K. Singh)

Counsel for the Respondents:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 504 & 506 - Petitioners contended that application u/s 156(3) Cr.P.C. filed by opposite party no. 2 was counter-blast to F.I.R. on petitioners' side - It is urged that when Magistrate, by order dated 11.11.2021, treating said application as complaint, fixed matter for St.ment of complainant u/s 200 Cr.P.C., opposite party no. 2 ought not to have challenged said order before revisional court on ground that only recourse available was to direct lodging of F.I.R - Revisional court, set aside Magistrate's order dated 11.11.2021 and directed lodging of F.I.R., pursuant to which Magistrate, by order dated 20.02.2024, directed registration of F.I.R - Held, it is settled law that before issuing summons

against prospective accused on complaint, Magistrate must comply with mandate of Section 202(1) Cr.P.C - If, upon such inquiry, Magistrate considers proper adjudication requires registration of F.I.R., he may direct at that stage - However, in instant case, such stage had not arisen, as immediately after order dated 11.11.2021, opposite party no. 2 preferred revision - It is undisputed that treating application u/s 156(3) Cr.P.C. as complaint case and directing recording of St.ment of complainant is interlocutory order, and revisional court could not set aside Magistrate's order dated 11.11.2021 - While allegations, including those of loot, are indeed serious and cognizable, it remains for Magistrate to determine appropriate course before proceeding further, as settled law on subject cannot be disregarded by subordinate courts - Thus, impugned order and consequential order, quashed. (Para 3, 4, 8)

Application allowed. (E-13)

List of Cases cited:

1. Sukhwasi Vs St. of U.P. : 2007(59) ACC 739

2. Mangalsen Vs St. of U.P., Criminal Misc. Application No. 7651 of 2009

3. Lalita Kumari Vs St. of U.P.& ors..: 2014 (2) SCC 1

4. Madhu Limaye Vs St. of Mah. : AIR 1978 Supreme Court 47

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Dinesh Kumar Singh, learned counsel for the petitioners, Ms. Nusrat Jahan, learned AGA for the State and Sri R.B.S. Rathaur, Advocate who has filed 'Vakalatnama' on behalf of opposite party no. 2, same is taken on record.

2. By means of this petition the petitioners have prayed following relief :

"Set aside the impugned judgment and order dated 07.02.2024 passed by the learned Additional Session Judge Court No. 1 Faizabad in Criminal Revision No. 187/2021 (Mohammad Ahmad Vs. State and others). contained as Annexure No. 1 to the present petition, with all consequential benefits.

It is further prayed that this Hon'ble Court may kindly be pleased to set aside the consequential order dated 20.02.2024 passed by the Judicial Magistrate-II, Faizabad/Ayodhya in complaint case no 1217/2021 (Mohammad Ahmad Vs. Dost Mohammad and others), contained as Annexure No. 2 to the present petition."

3. The precise contention of learned counsel for the petitioners is that though the complaint / application filed by the opposite party no. 2 u/s 156(3) Cr.P.C. on 28.9.2021 is a counter-blast to the F.I.R. bearing No. 0346 of 2021 u/s 420, 467, 468, 471, 504, 506 IPC, P.S. Kotwali Rudauli, District Ayodhya lodged from the side of the petitioners on 30.7.2021 but when on such application the Magistrate passed an order on 11.11.2021 (Annexure no. 5) referring the decision of Division Bench of this Court in re: ***Sukhwasi vs. State of U.P. : 2007(59) ACC 739*** to treat such application as complaint fixing the date for the statement of the complainant u/s 200 Cr.P.C., the opposite party no. 2 who is applicant of that application should have not challenged that order before the revisional court saying that on those allegations which have been leveled against the petitioners the only recourse was to issue direction to lodge F.I.R. inasmuch as this is a trite law that after recording the statement u/s 200 and 202 Cr.P.C. it is incumbent upon the learned Magistrate to make inquiry or direct investigation u/s

202(1) and if in any case the learned court concerned finds that the allegation may not be adjudicated on the basis of proceedings of complaint case, the magistrate may very well direct to lodge F.I.R. In the present case the revisional court cited the decision of this Court at Allahabad in re: ***Mangalsen vs. State of U.P. passed in Criminal Misc. Application No. 7651 of 2009*** and the Apex Court in re: ***Lalita Kumari vs. State of Uttar Pradesh and others : 2014 (2) SCC 1*** to set aside the order dated 11.11.2021 passed by the Magistrate court directing the magistrate to issue direction for lodging the F.I.R. Pursuant thereto the Magistrate has passed order dated 20.2.2024 referring the decision of ***Mangalsen (supra)*** to lodge F.I.R. pursuant to the aforesaid application filed u/s 156(3) Cr.P.C.

4. Sri D.K. Singh has stated that the impugned order dated 20.2.2024 (supra) is in-fact the compliance order making compliance of the order of the revisional court dated 7.2.2024 inasmuch as at the first instance and at the very instance the learned Magistrate has passed order dated 11.11.2021 (supra). Sri Singh has further submitted that the judgment so cited by the revisional court are not applicable in the present case inasmuch as the direction of Court in re: ***Mangalsen (supra)*** passed by this Court has been diluted by this Court in ***Sukhwasi (supra).*** In the judgment of ***Sukhwasi (supra)*** the reference has been indicated in para 1 and its answer has been indicated in para 23 which read as under :

"Whether the Magistrate is bound to pass an order on each and every application under Section 156(3) Criminal Procedure Code containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases"?

"23. The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under Section 156(3) Criminal Procedure Code and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under section 156(3) Criminal Procedure Code as a complaint."

5. He has further submitted that in the judgment of ***Lalita Kumari (supra)*** there is no specific direction of the Apex Court in respect of section 156(3) but it was relating to section 154 Cr.P.C., however, as an obiter dicta, some reference has been given in respect of section 156(3) Cr.P.C. Therefore, Sri Singh has stated that the impugned order of the revisional court is liable to be set aside.

6. Sri Singh has also referred the dictum of Apex Court in re: ***Madhu Limaye vs. State of Maharashtra : AIR 1978 Supreme Court 47*** to state that taking cognizance of the application of the opposite party no. 2 treating the same as complaint case directing to record the statement u/s 200 Cr.P.C., vide order dated 11.11.2021, is an interlocutory order and interlocutory order may not be assailed before the revisional court, therefore, in that way too the order passed by the revisional court is unwarranted and uncalled for.

7. Sri R.B.S. Rathaur, learned counsel for the private opposite party as well as learned AGA have at the very outset taken objection regarding maintainability of this petition by submitting that the present petitioners have got no locus to file this petition inasmuch as neither the magistrate had further proceeded pursuant to the order dated 11.11.2021 issuing summons to them nor any F.I.R. has been lodged against them in compliance of the order of the revisional court as well as the subsequent order of the magistrate. Therefore, this petition may be dismissed on the aforesaid count alone. They have further submitted that serious allegations have been leveled in an application filed u/s 156(3) Cr.P.C. wherein besides some other allegations the allegation of loot has been leveled against the applicant, therefore, on such allegation the magistrate would not be able to decide the issue on the basis of complaint case as in that case the F.I.R. must have been registered. Therefore, the opposite party no. 2 has rightly filed revision before the revisional court and revisional court has not erred in setting aside the order dated 11.11.2021 passed by the magistrate directing the magistrate to issue direction to lodge F.I.R. However, so far as the submission of Sri D.K. Singh is concerned to the effect that the opposite party no. 2 might have not approached the revisional court by filing revision against the interlocutory order inasmuch as the order dated 11.11.2021 was an interlocutory order, in view of the decision of Apex Court in re: ***Madhu Limaye (supra)*** they have stated that they may be given some time to address on the aforesaid legal point.

8. Having heard learned counsel for the parties and having perused the material available on record and also having regard of the judgments of the constitutional courts, undisputedly, it is a trite law that before issuing summons against the prospective accused on the complaint the mandatory exercise u/s 202(1) Cr.P.C. must be adhered to by the Magistrate and if the learned court of magistrate finds on the basis of such aforesaid inquiry that for proper adjudication of the allegation in question the appropriate recourse would be to lodge F.I.R., the magistrate may very well direct to register F.I.R. at that stage but admittedly such stage had not arrived by now because immediately after passing the order dated 11.11.2021 the opposite party no. 2 has filed the revision. Further, it may not be disputed that registering a complaint case treating the application u/s 156(3) Cr.P.C. as a complaint case and directing to record the statement of complainant u/s 200 Cr.P.C. is an interlocutory order as it has not attained the finality, therefore, in view of the dictum of Apex Court in re: ***Madhu Limaye (supra)*** the revisional court may not set aside the order of the magistrate dated 11.11.2021. It is also true that the allegations are serious wherein the allegation of loot has also been made and as per various decisions of this Court and Apex Court, in the cases wherein the allegation of cognizable offences are there including the allegation of loot etc., the appropriate recourse must be decided by the learned magistrate before proceeding further inasmuch as the trite law on the subject may not be ignored by any subordinate court.

9. Therefore, in view of the above, the impugned order dated 7.2.2024 passed by the learned Sessions Judge, Court no. 1, Faizabad in Criminal Revision No. 187/2021 (Mohammad Ahmad vs. State and others) and the consequential order 20.2.2024 passed by the Judicial Magistrate-II, Faizabad / Ayodhya in

Complaint Case no. 1217/2021 (Mohammad Ahmad vs. Dost Mohammad and others) are hereby ***quashed and set aside*** with the expectation that while proceeding further pursuant to the order dated 11.11.2021, which has been revived by this order, the learned magistrate shall carefully follow the mandatory compliance of section 202(1) Cr.P.C. and shall follow the settled proposition of law on the subject which shall be placed by the respective counsel and the observations of this order may not influence and the learned magistrate shall pass appropriate order strictly in accordance with law. Further, the magistrate shall take independent decision on the basis of provision of law and the settled position on the subject.

10. It is made clear that the quashing of the impugned revisional order and consequential order of the magistrate may not be treated as if the learned court of magistrate should only treat the application filed by the opposite party no. 2 only as a complaint but the magistrate court shall ensure that the appropriate justice is done with the parties strictly in accordance with law.

11. In view of the above, instant petition is ***allowed***.

(2024) 3 ILRA 946
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.03.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482. No. 2294 of 2024

S. Krishna **...Applicant**

Versus

State of U.P. **...Respondent**

Counsel for the Applicant:
Pranav Agarwal, Anumita Chandra

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Sections 205 & 317 - Rules for Video Conferencing for Courts in the St. of Uttar Pradesh, 2020 - Rule 11 - Against issuance of non-bailable warrant - Petitioner, aged about 85 years and suffering from age-related ailments, was unable to appear personally before Court at stage of framing of charges - Nevertheless, despite being apprised of his age and medical condition, Court proceeded to issue non-bailable warrant against him - Held, issuance of non-bailable warrant by trial court is wholly unacceptable and contrary to settled law laid down in Inder Mohan Goswami (infra), as every accused is entitled to protection of Article 21 of Constitution - Trial courts have been cautioned in earlier orders to ensure, before issuing non-bailable warrants, whether accused deliberately evaded proceedings despite service of summons and bailable warrants - In instant case, petitioner had been appearing, but owing to old age and age related ailments, could not appear on relevant date, hence, court concerned should not straightaway issued non-bailable warrant - Under Section 11 of Rules, proceedings may, in exceptional circumstances, be conducted virtually, in consonance with Sections 205 and 317 Cr.P.C - Impugned order, set aside - Directions accordingly. (Para 3, 8, 9)

Application allowed. (E-13)

List of Cases cited:

1. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors.., (2007) 12 SCC 1

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Nadeem Murtaza, learned counsel for the petitioner and Sri

Aniruddh Kumar Singh, learned AGA-I for the State.

2. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed the following reliefs:-

"A. Quash the impugned order dated 16.02.2024 and order dated 28.02.2024 passed by the ACJM-V, Lucknow in Case No. 9782/2013 vide which Non-Bailable Warrant has been issued against the Applicant. As Annexure no.3.

B. Permit the Applicant to appear through Counsel and participate in the proceedings before the Trial Court in accordance with Section 205 and 317 CrPC.

C. Any other and further relief which this Hon'ble Court deems fit and proper in the facts and circumstances of the present case may also be kindly granted in favour of the Applicant."

3. Sri Murtaza has stated that the petitioner is an old aged person of 85 years suffering various ailments, which are age related, therefore, he could not appear personally before the Court concerned at the time of framing charges, resultant thereof the court concerned has straight away issued non-bailable warrant against him, though the information regarding age and ailment was apprised to the court concerned.

4. Sri Murtaza has further submitted that in such a critical and ailing condition, the petitioner is willing to participate in the proceedings but has requested that he may be permitted to appear through counsel in terms of Sections 205 & 317 Cr.P.C. Attention has been drawn towards Rule 11 of the Rules for Video Conferencing for Courts in the State of Uttar Pradesh, 2020 (hereinafter referred to as "the Rules"), framed under Article 225 and 227 of the Constitution of India, whereunder Rule 11 reads as under:

"11. Judicial remand, framing of charge, examination of accused and proceedings under Section 164 of the Cr.P.C.

11.1 The Court may, at its discretion, authorize detention of an accused, frame charges in a criminal trial under the Code of Criminal Procedure, 1973 through video conferencing. However, ordinary judicial remand in the first instance or police remand shall not be granted through Video conferencing save and except in exceptional circumstances for reasons to be recorded in writing.

11.2 The Court may, in exceptional circumstances, for reasons to be recorded in writing, examine a witness or an accused under Section 164 of the Code of Criminal Procedure, 1973 or record the statement of the accused under Section 313 Code of Criminal Procedure, 1973 through video conferencing, while observing all due precautions to ensure that the witness or the accused as the case may be, is free of any form of coercion, threat or undue influence. The Court shall ensure compliance with Section 26 of the Evidence Act."

5. The aforesaid Rules also defines the exceptional circumstances under Rule 2 (viii) as under:

"2. Definitions.-

(viii) "Exceptional circumstances" include illustratively a pandemic, natural calamities, circumstances implicating law and order

and matters relating to the safety of the accused and witnesses."

6. Learned AGA has fairly assisted the Court and has submitted that non-bailable warrant should not have been issued straight away against any person unless the summon is issued and after verifying the fact that despite the service of summons, the accused person avoided the proceedings without having any cogent reasons, then bailable warrant may be issued and if, after service of bailable warrant, the accused person deliberately avoids the proceedings, in such exceptional circumstances, the non-bailable warrant can be issued as this law has been settled by the Apex Court in re; **Inder Mohan Goswami and Another v. State of Uttaranchal and Others, (2007) 12 SCC 1**. Therefore, learned AGA did not defend the impugned orders whereby the non-bailable warrants have been issued.

7. I appreciate the fair assistance of the learned AGA.

8. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I am constrained to observe that the manner in which the non-bailable warrant has been issued by the learned trial court is absolutely unacceptable and in derogation of the settled law of the Apex Court in re; ***Inder Mohan Goswami (supra)*** inasmuch as every citizen of the country including the accused person is having fundamental right under Article 21 of the Constitution of India. I have already cautioned the learned trial courts in my earlier orders in certain other cases to ensure before issuing non-bailable warrants as to whether after service of summons and bailable warrants, the accused person has deliberately avoided the proceedings. Besides, in the present case, the petitioner was appearing before the court concerned but on account of his old age and age related ailments, he could not appear, therefore, the court concerned should not have issued non-bailable warrant straight away.

9. In terms of Section 11 of the Rules, the proceedings of the case in exceptional circumstances may be undertaken virtually and also in accordance with Sections 205 & 317 Cr.P.C.

10. Therefore, considering the aforesaid submissions of the learned counsel for the parties and having regard the dictum of the Apex Court in re; ***Inder Mohan Goswami (supra),*** I hereby set aside/ quash the impugned orders dated 16.02.2024 and 28.02.2024 (supra), which have been enclosed as Annexure No.3 to this petition, at the admission stage.

11. I further direct the learned trial court to permit the petitioner/ applicant to appear virtually through counsel and participate in the proceedings strictly in accordance with Sections 205 & 317 Cr.P.C., for that, appropriate orders be passed and appropriate arrangements be done strictly in accordance with law.

12. It is made clear that the case of the present petitioner squarely covers with the definition "exceptional circumstances" (supra) inasmuch as he is an old aged ailing person, therefore, this order would confine to the present petitioner only as the benefit of this order may not be taken by other co-accused, if any.

13. Accordingly, the instant petition is **allowed**.

(2024) 3 ILRA 949
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2718 of 2023
&
Other Connected Cases

Akshay Pratap Singh @ Gopalji & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Meenakshi Singh Parihar, Abhiuday Pratap Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 395/ 397/ 307/ 364/ 323/ 325/ 504/ 506/ 427/ 34 - Criminal Law Amendment Act, 1932 - Section 7 - Code of Criminal Procedure, 1973 - Section 321 - Application for withdrawal of prosecution against applicants rejected - Validity of - Informant, BSP candidate, lodged FIR against 13 named persons alleging that while dining with some other political leaders and party workers at Dhaba, accused persons, including dozen other persons in two SUVs, intercepted, abused, and opened fire with intent to kill - Assailants pursued up to Kotwali, continued firing, damaged vehicles and assaulted companions, causing fractures to two persons - Further alleged that some companions were abducted, weapons and belongings snatched away - Despite indiscriminate firing by several persons from over dozen vehicles, no gunshot injury sustained by anyone - First charge sheet filed on 03.01.2011 against 11 persons, followed by supplementary charge sheet on 15.03.2011 against 15 persons, though FIR named only 13 accused - In withdrawal application, Public Prosecutor, opined that Government's decision was lawful as evidence was weak and prosecution doubtful - Trial court rejected application solely on ground that alleged offences were grave and non-compoundable - Trial court noted recovery of missing weapons from co-accused persons, but ignored that prosecution against them was not sought to be withdrawn - Informant filed application and counter affidavit supporting withdrawal of prosecution, stating FIR lodged under political pressure -Thus, impugned order, quashed. (Para 31, 33 to 37)

Application allowed. (E-13)

List of Cases cited:

1. Daxa Ben Vs St. of Gujarat, 2022 SCC OnLine SC 936

2. Ashwani Kumar Upadhyay Vs U.O.I. reported in (2021) 20 SCC 599, decided on 10.08.2021

3. Sheonandan Paswan Vs St. of Bihar, (1987) 1 SCC 288, (Paras 30, 37, 73, 78, 87, 90)

4. Ashwini Kumar Upadhyay Vs U.O.I., (2021) 20 SCC 599

5. Rajender Kumar Jain Vs St. (1980) 3 SCC 435, (Paras 14, 15)

6. St. of Kerala Vs K. Ajith, (2021) 17 SCC 318, (Para 25)

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

1. Heard the submissions of Sri H.G.S Parihar, Senior Advocate assisted by Smt. Meenakshi Singh Parihar and Abhiuday Pratap Singh Advocates, the learned counsel for the applicants in Application under Section 482 Nos. 2718 of 2023, Sri. P. K. Singh Bisen Advocate, the learned

Counsel for the applicant in Applications under Section 482 No. 4038 of 2023 and 5595 of 2023 and Sri Rao Narendra Singh, the learned A.G.A-I for the State, Sri Ravi Shanker Singh, the learned counsel for the informant and Sri Ajmal Khan, the learned counsel for the intervener.

2. The application No. 2718 of 2023 has been filed by (1) Akshay Pratap Singh alias Gopalji, (2) Satyendra Singh, (3) Kailash Nath Ojha, (4) Lalji Nigam, (5) Hitesh Kumar alias Pankaj Singh, (6) Rohit Singh alias Rohit Kumar Singh, (7) Raghvendra Pratap Singh alias Mukur alias Raghvendra Singh, (8) Monu sinsh alias Ashutosh Singh, (9) Yogendra Singh, (10) Sarvesh Singh, (11) Prafulla Kumar Singh alias Dabbu Singh, (12) Zulfeqar Ahmad alias Zulfeqar Ahmad Siddiqui, (13) Shailendra Kumar, (14) VInod Kumar, (15) Raghuraj Pratap Singh alias Raja Bhaiya alias Kunwar Raghuraj Pratap Singh, (16) Ram Kumar alias Banti, (17) Hariom Shankar Srivastava alias Hariom Shankar, (18) Narendra Singh alias Nanhe Singh, (19) Sheetla Singh alias Sheetla Prasad Singh and (20) Dron Kumar Upadhyay alias Dron Upadhyay. Application No. 4038 of 2023 has been filed by the applicant Sudhakar Singh. Application No. 5595 of 2023 has been filed by the applicant Sanjay Pratap Singh alias Guddu Singh.

3. By means of the all the aforesaid three applications filed under Section 482 Cr.P.C. the applicants have challenged the validity of an order dated 17.03.2023 passed by the Special Judge MP/MLA/ Civil Judge (SD)/FTC-II, District Pratapgarh in Case No. 236 of 2011 (State v. Raghuraj Pratap Singh & Others) arising out of Case Crime No. 513 of 2010, under Sections 395/397/307/364/323/325/504/506/ 427/34 of the Indian Penal Code (hereinafter referred to as 'IPC') & Section 7 of the Criminal Law Amendment Act, Police Station Kunda, District Pratapgarh, whereby the application under Section 321 Cr.P.C. for withdrawal of the prosecution against the applicants, has been rejected.

4. The points involved in these cases are similar, therefore, these cases are being decided together by a common judgment.

5. The informant-opposite party no. 2 had lodged First Information Report (hereinafter referred to as 'FIR') No. 189/2010 on 19.12.2010 against 13 named persons alleging that he was Bahujan Samaj Party's candidate for Babaganj Block. When he had gone to have dinner with some other political leaders and numerous other party workers to have dinner at a Dhaba (roadside eatery) in Kunda, the accused persons Sudhakar Singh, Pradeep Singh and about a dozen other persons riding two SUVs stopped the vehicles of the complainant and started abusing them. When the complainant and other persons tried to escape, the accused persons fired shots with weapons. The complainant and the persons accompanying him reached in front of Kotwali Kunda but several persons riding two Fortuner SUVs and about a dozen other vehicles started firing shots with weapons towards the informant and his companions. The complainant and the persons accompanying him went inside the Kotwali to save themselves but the accused persons damaged the vehicles of the complainant and assaulted the persons accompanying him with buts of rifles causing fractures to Pushpendra Shukla and Rohit Mishra. The F.I.R. further alleges that some companions of the complainant had been taken away in

the vehicles to some unknown destination and their whereabouts could not be known and that some weapons and goods had been snatched away by the accused persons.

6. A charge sheet no. 01 of 2011 was submitted by the police on 03.01.2011 against 11 persons. Thereafter another charge sheet was submitted on 15.03.2011 against 15 persons.

7. On 04.03.2014, the Public Prosecutor filed an application for withdrawal of prosecution under Section 321 Cr.P.C. stating that the Government had taken a decision to withdraw the prosecution and that the Public Prosecutor had also applied his independent mind and perused the entire material available on record and he was of the view that the decision taken by the Government to withdraw the prosecution was in accordance with law and that from a perusal of the case diary it appears that the evidences collected against the accused persons are very weak and success in the prosecution was doubtful.

8. The aforesaid application remained pending and meanwhile under the orders passed by the trial court, the police conducted further investigation and had submitted a supplementary charge-sheet on 22.07.2015 stating that upon investigation, the charges under Sections 182, 195, 379, 411, 120-B/34 IPC and 3/25 Arms Act were established against the accused persons Diwakar Tiwari alias Dabloo and Manoj Kumar Tiwari.

9. Yet another supplementary charge-sheet was submitted at 08.02.2019 stating that the allegations of beating, assault, abduction and loot as also of firing gun shots and damaging vehicles, could not be established and that the stolen weapons had been recovered from Rajesh Shukla alias Budul Shukla and charges under Section 379/411 IPC is established against Rajesh Shukla alias Bubul Shukla.

10. Subsequently the informant has also filed an application dated 27.02.2023 before the trial court supporting the application filed by the Public Prosecutor for withdrawal of the prosecution.

11. After submission of the aforesaid supplementary charge-sheets, the applicants had filed application under Section 482 Cr.P.C. No. 688 of 2023 before this Court praying for quashing of the proceedings of Criminal Case No. 236 of 2011 arising out of Case Crime No. 513 of 2010, cognizance orders dated 27.01.2011 and 29.03.2011 and the charge-sheet dated 03.01.2011 and 15.03.2011 filed in Case Crime No. 236 of 2011, so far as it relates to the applicants. The aforesaid application was disposed of by means of the order dated 09.02.2023 observing that the application under Section 321 Cr.P.C. was pending before the trial court and a direction was issued to the trial court to consider and disposed of the application in accordance with law.

12. The application under Section 321 Cr.P.C. filed by the prosecution was rejected by the trial court by means of the impugned order dated 17.03.2023 stating that while deciding an application under Section 321 Cr.P.C., the court has to take into consideration the following points:-

(i) Whether the application for withdrawal of prosecution has been moved with the object of strengthening the administration of justice or it has been moved by the prosecution for improper and extraneous reasons.

(ii) Whether withdrawal of prosecution would be in the interest of administration of justice.

(iii) Whether the prosecution has given the application for withdrawal in a bona fide manner.

(iv) Whether it has been moved to stop misuse of the judicial process by making it a vehicle of injustice.

(v) Whether the prosecution will culminate in acquittal of the accused persons for want of evidence.

(vi) Whether the accused persons are victims of personal/political animosity.

13. The trial court held that the offences involved in the present case fall within the category of grave and serious non compoundable offences. The missing weapons have been recovered from co-accused persons Diwakar Tiwari, Manoj Kumar Tiwari and Rajesh Kumar Shukla. The subject matter of the present case is very serious and challenges the administration of justice and it has adverse impact on a civilized society. Therefore, the application for withdrawal of prosecution moved by the State cannot be allowed.

14. The trial court further held that although the prosecution claims that withdrawal of prosecution would be in public interest but no basis for this contention has been lead. The trial court referred to the decision of the Hon'ble Supreme Court in **Daxa Ben v. State of Gujarat,** 2022 SCC OnLine SC 936 wherein it has been held that in case of grave and serious non-compoundable offences which impact the society, the informant and/or complainant only has the right of hearing to the interest of ensuring that justice is done by conviction or punishment of the offence and the informant has no right to withdraw the FIR in respect of an offence of a grave, serious, or heinous nature, which impacts the society at large.

15. The trial court has also referred to the decision of Supreme Court in **Ashwani Kumar Upadhyay versus Union of India** decided on 10.08.2021, which is reported in (2021) 20 SCC 599, directing that prosecution against a sitting or former MP or MLA cannot be withdrawn without sanction High Court.

16. A supplementary affidavit has been filed on behalf of the applicant stating that only two persons namely Pushpendra Shukla and Rohit Mishra had suffered injuries in the incident and copies of their injury reports have been annexed with the Supplementary affidavit.

17. Pushpendra had suffered a lacerated wound of size 6 cm X 0.5 cm on the left side of his head - scalp deep, and a traumatic swelling around his left wrist joint. The injuries were simple in nature and had been caused by a hard and blunt object. Rohit had suffered two lacerated wounds - (i) 2.5 cm X 0.5 cm. 0.5 cm. and (ii) 1.5 c.m. x 0.3 cm., both on his forehead. Both the injuries were simple in nature and had been caused by a hard and blunt object. It has categorically been stated in the supplementary affidavit that no person had received any gun-shot injury in the incident.

18. The State has filed a counter affidavit and a supplementary counter affidavit annexing therewith a copy of the application for withdrawal of the prosecution and a copy of the opinion of District Government Counsel (Crl.) wherein the following points have been highlighted: -

(i) The place of incident is said to be the main gate of the police station whereas the guard on duty had not intervened in the matter and no police person has lodged any FIR, which fortifies the probability that the incident did not occur in the matter alleged in the F.I.R.

(ii) The public representatives made accused in the matter were arrested soon after the incident but nothing was recovered from them, which also raises doubt against the credibility of the allegation.

(iii) No intimation of arrest of the public representative was sent to the Chairperson of the Parliament, legislative assembly and legislative Council.

(iv) No statement of the security guards employed in security of the public representatives was recorded by the Investigating Officer. The investigation appears to be merely a table work and the entire proceedings from the time of registration of the FIR till the arrest of the accused persons, appear to be suspicious.

(v) The complainant was a candidate for Kshetra Panchayat Babaganj. As to why he and his companions carrying weapons were present at 12 in the night within the limits of Kshetra Panchayat, Kunda, is a matter to be questioned. The complainant and his associates were connected to the ruling party and their act was affecting the election process, which amounts to commission of offence and this fact was ignored by the administration. It appears that the entire proceedings were taken because of political vendetta and continuance of such proceedings would carry an adverse effect on administration of justice. The member of parliament, member of legislative assembly and member of legislative council are public servants and before taking cognizance of the offences committed by them no previous sanction was taken under Section 197 IPC.

In view of the aforesaid facts and circumstances, the District Government Counsel (Criminal) recommended withdrawal of prosecution under Section 321 (b) Cr.P.C.

19. The Court had summoned the original record regarding withdrawal of prosecution, from which it appears that on 29.03.2012, the Government had written a letter to the District Magistrate, Pratapgarh for furnishing certain information regarding withdrawal of prosecution of 8 cases, including the present case. The information sought included the information regarding the facts of the case, injuries suffered by the persons from the complainant's side, recoveries made during investigation, the latest status of case, assessment of public prosecutor regarding strength/weakness of the case and opinion of the public prosecutor and Superintendent of Police regarding withdrawal of prosecution.

20. The prosecution officer gave opinion that there were contradictions in the material collected, which might benefit the accused persons. However, subsequently a revised opinion was given by the prosecution officer, which has been referred to above.

21. The informant – opposite party no. 2 has also filed a counter affidavit stating that the ruling Bahujan Samaj Party was interested to win the seat of Block Pramukh of every block and he had lodged the F.I.R. under party pressure. Nothing was recovered from the applicants yet a charge-sheet was submitted against 11 persons. A supplementary charge-sheet was submitted against 15 more persons,

although nothing was recovered from them also.

22. Sri H.G.S. Parihar, Senior Advocate, the learned counsel for the applicant has submitted that the impugned order dated 17.08.2023 does not make any reference to the findings in the subsequent charge-sheets to the effect that no charge was established against applicants and, therefore, the order has been passed without dealing with the relevant material available on record.

23. Sri Ajmal Khan has opposed the application on behalf of intervener Manoj Kumar Tiwari, who is co-accused in the present case. He has placed reliance on the judgment of the Hon'ble Supreme Court in **Sheonandan Paswan v. State of Bihar,** (1987) 1 SCC 288 and **Ashwini Kumar Upadhyay v. Union of India,** (2021) 20 SCC 599.

24. Sri Jayant Singh Tomar, the learned AGA-I has submitted that the application for withdrawal of prosecution was filed under political pressure and the trial court was justified in rejecting the application keeping in view the nature and gravity of the offence and its impact upon the public life.

25. Section 321 Cr.P.C., as it applies to the State of Uttar Pradesh, reads as follows: -

"321. Withdrawal from prosecution.—*The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, on the written permission of the State Government to that effect (which shall be filed in Court), with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—*

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:
Provided that …"

26. **Sheonandan Paswan versus State of Bihar,** (1987) 1 SCC 288, is a judgment of a Constitution Bench consisting of 5 Hon'ble Judges of the Hon'ble Supreme Court – (1) P. N. Bhagwati, C.J., (2) E. S. Venkataramiah, J, (3) V. Khalid, J, (4) G. L. Oza, J and (5) S. Natarajan, J. The majority view was expressed by a judgment written by Hon'ble V. Khalid, J for himself and Hon'ble S. Natarajan, J. Hon'ble E. S. Venkataramiah, J gave a separate judgment concurring with the majority view. The minority view was expressed by Hon'ble P. N. Bhagwati C.J. and Hon'ble G. L. Oza, J.

27. In the majority judgment delivered by Hon'ble V. Khalid, J with the concurrence of Hon'ble S. Natarajan, J, his lordships laid down the principles regarding Section 321 Cr.P.C. in the following words: -

"73. … When an application under Section 321CrPC is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and

find out whether the case would end in acquittal or conviction, would be to rewrite Section 321CrPC and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the court has to see is ***whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given.*** *In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321CrPC.*

***

78. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the court is to grant its consent. The initiative is that of the Public Prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that ***the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.***

* * *

87. ... Section 321, in view of the wide language it uses, enables the Public Prosecutor to withdraw from the prosecution any accused, the discretion exercisable under which is fettered only by a consent from court on a consideration of the materials before it and that at any stage of the case. The section does not insist upon a reasoned order by the Magistrate while giving consent. All that is necessary to satisfy the section is to see that the Public Prosecutor acts in good faith and that the Magistrate is satisfied that the exercise of discretion by the Public Prosecutor is proper.

* * *

90. Section 321 CrPC is virtually a step by way of composition of the offence by the State. The State is the master of the litigation in criminal cases. It is useful to remember that by the exercise of functions under Section 321, the accountability of the concerned person or persons does not disappear. A private complaint can still be filed if a party is aggrieved by the withdrawal of the prosecution but running the possible risk of a suit of malicious prosecution if the complaint is bereft of any basis."

(Emphasis supplied)

28. Hon'ble G. L. Oza, J has expressing the following view while concurring with the majority view: -

"37. At the outset it should be stated that merely because a court discharges or acquits an accused arraigned before it, the court cannot be considered to have compromised with the crime. Corruption, particularly at high places should be put down with a heavy hand. But

our passion to do so should not overtake reason. The court always acts on the material before it and if it finds that the material is not sufficient to connect the accused with the crime, it has to discharge or acquit him, as the case may be, notwithstanding the fact that the crime complained of is a grave one."

29. Hon'ble G. L. Oza, J quoted with approval legal position flowing from Section 321 Cr.P.C. as explained by Hon'ble Krishna Iyer and Chinnappa Reddy, JJ. in **Rajender Kumar Jain versus State** (1980) 3 SCC 435: -

"14. Thus, from the precedents of this Court, we gather:

(1) Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the executive.

(2) The withdrawal from the prosecution is an executive function of the Public Prosecutor.

(3) The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

(4) The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

(5) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammary Hall enterprises.

(6) The Public Prosecutor is an officer of the court and responsible to the court.

(7) The court performs a supervisory function in granting its consent to the withdrawal.

(8) ***The court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations.*** *The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.*

15. We may add it shall be the duty of the Public Prosecutor to inform the court and it shall be the duty of the court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort to the provisions of Section 321, Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the court, the court and its officers alone must have control over the case and decide what is to be done in each case."

14. Sri. Ajmal Khan has relied upon the following passage from the judgment in **Sheonandan Paswan** (Supra), which is from the minority view contained in the judgment delivered by P. N. Bhagwati C.J. with the concurrence of Hon'ble G. L. Oza, J: -

"30. Now when a warrant case instituted on a police report comes before the court, the court is required to consider only the police report and the documents sent along with it and the court may make such examination, if any, of the accused as it thinks necessary and on the basis of such material if the court, after giving the prosecution and the accused an opportunity of being heard, considers the charge against the accused to be groundless, the court is bound to discharge the accused. What the court, therefore, does while exercising its function under Section 239 is to consider the police report and the document sent along with it as also any statement made by the accused if the court chooses to examine him. And if the court finds that there is no prima facie case against the accused the court discharges him. But that is precisely what the court is called upon to do when an application for withdrawal from the prosecution is made by the Public Prosecutor on the ground that there is insufficient or no evidence to support the prosecution. There also the court would have to consider the material placed before it on behalf of the prosecution for the purpose of deciding whether the ground urged by the Public Prosecutor for withdrawal of the prosecution is justified or not and this material would be the same as the material before the court while discharging its function under Section 239. If the court while considering an application for withdrawal on the ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is in fact insufficient evidence or no evidence at all in support of the prosecution, the court might as well engage itself in this exercise while considering under Section 239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the court will be performing whether the court acts under Section 239 or under Section 321. If that be so, we do not think that in a warrant case instituted on a police report the Public Prosecutor should be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no evidence in support of the prosecution. The court will have to consider the same issue under Section 239 and it will most certainly further or advance the cause of public justice if the court examines the issue under Section 239 and gives its reasons for discharging the accused after a judicial consideration of the material before it, rather than allow the prosecution to be withdrawn by the Public Prosecutor. When the prosecution is allowed to be withdrawn there is always an uneasy feeling in the public mind that the case has not been allowed to be agitated before the court and the court has not given a judicial verdict. But, if on the other hand, the court examines the material and discharges the accused under Section 239, it will always carry greater conviction with the people because instead of the prosecution being withdrawn and taken out of the ken of judicial scrutiny the judicial verdict based on assessment and evaluation of the material before the court will always inspire greater confidence. Since the guiding consideration in all these cases is the imperative of public justice and it is absolutely essential that justice must not only be done but also appear to be done, we would hold that in a warrant case instituted on a police report — which the present case against Dr Jagannath Mishra and others admittedly is — it should not be a legitimate ground for the Public Prosecutor to urge in support of the

application for withdrawal that there is insufficient or no evidence in support of the prosecution. The court in such a case should be left to decide under Section 239 whether the accused should be discharged or a charge should be framed against him."

However, the aforesaid view being the minority view, undoubtedly it would give way to the majority view.

15. In **State of Kerala Versus K. Ajith,** (2021) 17 SCC 318, Hon'ble Supreme Court has held as under: -

"25. The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:

25.1. Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;

25.2. ***The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;***

25.3. The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;

25.4 While ***the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;***

25.5. In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

25.6. While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

25.7 In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent."

(Emphasis supplied)

30. From a cumulative reading of the aforesaid judgment, the principles which can culled out are as follows: -

(i) The withdrawal from the prosecution is an executive function of the Public Prosecutor and he has to exercise the discretion to withdraw from the prosecution independently. However, the Government may suggest to the Public Prosecutor that he may withdraw from the prosecution, without compelling him to do so.

(ii) The mere fact that the initiative has come from the government will not vitiate an application for withdrawal, if the public prosecutor is satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons.

(iii) The Public Prosecutor may withdraw from the prosecution on the ground of paucity of evidence or on any other relevant ground in order to further the broad ends of public justice, public order and peace.

(iv) The Public Prosecutor is an officer of the court and responsible to the court. However, the Court is not required to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution While granting its consent to the withdrawal of prosecution under Section 321, the court performs a supervisory function and it has to examine whether the Public Prosecutor has applied his mind properly, uninfluenced by irrelevant and extraneous considerations and the application has been moved by him in good faith, in the interest of public policy and justice or whether the move for withdrawal is an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

(v) If the court finds that the material before it is not sufficient to connect the accused with the crime, it has to discharge or acquit him, as the case may be, notwithstanding the fact that the crime complained of is a grave one.

31. When we examine the facts of the present case in light of the law laid down by the Hon'ble Supreme Court in the above mentioned cases, the relevant facts which emerge are that the informant-opposite party no. 2 had lodged the FIR against 13 named persons stating that that he was Bahujan Samaj Party's candidate for Babaganj Block. When he had gone to have dinner with some other political leaders and numerous other party workers to have dinner at a Dhaba in Kunda, the accused persons Sudhakar Singh, Pradeep Singh and about a dozen other persons riding two SUVs stopped the vehicles of the complainant and started abusing them. When the complainant and other persons tried to escape, the accused persons fired shots with weapons towards them with intention to kill them. The complainant and the persons accompanying him reached in front of Kotwali Kunda but several persons riding two Fortuner SUVs and about a dozen other vehicles started firing shots with weapons towards the informant and his companions. The complainant and the persons accompanying him went inside the Kotwali to save themselves but the accused persons damaged the vehicles of the complainant and assaulted the persons accompanying him with buts of rifles causing fractures to Pushpendra Shukla and Rohit Mishra. The F.I.R. further alleges that some companions of the complainant had been taken away in the vehicles to some unknown destination and their whereabouts could not be known and that

some weapons and goods had been snatched away by the accused persons.

32. Although the FIR alleges that initially only two named persons Sudhakar Singh, Pradeep Singh and about a dozen other persons riding two SUVs had apprehended the complainant and his companions and when he reached Kotwali Kunda, several persons riding two Fortuner SUVs and about a dozen other vehicles started firing shots with weapons towards the informant and his companions, he has named only 13 persons as accused in the FIR and he did not allege the involvement of any other unnamed persons in the FIR.

33. The alleged indiscriminate firing made by numerous persons riding more than a dozen vehicles towards the informant and his companions did not result in any single gun-shot injury to any person.

34. The first charge-sheet was submitted on 03.01.2011 against 11 persons. The first supplementary charge-sheet was submitted on 15.03.2011 against 15 persons although the FIR was lodged against 13 named persons only and no other unnamed person was made accused in it.

35. In the application for withdrawal of prosecution filed on 04.03.2014, the Public Prosecutor stated that he had applied his independent mind and perused the entire material available on record and he was of the view that the decision taken by the Government to withdraw the prosecution was in accordance with law and that from a perusal of the case diary it appears that the evidences collected against the accused persons are very weak and success in the prosecution was doubtful. The trial Court has not dealt with this aspect of the matter and has rejected the application merely because the offences alleged are grave and serious non compoundable offences.

36. The trial Court has noted that the missing weapons were recovered from co-accused persons Diwakar Tiwari, Manoj Kumar Tiwari and Rajesh Kumar Shukla, but it ignored the fact that prosecution against those three persons has not been sought to be withdrawn.

37. The informant has also filed an application before the trial court supporting the application filed by the Public Prosecutor for withdrawal of the prosecution and he has filed a counter affidavit before this Court supporting withdrawal of prosecution stating that he had lodged the FIR under political pressure.

38. In these circumstances, the decision taken by the Public Prosecutor to withdraw the prosecution keeping in view the aforesaid weaknesses and discrepancies in the prosecution case is based on cogent. The continuance of prosecution against the persons against whom it has been sought to be withdrawn, will clearly result in an abuse of the process of law.

39. In view of the foregoing discussion, the application under Section 482 Cr.P.C. is allowed. The order dated 17.03.2023 passed by the Special Judge MP/MLA/ Civil Judge (SD)/FTC-II, District Pratapgarh in Case No. 236 of 2011 (State versus Raghuraj Pratap Singh & Ors) arising out of Case Crime No. 513 of 2010, under Sections 395/397/307/364/323/ 325/504/506/427/34 IPC & Section 7 Criminal Law Amendment Act, Police Station Kunda, District Pratapgarh, whereby the

application under Section 321 Cr.P.C., is quashed.

40. The trial Court is directed to decide the application under Section 321 Cr.P.C. filed by the State afresh keeping in view the observations made in this judgment.

(2024) 3 ILRA 961
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.03.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 2998 of 2014

Dr. Vinod Kumar Bassi ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Amrendra Singh, Ishan Baghel, Pankaj Bala, Veena Vijayan Rajes

Counsel for the Respondents:
G.A., Ajay Krishna

Criminal Law – Criminal Procedure Code, 1973 – Sections 482 – Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Sections 3, 23, 17(1), 17(2), 17(3)(a), 17(3)(b) & 28 - Application U/s 482 Cr.P.C. – for quashing the order by which trial court taking cognizance and summon the applicant – complaint – filed by the Additional Chief Medical Officer under section 3/23 of the Act, 1994 – under authority given by the Competent Authority/District Magistrate under Sections 28 of the Act, 1994 – court observed that, Complaint had been filed by the Additional Chief Medical Officer, who was not the "Appropriate Authority" as defined under Section 17 of the Act and thus lacked the legal standing to initiate proceedings under Section 28 – held - since the Act mandates that only the Appropriate Authority or an authorized officer may file such complaints, the trial court's cognizance of the matter was deemed without jurisdiction, rendering the complaint and subsequent proceedings invalid – accordingly, application is allowed and impugned order as well as entire proceeding are quashed.
(Para – 6, 7, 9, 10, 11)

Application Dismissed. (E-11)

List of referred Cases: - no case cited.

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

1. Heard Sri Ishan Baghel Advocate, the learned counsel for the applicant, Sri Anurag Verma, the learned AGA-I for the State and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of an order dated 03.06.2014 as well as entire proceeding of Case No. 4495 of 2011, under Sections 3/23 Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, Police Station Sandila, District Hardoi, pending in the court of learned Additional Chief Judicial Magistrate, Court No. 3, Hardoi.

3. The aforesaid complaint was filed by Additional Chief Medical Officer, Hardoi against the applicant and one Raj Kishore Awasthi, stating that he had been authorized by the District Magistrate/ Appropriate Authority to file the complaint under Section 28 of Pre-conception & Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (which will hereinafter be referred to as 'the Act of 1994'). The complaint alleges that the provisions of the aforesaid act were being violated in a diagnostic centre owned by the co-accused persons where the applicant was carrying out Ultra Sonographic Examination of patients.

4. Learned counsel for the applicant has submitted that Section 28 of the Act of 1994 provides as follows:-

"28. Cognizance of offences.— *(1) No court shall take cognizance of an offence under this Act except on a complaint made by—*

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government, as the case may be, or the Appropriate Authority; or

(b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.—For the purpose of this clause, "person" includes a social organisation.

(2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person."

5. The manner of appointment of 'appropriate authority' is provided in Section 17 (1) & (2) of the Act of 1994 as follows:-

"17. Appropriate Authority and Advisory Committee.—

1. The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union Territories for the purposes of this Act.

2. The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

3. The officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be,—

(a) when appointed for the whole of the State or the Union Territory, consisting of the following three members—

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare—Chairperson;

(ii) an eminent woman representing women's organisation; and

(iii) an officer of Law Department of the State or the Union Territory concerned:

Provided that it shall be the duty of the State or the Union Territory concerned to constitute multi-member State or Union territory level Appropriate Authority within three months of the coming into force of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of the occurrence.]

(b) when appointed for any part of the State or the Union Territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

* * *

6. In exercise of the aforesaid provision, the State Government has issued a Notification dated 30.11.2007 providing

that the District Magistrate shall be the Appropriate Authority under Section 17(3)(a) read with 17(3)(b) of the act of 1994. The submission of the learned counsel for the applicant is that as the Additional Chief Medical Officer is not the appropriate authority, he could not have filed a complaint for any alleged violation of the provisions of the aforesaid Act and the trial court could not have taken cognizance of the complaint which had not been filed by the appropriate authority.

7. Opposing the submissions, the learned AGA-I has submitted that the applicant has the opportunity to defend him before the trial court and since the complaint makes out commission of offences under the Act by the applicant, it is not a fit case where this Court should exercise its inherent powers for quashing the proceedings of the complaint.

8. I have heard the aforesaid facts and circumstances of the case and the submissions advanced by the learned counsel for the parties.

9. When the Act of 1994 clearly provides that no Court shall take cognizance of any offence under the Act except on a complaint made by the appropriate authority, the court has no jurisdiction to take cognizance of any offence except on a complaint made by the appropriate authority. There can be no dispute against the fact that the Additional Chief Medical Officer is not an appropriate authority and he has no authority to file a complaint for any alleged offence committed under the provisions of the aforesaid Act and the Government Order. Therefore, as the complaint itself was incompetent, the trial court had no jurisdiction to take cognizance of the offences alleged in the complaint and to summon the applicant for being tried for the alleged offences.

10. Accordingly, the application is ***allowed***.

11. The order dated 03.06.2014 as well as entire proceeding of Case No. 4495 of 2011, under Sections 3/23 Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, Police Station Sandila, District Hardoi, pending in the court of learned Additional Chief Judicial Magistrate, Court No. 3, Hardoi, are hereby quashed.

(2024) 3 ILRA 963
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 3923 of 2005

Mohd. Deen ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Kumar Dhananjay

Counsel for the Respondents:
G.A., Sri Shivesh Mishra

Criminal Law – Criminal Procedure Code, 1973 – Sections 311 & 482 – Indian Penal Code, 1860 – Sections 302 & 307 – Indian Evidence Act, 1872 - Sections 40, 41, 42 & 44 - Application U/s 482 Cr.P.C. – for quashing the charge-sheet as well as the entire criminal proceedings – FIR – offence of murder – writ petition filed challenging the FIR – court issued

notices and granted order of arrest stay till conclusion of investigation – Investigation – during investigation applicant was never arrested – however co-accused were arrested and they were enlarged on Bail - charge-sheet was filed against them – order of cognizance against them – Session Trial initiated against co-accused persons – in their trial witnesses were declared hostile – resulted co-accused persons were acquitted – thereafter, a charge-sheet was filed against the applicant – cognizance was taken – applicant pleaded that with regards to the FIR and incident there is no difference, whatsoever, in the chares, evidence and witnesses were cited in support of prosecution case in session trial against co-accused persons are same in applicant case due to which police is trying to arrest the applicant – court emphasized that the provisions of the Evidence Act and precedents including *Moosa Vs Sub Inspector of Police* and *CBI Vs Ravi Shankar Srivastava*, the Court must be exercised power under section 482 of Cr.P.C. sparingly and not to pre-empt trial proceedings – held - the acquittal of co-accused due to hostile witnesses does not automatically entitle the applicant to similar relief – and the trial judge retains the authority to summon witnesses under Section 311 CrPC – further, previous judgments do not operate as res judicata in such cases – hence, grounds which are taken by the applicant are imaginary and trivial in nature and are not sustainable in the eyes of law – consequently, applicant is liable to be dismissed – direction issued to proceed the trial and conclude expeditiously within a period of one year.

(Para – 19, 22, 23, 25)

Application Dismissed. (E-11)

List of referred Cases: -

1. Moosa Vs Sub Inspector of Police, 2006 CrLJ 1922 (Kerala),

2. Central Bureau of investigation Vs Ravi Shankar Srivastava, IAS & anr.AIR 2006 SC 2872,

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

1. Heard Sri Kumar Dhananjay, learned counsel for the applicant, Sri Shivesh Mishra, learned counsel for the informant, learned AGA for the State and perused the record.

2. The instant application has been moved to quash the charge-sheet arising out of Case Crime No.629 of 1995 under Section 307/302 IPC, Police Station Kotwali, District Ghaziabad and the proceedings of Criminal Case No.1466 of 1997 (State Vs. Mohd. Deen).

Grounds of appeal-

3. The applicant has taken ground that an FIR was lodged by opposite party no.2 namely Mohd. Idris on 12.12.1995 with the allegations that on 12.12.1995, the informant, Mohd. Idris along with his nephew Naeem and Shahnawaz @ Ballu were proceeding to a relatives place located at Kaila Bhatta. When they reached near Bokhari Clinic at about 12.15 in the noon, the applicant allegedly accompanied by his sons Salim and Sharif accosted the informant and exhorted his sons to shoot down Shah Nawaz on account of certain election rivalry. It was alleged in the first information report that upon exhortation by the applicant, his sons Salim and Sharif shot Shah Nawaz, as a result of which, he was badly injured. Later on, Shah Nawaz succumbed to his injuries. True copy of the FIR has been annexed as annexure-1.

4. The entire story in the first information report was baseless and the allegation against the applicant was only of exhortation. The impugned first information report contains allegation of shooting against the applicant's sons but there was no material, whatsoever, against the applicant. The applicant filed a petition

being Criminal Misc. Writ Petition No.15006 of 1996 before this Court, challenging the first information report dated 12.12.1995, whereupon this Court, issued notice and by an interim order, stayed arrest of the applicant until conclusion of investigation. A true copy of the interim order dated 23.04.1996 has been annexed as annexure-2 to the petition.

5. Consequently, the applicant was never arrested pending investigation. The applicant's sons, co-accused, Sharif and Salim were, however, arrested and were enlarged on bail by this Court. However, a charge-sheet was filed against them on 15.01.1996, whereupon, the cognizance was taken on 13.03.1996. A photo copy of the charge-sheet filed against the co-accused, Salim and Sharif has been filed as annexure-3 to the petition.

6. The case with regard to the co-accused, Salim and Sharif was committed to the sessions which was registered as ST No.394 of 1996 (State Vs. Salim and another) under Section 302 IPC, Police Station Kotwali, District Ghaziabad.

7. During course of the trial, the witnesses of fact did not support the prosecution version. Each has stated that he had not seen the accused committing the offence in question. The prosecution witnesses were declared hostile and were subjected to cross- examination. However, the cross-examination did not yield any benefit to the prosecution. A true copy of the statements of PW-1, Mohd. Kasim, PW-2, Mohd. Ashraf and PW-3, Mohd. Idris have been annexed as annexure nos.3, 4 and 5 to the petition.

8. The learned Additional Sessions Judge, after examination of evidence on record, vide his judgment and order dated 14.03.2001, held that the prosecution was totally unsuccessful in proving its case against the co-accused Salim and Sharif and, accordingly, entered a judgment of clean acquittal in ST No.394 of 1996. A true copy of judgment of acquittal of co-accused Salim and Sharif dated 14.03.2001 has been annexed as annexure-6 to the petition.

9. However, a charge-sheet was filed before the Chief Judicial Magistrate on 02.07.1996 also against the applicant and cognizance whereof was taken by the Chief Judicial Magistrate on 13.06.1997. A true along with certified copy of the impugned charge-sheet dated 13.06.1997 has been annexed as annexure-7 to the petition.

10. That a perusal of the impugned charge sheet would indicate that witnesses of fact cited by the prosecution in the impugned charge sheet are one and the same as were cited in the charge sheet against co-accused Salim and Sharif. The charge sheet has been filed about the same incident dated 12.12.1995 and arising out of the same first information report. There is no difference, whatsoever, in the evidence which was cited in support of the prosecution case in ST No.394 of 1996. The same witnesses are also the witness in the impugned charge-sheet and no other witness has been shown.

11. In view of the above circumstances, the proceedings against the applicant on the basis of impugned charge-sheet, on the face of record, absolutely futile as there is no possibility of a conviction being recorded on the same evidence on the basis of which co-accused have already been acquitted. Thus, the impugned charge-sheet is a patent abuse of

process of court and deserves to be quashed.

12. A charge-sheet before the CJM that is criminal case no.1466 of 1997, non-bailable warrant of arrest has been issued against the applicant. The last non-bailable warrant had been issued on 08.03.2005 due to which the police is trying to arrest the applicant and going by the old age and health of the applicant, in case the applicant is arrested, he will suffer irreparable loss and injury. Under the aforesaid circumstances, the charge-sheet arising out of case crime no.629 of 1995, under Section 307 /302 IPC and criminal case no.1466 of 1997 – State Vs. Mohd. Deen, pending in the Court of CJM, Ghaziabad be quashed.

13. All the annexures referred in the petition, have been annexed by the applicant.

14. A counter affidavit bearing no.173098 has been filed on behalf of opposite party no.2. In the counter affidavit it is admitted that the arrest of the applicant was stayed by the High Court vide order dated 23.04.1996 and it is further averred that the IO had illegally submitted the charge-sheet against only two accused. The police has submitted charge-sheet against the applicant and the learned Magistrate has taken cognizance on 13.06.1997 and it is submitted that the evidence is not the same and the evidence has not yet come and the trial has not yet started. It is further averred that it is well settled law that charge-sheet under Section 302 IPC may not be quashed and the matter should be tried by the trial Court.

15. No rejoinder affidavit has been filed by the applicant against the aforesaid counter affidavit.

Conclusion-

16. The only ground taken by the applicant is that since the previously charge-sheeted main accused persons Salim and Sharif have been acquitted on account of hostile evidence of the witnesses of fact and he was only assigned the role of exhortation, it would not be feasible to conduct the trial in respect of the applicant and therefore, no trial should be conducted against the applicant and the charge-sheet and the aforesaid criminal case must be quashed.

17. In the charge-sheet filed against the applicant, Mohd. Idrish, Naeem, Ashraf have been shown to be witnesses of fact. Out of them, Mohd. Naeen was discharged in the main trial and was not testified by the prosecution. Similarly witness Mohd. Kasim, a witness of inquest, Zaheer Ali, Sheru, Nawabuddin, Siraj, Salim have been shown to be witnesses of fard and inquest and they were not examined in the previous trial. There is another aspect that in a criminal trial, a judge can not be a silent spectator and for the ends of justice, he may summon any of the person as witness under Section 311 CrPC. Therefore, it can not be said that since the witnesses of fact had been turned hostile, therefore, the impugned trial should not proceed against the applicant. There is no law that if the co-accused have been tried and acquitted separately, rest of the accused persons would not be tried and would be discharged and the proceeding of the criminal case against the rest of the accused would be liable to be quashed under Section 482 CrPC.

18. The relevancy and the evidentiary value of the previous judgement has been defined and enumerated under Section 40

to 44 of the Evidence Act are relevant which are as follows:

"40. Previous judgments relevant to bar a second suit or trial.—*The existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.*

41. Relevancy of certain judgments in probate, etc. jurisdiction.—*A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to an specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.*

Such judgment, order pr decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued, to that person to be entitled, accrued, to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any person ceased at the time from which judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree] declares that it had been or should be his property.

42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.—*Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.*

Illustration

A Sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favor of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

43. Judgment, etc. other than those mentioned in sections 40 to 42, when relevant.—*Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.*

Illustrations

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery. Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him, B is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B, C, B's son, murders A is consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

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

19. From the combined reading of the aforesaid provisions and the case in hand, it is crystal clear that the judgment and order passed in respect of Salim and Sharif does not apply as res judicata. At most it can be said to be relevant which may be considered by the trial court but there is no law that if separately tried co-accused persons have been acquitted, the applicant co-accused will also be liable to be acquitted and the charge-sheet and the criminal trial would be liable to be quashed under the inherent powers of the Court.

20. In ***Moosa Vs. Sub Inspector of Police, 2006 CrLJ 1922 (Kerala)*** the facts of the case was that the co-accused were acquitted in the trial against them in the absence of absconding co-accused. Later on, the absconding co-accused moved an application to reckon the jurisdiction under Section 482 CrPC to quash the proceeding of the criminal case pending against him. It was held that a judgement which is not inter parties cannot justify the invocation of the Doctrine of Estoppel under the law at present.

21. In ***Central Bureau of investigation Vs. Ravi Shankar Srivastava, IAS and Another AIR 2006 SC 2872*** it has been held that while exercising jurisdiction under Section 482 CrPC, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of trial Judge.

22. It has been held in several judgements by the Apex Court that powers under Section 482 CrPC cannot be liberally exercised and it has to be sparingly exercised, in cases where there is a dire need of exercise of this power.

23. Thus, from the above discussion, this Court is of the considered view that the previous judgment passed in favour of the co-accused persons is no ground to allow the petition under Section 482 CrPC and to

quash the impugned charge-sheet and the proceedings of the criminal case pending against the applicant. The grounds taken by the applicant are imaginary and trivial in nature and are not sustainable in the eyes of law. Therefore, the petition lacks merit and is liable to be dismissed.

24. Accordingly, this petition under Section 482 CrPC is **dismissed**. Interim order, if any, stands vacated.

25. Let a copy of this order be sent to the CJM, Ghaziabad for necessary compliance and for committal of the case if the same has not been committed to the Court of Sessions. In case the trial is not conducted, the same shall be conducted and concluded as early as possible preferably within a **period of one year** from the date of receipt of a copy of this order by the court concerned as the matter has become very old.

(2024) 3 ILRA 969
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 5372 of 2005

Sirajuddin ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vinod Prasad, Sri Dhirendra Kumar Srivastava, Sri Dinesh Kumar Singh, Sri Mohd. N. Siddiqui, Sri Pushkar Srivastava, Sri Vinod Sharma

Counsel for the Opposite Parties:
G.A., Sri R.P. Srivastava

Criminal Law – Criminal Procedure Code, 1973 – Sections 161, 164, 311, 313 & 482 – Indian Penal Code, 1860 – Sections 363, 366, 366-A, 376 & 506 – Indian Evidence Act, 1872 - Sections 80, 145 & 157 - Application U/s 482 Cr.P.C. – for quashing of trial court's order allowing prosecution's request under Section 311 CrPC to recall and re-examine victim (PW-3) – FIR - charge-sheet – offence under Sections 363, 366, and 376 IPC – Prosecution argued victim was frightened during initial deposition and her Section 164 CrPC St.ment remained unproved – Defence opposed recall, alleging attempt to plug evidentiary gaps and citing admissibility under Section 80 of Evidence Act – Trial court permitted re-examination despite objections – instant application, alleging judicial impropriety and procedural unfairness – Court observed that, PW-3 had already been declared hostile, cross-examined, denied allegations of rape and abduction, disowned St.ments under Sections 161 and 164 CrPC, and affirmed her court testimony as truthful – and the St. of UP or the opposite party no. 2 had not questioned the proceedings of the trial court - Held - recalling PW-3 would prejudice the accused and serve no legal purpose – and the testimony on oath in the court during the course of trial has overriding effect – therefore, to prevent abuse of process and secure justice, application is allowed – and the impugned order is hereby quashed.
(Para –14, 17, 18, 19, 20, 22)
Application Allowed. (E-11)

List of referred Cases: -

1. Raja Ram Prasad Yadav Vs St. of Bihar & anr., AIR 2013 SC 3081,

2. VN Patil Vs Niranjan Kumar & ors., (2021) 3 SCC 661,

3. Utpal Das Vs St. of W.B., AIR 2010 SC 1894,

4. Baijnath Singh Vs St. of Bihar, 2010 (70) ACC 11 (SC),

5. Asian Resurfacing of Road Agency Pvt. Ltd. Vs Central Bureau of Investigation, (2018) 16 SCC 299.

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

1. Heard Sri Dhirendra Kumar Srivastava, learned counsel for the applicant, learned AGA for the State and perused the record.

2. This application has been moved by the applicant to quash the order dated 03.05.2005 passed by Additional District and Sessions Judge, Court No.12, Varanasi in ST No.535 of 2002 (State Vs. Bafati), under Sections 363, 366, 376 IPC, Police Station Lohta, District Varanasi, whereby the learned trial court allowed the application 77kha and summoned the victim PW-3 for re-examination under Section 311 CrPC.

3. In brief, facts of the case are that informant Munir moved a written complaint on 24.04.2001 that on 20.04.2001 when his wife Jamila had gone to Dargah Sharif, Akbarpur and he had gone to Lallapura to meet his friend, his neighbourers Nizamuddin, Sirajuddin, Mainuddin sons of Bafati and Bafati himself entered into his house at about 02:00 a.m. In the night of 20.04.2001 they forcefully took away his 14 years old daughter Rizwana. When his niece Kallo opposed, they threatened to shoot her. Till now his daughter has not come back. After return of his wife he is informing the police for taking appropriate action. On the basis of the aforesaid complaint a case under Sections 363, 366A and 506 IPC was lodged against the accused persons and the charge sheet was submitted in the aforesaid sections after the investigation. The case was committed to the court of sessions which was transferred to the Court of ASJ, Court No.12, Varanasi and thereafter it was transferred to the Court of ASJ/Fast Track Court No.1, Varanasi.

4. After recording the evidence of victim PW-3, an application under Section 311 CrPC was moved that the statement of the victim recorded under Section 164 CrPC could not be proved. Hence, the concerned witness be summoned for re-examination to prove the statement under Section 164 CrPC. It has also been averred that during the course of deposition she was so affraid that she had forgotten to depose about the same, hence, it is expedient to recall the witness for proving her statement recorded under Section 164 CrPC.

5. The application was opposed by the defence but it was allowed on the ground that during the course of examination-in-chief, no evidence of the witness could be recorded for proving her statement under Section 164 CrPC and accordingly the application was allowed and the witness was summoned for re-examination.

6. Being aggrieved, the present application has been moved by the accused Sirajuddin that the informant Munir had lodged a false and fabricated FIR on which basis the charge-sheet has been submitted by the IO. The trial court has allowed the application without applying judicial mind just to fill up lacuna of the prosecution case which is illegal, unjust and is liable to the quashed. During the examination of the victim PW-3, she was questioned in respect of her statement under Section 164 CrPC and in fact on the contradiction and omission put by her, there was no justification for the trial court to pass the impugned order. The statement under section 164 CrPC has not been exhibited but it does not make any difference in the case as the statement under section 164 CrPC is admissible in evidence under Section 80 of the Indian Evidence Act without its formal proof. In the garb of the

impugned order now prosecution wants to fill lacuna of the prosecution which cannot be permitted because it will amount to unfair trial, therefore, the impugned order dated 03.05.2005 be quashed.

7. During the course of hearing of this application opposite party no.2 left parvi though a counter affidavit had been filed on behalf of opposite party no.2, the victim of the case in support of the impugned order and against the petition against which a rejoinder affidavit has also been produced. At the time of hearing none appeared from the side of opposite party no.2 hence heard Sri Dhirendra Kumar Srivastava, learned counsel for the applicant and learned AGA for the State and the application is decided on merit.

8. Before concluding the case it would be appropriate to reproduce section 311 CrPC alongwith relevant citations which are as under:-

9. For convenience Section 311 CrPC is reproduced as under:-

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

10. From the above, it is very much clear that there are two part of this Section. According to first part of the Section, the Court can exercise the power :-

(1) to summon any person as a witness, or.

(2) to examine any persons in attendance, though not summoned as a witness, or,

(3) to recall and re-examine any person already examined.

The second part, which is mandatory and imposes an obligation on the Court:-

(1) to summon and examine, or

(2) to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case.

11. In **Raja Ram Prasad Yadav Vs. State of Bihar and another, AIR 2013 SC 3081,** it has been held that it is, therefore imperative that invocation of Section 311 CrPC and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under the code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the court must necessarily consider and ensure that such re-call and re-examination of any person, appears in the view of the court to be essential for the just decision of the case.

12. The averments of paragraphs-14 to 17 in **VN Patil Vs. Niranjan Kumar and others, (2021) 3 SCC 661** are relevant, hence they are reproduced as under :-

"14. The object underlying Section 311 CrPC is that there may not be

failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240 : (SCC p. 141, para 17)

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547 and thereafter in Ratanlal v. Prahlad Jat, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729 and Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 . The relevant paragraphs of Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839 are as under: Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839, SCC p. 331, paras 10-11)

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen

the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

13. In this case the statement of PWs-1, 2 and 3 had already been recorded before the application under Section 311 CrPC was moved. For the purposes of this petition the statement of the victim PW-3 is material. This witness has deposed on oath in the court that in the fateful night none of the accused had entered in her house and none of the accused had taken away her forcefully and none of the accused had raped her. This witness was declared hostile and she was cross-examined by the ADGC of the court in which she deposed that she had gone to Himachal Pradesh with accused Nijamuddin at her own will where accused had not co-habitated with her. She was taken back therefrom by the Varanasi Police and her statement was recorded before the Magistrate. She had falsely stated that in the fateful night accused persons had entered in her house, closed her mouth with clothes and had taken herself forcefully near the grave. The witness clearly deposed that the evidence adduced by her in the court is true and correct. She had given the statement under Section 164 CrPC after being directed by some one else. The witness further totally denied the statement recorded under Section 164 CrPC. The witness also deposed that at that time also she loved Nijamuddin and even today. The witness also denied the statement recorded by the IO in favour of the prosecution under Section 161 CrPC.

14. According to this Court, from the statement of the victim, it is very much clear that she had neither supported the prosecution version nor the statements under Sections 161 and 164 CrPC. The opportunity to prove the statement under Section 164 CrPC was very much available to the prosecution which had not been availed. From the perusal of the statement of the victim it is very much clear that the witness has been examined with regard to Section 164 CrPC in 2-3 pages, therefore, it cannot be said that some more opportunity ought to have been provided to the prosecution to prove the statement under Section 164 CrPC. It is very much clear that though the victim has accepted that she was produced before the Magistrate and her statement was recorded and she had signed it but she has not owned the statement saying that it was not her statement with free will but it was under compulsion. According to this Court, in such a situation it was not necessary for the Court to summon the witness again under Section 311 CrPC. As the witness has already deposed that she had given the statement before the Magistrate, therefore, the same could be exhibited without any further formality.

15. So far as the evidentiary value of the statement under Section 161 and 164 CrPC is concerned, both have almost equal value and if the same are not supported during the trial, the witness may be contradicted.

16. In **Utpal Das Vs. State of West Bengal, AIR 2010 SC 1894** and in **Baijnath Singh Vs. State of Bihar, 2010 (70) ACC 11 (SC),** it has been held that an FIR does not constitute a substantive evidence. The statement of a witness recorded under Sections 161 or 164 CrPC can only be used to contradict or corroborate the witness under Section 145

or 157 of the Indian Evidence Act but it cannot be used as substative evidence.

17. In view of the above also, it can be said that the witness had been examined at length with regard to her statement under section 161 and 164 CrPC, there was no need to recall her again for re-examination. When the witness had not corroborated her statement recorded under Section 164 CrPC and she had been already contradicted under Section 145 of the Indian Evidence Act, even then if she was summoned, certainly it would cause a prejudice to the accused persons. In view of the testimony of the victim recorded in the court it can safely be said that those statements are nothing but a waste paper. According to this Court, there was no occasion to pass the impugned order considering the nature of the evidence of the victim PW-3. The testimony on oath in the court during the course of trial has overriding effect.

18. From the perusal of the above, it is very much clear that the victim PW-3 has not supported her statement recorded under Sections 161 and 164 CrPC and her statement on oath is contrary to the prosecution. Hence, the order for recalling the witness was of no avail. Thus, the application under Section 482 CrPC deserves to be allowed to prevent abuse of the process of the Court and to secure the ends of justice.

19. One more ground has arisen during the pendency of this petition that in view of the judgment of **Asian Resurfacing of Road Agency Private Limited Vs. Central Bureau of Investigation, (2018) 16 SCC 299,** the trial court started the trial treating the stay order passed by this Court to be vacated and recorded the statements of rest of the witnesses, the statement of the accused under Section 313 CrPC and after hearing the argument, acquitted the accused persons giving benefit of doubt on 30.09.2022. A photocopy of the certified copy of the judgment has been produced by the learned counsel for the applicant for perusal of this Court.

20. It is noteworthy that the accused persons had taken shelter of this Court and had obtained interim stay order and when the interim stay order passed by this Court was ignored in view of the judgment in **Asian Resurfacing** (supra), the State of UP or the respondent no.2 had not questioned the proceedings of the trial court, therefore, the respondents have no ground to claim the benefit of the same. If the respondents feel themselves to be aggrieved, the remedy is open for them to seek remedy available under the law against the order and judgement of acquittal.

21. On the basis of above, this Court is of the considered view that the application is liable to be allowed. (Though it has no importance after decision of the case)

Order

22. The application under Section 482 CrPC is allowed and the impugned order dated 03.05.2005 regarding summoning PW-3 for re-examination under Section 311 CrPC is hereby quashed.

23. A copy of this judgment be sent to the Court of ASJ/FTC-I, Varanasi to keep on record.

(2024) 3 ILRA 974
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 5419 of 2021

Jiyaullah ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mirza Ali Zulfiquar

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 419, 420, 376, 504 & 506 - Criminal Proceedings - quashing of - In instant case, from F.I.R. and Statements u/s 161 and 164 Cr.P.C., undisputed facts emerge that parties have known each other for over 15 years, they were in consensual physical relationship for more than eight years with approval of victim's parents, applicant later refused to marry victim, leading to registration of F.I.R., promise to marry by applicant was not false at inception but due to later developments, applicant denied to marry victim - In view of law laid down in cited judgments, even assuming allegations to be true, no offence u/s 376 IPC is made out - Relationship between parties was consensual with family approval, and initial promise of marriage was not false at inception - Subsequent refusal to marry, after long-standing consensual relationship with full knowledge of its consequences by victim and her family members, therefore, any subsequent breach of such relationship would not constitute rape u/s 375 IPC - Thus, application allowed - Impugned order, quashed. (Para 19, 20)
Application allowed. (E-13)

List of Cases cited:

1. Shivashankar @ Shiva Vs St. of Karnataka, Criminal Appeal No. 504 of 2018

2. Pramod Suryabhan Pawar Vs the St. of Maharashtra & anr. (Criminal Appeal No. 1165 of 2019)

3. Sonu @ Subhash Kumar Vs St. of U.P.& anr. reported in AIR 2021 SC 1405, (Paras 9 to 12)

4. Ashutosh Kumar Vs St. of U.P. & anr., Criminal Misc. Application under Section 482 Cr.P.C. No. 9700 of 2022

5. Dr. Dhruvaram Murlidhar Sonar Vs St. of Maharashtra : (2019) 18 SCC 191, (Paras 8, 9 11, 12, 13, 24)

6. Shambhu Kharwar Vs St. of U.P. : 2022 SCC Online SC 1032, (Paras 8 to 12)

7. St. of HP Vs Mango Ram : (2000) 7 SCC 224

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Mirza Ali Zulfaquar, learned counsel for the applicant and Sri Prashant Saxena, the learned AGA for the State.

2. Vide order dated 03.09.2021, a notice was issued to opposite party no.2. However, despite service of notice, none appeared on behalf of the opposite party no.2.

3. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the charge sheet dated 16.03.2020 and cognizance/summoning order dated 10.12.2020 as well as the entire proceedings of Case No. 21205 of 2020 (State vs. Ziya Ullah), under Sections 419, 420, 376, 504, 506 IPC, arising out of Case Crime No. 20/2019, P.S. Mahila Thana, District Sant Kabir Nagar, pending before the Court of Civil Judge, Junior Division / Judicial Magistrate, Sant Kabir Nagar.

4. The brief facts as emerge from the F.I.R. and the statements under Sections 161 and 164 Cr.P.C., are as under:

i) The date of birth of alleged victim is stated to be 01.06.1994 and she has stated that she passed the VIIIth Class in the year, 2008. Sister of the victim was married in Gorakhpur and the accused/applicant herein met first time to

the victim in the marriage of her sister and since then whenever the victim used to visit her sister's house, at Gorakhpur, she used to meet the accused/applicant herein. During these meetings, they fell in love with each other and the accused/applicant herein started visiting the house of the victim.

ii) Out of such relationship, the victim and her parents sent the accused/applicant to Saudi Arabia by arranging the funds by selling the jewellery etc. When the applicant herein came back from Saudi Arabia, the victim and her family members pressurized the applicant herein for marriage with the victim. Even after the marriage of the sister of the applicant herein when the victim and her family members pressurized the applicant herein to marry the victim, the accused applicant herein denied to marry the victim. It is further alleged in the F.I.R. that the applicant herein made physical relations with the victim, between 2008 to 2018, under the promise of marriage against her will.

iii) Ultimately, in the year 2018, the applicant herein denied to marry the victim. Therefore, in her 161 Cr.P.C. statement, the victim categorically states that the applicant used to have physical relations with the victim at her house in the presence of her parents in the house. She further stated that at the time of physical relationship established between them she was 17 years of age. She further states that in the month of June, 2011, first time relationship was established between them, which continued for about 8 years. In her 161 Cr.P.C. statement, the victim has stated that in the year 2013, the applicant had made physical relationship with her 8 years back under the promise of marriage. My parents had no objection on the visits of the applicant at her house and in the year, 2013, when the parents asked the applicant herein to marry the victim, he promised to marry the victim after the marriage of his sister and when he is able to built his own house.

iv) This relationship continued upto February, 2019, when a complaint was filed by the victim, which was settled at the police station with the assurance by the applicant that he would marry the victim within next 10 months and after one month of such promise he again refused to marry and threaten the victim to do whatever she can.

v) During investigation, medical examination of the victim was conducted on 22.06.2019, wherein she stated her age to be 25 years. After medically examining the victim, the doctors opined the age of the victim to be 20 years on 26.06.2019. After completion of the investigation the chargesheet was filed on 16.03.2020 u/S 419, 420, 376, 504, 506 I.P.C.

5. The learned counsel for the applicant submits that the instant prosecution by the opposite party no.2 herein amounts to misuse of process of law. As from the allegations made in the F.I.R. as well as in the Statements under 161 and 164 Cr.P.C., it is apparent that there was a longstanding consensual relationship between the parties, for more than eight years, which was duly approved by the parents of the opposite party no.2. Therefore, from the cumulative reading of the F.I.R. as well as 161 and 164 statements of the victim no offence as alleged against the applicant herein can be said to have been made out.

6. To substantiate his arguments, learned counsel for the applicant has relied upon the judgment of the Apex Court in the case of ***Shivashankar @ Shiva vs. State of Karnataka (Criminal Appeal No. 504 of***

2018), wherein the Hon'ble Apex Court has held that "it is, however, *difficult to hold sexual intercourse, which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife."*

7. Learned counsel for the applicant has further placed reliance upon the judgment of the Apex Court in the case of ***Pramod Suryabhan Pawar vs. the State of Maharashtra and another (Criminal Appeal No. 1165 of 2019).*** He has placed reliance upon paragraphs '18' and '20' of the said judgment, which are as follows:

"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

20 The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the 17 appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 of the IPC has occurred."

8. Learned counsel for the applicant has further placed reliance upon the judgment of the Apex Court in the case of ***Sonu alias Subhash Kumar vs. State of Uttar Pradesh and another*** reported in ***AIR 2021 SC 1405.*** He has relied upon paragraphs '9', '10', '11' and '12' of the said judgment, which are as follows:

"9 In Pramod Suryabhan Pawar (supra), while dealing with a similar situation, the principles of law which must govern a situation like the present were enunciated in the following observations:

"Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it..."

10. Further, the Court has observed:

"To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

11. Bearing in mind the tests which have been enunciated in the above decision, we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482 of CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482 of CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established.

12. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 26 September 2019. In view of the reasons which have been adduced earlier, the charge sheet dated 25 April 2018, which has been filed in pursuance of the investigation which took place, shall stand quashed. The order of the trial Court dated 3 October 2018 taking cognizance shall accordingly stand quashed and set aside."

9. Learned counsel for the applicant has further relied upon the judgment and order dated 12.10.2022 passed by this Court in ***Criminal Misc. Application under Section 482 Cr.P.C. No. 9700 of 2022 (Ashutosh Kumar vs. State of U.p. and another),*** relying upon the judgements of Apex Court in ***Shivashankar (supra), Pramod Suryabhan Pawar (supra), Sonu alias Subhash Kumar (supra).***

10. Learned counsel for the State submits that as per the allegations made in the FIR, the date of birth of the opposite party no.2 is stated to be 01.06.1994 and the allegation is that since 2008 till June 2018, the applicant and opposite party no.2 were continued to have physical relationship under the promise to marry the opposite party no.2. As per the medical report as well as the supplementary examination report, which is filed an annexure '7' to the application, the age of the victim as on 06.06.2019 is stated to be 20 years. Therefore, on the first date of co-habitation between the parties, which is stated to be in the FIR as June, 2008, and June, 2011, which is stated as the first date of co-habitation in the statement of the victim under Section 161 Cr.P.C., on both the dates, the opposite party no.2, the victim was a minor, therefore, there was no question of consent by the minor and the act committed by the applicant is treated as a rape within Section 375 IPC.

11. Having heard the arguments made by learned counsels for the parties, this Court has carefully perused the records of the case.

12. In ***Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra : (2019) 18 SCC 191,*** the Apex Court has held as under:

"8. It is well settled that exercise of powers under Section 482 CrPC is the exception and not the rule. Under this section, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in accordance with law, including procedural law and not otherwise.

9. This Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , has elaborately considered the scope and ambit of Section 482 CrPC. Seven categories of cases have been enumerated where power can be exercised under Section 482 CrPC. Para 102 thus reads : (SCC pp. 378-79)

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act

concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. In State of Karnataka v. M. Devendrappa [State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , it was held that while exercising powers under Section 482 CrPC, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It was further held as under : (SCC p. 94, para 6)

"6. ... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

12. Recently, in Vineet Kumar v. State of U.P. [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] , this Court has observed as under : (SCC p. 387, para 41)

"41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. ... Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of oppression or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding. ... the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."

13. It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of the inherent powers.

24. In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states

that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

13. Similarly, in ***Shambhu Kharwar vs. State of U.P.: 2022 SCC Online SC 1032,*** the Apex Court has held as under:

"8. In Bhajan Lal (supra) this Court formulated the parameters in terms of which the powers in Section 482 of CrPC may be exercised. While it is not necessary to revisit all these parameters again, a few that are relevant to the present case may be set out. The Court held that quashing may be appropriate:

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

[...](7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

9. In Dhruvaram Murlidhar Sonar v. State of Maharashtra,6 a two Judge Bench of this Court while dealing with similar facts as the present case reiterated the parameters laid down in Bhajan Lal (supra) held that:

"13. It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. ***If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."***

(emphasis supplied)

10. An offence is punishable under Section 376 of the IPC if the offence of rape is established in terms of Section 375 which sets out the ingredients of the offence. In the present case, the second description of Section 375 along with Section 90 of the IPC is relevant which is set out below.

***"375. Rape -** A man is said to commit "rape" if he - […] under the circumstances falling under any of the following seven descriptions Firstly …Secondly. - Without her consent.*

[…]Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

xxx

***90. Consent known to be given under fear or misconception -** A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or…"*

11. In Pramod Suryabhan Pawar v. State of Maharashtra,7 a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in Sonu @ Subhash Kumar v. State of Uttar Pradesh,8 observed that:

"12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action…[…]

14. […] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled…[…]

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. ***The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act…[…]***

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. ***The false promise itself must be***

of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

(emphasis supplied)

12. In the present case, the issue which had to be addressed by the High Court was whether, assuming all the allegations in the charge-sheet are correct as they stand, an offence punishable under Section 376 IPC was made out. Admittedly, the appellant and the second respondent were in a consensual relationship from 2013 until December 2017. They are both educated adults. The second respondent, during the course of this period, got married on 12 June 2014 to someone else. The marriage ended in a decree of divorce by mutual consent on 17 September 2017. The allegations of the second respondent indicate that her relationship with the appellant continued prior to her marriage, during the subsistence of the marriage and after the grant of divorce by mutual consent."

14. From the aforequoted judgments, it is apparent that the powers u/S 482 Cr.P.C. vested in the High Court is with the purpose and objective of advancement of justice. In case, the High Court is of an opinion that the process of the Court is being abused by persons with some oblique motive, the Court has to thwart such an attempt at the very threshold and the judicial process cannot be allowed to be converted into an instrument of oppression and harassment. It is also a settled position of law that if there are materials to indicate that the criminal proceedings is initiated with mala fide intentions and with an ulterior motive, it is the duty of the High Court to quash such proceedings in exercise of powers u/S 482 Cr.P.C.

15. In Section 375 I.P.C., where the offence of rape is constituted when the sexual intercourse is committed against the will of women and without her consent. A women is said to consent only when she freely agrees to submit herself while in free and unconstrained possession of physical and moral power to act in a manner she wanted. Consent implies the exercise of free and untrammelled right to forbid or withhold what is being consented to.

16. In ***State of HP vs. Mango Ram : (2000) 7 SCC 224,*** a three Judge Bench of the Apex Court held that consent for the purpose of Section 375 I.P.C. requires voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the act but after having fully exercised the choice between resistance and assent whether there was consent or not is to be ascertained only careful perusal of relevant circumstances.

17. Thus, from the cumulative reading of the judgments passed by the Apex Court in ***Shivashankar (supra), Pramod Suryabhan Pawar (Supra), Sonu alias Subhash Kumar (supra), Dr. Dhruvaram Murlidhar Sonar (supra) and Mango Ram (supra),*** it is apparent that when there is a longstanding relationship between the parties under the promise of marriage. It is to be seen that whether such promise of marriage was false at the inception or it is a subsequent breakdown of relationship and refusal to marry amounts to breach of such promise, which was genuinely made at the inception of such relationship.

18. The expression "against her will" would ordinarily mean that the intercourse was done by man with a women despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation.

19. In the instant case, from the F.I.R. as well as from the Statements u/S 161 and 164 Cr.P.C., the following undisputed facts emerged that the relationship between the applicant herein and the opposite party no.2 was of a consensual nature:

(i) Parties were known to each other for more than 15 years;

(ii) They were in active physical relationship with the approval of parents of opposite party no.2, since more than 8 years. Therefore, there was an active and considered consent by the victim, with the approval of her parents and the physical relationship with her was not against her will;

(iii) Subsequently, the applicant herein has broken his promise to marry and refused to marry the opposite party no.2 which resulted in the registration of the F.I.R. against the applicant herein;

(iv) From the allegations made, it is apparent that the promise to marry by the applicant herein was not false from its inception. Due to later developments, the applicant has denied to marry the victim.

20. Thus, from the proposition of law as enunciated in the above cited judgments, this Court is of the view that even assuming that all the allegations made against the applicant herein are true for the purposes of considering the application for quashing u/S 482 Cr.P.C., no offence u/S 376 is established as the relationship between the parties was of consensual nature and which has an approval of the family as well and the initial promise by the applicant herein was not false. It is only after subsequent developments between the parties, the applicant herein has refused to marry the applicant herein. Since, the relationship between the parties was longstanding and the victim as well as her family members knew the consequences of the relationship, therefore, any subsequent breach of such relationship would not amount to the offence of rape u/S 375 I.P.C.

21. For the reasons stated above, the instant application u/S 482 Cr.P.C. is **allowed** and the chargesheet dated 16.03.2020 as well as the cognizance/summoning order dated 10.12.2020 and the entire proceedings of Case No. 21205 of 2020 (State vs. Ziya Ullah), under Sections 419, 420, 376, 504, 506 IPC, arising out of Case Crime No. 20/2019, P.S. Mahila Thana, District Sant Kabir Nagar, pending before the Court of Civil Judge, Junior Division / Judicial Magistrate, Sant Kabir Nagar, are hereby **quashed**.

(2024) 3 ILRA 984
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.10.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482. No. 8020 of 2022

Aruni Mittal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Saurabh Chaturvedi, Sri Ayush Kaushik, Sr. Advocate

Counsel for the Opposite Parties:
G.A., Sri Dileep Kumar Pandey. Sri Gaurav Pundir, Sri Nitin Sharma

Criminal Law – Criminal Procedure Code, 1973 - Sections 156(3), 161, 164 & 482 – Indian Penal Code, 1860 - Sections 120-B, 323, 376, 420, 452, 504 & 506 - Application under Section 482 Cr.P.C. – assailing the

chargesheet and the summoning order – FIR – allegation against the applicants that applicant no.1 has raped the prosecutrix for over several years under a false promise of marriage and thereafter he kept trying to contract marriage again with some another girl with the conspiracy of his other family member - The applicants challenged these allegations as fabricated and politically motivated, citing contradictions and lack of evidence, and accused the prosecution of mechanical cognizance - Opposite party no.2 referenced a prior complaint by applicant no.1 stayed by the High Court and alleged harassment via a rejected Section 156(3) Cr.P.C. application, denying any financial disputes - The applicants clarified that mediation proceedings were never initiated and the revision against the 156(3) order remains pending - Upon reviewing the facts and case law, the court finds that, the prolonged sexual relationship to be consensual and not founded on a false promise of marriage from inception, with the prosecutrix fully aware of familial opposition – held that, no offences of criminal conspiracy or threats were made out against the family members, who were within their rights to oppose the relationship – thus, the court concluded the criminal proceedings were an abuse of process – consequently, the entire criminal proceedings is quashed -application is allowed, accordingly.
(Para – 17, 18, 19, 20)
Application Allowed. (E-11)

List of referred Cases: -

1. St. Vs Aruni Mittal & ors.crl. Case no. 20577 of 2021,

2. Pramod Suryabhan Pawar Vs The St. of Mah.; (2019) 9 SCC 608,

3. Maheshwar Tigga Vs The St. of Jharkhand; (2020) 9 SCR 482,

4. Naim Ahmad Vs State (NCT of Delhi); (2023) 1 SCR 106.

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

1. Heard Sri Ayush Kaushik learned counsel for the Applicants, learned AGA and Sri Nitin Sharma along with Sri Dileep Kumar Pandey learned counsel for the opposite party no.2 and perused the records.

2. The present criminal misc. application u/s 482 has been filed for the quashment of the chargesheet dated 3.9.2021 and cognizance/summoning order dated 17.11.2021 passed by the learned Addl. Chief Judicial Magistrate, Court No. 5, Meerut as well as entire criminal proceedings of crl. Case no. 20577 of 2021 (state vs. Aruni Mittal and others) by which the applicants have been summoned in Case Crime No. 141 of 2021 under Section 376, 506 and 120-B, I.P.C, P.S. Civil Lines, District Meerut.

3. The prosecution story in brief is as follows:-

There is an allegation against the applicants that applicant no.1 has raped the prosecutorix for years altogether and, thereafter, he kept trying to contract marriages again with some other girl with the conspiracy of his other family members. F.I.R has been registered initially on 14.03.2021 at 21.:10 hrs. at PS Majhola, District Moradabad U/S 376, 506, 120-B bearing case crime no. 204/2021 which subsequently got transferred to P.S. Civil Lines Meerut on 3.6.2021 and was registered as Case crime no. 141 of 2021 U/S 376, 506, 120-B IPC. The alleged date of occurrence as per the F.I.R version is stated to be between 1.1.2003 to 29.12.2020, and the said information being initially received at the P.S is marked as on 03.03.2021. It is being alleged in the FIR that first informant and the applicant No.1 both met in the year 2003-04 at Oxford Institute, Gandhi Nagar, Meerut as both used to take tuition there. Both were major

of above 30 years each. She fell in love and till 2010 she was completely traped in his love but the family members of applicant no.1 were against this relationship as they strongly opposed the same. In the year 2011, one day, applicant no.1 accepted her as his wife before the presiding deity of Balaji Mandir at Sadar, Meerut. She also took vow of marriage before the deity and accepted him (applicant no.1) as her husband and the applicant no.1 took the advantage of this situation to satisfy his lust and established physical relationship in the name of being married. She started to mount pressure upon him to solemnize valid marriage but he could not manage to get the marriage solemnized validly. Nevertheless, he (applicant no.1) kept establishing physical relationship with her till 28.12.2019. Later on, he maintained distance from her and after some time, there took a hot-talk between them on mobile phone. The applicant no.1 was misled by the family members and particularly, his sister Rashmi Mittal, created atmosphere against the first informant as she used to state that the first informant is a politician lady, if she gets married in the family, there will be held meetings with many boys and kept trying to tarnish and destroy her public image. After that the applicant no.1 has left her company and tried to marry other girl as all the family knew their relationship, they in conspiracy, tried to get him married with other girl. It has been intended by the applicant no.1 marrying another girl on 15.03.2021 in District-Moradabad with the conspiracy of the other applicants. Charge-sheet has been submitted by the investigating officer after completing the investigation, against the applicants on 3.9.2021, on which the Learned A.C.J.M, Court no. 5 has taken cognizance and issued summoning order against the applicants on 17.11.2021.

4. In her statements under Section 161 and 164 Cr.P.C., she has almost reitereated the allegations made in the FIR and stated that since 2011 to 2019 she was continously raped and taken to different hotels and raped there. He committed rape continously for nine years under the misconception of marriage and refused to marry to the first informant. In her statements she introduced the theory of video recording.

5. Pleadings have been exchanged between the parties.

5. Learned counsel for the applicants submitted that the offences levelled are not made out against the applicants as the whole prosecution version stated in the impugned F.I.R are totally false, fabricated and baseless as there never existed any alleged marriage/relationship of the applicant no.1 with the first informant, only acquaintance turned friendship relationship, was there, being classmates earlier in an educational institution. It is further submitted that the ruckus has been created purposely by the informant on 15.03.2021, when the 'Sagai' ceremony/family function of the applicant no.1 was going on in a Hotel Drive Inn-24 in Moradabad with an ulterior motive and on the basis of it, falsely implicated the whole family to overcome the pressure of financial transactions and liabilities which had taken place in the past and create undue pressure by lodging the impugned F.I.R on the basis of said Marriage, which was never solemnized. It is further submitted that in the said incident which happened on 15.03.2021, the informant along with many people, not only caused ruckus in order to interrupt the ongoing ceremony, also involved in fighting, due to which, various injuries had also been caused to many people, regarding which an F.I.R has been registered by the applicant no.3 being case crime no. 200 of 2021 U/S 323, 504, 506 I.P.C in P.S Majhola, District Moradabad. In the said incident, various injuries have

also been sustained by the applicant no.3 (mother of applicant no.1).

5. It is further submitted by the learned counsel for the applicants that genesis of the alleged incident is the financial transactions which took place between the first informant/opposite party no.2 and applicant no.1 in the past which has been stated, has taken place through the electronic transfer modes & cash mode on various dates and due to inability to return back, a long delayed F.I.R has been lodged after a lapse of around two years, falsely implicating the applicants for the purpose of harassment & extortion of money, instead of paying back the borrowed sum of money. It is further submitted that victim has also admitted that they have solemnized their marriage at Balaji Mandir, Meerut as is evident from the averments made in the FIR itself.

6. Learned Counsel for the applicants further submitted that there has been stepwise and material contradiction in the F.I.R version and the statement recorded under Section 161 and 164 Cr.P.C. of the informant/victim. So far as charge of commission of rape is levelled upon the applicant no.1 is concerned, it is clear that she willingly entered into physical relationship with the applicant no.1. The version of the alleged F.I.R was improved to the extent, by the allegations made in 161 Cr.P.C., mentioning therein that videography has also been made by the applicant no.1 and further much of it in 164 Cr.P.C., the theory of videography was introduced, whereas no evidences are brought in support of allegations made, which creates doubt in the story of the prosecution, as such, it is evident that there being no such marriage, ever solemnized and the only purpose of implication is to avoid the financial liabilities and to get political benefits, such false charges are being levelled and merely on the basis of earlier friendship/ relationship, no offence is made out against the applicants under the aforesaid sections as has been alleged in the FIR, thereafter, charge-sheet has been submitted by the Investigation Officer in a very routine and perfectory manner, on which, without applying the judicial mind, learned court below has taken cognizance mechanically and summoned the applicants.

7. On the other hand, learned AGA as well as learned counsel for the opposite party no.2 have very vehemently opposed the aforesaid contentions and stated that applicant no.1 has seduced and deceived opposite party no.2 by way of marriage before the deity in Balaji Mandir with first informant and has tried to enter into second marriage with some other girl, as such, applicant no.1 cannot deny the marriage solemnized with the first informant and step away from the liability of husband and cannot enter into any second marriage after being in relationship with informant/victim for such a long period of time right from the year 2010 when the said marriage was solemnized till the year 2019, committed rape for altogether for 9 years. It is further submitted that it is a case of false promise of marriage. The applicant no.1 fraudulently enter into a marriage with the first informant and obtained interim protection fraudulently by stating that there has been a marriage between the parties. The applicants have not come before the court with clean hands. In another case, they obtained order for mediation and conciliation on the basis of false statement regarding live-in-relationship.

8. Learned counsel for the opposite party no.2 relying upon the Supplementary

Counter Affidavit filed today in court also fairly states that earlier one complaint case has been filed by the applicant no.1 U/S 323, 452, 420, 504, 506 I.P.C before the court of Lrd. ACJM, Court no. 5, Meerut which has been challenged by the Opposite party no. 2 before this Hon'ble Court in Crl. Misc. 482 no. 31414 of 2022 (Meenal Gautam Vs State of U.P. & Another) and to which vide order dated 05.12.2022 further proceeding of the case has been stayed and the matter is referred to the mediation and reconciliation centre. It is further submitted by the counsel for the opposite party no.2 that an application U/S 156(3) Cr.P.C. was filed by the applicant no.1 dated 18.03. 2021 in the court of learned ACJM Court no. 5, Meerut only with a view to harass the informant and to create undue pressure. The said 156(3) application was rejected vide order dated 08.10.2021, which has never been challenged and the same has obtained the finality. It has been also pointed out by the counsel for O.P. no. 2 that there existed no financial transactions between the parties and it is no where produced on the records, hence, the averments and arguments made by the counsel for the applicants does not sustains in the eyes of law.

10. Learned counsel for the applicants submits that there has been never any such marriage ever solemnized between the applicant no.1 and first informant/opposite party no.2, and allegations made are totally false, fabricated and politically motivated with an intent to harm the social recognition and social image of the applicant and in order to extort money, although no material is on records or evidences are ever adduced in support of the allegations made in the FIR, and version of prosecution made as either by the victim/informant or any other independent witnesses, not any proof of the alleged marriage is established. It is further submitted that with regard to the case referred to the mediation centre and the stay obtained by the opposite party no.2, it has been specifically stated that the said proceedings never initiated and it has nothing to do with the present case.

11. So far as the arguments made by the counsel for the opposite party no.2 regarding final order passed in the 156(3) application filed by the Applicant no.1 is concerned, the said order has not obtained finality, but a revision has been filed against the said order and the said revision has been allowed by the learned Additional Session Judge, Court no.2 , Meerut in Criminal Revision No.1 of 2022 vide order dated 31.08.22 and the said case is still pending in the court concerned.

12. In reply to the arguments made regarding there being no evidence or version on records regarding the funds transactions made, it has been categorically stated that a details regarding the said transactions have been mentioned in various paras as well as Annexures filed in the applications.

15. The Court has occasion to go through the judgment of Hon'ble Apex Court in case of **Pramod Suryabhan Pawar Vs. The State of Maharashtra; (2019) 9 SCC 608**. Relevant paragraphs of the aforesaid order reads as follows:-

"1.1. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as

it denies the prosecution the opportunity to establish its case through investigation and evidence. In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. [Paras 7, 8] [432-G-H; 433-A; 434-C-D].

2. The instant proceedings concerned an FIR registered against the appellant under Sections 376, 417, 504, and 506(2) of the IPC and Sections 3(1)(u), (w) and 3(2)(vii) of SC/ST Act. Section 376 of the IPC prescribes the punishment for the offence of rape which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law. The consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. This understanding of consent has also been set out in Explanation 2 of Section 375. In the instant case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. There is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. [Paras 9, 10, 12-14, 16] [434-F-G; 435-E, G; 436-D; 437-A-B; 438-E, F].

3.1 The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. The allegations in the FIR indicate that in November 2009, the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations such as, the complainant and the appellant knew each other since 1998 and were intimate since 2004; the complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant; and the appellant expressed his reservations about marrying the complainant on 31 January 2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse

until March 2015. [Paras 18, 19] [441-A-E].

3.2 The allegations in the FIR did not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 of the IPC has occurred. [Para 20] [441-F-H; 442-A]."

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

16. The court has also occasion to go through the judgment of the Hon'ble Apex Court in the case of **Maheshwar Tigga Vs. The State of Jharkhand; (2020) 9 SCR 482**. Relevant paragraphs of the aforesaid order is reproduced hereinunder:

"4.1. It is not possible to hold in the nature of evidence on record that the appellant obtained the consent of the prosecutrix at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eyes of law. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her. In the facts of the present case, the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury, is not acceptable. [Paras 13, 14][490-G-H; 491-A-D].

4.2 The facts and circumstances of the present case show that the appellant did not make any false promise or intentional misrepresentation of marriage

leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to be solemnised in the Church or in a Temple and ultimately failed. It is not possible to hold on the evidence available that the appellant, right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her. [Para 18][492-F-H].

4.3 Therefore, the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love.

17. The court has also occasion to go through the judgment of the Hon'ble Apex Court in the case of **Naim Ahmad Vs. State (NCT of Delhi); (2023) 1 SCR 106**. Relevant paragraphs of the aforesaid order is reproduced hereinunder:

13. A reference of some of the decisions of this Court dealing with the different dimensions and angles of the word 'consent' in the context of Section 90 and Section 375 would be beneficial for deciding this appeal.

*14. In **Uday vs. State of Karnataka**, the prosecutrix aged about 19 years had given her consent for having a sexual intercourse with the accused with whom she was deeply in love, and it was alleged by the prosecution that the prosecutrix continued to meet the accused as the accused had given her a promise to marry her on a later date. The prosecutrix became pregnant and the complaint was lodged on failure of the accused to marry her. This Court while holding that under the circumstances, the consent could not be said to have been given under a misconception of fact under section 90 of IPC, held in para 21 and 23 as under :-*

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to 4 (2003) 4 SCC 46 12 agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

22. -xxx- xx -

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

15. In ***Deelip Singh alias Dilip Kumar Vs. State of Bihar (supra),*** *this Court after discussing various earlier decisions of this Court and other High Courts, further explained the observations made in Uday case (supra) and observed as under:-*

"28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] which was approvingly referred to in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : (2003) 2 Scale 329] . The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p. 1538, para 7) — "unless the court can be assured that from the very inception the accused never really intended to marry her". (emphasis supplied) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case [ILR (1913) 36 Mad 453 : 15 Cri LJ 24] (vide passage quoted supra). By making 14 the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining

whether the consent was given under a misconception of fact. Reading the judgment in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : (2003) 2 Scale 329] as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."

16. In ***Deepak Gulati vs. State of Haryana****, this Court gave one more dimension of the word 'consent' by distinguishing 'Rape' and 'consensual sex' and observed as under:*

"21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on 5 (2013) 7 SCC 675 15 account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. xxxxx

23. xxxxx

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her".

17. Again in ***Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others (supra),*** *this Court interpreting the Section 90 and the Clause – Secondly in Section 375 of IPC, observed as under -*

"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very

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

18. Thus, from the survey of the aforesaid case laws, the legal position in this regard is very clear that there is a distinction between the rape and consensual sex. In case of rape, besides other categories, there is absence of will and consent with regard to the sexual activities. Consent should always be free and voluntary in case of consensual sex. If consent is obtained under the misconception of fact in that case, consent cannot be considered to have been giving freely and voluntarily. There is a distinction between false promise to marry and breach of promise to marry. In the latter case, does not amount to a case of rape, if the circumstances were in the knowledge of the prosecutorix and were beyond the control of the accused. A false promise to marry amounts to the case of rape, if there has been a false promise from the inception not to marry. Two tests are laid down under the law to establish whether the consent is vitiated by misconception of fact, arising out of a promise to marriage; (i) The promise of marriage must have been a false promise, given in a bad faith and with no intention of being adhered to at the time it was being given. (ii) The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. The misconception of fact has to be in approximity of time to the occurrence and cannot be spread over a period of nine years.

17. From bare and plain reading of allegations made in the FIR as well as statements recorded under Sections 161 Cr.P.C. and 164 Cr.P.C. of the prosecurtorix, the picture emerges, of which the salient features are as follows:-

(i) Prosecutorix (first informant) is a major lady and an active member of BJP and indulging in political activities;

(ii) Prosecutorix (first informant) has met the applicant no.1 in the year 2003-04 at the Oxford Institute while taking tuition together with him and, thereafter, she was in love till 2011;

(iii) Prosecutorix (first informant) has not stated that there has been a false promise to marry since begining/inception.

(iv) Prosecutorix herself has admitted that both, she and applicant no.1 have accepted themselves as wife and husband before the presiding deity in Balaji Mandir, Meerut and she took vow before

the deity as a wife of the applicant no.1. and established physical sexual relationship.

(v) She was aware and had knowledge that their relationship was strongly objected and opposed by the family members of the applicant no.1.

(vi) She mounted pressure for solemenizing the valid marriage but the applicant no.1 could not manage valid marriage and kept physical and sexual relations till 28.12.2019. Thereafter, he maintained distance resultantly hot-talks occurred between them.

(vii) Applicant no.1's family members misled him against her and her sister Rashmi Mittal, particularly, created atmosphere against her by stating that prosecutorix is a political lady and meetings will be held with other boys, if she gets married with her brother and she tried to tarnish and destroy her political image.

(viii) Prosecutorix visited different hotels over a period of time and established sexual relationship.

(ix) The physical and sexual relationship between the prosecutorix and applicant no.1 remain active for a period of nine years.

(x) Prosecutorix never resisted or opposed the sexual relationship with the applicant no.1 and there has been a consensual sex between the parties, though allegedly under the conception of fact.

19. Considering the facts and circumstances of the case and perusal of records, it is apparent that allegations in the FIR do not on their face value, indicate that promise by the applicant no.1 was false or that prosecutorix engaged in sexual relationship on the basis of that promise only. Relationship between them has been activated and prompte by love and affection also. There is no allegation in the FIR that when the applicant no.1 accepted her as his wife before the deity in the temple, it was done in bad faith or with the intention to deceive her. The applicant no.1's failure in 2019 to fulfill his promise made in 2011 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the prosecurtorix was aware that there existed obstacles to marrying the applicant no.1 since beginning as applicant no.1's family members were strongly against their relationship particularly, his sister was creating atmosphere against the prosecutorix, despite all this, the prosecutorix and applicant no.1 continued to engage in sexual relations over a long period of time i.e. nine years, after their getting married had became a disputed matter. Even thereafter, the prosecutorix travelled to visit several hotels and remained there with the applicant no.1 and had established sexual relations there. The allegations in the FIR belie the case that the prosecutrorix was deceived by the applicant no.1's promise of marriage. Therefore, even if the facts set out in the prosecurtorix's statements are accepted in totality, no offence under Section 375 of IPC is made out, as such, the present criminal proceedings against the applicants is nothing but an abuse of process of law, which is liable to be quashed.

20. So far as the proceedings against the applicant nos.2 to 4 is concerned, offences against them are levelled under Section 506 and 120-B IPC. As they are the family members of the applicant no.1 as father, mother and sister, they have every right of choice to approve and oppose the relationship of applicant no.1 with any woman even the prosecutorix in this case. By virtue of their strong objection and

opposition to the relationship and proposed marriage of applicant no.1 with the prosecutorix they cannot be said to have conspired against the prosecurtorix and extended threat to her life. Thus, from the plain reading of the FIR and statements of the prosecutorix, no offence under Section 506 and 120-B is made out.

21. Thus, considering the facts and circumstances of the case as well as the arguments made by the learned counsel for the parties and case-laws cited above, the present Application succeeds and is, accordingly, **allowed**.

22. Consequently, the entire criminal proceedings of Crl. Case no. 20577 of 2021 (state vs. Aruni Mittal and others) is hereby quashed against the applicants.

23. Let a copy of this order be sent to the court concerned forthwith.

(2024) 3 ILRA 996
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2023

BEFORE

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

Application U/S 482. No. 9136 of 2023

Manoj ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Pandey Balkrishna, Sri Sunil Kumar Mishra

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

Criminal Law – Criminal Procedure Code, 1973 – Sections 156(3), 161, 164, 313 & 482 – Indian Penal Code, 1860 – Sections 147, 148, 149, 308, 323, 325, 342, 354, 504 & 506 - Application U/s 482 Cr.P.C. – for quashing the impugned order passed in a Session Trial and proceedings of a complaint case be tried along with the Session Trial as a cross-case - Both cases stem from the same incident - FIR in the sessions trial, alleges that informant's son was abducted and brutally assaulted by accused-applicant & ors.using iron rods and sticks, with an attempt to shoot him – and in the cross-version, lodged later by wife of applicant under Section 156(3), alleges that aforesaid informant and his associates molested her and assaulted her family – injuries - St.ment recorded under Section 164 - police filed a final report – accepted – but set aside in revision - The Magistrate then treated it as a complaint case and summoned the accused under Sections 323, 354, 504, and 506 IPC - The application seeks consolidation of both cases for joint trial to ensure fair adjudication – the Court observed that while cross-cases must be tried separately, they should be placed before the same Judge to avoid conflicting judgments and ensure a comprehensive view of the incident – held - the impugned order rejecting the applicant's plea was quashed and the proceedings of complaint case shall be called by the Additional Session Judge and tried by the same Judge, though separately, where evidence would be recorded in each case, also separately and the judgment shall, however, be pronounced by the same learned Judge, one after the other, bearing in mind the guidance in this judgement and the law - in the result, this application succeeds and is allowed. (Para – 23, 24)

Application Allowed. (E-11)

List of referred Cases: -

1. Pal alias Palla Vs St. of U.P., (2010) 10 SCC 123,

2. M.P. Vs Mishrilal (dead) & ors., (2003) 9 SCC 426,

3. Nathi Lal & ors.Vs St. of U.P. & anr., 1990 Supp SCC 145.

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

1. This is an application under Section 482 of the Code of Criminal Procedure,

1973 (for short, 'the Code') praying that the order dated 09.02.2023 passed by the learned Additional Sessions Judge, Court No.12, Bulandshahr in S.T. No. 219 of 2017, State vs. Manoj & others (arising out of Case Crime No.58 of 2017), under Sections 342, 323, 325, 308 I.P.C., Police Station Khurja Dehat, District Bulandshahr be quashed; and proceedings of Complaint Case No.523 of 2019, Kripa Devi vs. Ravikant and others, under Sections 323, 354, 504, 506 I.P.C., Police Station Khurja Dehat, District Bulandshahr, pending before the Magistrate be called from that Court and tried along with the sessions trial aforesaid as a cross-case by the learned Additional Sessions Judge.

2. The offence, according to the First Information Report (for short, 'FIR'), giving rise to the sessions trial and the one giving rise to the cross-version lodged at the instance of the accused in the sessions trial, both relate to an incident that happened on 16.02.2017. The FIR, leading to the sessions trial, does not mention the time of occurrence, whereas the one that has led to the complaint case pending before the Magistrate, indicates the time to be 18:00 hours (6:00 p.m.). While the FIR giving rise to the sessions trial was promptly lodged on 16.02.2017, to wit, the date of occurrence, the cross-version came to be registered after a refusal by the Police to lodge it, under orders of the learned Magistrate passed under Section 156(3) of the Code. It was registered on 01.05.2017.

3. It would be apposite to refer to the prosecution version, as carried in the FIR, relating to Crime No.58 of 2017, that has given rise to the sessions trial. The FIR here was lodged by one Ratibhan son of Pyare Lal, a resident of Village Bagarai Kalan, District Bulandshahr. According to the informant here, the informant's son Ravikant Singh was abducted by the accused Manoj son of Dalchand, Mahesh, Babloo, sons of Dalchand, Trilok Chand son of Mahveer, Mahaveer son of Roopa, Deepak son of the late Raju and Dalchand son of the late Babu Lal, all natives of the village. These men abducted the informant's son Ravikant from his home and forcibly took him over to their house, where the accused battered the informant's son mercilessly, after stuffing his mouth with cloth. They carried out the assault employing iron rods, which were wielded by Mahaveer and Mahesh, whereas Babloo and Trilok wielded sticks (danda). These they employed to deliver grievous injuries to the victim's head. The accused, Deepak and Dalchand also had iron rods, which they used to deliver blows to the victim's limbs causing fracture to his hands and lower limbs. It is also alleged that Manoj, amongst the accused, opened fire with an intention to kill the victim employing a country-made pistol, but the informant's son was saved by a hairbreadth. It is on the basis of this version that Crime No.58 of 2017 was registered under Sections 147, 148, 149, 342, 308, 323, 325 I.P.C. at Police Station Khurja Dehat, District Bulandshahr.

4. According to the FIR lodged by Smt. Kripa Devi wife of Manoj, that carries the cross-version, the accused were five in number. It includes Ravikant son of Ratibhan, Sanjeev son of Ratibhan, Vijayveer son of Kishan, Ratibhan son of Pyare Lal and Kishan son of Pyare Lal. According to this report, that has been lodged under orders of the A.C.J.M., Khurja, District Bulandshahr, on 16.02.2017 at about 6 o'clock in the evening, the first informant was feeding her buffaloes in the Gher behind her house,

when Ravikant and Sanjeev sons of Ratibhan, Vijayveer, Ratibhan and Kishan forced their entry into her home and molested her. They tore up her clothes with an intent to outrage her modesty. The informant raised alarm, whereupon the informant's husband Manoj, his younger brothers Mahesh and Babloo, came over to the informant's rescue. Upon an attempt to rescue the informant, the accused here, employing the sticks and iron rods that they were carrying, assaulted the informant. The victim and her family raised alarm, which brought natives of the village, Anil, Jallu and Ajay, besides others to the spot.

The men, who arrived there, rescued the first informant and her family from the clutches of the accused here, who left the place abusing the first informant and saying that their brother serves in the Police, on account of which the informant cannot bring them any harm. The assailants also threatened the victim with death. The informant goes on to say that with the assistance of her family, she caught Ravikant red handed on the spot. The Police arrived at that time. The informant handed over Ravikant to the Police. Since, the informant's husband and brothers-in-law had sustained considerable injury, the informant approached the local police station to lodge an FIR. The local police, however, said that the informant should better get a medical examination done for a first. She went to the Jatia Government Hospital, Khurja, where a medico-legal examination was carried out. Still, the Police did not lodge the informant's FIR. Instead, in connivance with Ravikant, he was let off with no proceedings being taken against him. The informant sent a written information to the Senior Superintendent of Police by registered post on 17.04.2017, but no action was taken. It was in these circumstances that she had to move the learned Magistrate, who ordered registration of a case.

5. The case of the informant in the cross-version, that is to say, Smt. Kripa Devi, was registered as Crime No.176 of 2017 under the provisions already mentioned and investigated by the Police. The informant, Kripa Devi too had sustained injuries and her statement was recorded under Section 164 of the Code, where she supported the prosecution. The Investigating Officer, nevertheless, submitted a final report. A protest petition was moved against the final report, which was rejected by the Magistrate and the final report accepted vide order dated 20.11.2018.

6. Aggrieved, Kripa Devi carried Criminal Revision No.436 of 2018 to the learned Sessions Judge, which came up before the learned Additional Sessions Judge, Khurja at Bulandshahr. He set aside the order dated 20.11.2018 vide his judgment and order dated 06.04.2019. The matter was sent back to the Magistrate, but with what directions, is not very patent. The Magistrate, bearing in mind the gravity of the offence, under orders of the Revisional Court, directed the case to be registered as a complaint case vide order dated 06.06.2019 and proceeded as such.

7. The Additional Chief Judicial Magistrate vide her order dated 20.10.2021, upon considering the statements under Sections 200 and 202 of the Code, proceeded to summon the informant of the present crime, Ratibhan, his son Ravikant, Sanjeev, Vijayveer and Kishan to stand their trial for offences punishable under Sections 323, 354, 504, 506 I.P.C.

8. Now, this case is pending before the Magistrate. It is no doubt a complaint

case, and, may be, as the learned Additional Sessions Judge says in the impugned order, is at a very incipient stage. The applicant, who is one of the accused in the sessions trial and the informant's husband in the complaint case carrying the cross-version, moved an application dated 04.02.2023 before the Trial Judge praying that the record of proceedings of the pending Complaint Case No.523 of 2019, be summoned from the Magistrate's Court and tried along with the sessions trial. The prayer in the application falls short of saying that, but given the legal acumen, seen now-a-days in Mofussil Courts, the purport of the application is clear. It is, particularly, so as the following averment in the application would demonstrate:

"इस प्रकार ए०सी०जे०एम०खुर्जा में लम्बित परिवाद व उक्त सत्र वाद की घटना एक ही दिनांक व समय दिनांक - 16-02-2017 समय शाम 6.00 बजे की है। इसके अलावा इस सत्र वाद के वादी व गवाह परिवाद सं0 - 523 / 2019 में अभियुक्त है। इस प्रकार माननीय न्यायालय में लम्बित उक्त सत्र वाद व प्रार्थनापत्र में वर्णित परिवाद सं0-523 / 2019 अं० धारा - 354, 323, 504, 506, आई० पी० सी० थाना खुर्जा देहात क्रोस केस है। दोनो वादों का निस्तारण एक ही साथ आवश्यक है।"

9. The learned Sessions Judge has understood the application to be one made for trial of both cases together by the learned Sessions Judge, as cross-versions. There is, therefore, no ambiguity about the purport of the application, bearing Paper No.71-B, notwithstanding the casual words in which the prayer has been made. The learned Sessions Judge has rejected the applicant and directed the trial to proceed.

10. Parties have exchanged affidavits and the matter was admitted to hearing on 16.05.2023. It was subsequently heard and judgment reserved, when an interim order was granted staying delivery of judgment in the sessions trial till pronouncement of judgment in this case.

11. Heard Mr. Pandey Balkrishna, learned Counsel for the applicant, Mr. Sunil Kumar Singh, learned Counsel on behalf of opposite party No.2 and Mr. D.K. Srivastava, learned A.G.A. on behalf of the State.

12. It is submitted by the learned Counsel for the applicant that it is a salutary principle of law governing procedure in criminal trials that cross-version must always be tried together. He submits that keeping out one cross-version gives an incomplete picture to the Court, and, in any case, one of the versions if tried in isolation, almost results in rejection of the other, without a trial.

13. Mr. Sunil Kumar Singh, learned Counsel for the complainant and Mr. D.K. Srivastava, learned A.G.A., on the other hand, say that bringing in the so called cross-version, which is pending as a complaint case before the Magistrate, is no more than a dilatory tactic by the accused in a case where the sessions trial has reached a stage where judgment has to be pronounced.

14. Upon hearing learned Counsel for parties, this Court finds that what the learned Counsel for the complainant and

the learned A.G.A. say, is in accord with what the learned Trial Judge held, and what has to be seen is, if the order passed by the Trial Court, given the nature of the two versions, is in accord with the law. The learned Judge has said in his remarks that the sessions trial is at the stage of address of arguments and the complaint case, which the applicant says, ought to be called and tried, is pending before the A.C.J.M., Khurja, Bulandshahr. In that case, summons have been issued against the accused and the entire testimony is yet to be recorded. It is also remarked by the learned Sessions Judge that the accused, in their statements under Section 313 of the Code, have not mentioned the cross-case nor do they say that the present sessions trial arises out of the same incident. It is also noted by the Trial Judge that between the two sides in the past also, according to the accused's statement under Section 313 of the Code, offences have been committed involving the family, where cases are pending. The Court has concluded that the application made by the applicant in this case is one to delay trial and runs counter to the directions of the Supreme Court and this Court to conclude criminal trials at the earliest as an imperative. The first to be determined is the fact if indeed the complaint case at the instance of the applicant or so to speak his wife, is a cross-version of the occurrence. The Trial Judge has contented himself, by holding it not to be so, because the accused in their statement under Section 313 of the Code have not said it to be a cross-case pending between parties. We do not think that, that is in any way decisive of the matter.

15. The substance of a cross-version or a cross-case comes from the fact if in the same occurrence, the aggressor, who is the accused, says that in fact he is not to blame, but the other side, who are the complainant and dubbed him as the aggressor, are themselves the aggressors, who have committed an offence, for which they ought to be punished. The fact, therefore, if a case indeed is a cross-version, depends mostly upon the fact if the occurrence is the same, about which two sides have different versions. The mere fact that one side being tried as the accused do not say in their statement under Section 313 of the Code that there is a cross-version also, is not at all relevant. The learned Trial Judge has spoken about the stage of the trial as fairly advanced before him and the complaint case being at an incipient stage, as a consideration against trying the cross-version together. That again is an irrelevant consideration. The question of delay while certainly of concern for every Judge, cannot be remedied by haste, resulting in miscarriage of justice. If two cross-versions that are indeed so and arise from the same occurrence are tried at different points of time, one earlier and the other later, one before one Judge and the other before another Judge, would certainly result in the determination of truth being lost to preclusion by the first determination and a truncated trial being held, causing miscarriage of justice. The complete and wholesome version would never be tried. This is not the cost at which the trial of a case is to be expedited. This is not to say that cross-versions being in most cases mutually exclusive in the sense that if one is true, the other false, the trial of cross-versions is to be consolidated and common evidence recorded. That is not the law about it. In cross-versions arising out of the same occurrence, trials are to be separately held, one after the other, but before the same Judge, who may, therefore, have a complete picture of it before him, when evidence concludes in both trials. The

further salutary purpose to be achieved by this course of action is to eschew conflicting judgments relating to the same occurrence.

16. What we observe in this case from the records is that the cross-version is not merely one that has been propounded as some kind of a counterblast or a mala fide enterprise. Rather, the learned Trial Judge has himself noticed that there is a history of offences involving families of the applicant and the complainant in this case. The version here also narrates that there are injuries, regarding which the Police told the applicant and his party to get themselves medically examined first before an FIR is lodged. They did get themselves medically examined according to the applicant's version, but an FIR was still not lodged. The applicant and his side approached the Senior S.P. by intimating him of the information through registered post, but to no avail. The applicant's wife acting as the informant, then moved the learned Magistrate under Section 156(3) of the Code and an FIR came to be registered by the Police. The Police put in a final report, which was protested. The protest was rejected and the FR accepted. The applicant's wife then preferred a revision to the Sessions Judge, that was allowed and the matter remanded. In the next lap, the learned Magistrate chose to take cognizance of the matter as a complaint and after an inquiry under Sections 200 and 202 of the Code, summoned the opposite party-complainant and the other accused on his side to stand their trial.

17. In the background of these facts, what is further noticeable is that the FIR lodged at the instance of the applicant and that on behalf of the complainant-opposite party, allege the incident to have happened on the same date i.e. 16.02.2017. Rather, quaintly the FIR lodged at the instance of the complainant-opposite party, does not mention any time of the incident. To the contrary, the FIR lodged at the instance of the applicant, under orders of the Magistrate, mentions the time of occurrence to be 6 o'clock in the evening hours. According to the FIR that the applicant's wife had lodged, which has now culminated in the complaint case, the aggressors were the complainants of the case giving rise to the sessions trial, where the victim Ravikant and the informant himself were amongst the party, who entered the applicant's home and molested the informant. The FIR at the instance of the applicant's wife clearly says that Ravikant was apprehended when others had arrived and the informant's husband and her two brothers-in-law were there, the co-accused in this case. All these facts coalesce to show that the two incidents are indeed cross-versions.

18. All that has been said here may not be taken to mean in the slightest an expression of opinion on the merits of the parties' case. That is not the office of these proceedings under Section 482 of the Code nor the intention of the Court to judge the truth or otherwise of the two versions. All that we wish to say is that the facts that we have noticed show both the cases to be indeed cross-versions, arising out of the same occurrence. The concern of the learned Sessions Judge about the delay is also not well-founded, the way the proceedings in this case have turned. The fact that the Police had not registered the informant's case and when it was indeed registered under orders of the Magistrate, they put in a final report, which was accepted by the learned Magistrate, compelling the applicant to approach the

Revisional Court, makes the delay not relevant. These are all matters that do not support inherently a dilatory conduct on the applicant's part or the other co-accused on his side. The applicant cannot be blamed for delays on the part of the Police, or the mistakes that they have committed, or the errors by the learned Magistrate that were rectified in revision. The blame for the time consumed in all these proceedings cannot be placed on the applicant's shoulder.

19. The principles governing cross-cases and the propriety of these being tried together, this Court has already dealt with. This issue has engaged the attention of the Supreme Court in **Nathi Lal and others v. State of U.P. and another, 1990 Supp SCC 145,** where it was observed:

"2. We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

20. A more elaborate statement of the principles is to be found in the decision of the Supreme Court in State of **M.P. v. Mishrilal (dead) and others, (2003) 9 SCC 426,** where following **Nathi Lal (supra)** it has been held:

"8. In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just, fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathi Lal case [1990 Supp SCC 145 : 1990 SCC (Cri) 638] . The cross-cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross-cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either one of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice."

21. The question that is involved here in the context of trying two cases together by the same Judge, arising out of the same occurrence, one instituted on a police report and the other dealt with as a complaint, came up before the Supreme Court in **Pal**

alias Palla v. State of Uttar Pradesh, (2010) 10 SCC 123. The issue was if the case on the police challan had to be tried together with the complaint carrying a cross-version or just the police case tried in accordance with the provisions of sub-Sections (1) and (2) of Section 210 of the Code. It was held in **Pal alias Palla (supra):**

"30. The facts of the case also warrant that the two trials should be conducted by the same Presiding Officer in order to avoid conflict of decisions. As was observed in Harjinder Singh case [(1985) 1 SCC 422 : 1985 SCC (Cri) 93] clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously."

22. Since in cross-cases, the versions would be mutually exclusive and conflicting decision is to be eschewed, the two cases are to be tried together by the same Judge recording evidence separately in both the trials. And, as held in **Nathi Lal**, judgment must be pronounced by the same learned Judge, one after the other, to borrow the words of their Lordships.

23. In view of these facts, this Court finds that the impugned order passed by the learned Sessions Judge is not sustainable and deserves to be quashed.

24. In the result, this application succeeds and is **allowed**. The impugned order passed by the learned Additional Sessions Judge, Court No.12, Bulandshahr dated 09.02.2023 is hereby **quashed**. It is ordered that proceedings of Complaint Case No.523 of 2019, Kripa Devi vs. Ravikant and others, under Sections 323, 354, 504, 506 I.P.C., Police Station Khurja Dehat, District Bulandshahr pending before the learned Magistrate, shall be called by the Additional Sessions Judge, Court No.12, Bulandshahr and tried by the same Judge, though separately, where evidence would be recorded in each case, also separately. The judgment shall, however, be pronounced by the same learned Judge, one after the other, bearing in mind the guidance in this judgment and the law.

(2024) 3 ILRA 1003
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2023

BEFORE

THE HON'BLE DINESH PATHAK, J.

Application U/S 482. No. 9198 of 2021

Aman Deep Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri K.S. Tiwari, Sri Amber Khanna, Sri Raj Kumar Khanna, Sri Vivek Tiwari

Counsel for the Opposite Parties:
G.A., Sri Pawan Kumar Shukla, Sri Santosh Kumar Pandey, Sri Shaeshadri Trivedi, Sri Satish Trivedi (Sr. Advocate)

Criminal Law – Criminal Procedure Code, 1973 – Sections 145, 145-(1) & 482 – Constitution of India,1950 - Article - 227- Application U/s 482 Cr.P.C. - for quashing of the impugned order of property attachment under Section 145(1) Cr.P.C. as well as the entire criminal proceedings – a suit is pending

between Applicant and Opposite party no. 2 with regards to a 'Hari Nikunj Asharam' exists in two separate buildings – police submitted report – strained situation on the spot – Magistrate passed preliminary order of attachment of property u/s 145(1) Cr.P.C. during pendency of dispute – applicant argued that a Civil Suit is pending and an interim *'status quo order'* is exist provided by the High Court as such impugned criminal proceedings is unjustified by citing precedents like *Ram Sumer Puri Mahant* and *Amresh Tiwari*,- applicant further contended that possession issues should be resolved exclusively by the civil court, especially since the Ameen report and trial court had acknowledged the applicant's possession - The opposite party countered that mere pendency of a civil suit does not bar Section 145 Cr.P.C. proceedings in the absence of effective interim relief or final adjudication – relying upon the judgment passed in the case of '*Mohd. Shakir Vs St. of U.P. & ors.'* wherein the Hon'ble Supreme Court held that during the pendency of a civil suit concerning property, criminal proceedings under Section 145 Cr.P.C. should be dropped without the Magistrate issuing findings or interim directions, leaving all matters to the civil court - Applying this principle, Court held that, the preliminary order passed u/s 145(1) Cr.P.C. is unjustified during the ongoing civil suit and existing interim order from the High Court - Since the civil court had already acknowledged the applicant's possession, *albeit not peaceful or legal*, the continuation of parallel criminal proceedings was deemed an abuse of process - Consequently, the Court quashed the impugned order and allowed the application with liberty to the parties to seek remedies through the civil court during the suit's pendency.
(Para – 9, 10, 11)
Application Disposed of. (E-11)

List of referred Cases: -
1. Ram Sumer Puri Mahant (appellant) Vs St. of U.P. & ors.(respondent) - AIR 1985 Supreme Court 472,

2. Amresh Tiwari (appellant) Vs Lalta Pradad Dubey & ors.(respondents) - AIR 2000 Supreme Court 1504,

3. Jhunamal @ Devandas Vs St. of M.P. & ors.- AIR 1988 Supreme Court 173,

4. Sanjay Kumar Vs VI Additional District Judge, Bareilly decided vide order dated 16.01.1996 - 1996 1 AWC 277,

5. Sanjay Sahai Vs St. of U.P. & anr.- application U/S 482 No.36518 of 2022 - decided on 19.11.2022,

6. Mohd. Shakir Vs St. of U.P. & ors.[2022 Live Law (SC) 727],

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Raj Kumar Khanna learned counsel for the applicant and Sri Satish Trivedi (Senior Advocate) assisted by Sri Sheshadri Trivedi learned counsel for the opposite party no.2 as well as learned A.G.A. for the State.

2. The present applicant has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. beseeching the quashing of the order dated 04.03.2021 passed by City Magistrate, Mathura, under Section 145 (1) Cr.P.C. in Case No.35 of 2021 (Aman Deep Singh vs. Adarsh Pal Gupta) and entire proceeding of said case under Section 145 Cr.P.C.

3. Facts culled out from the record reveals that the property in question known as Hari Nikunj Ashram exist in two separate buildings situated at Sri Radha Rani Anna Kshetra, Sri Banke Bihari Colony, Vrindavan, Mathura. Police has submitted report dated 02.03.2021 with an averment that the first party (applicant herein) and the second party (contesting opposite party herein) are claiming their right, title and possession over the property in question, therefore, considering the strained situation on spot both the parties may be summoned and Ashram (property in question) may be attached till the decision with respect to the right and possession of parties over there, so that,

law and order could prevail. Considering the police report, learned Magistrate, by order dated 04.02.2021, has passed preliminary order under Section 145 (1) Cr.P.C. calling upon the parties to present their respective cases with respect to the possession and title over the property in question, which is under challenge before this Court.

4. Learned counsel for the applicant has hammered the preliminary order under Section 145 (1) Cr.P.C. on the ground of pendency of the Civil Suit No.15 of 2021 and submitted that the property in question namely Hari Nikunj Ashram is run under the supervision and control of Panchayati Akhada Nirmal. Owing to disturbance in the possession of Panchayat Akhada Nirmal created by the opposite party no.2 (second party in proceeding under Section 145 Cr.P.C.), Panchayati Akhada Nirmal along with Hari Nikunj Ashram has filed a civil suit being O.S. No.15 of 2021 dated 06.01.2021 for permanent prohibitory injunction against the opposite party no.2 herein. Considering delay in decision on the interim injunction application plaintiff has approached before this Court by moving a petition being mater Under Article 227 No.115 of 2021. Co-ordinate Bench of this Court, vide order dated 13.01.2021, has disposed of the said petition with a direction to decide the interim injunction application (7-C) within a period of one months, however, interim protection for maintaining status-quo was granted as well for a period of two months or till the decision on the aforesaid application, whichever is earlier. During pendency of the aforesaid civil suit, preliminary order dated 04.03.2021 under Section 145 (1) has been passed on the basis of police report dated 02.03.2021. Interim injunction application was rejected by order dated 09.09.2021 (Annexure-C.A.1), however, Misc. Appeal No.28 of 2021 is still pending against said rejection order. It has been emphasized that during the existence of interim order passed by Hon'ble High Court, vide order dated 13.01.2021, and pendency of the civil suit which was filed on 06.01.2021, learned Magistrate had inherent lack of jurisdiction to entertain the police report and pass preliminary order under Section 145 (1) Cr.P.C. It is further submitted that the possession of the first party (applicant herein) is evident from the Ameen report dated 14.01.2021 submitted in the civil suit and the observation made by the trial court in its order dated 09.09.2021. It is further submitted that in the light of the fact that the civil suit was pending before the court competent and opposite party no.2 has a remedy to file an appropriate application for the possession and appoint a receiver for the purposes of protection of the property in question, there is no justification of continuing a parallel proceeding in criminal side under Section 145 Cr.P.C. In support of the his submission learned counsel for the applicant has relied upon and case of ***Ram Sumer Puri Mahant (appellant) vs. State of U.P. and others (respondent), AIR 1985 Supreme Court 472, and Amresh Tiwari (appellant) vs. Lalta Pradad Dubey and others (respondents), AIR 2000 Supreme Court 1504.***

5. Per contra learned counsel for private opposite party no.2 has vehemently opposed the submissions advanced by learned counsel for the applicant and contended that mere pendency of the civil suit between the parties is not sufficient ground to drop the proceeding under Section 145 Cr.P.C. It is further contended that no interim protection has been granted

to the present applicant at any stage of civil litigation, even, interim protection granted by Hon'ble High Court was vacated after two months from the date of its order i.e. 13.01.2021. In absence of any interim order or final decision from the court competent with respect to the right and tile over the property in question, the initiation of proceeding under Section 145 Cr.P.C. cannot be said to be illegal. It is further contended that the applicant has still an opportunity to contest before the Magistrate concerned by way of filing their objection and adducing evidence in support of his case. Learned counsel for private opposite party has relied upon the following cases :-

(I) Jhunamal @ Devandas vs. State of M.P. and others, AIR 1988 Supreme Court 173;

(II) Sanjay Kumar vs. VI Additional District Judge, Bareilly decided by co-ordinate Bench of this court on 16.01.1996, 1996 1 AWC 277;

(III) Sanjay Sahai vs. State of U.P. and another decided by co-ordinate Bench of this Court vide order dated 19.11.2022 passed in application U/S 482 No.36518 of 2022.

6. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, it is manifested that property in question is known as Hari Nikunj Ashram. Present applicant (first party) is claiming his right and title over the property in question on the basis of registered sale deed and the gift deed said to have been executed by then owners of the property in question in favour of the predecessor in the interest of the applicant herein. However, opposite party no.2 is claiming his right and title over the property in question through separate society. At this juncture, it would not be befitting to consider this aspect of the matter which relates to the right and title of the parties and the same is subjudice before the civil court in Original Suit No.15 of 2021. Admittedly, Original Suit No.15 of 2021 has been filed on 16.01.2021. However, having considered the delay in decision on the interim injunction application (7-C), present applicant has invoked the supervisory jurisdiction of this Court by way of filing a petition under Article 227 No.115 of 2021. Co-ordinate Bench of this Court vide order dated 13.01.2021 has disposed of the aforesaid petition with a direction to decide the interim injunction application (Paper No.7-C) within a period of one month, however, for a period of two months or till the decision on the interim injunction application, whichever is earlier, parties were directed to maintain status-quo. During the existence of two months protection for maintaining status-quo and the pendency of the suit, police has submitted report dated 02.03.2021, which was taken into account while passing the preliminary order under Section 145 (1) Cr.P.C. Thus, order impugned has been passed not only during pendency of the suit but also during existence of the interim order granted by this Court. Apart from that while rejecting the interim injunction application, vide order dated 09.09.2021, learned Civil Judge (Senior Division), Mathura has made an observation acknowledging the possession of the present applicant over the property in question, however, he has refused to grant interim injunction on the ground that plaintiff/applicant has failed to prove his possession legal. Learned Civil Court might has not passed interim injunction in favour of the present applicant, however, in my considered opinion, his observation with respect to the possession of the present

applicant over the property in question cannot be ignored particularly for the purposes of parallel criminal proceeding under Section 145 (1) Cr.P.C. Opposite party no.2 herein has been arrayed as defendant no.1 in the Original Suit No.15 of 2021 and he has an ample opportunity to move an appropriate application before the Civil Court to get injunction in his favour with respect to the property in question along with the counter claim to establish his legal right and title over there. On the premise of pendency of the civil suit which has already been instituted on 06.01.2021 prior to the police report dated 02.01.2021 and preliminary order dated 04.01.2021 under Section 145 (1) Cr.P.C., there is no justification to continue the parallel criminal proceeding under Section 145 Cr.P.C. to examine the possession of the parties over the property in question. In the matter of Amrish Tiwari (supra) proceeding under Section 145 Cr.P.C. was dropped by learned Magistrate considering the pendency of the civil suit, however, same was reversed by the higher court. Hon'ble Supreme Court has upheld the order passed by learned Sub-Divisional Magistrate and held that multiplicity of the litigation should be avoided as it is not in the interest of the parties and the public time would be wasted over meaningless litigation. It is further observed that when possession is being examined by the civil court and the parties are in a position to approach the civil court for adequate protection of the property during pendency of the dispute, the parallel proceeding i.e. under Section 145 Cr.P.C. should not continue. Hon'ble Supreme Court in said case has considered the ratio decided by Hon'ble Supreme Court in the matter of Ram Sumer Puri Mahant (supra). For ready reference relevant paragraph Nos.12, 13 and 14 of the judgement passed in the case of ***Amresh Tiwari (supra)*** is quoted hereinbelow:-

"12. The question then is whether there is any infirmity in the order of the S.D.M. discontinuing the proceedings under Section 145 Criminal Procedure Code. The law on this subject-matter has been settled by the decision of this Court in the case of Ram Sumer Puri Mahant v. State of U.P., reported in, (1985) 1 SCC 427: (AIR 1985 SC 472: 1985 Cri LJ 752). In this case it has been held as follows:

"When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, we see hardly any justification for initiating a parallel criminal proceeding under Section 145 of the Code. There is no scope to doubt or dispute the position that the decree of the civil court is binding on the criminal Court in a matter like the one before us. Counsel for respondents 2-5 was not in a position to challenge the proposition that parallel proceedings should not be permitted to continue and in the event of a decree of the civil Court, the Criminal Court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the Civil Court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation. We are, therefore, satisfied that parallel proceedings should not continue."

13. We are unable to accept the submission that the principles laid down in Ram Sumers case (AIR 1985 SC 472: 1985 Cri LJ 752) would only apply if the civil Court has already adjudicated on the dispute regarding the property and given a finding. In our view Ram Sumers case is laying down that multiplicity of litigation should be avoided as it is not in the interest of the parties and public time would be wasted over meaningless litigation. On this principle it has been held that when possession is being examined by the civil

Court and parties are in a position to approach the civil Court for adequate protection of the property during the pendency of the dispute, the parallel proceedings i.e. Section 145 proceedings should not continue.

14. Reliance has been placed on the case of Jhummamal alias Devandas v. State of Madhya Pradesh reported in, (1988) 4 SCC 452: (AIR 1988 SC 1973: 1989 Cri LJ 82). It is submitted that this authority lays down that merely because a civil suit is pending does not mean that proceedings under Section 145, Criminal Procedure Code should be set at naught. In our view this authority does not lay down any such broad proposition. In this case the proceedings under Section 145, Criminal Procedure Code had resulted in a concluded order. Thereafter the party, who had lost, filed civil proceedings. After filing the civil proceedings he prayed that the final order passed in the Section 145 proceedings be quashed. It is in that context that this Court held that merely because a civil suit had been filed did not mean that the concluded order under Section 145 Criminal Procedure Code should be quashed. This is entirely a different situation. In this case the civil suit had been filed first. An Order of status quo had already been passed by the competent civil Court. Thereafter Section 145 proceedings were commenced. No final order had been passed in the proceedings under Section 145. In our view on the facts of the present case the ratio laid down in Ram Sumers case (AIR 1985 SC 472: 1985 Cri LJ 752) (supra) fully applies. We clarify that we are not stating that in every case where a civil suit is filed. Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil Court that proceedings under Section 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the orders of the civil Court would be binding on the Magistrate."

7. In a recent judgement of Hon'ble Apex Court, viz. ***Mohd. Shakir vs. State of U.P. & others [2022 Live Law (SC) 727],*** it has been held that during pendency of civil suit qua property in question, while dropping the proceeding under Section 145 Cr.P.C., there is no justification for the learned Magistrate to record any finding or issue any interim direction. The Magistrate ought to have left all the relevant aspects for consideration of the competent civil court, without recording any finding in the matter.

8. Having careful consideration to the ratio decided by Hon'ble Supreme Court, in the matters as discussed above, in the given facts of the present case, there is no room of doubt that while the civil suit is pending between the parties with respect to the possession and title over the property in question, parties could avail appropriate remedy before the civil court concerned qua their possession and protection of the property during pendency of the suit.

9. Judgement relied upon by learned counsel for the respondent does not come in rescue to his contention. Case of ***Jhunamal @ Devandas (supra)*** has been distinguished by Hon'ble Supreme Court in its judgement passed in the case of ***Amresh Tiwari (supra).*** In the matter of ***Jhunamal @ Devandas (supra),*** after culmination of proceeding under Section 145 Cr.P.C. civil

suit was filed and Hon'ble High Court has quashed the order passed under Section 145 Cr.P.C. on the ground of pendency of the civil suit. In this backdrop of the facts, Hon'ble Supreme Court has observed that concluded proceeding under Section 145 Cr.P.C. should not be set at naught merely because unsuccessful party has approached before the civil court. So far as the case of Sanjay Kumar (supra) is concerned, same is not much helpful as well to the opposite party wherein proceeding under Section 145 Cr.P.C. has been held to be valid for want of adjudicate interim injunction from the civil court. It has been observed by co-ordinate Bench of this Court in the cited case that proceeding under Section 145 Cr.P.C. should be dropped only when the civil court has passed some effective order indicating as to which of the parties was entitled to possession. Apart from that proceeding should also be dropped when civil court has appointed a receiver or has made same arrangement for maintenance of such property. But, when the civil court does not clarify the position regarding the possession of contesting parties by passing an effective order, the criminal proceeding are not to be dropped because in that case both the parties may stake their claim for the possession and the situation may lead to the breach of peace. Applying the observation made by co-ordinate Bench of this Court in the given circumstances of the present case, I am of the opinion that while deciding the interim injunction application (Paper No.7-C), learned trial court has made unequivocal observation acknowledging the possession of the present applicant over the property in question, however, refused to grant interim order on the ground that possession is not legal. While discussing the prima-facie case and balance of convenience, learned trial court has made observation that possession of the plaintiff (applicant) is for a short period that too it was restrictive and was not peaceful. It has also been observed that possession of the applicant was not in accordance with law. Thus, learned civil court has unequivocally indicated the possession of the plaintiff (applicant herein) over the property in question that might be illegal or not peaceful. In the matter of Sandeep Sahai (supra), co-ordinate Bench of this Court has declined to exercise its inherent jurisdiction under Section 482 Cr.P.C. on the ground that the applicant in that matter had an alternative remedy to approach before the authority concerned by filing an appropriate application/objection against the preliminary order under Section 145 (1) Cr.P.C.

10. In this conspectus, as above, I am of the considered view that in the peculiar facts and circumstances of the present case wherein at the time of passing the preliminary order dated 04.05.2021 under Section 145 (1) Cr.P.C., interim order dated 13.01.2021 passed by Hon'ble High Court was in existence and civil suit was pending and, precisely, learned civil court in its order dated 0909.2020 has indicated the possession of the plaintiff over the property in question, there is no justification to keep the parties indulge in a parallel criminal proceeding as enunciated under Section 145 Cr.P.C. Ratio decided by Hon'ble Supreme Court in the matter of Amresh Tiwari is still a law of land in the matter pertaining to proceeding under Section 145 Cr.P.C. This Court found an abuse of process of court in passing the impugned preliminary order dated 04.02.2021 under Section 145 (1) Cr.P.C., therefore, to secure the ends of justice, same is liable to be quashed. There is no need to say that the right, title and possession of the parties

would be abided by the final outcome of the civil suit pending before the court competent and in case of any peculiar circumstances requiring interim protection parties can approach before the civil court for appropriate order.

11. Resultantly, instant application under Section 482 Cr.P.C. is hereby allowed and the preliminary order dated 04.02.2021 passed by City Magistrate, Mathura, under Section 145 (1) Cr.P.C. in Case No.35 of 2021 (Aman Deep Singh vs. Adarsh Pal Gupta), under challenge before this Court, is hereby quashed.

(2024) 3 ILRA 1010
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482. No. 10238 of 2023

Sanjay Verma ...Applicant
Versus
State of U.P. ...Opposite Parties

Counsel for the Applicant:
Sri Imran Ullah, Sri Sahibe Alam, Sri Vineet Vikram

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section 482 – U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 3 & 23 - Indian Penal Code, 1860 - Sections 34, 120-B, 201, 302, 328, 404, 406, 411, 419, 420, 427, 441, 447, 467, 471, 504, 506 & 713 - U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021 - Rule 2(b), 2(c), 5, 5(3)(C), 6, 7, 11, 13, 15, 16, 17, 21, 24 & 26 - Application under Section 482 Cr.P.C. – for quashing the criminal proceedings stemming from a charge-sheet and cognizance order under Sections 2/3 of the Gangsters Act – FIR - based on a gang-chart approved by authorities - alleged that applicant was a gang leader involved in serious crimes – applicant pleaded that, the FIR was lodged with mala fide intent, lacked evidence of gang activity, and violated procedural rules by including an acquitted case and omitting required documentation - in response, the police claimed applicant instilled societal fear for personal gain, but the applicant refuted these claims, asserting that the cited cases were personal in nature and did not meet the legal criteria for gangsterism - court finds that, the gang-chart was prepared and approved mechanically without legal justification or recorded satisfaction, violating procedural safeguards and constitutional protections under Article 21 – held that, the proceedings were an abuse of process and amounted to harassment - hence, the court quashed the charge-sheet and cognizance order - therefore, application is allowed.
(Para – 23, 24, 25, 26, 27)

Application Allowed. (E-11)

List of referred Cases: -

1. Writ Petition No. 6249/2003 Inre: Amar Nath Dubey Vs St. of U.P.,

2. Ashok Kumar Dixit Vs St. of U.P.; 1987 (34) ACC 164

3. Vimal Shukla Vs St. of U.P.; 2019 (1) ARC 299,

4. Shubhankar Gupta Vs St. of U.P.; (2019) 1 A.Cr.R.,

5. Ashok Kumar Dixit Vs St. of U.P.; 2007 (2) ACC 683 Alld.

6. Parvez Vs St. of U.P.; 2021 Crl.J. 4034 (All) (LB).

7. Shraddha Gupta Vs St. of U.P. & ors.; (2022) 17 S.C.R. 622 (Para 10) (635-B-G),

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

1. Heard lerned counsel for the applicant and learned AGA for the State-respondents.

2. The instant Application U/S 482 Cr.P.C. has been filed on behalf of the applicant for quashing the entire criminal proceedings emanating from charge-sheet dated 29.06.2021 and cognizance order dated 31.08.2021 in case No.618 of 2021 in relation to Case Crime No.286 of 2020, under Section 2/3 of Gangsters and Anti-Social Activities (Prevention Act, 1986, Police Station-Nawabad, District-Jhansi, which is pending before the Special Judge (Gangster Act), Court No.3, Jhansi.

3. On the basis of gang-chart prepared/forwarded/approved by the Police and Administrative Authority, FIR was lodged against the applicant and five other co-accused persons. The First Information Report giving rise to the crime, which after investigation, has culminated in the charge-sheet impugned, was submitted against the applicant and five other co-accused persons on 22.08.2020 at P.S.-Nawabad, District Jhansi, by Vinod Kumar Mishra, Inspector (In-charge), P.S.-Nawabad, District-Jhansi with the allegation that applicant has an organized gang wherein he is a gang-leader, whereas five other co-accused are members of the said Gang. It is further alleged in the impugned FIR that applicant is a notorious criminal and has been involved in the offences of murder, kidnapping and extortion for quite sometime and is also obtaining pecuniary gains from the same.

4. It is submitted by the counsel for the applicant that applicant has been falsely implicated in the present case on the basis of mala fide intentions of the police as there is no evidence available on record to show that the applicant is a part of any gang. It is further submitted that impugned FIR was lodged on the basis of a gang-chart dated 08.08.2020, wherein, four cases have been shown against the applicant. It is further submitted that gang-chart prepared in the present case is not at all in consonance with the provisions of Rule 5(3)(c) of the Rules, 2021 as the same dictate that no cases where the accused has been acquitted shall be included in the gang-chart, whereas in the present case crime No.482 of 2015 has been included in the same. According to gang-chart attached with the present case, four criminal cases have been shown against the applicant no.1 registered as case crime Nos.229 of 2019, under Sections 713, 302, 201, 328/34, 411 and 404 IPC, Police Station-Nawabad, District-Jhansi (ii) Case Crime No.594 of 2019, under Sections 420, 406, 506, 504 IPC, Police Station-Nawabad, District-Jhansi (iii) case crime No.476 of 2015, under Sections 441, 447, 427, 506 IPC, Police Station-Nawabad, District-Jhansi (iv) case crime No.482 of 2015, under Sections 302, 120-B/467/468/471/41 9/420 IPC, Police Station-Nawabad, District-Jhansi. It is noteworthy that applicant is shown to have been involved in all the four cases cited in the gang-chart but the alleged members (co-accused) are shown to have been involved only in one criminal case registered as case crime Nos.229 of 2019, under Sections 713, 302, 201, 328/34, 411 and 404 IPC, Police Station-Nawabad, District-Jhansi, wherein applicant has already been enlarged on bail by the court concerned.

5. The gang chart of the said cases is reproduced here-in-under:-

Gang Chart –Gang Leader Sanjay Verma s/o of Hari Mohan Verma

r/o 57, Vasudev, Bada Bazar P.S.- Kotwali, District-Jhansi.

क्र०सं०	लीडर /सदस्य का नाम व पता	गैग लीडर /सदस्य	मु०अ० सं० 229/19 धारा 364/120बी/419/420/467/468/471/302/201/328/34/411/404 भादवि थाना नवाबाद झाँसी आरोप पत्र सं० 462/19 दिनांक 01/12/19	मु०अ०सं० 594/19 धारा 420/406/506/504 भाद वि थाना नवा बाद झाँसी आरोप पत्र सं० 224/19 दिनांक 07.11/19	मु०अ०सं० 476/15 धारा 441/447/427/506 भाद वि थाना नवा बाद झाँसी आरोप पत्र सं० 443/15दिनांक 17.10.15	मु०अ०सं० 482/15 धारा 302/120 बी/467/468/471/419/420 भाद वि थाना नवा बाद झाँसी आरोप पत्र सं० 436/15 दिनाँक 11.10.15
1-	संजय वर्मा पुत्र हरि मोहन वर्मा निवासी 57 वासुदेव बडा बाजार थाना कोतवाली झाँसी उम्र 55वर्ष	गैग लीडर	√	√	√	√
2-	योगेश कुमार गुप्ता पुत्र स्व० निखिल कुमार गुप्ता निवासी 67/02 ऋषि कुन्ज स्कूल भैरो खिड की अन्दर विसात खाना थाना	सदस्य	√	०	०	०

	कोतवाली जनपद झाँसी उम्र 29वर्ष					
3-	जितेन्द्र राय पुत्र मुरलीधर राय निवासी शिव परिवार का लोनी डडियापुरा थाना कोतवाली झाँसी उम्र 31 वर्ष	सदस्य	√	०	०	०
4-	नरेन्द्र सैन पुत्र कृपाराम निवा	सदस्य	√	०	०	०
	सी राजेन्द्र नगर उरई थाना कोतवाली उरई जनपद जालौन हाल निवासी राय विहार का लोनी नारायण बाग थाना नवाबाद झाँसी उम्र 31 वर्ष					
5-	सर्वेश कुमार राय पुत्र मिथलेश कुमार राय	सदस्य	√	०	०	०

	निवासी बैकर्स का लोनी डडियापुरा शिवाजी नगर थाना कोतवाली जिला झांसी उम्र 37 वर्ष					
6-	जय नारायण लिटौरिया पुत्र महादेव प्रसाद निवासी का शीराम का लोनी मण्डी के पीछे थाना कोतवाली जनपद ललितपुर उम्र 36वर्ष	सदस्य	√	०	०	०

6. It is further submitted that according to the provisions of Rule 5(3)(e) of 2021, all the other criminal cases pending against the accused have to be attached with the gang-chart, but in the present case, no such separate list was attached with the gang-chart at the time when the same was approved. It is further contended that there is violation of relevant provisions of Section 2(b) of the Act as well as relevant provisions of Rules, 2021.

7. In response to the notice issued to respondent nos.1 and 2, a counter affidavit was filed which is duly sworn by Jai Prakash Yadav, presently posted as Inspector, Police Station-Nawabad, District-Jhansi, in which all the allegations and averments made in the affidavit filed in support of the application under section 482 cr.p.c. have been totally denied and it is asserted that accused-applicant is a gang-leader of the gang and is created a fear and terror in the society and is involved in anti-social activities for pecuniary and temporal gains and due to his terror and fear no person of public is coming forward to depose against him.

8. In response to the counter affidavit filed by the opposite parties, rejoinder affidavit was filed on behalf of the applicant, in which, the allegations and

averments made in the counter affidavit were totally denied.

9. It is submitted by the learned counsel appearing for the applicant, that even if all allegations in the impugned FIR and charge-sheet are regarded as true, no case under Sections 2/3 of the Act of 1986 is made out against the applicant. In order to support the aforesaid submission, learned counsel has referred to the provisions of the gangster Act of 1986. He submits that there are two essential ingredients to constitute a gang. The two essential ingredients, according to learned counsel for the applicants, are 'violence' or 'disturbance of public order' indulged in by a group of persons, acting either singly or collectively, for the purpose of pecuniary gain etc.

10. It is the learned counsel for the applicants' submission that none of the offences charged against the applicant, either involves violence or the disturbance of public order. Therefore, even if there be allegations about pecuniary gain, the consequences under the Act of 1986 would not be attracted. He next submits that there are four base cases registered against the applicant, on the foot of which the present prosecution has been launched under Section 2/3 of the Act of 1986, out of which, in three cases, applicant has been enlarged on bail by the court concerned, whereas, in one case, he has been acquitted by the court concerned. It is also submitted that out of four cases, in two cases viz. case crime No.476/15, under Sections 441, 447, 427, 506 IPC, P.S.-Nawabad, District-Jhansi and case crime No.482 of 2015, under Sections 302, 120-B, 467, 468, 471, 419, 420 IPC, P.S.-Nawabad, District-Jhansi for initiating proceedings under Gangster Act, gang-chart was earlier prepared/forwarded, on which, after consideration and deliberation District Magistrate refused to approve the same for the aforesaid purpose. It is further submitted that the applicant has been falsely implicated in the case crime No.229 of 2019, under Sections 364, 120-B, 419, 420, 467, 468, 471, 302, 201, 328, 34, 411, 404 IPC, P.S.-Nawabad, District-Jhansi on the basis of mere suspicion. Further more this case is based on circumstantial evidence and alleged motive against the applicant is avoidence of marriage with the deceased, however, no active and specific role has been given to the applicant and the other case crime No.594 of 2019 under Sections 420, 406, 506, 504 IPC, P.S.-Nawabad, District-Jhansi is regarding fraudulent withdrawal of money from the account of the deceased of the previous case. It is further alleged that in that case, applicant is not alleged to have fraudulently withdrawal money from the account nor he has received any money in his account. It is further submitted that the cases allegedly filed against the applicant are regarding the offence/crime committed by him in his private/personal capacity nor as a gang-leader of any gang whatsoever for temporal and pecuniary gains. Therefore, in the submission of the learned counsel, the base cases are not available to provide foundation to the prosecution to pursue the present case under the Act of 1986. It is in the last submitted by the learned counsel for the applicant that there is violation of Rules 5, 6, 11, 15, 16, 21, 24 and 26 of The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021, vitiating the gang-chart. He has emphasized that non-adherence to these rules has vitiated the basis of registration of the crime and a fortiori the police report and the prosecution. He has emphatically submitted that violation of the aforesaid

rules is not mere omission but it shows that the proceedings before registering FIR has been carried out mechanically without giving heed to the provisions of law and rules, which are of fundamental importance as any false and malacious prosecution entails serious consequances resulting into the deprivation of life and personal liberty of the accused person, which cannot be deprived except for the procedure established by law as is enshrined in the Article 21 of the Constitution of India. The forwarding, recommending and approving authorities have not paid any heed or attention to relevant law and rules, while exercising their authority with regard to the preparation and approval of the gang-chart. The whole exercise on their part has been carried out without application of mind.

11. On the other hand, learned AGA vehemently opposed the aforesaid contentions and submits that applicant is a leader of the gang, who is involved in committing the anti-social activities and crimes for pecuniary and temporal gains, but he could not dispute the violation of aforesaid Rules.

12. Upon hearing learned Counsel for the parties, this Court is of opinion that in order to consider the submissions of learned counsel for the applicant as well as learned counsel for the State, it is imperative to refer to the relevant provoisions of the Act of 1986, which reads as follows:

As the Act being a special statute- *The Act is a special statute which has been enacted for the prevention of and for coping with gangsterism and anti-social activities. The Object and reasons as well as preamble are quoted hereinbelow:-*

Objects and reasons of the Act:- *Gangsterism and anti-social activities influenced the State Legislature in making introduction of such Act. The objects and reasons of the Act are that gangsterism and anti-social activities were on the increase in the state posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with new menace. With a view to break the gangs by punishing the gangsters and to nip their conspirational designs, it was considered necessary to make special provision for the prevention of and for coping with gangsters and anti-social activities in the State. [Ashok Kumar Dixit v. State of U.P., 1987 (34) ACC 164: 1987 ACFR 230 AIR 1987 (All) 235 (All HC, FB)].*

Preamble of Act.-*The Act seeks to punish declared criminals who have deliberately chosen the life of crime. The activities of these professional perpetrators of organised crimes, violence and orgy has a far more baneful effect on the health and morals of the society and its people. If the activities of such recidivist are subjected to same punishment as that other ordinary criminals, the confidence of public in the efficacy and efficiency of State Administration is bound to shake.* ***[Ashok Kumar Dixit v. State of U.P., 1987 (34) ACC 164: 1987 ACTR 230: AIR 1987 (All) 235 (All HC, FB)].***

13. It is important to refer to the relevant provisions of the Act of 1986, which reads as follows:-

"2. Definitions.--*In this Act,--*

(a) x x x

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing

public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities (Act no. 2 of 1974), namely--

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act no. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act no. 4 of 1910) or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or talking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or (Act no. 61 of 1985)

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

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Art, 1956, or

(vi) offences punishable under section 3 of the Public Gambling Act, 1867 (Act no. 104 of 1956), or

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

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

(ix) offences punishable under section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

14. A perusal of the aforesaid provisions shows that violence or disturbance of public order alone are not the sine qua non of a gang as defined under the Act of 1986. It postulates a group of persons, who either acting singly or collectively, employ violence, or threat or show of violence, or intimidation, or coercion, "or otherwise' with the object of (i) disturbing public order; (ii) or of gaining any undue temporal, pecuniary, material; or other advantage for himself or any other person, indulge in anti-social activities, enumerated in clauses (i) to (xxii) of sub-Section (b) of Section 2 of the Act of 1986.

15. It is a well settled cannon of statutory interpretation that a statute should be read and understood according to its plain grammatical meaning, unless that construction leads to an absurd result, or defeats the object and the very purpose of it.

16. Learned counsel for the applicants has also drawn attention towards the mandatory compliance with the provisions of Rule 5, 6, 7, 11, 13, 15, 16, 17, 21, 24 and 26 of the Rules of 2021 framed under the Act of 1986. These Rules have been made by the State Government in exercise of powers under Section 23 of the Act of 1986 to carry out its purposes. Rule 5, 6, 7, 11, 13, 15, 16, 17, 21, 24 and 26 are extracted below:

"5. General Rules.--(*1) To initiate proceedings under this Act, the concerned In-charge of Police Station/Station House Officer/Inspector shall prepare a gang chart mentioning the details of criminal activities of the gang.*

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation to all the persons of the said gang.

(3) The following provisions shall be complied with in respect of gang-charts--

(a). The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/Senior Superintendent of Police/Superintendent of Police.

(b). There may be no gang of one person but there may be a gang of known and other unknown persons and in that

form the gang-chart may be approved as per these rules.

(c). The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.

(d). Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.

(e). A separate list of criminal history, as given in Form No.--4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those cases or even where final report has been submitted in the absence of evidence.

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members mentioned in the gang-chart will also be updated on Interoperable Criminal Justice System (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

6. Relevant provision of the Act to be specifically mentioned-(1) *While preparing the gang-chart, it shall be clearly mentioned if the alleged act of the gang falls within the purview of clause (b) of Section 2 of the Act along with the relevant provision.*

7. Charges mentioned in the earlier gang-chart not to be made the basis of charges in the new gang-chart-*(1) If action has been taken against a gang in the past under the Act and at present a new gang has been formed by the member or gang leader of such gang which has changed its criminal territory or is indulging in new criminal activities, then while preparing the new gang-chart, any crime mentioned in the earlier gang-chart shall not be mentioned in the existing gang-chart and if crime is being committed by changing the gang, with new members or with new gang, then this fact should be clearly mentioned in the abstract of the gang-chart.*

(2) In addition to the above, a list of criminal history may be attached separately.

11. Present status of witness and accused-*(1) If any witness has turned hostile, it will also be clearly mentioned in the summary of gang-chart.*

(2) In the concerned column of gang-chart, the present status of all the accused, whether they are presently in jail or on bail or absconding, shall be clearly mentioned.

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

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

(ii) which disturb the public order; or

(iii) which are a ground for detention under the National Security Act, 1980 (Act No.65 of 1980).

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

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

(2) If action is not to be taken against any member of a gang who has

committed a criminal act in association with the said gang, then in such a case clear and reasonable grounds for not mentioning his name in the gang and gang-chart shall be recorded with reasons and evidences.

(3) The final decision as to whether to include or not to include the name of member of a gang in the gang and gang-chart shall be at the discretion of the commissioner of Police/District Magistrate.

16. Forwarding of Gang-Chart.--

The following manner shall be followed in the forwarding of Gang-Chart:

(1) Forwarding of the gang-chart by the Additional Superintendent of Police:- *The Additional Superintendent of Police will not only take a quick forwarding action in the case but he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and satisfactory basis to pursue the case, only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police/Senior Superintendent of Police.*

'Throughly studied the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 exists. Accordingly, forwarded with recommendation."

(2) Forwarding of the gang-chart by the district police in-charge:- *When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also thoroughly analyse all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal basis for taking action in the case, then he should forward the gang-chart to the Commissioner of Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. Accordingly, approved."*

(3) Resolution of the Commissioner of Police/District Magistrate:- *When the gang-chart is sent to the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/District Magistrate and when he is satisfied that the basis of action exists in the case, then he will approve the gang-chart stating therein that: "I duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang-chart is approved accordingly."*

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked.

17. Use of independent mind.--

(1) The Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.

(2) A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same

shall tantamount to the fact that the Competent Authority has not exercised its free mind."

21. Records relating to sub-clause (iii) of clause (b) of Section 2 of the Act- *If evidence related to possession of any land, etc. Is required, then the entries of that revenue record such as Khasra, Khatauni and map of such land shall be prepared and included in the investigation.*

24. Expeditious Investigation-

(1) The investigation of any offence under the Act shall, as far as possible, be completed within six months.

(2) In unavoidable circumstances, after the approval of the district police in-charge, a maximum extension of three months can be provided.

(3) In no case, can the investigation be extended for more than one year.

26. Approval of district police in-charge-

(1) On receipt of the oral and documentary evidence collected in the case diary, the Commissioner of Police/Senior Superintendent of Police/Superintendent of Police shall again duly peruse all the facts.

(2) Before submitting the charge-sheet in the Court, the approval of the district police in-charge shall be mandatory.

17. Thus from perusal of the Rules, all that is required by Rules is that the Authorities recommending registration of a case under the Act of 1986 should come to the conclusion with an independent application of mind that a case under the Act of 1986 ought to be registered. Likewise, the Authorities approving the gang-chart also should come to the conclusion on an independent application of mind that a case under the Act of 1986 ought to be registered against the accused on the basis of the activities of the gang. However there is no prescription for the employment of particular words to serve as index of due application of mind.

18. It is pertinent to note here that the above noted rules of 2021 are in the form of procedural safeguards in relation to offences under the Gangsters Act. Even before these Rules of 2021, certain safequards were already, in place, in one way and the other in the form of G.Os. and Notifications/Communications issued by the Government/Executive Authority/Police Authority. These were all ad hoc Procedural Safequards to be observed and complied with by the concerned authorities while dealing with gangster cases, just to make a stop gap arrangement and an effort to plug the void, in place of formal Rules as contemplated by Section 23 of the Act.

<u>डीजी परिपत्र संख्या-27/2003</u>

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आई0पी0एस0

पुलिस महानिदेषक
उत्तर प्रदेष,

1,तिलकमार्ग, लखनऊ।
<u>दिनांक–अक्टूबर, 24, 2003</u>

प्रिय महोदय,

उ0प्र0 में अपराधी, अपराधियों, अराजक तत्वों, समूह बनाकर अपराध करने वाले लोगों, समाज विरोधी किया कलापों में संलग्न व्यक्तियों पर नियन्त्रण रखने तथा उनकी गतिविधियों पर अंकुष बनाये रखने के उद्देष्य से प्रदेष में उ0प्र0 गुण्डा नियन्त्रण अधिनियम 1970 एवं उ0प्र0 गिरोह बन्द एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम 1986 का प्रावधान है।

इन अधिनियमों का उपयोग केवल पात्र व्यक्तियों के विरूद्ध ही हो एवं इसका दुरूपयोग न हो, इसलिए इस विषय पर समय समय पर विस्तृत निर्देष जारी किये गये है, किन्तु0 मा0 उच्च न्यायालय तथा इस मुख्यालय के संज्ञान में कुछ ऐसे प्रकरण आये हैं, जिससे यह प्रतीत होता है कि इन अधिनियमों का दुरूपयोग

रोकने के लिए शासन द्वारा जो दिषा–निर्देष जारी किये गये है उनका उचित

मा0 उच्च न्यायालय ने रिट याचिका संख्या 6249/2003 अमरनाथ दुबे बनाम उ0प्र0 राज्य एवं अन्य में उ0प्र0 समाज विरोधी क्रिया–कलाप और गिरोह बन्द अधिनियम के दुरूपयोग पर अप्रसन्नता व्यक्त किया है तथा यह निर्देष दिया है कि उपरोक्त का दुरूपयोग करने वाले अधिकारियों पर भारी अर्थदण्ड लगाया जा सकता है । अतः उपरोक्त दोनों अधिनियमों के क्रियान्वयन के सम्बन्ध में निम्नलिखित दिषा–निर्देष जारी किये जा रहे है । आप अक्षरषः अनुपालन सुनिष्चित करें, आपको यह भी सचेत किया जाता है कि यदि भविष्य में कोई ऐसा प्रकरण संज्ञान में आता है जिससे यह प्रतीत हो कि इन निर्देषों का उल्लंघन किया गया है या प्रकरण के विष्लेषण से ऐसा स्पष्ट हो कि आपकी या आपके किसी अधीनस्थ द्वारा जानबूझकर, लापरवाही या त्रुटिपूर्ण आचरण के कारण किसी निर्देश व्यक्ति के विरूद्ध उपरोक्त अधिनियमों के अन्तर्गत कार्यवाही की गयी है तो दोषी अधीनस्थ पुलिस कर्मियों के अतिरिक्त आपके विरूद्ध कठोर दण्डात्मक कार्यवाही की जायेगी ।

<u>उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम 1986 के अन्तर्गत कार्यवाही–</u>

1– उ0प्र0 गिरोह बन्द अधिनियम एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम 1986 के अन्तर्गत कार्यवाही करने के लिए उ0प्र0ष्शासन के शासनादेष संख्या– 3216/8–9–1986 दिनांक 23 जून, 1986, शासनादेष संख्या 3352/ छ–पु0–9–1997 दिनांक 10 अक्टूबर, 1997 द्वारा विस्तृत दिषा निर्देष जारी किये गये है । किसी भी अपराधिक प्रवृत्ति के व्यक्ति के विरूद्ध कार्यवाही करने से पूर्व यह सुनिष्चित करें कि सम्बन्धित व्यक्ति इस अधिनियम के अन्तर्गत कार्यवाही किये जाने के लिए पात्र है ।

2– किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानना चाहिए जिन मामलों में पुलिस द्व ारा विवेचना के उपरान्त आरोप–पत्र प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे आपराधिक विवरण में सम्मिलित न किया जाय।

3– जिन मामलों के आधार पर उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम के अन्तर्गत कार्यवाही की गयी है उसी आधार पर पुनः कार्यवाही न की जाये अर्थात किसी गिरोह के विरूद्ध उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम के अन्तर्गत कार्यवाही करने के बाद कोई नया अपराधिक कृत्य प्रकाष में आने पर ही उ0प्र0 समाज विरोधी क्रिया कलाप के अन्तर्गत कार्यवाही की जाये ।

4– किसी गिरोह के विरूद्ध कार्यवाही प्रारम्भ करने के लिए थानाध्यक्ष द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए चार्ट तैयार किया जायेगा तथा चार्ट के अतिरिक्त गिरोह के क्रिया कलापों का विवरण देते हुए तथा गिरोह के किन–किन व्यक्तियों के विरूद्ध कार्यवाही किया जाना प्रस्तावित है, उसका स्पष्ट उल्लेख करते हुए प्रतिवेदन प्रस्तुत किया जायेगा जो क्षेत्राधिकारी तथा अपर पुलिस अधीक्षक की स्पष्ट संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक को प्रस्तुत किया जायेगा ।

5– वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी अपने स्तर पर गिरोह के सदस्यों के आपराधिक विवरण तथा उनके क्रिया कलापों का भली भांति परीक्षण के उपरान्त जिलाधिकारी के साथ विचार–विमर्ष करके सूची को अन्तिम रूप प्रदान करेंगे।

6– प्रतिवेदन तथा गैंग चार्ट पर वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक एवं जिलाधिकारी के अनुमोदन के उपरान्त अग्रिम कार्यवाही की जायेगी ।

7– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः थाना प्रभारी द्वारा की जानी चाहिए ।

8– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना के बाद आरोप–पत्र भेजने से पूर्व जिलाधिकारी से सहमति प्राप्त कर ली जायेगी।

9– विवेचना की अवधि में मा0 उच्चतम न्यायालय के आर0 सरला बनाम टी0एस0 वेल एवं अन्य में पारित निर्णय दिनांक 13 अप्रैल, 2002 का भी अनुपालन किया जाये।

19. Here, it is pertinent to mention here that above letters were issued by the D.G. Police and thereafter G.O. Dated 02.01.2004, pursuant to the direction given by this Court while deciding **Writ Petition No. 6249/2003 Inre: Amar Nath Dubey Vs. State of U.P.**

20. Noticing the above letter, and the direction contained in the order of Division Bench of this Court, Principal Secretary (Homes) issued yet another set of procedure/instruction mentioning therein the manner in which gang chart in relation to offences under the Gangsters Act has to be prepared. These were all ad hoc practices adopted by higher bureaucracy just to make a stop gap arrangement and an

effort to plug the void, in place of formal Rules as contemplated by Section 23 of the Act. Clause 2 of these instructions would indicate the details of information that has to be contained therein. The said instruction issued by Principal Secretary Homes, in the shape of Government Order is extracted herein below: -

"संख्या 137 प्र0सं0/6–पु0–11–2003–58(रिट)/2003

प्रेषक,

अनिल कुमार,
प्रमुख सचिव,
उ0प्र0 शासन।

सेवा में,

समस्त जिलाधिकारी,
जनपदीय वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक,
उत्तर प्रदेष।

गृह (पुलिस) अनुभाग–11 लखनउ दिनांक 2 जनवरी 2004

महोदय,

मा0 उच्च न्यायालय, इलाहाबाद के द्वारा रिट याचिका संख्या 6249/2003 अमरनाथ दुबे बनाम उ0प्र0 राज्य एवं अन्य में उ0प्र0 गिरोहबन्द व समाजबिरोधी क्रिया कलाप निवारण अधिनियम के दुरूपयोग पर चिन्ता व्यक्त की है। मा0 उच्च न्यायालय ने उ0प्र0 गिरोहबन्द निवारण अधिनियम उ0प्र0 गुण्डा अधिनियम एवं एन0डी0पी0एस0 अधिनियम के सम्यक उपयोग हेतु आवष्यक दिषा निर्देष जारी करने एवं दुरूपयोग रोकने हेतु यथोचित कदम उठाने के लिए कडे निर्देष दिये है ।

इन अधिनियमों के सम्यक सदुपयोग करने एवं इनके दुरूपयोग के रोकथाम हेतु समय समय पर विस्तृत निर्देष पूर्व में जारी किये गये है। परन्तु ऐसा प्रतीत होता है कि इन अधिनियमों का दुरूपयोग रोकने के लिए शासन/पुलिस महानिदेषक, उ0प्र0 द्वारा जो दिषा निर्देष जारी किये गये है, उनका कडाई से अनुपालन नहीं किया जा रहा है। आप सहमत होगें कि निर्दोष व निरपराध व्यक्तियों के विरूद्ध इन अधिनियमों के अन्तर्गत दिये गये अधिकारों का दुरूपयोग कुछ अधिकारियों द्वारा किये जाने के कारण शासन एवं पुलिस विभाग की छवि पर प्रतिकूल प्रभाव पडता है।

अतः इस सम्बन्ध में पुनः निम्नलिखित दिषा निर्देष दिये जा रहे है, जिनका कड़ाई से अनुपालन सुनिष्चित किया जाये–

1– समस्त थाना प्रभारी, क्षेत्राधिकारी, अपर पुलिस अधीक्षक वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, प्रभारी जनपद एवं जिलाधिकारी इस अधिनियम में दिये गये प्राविधानों का अध्ययन करके इसको भली भंति समझ लें। इस हेतु यह जान लेना रहेगा कि जनपद स्तर पर एक कार्यषाला आयोजित करा ली जाये जिसमें सभी अधिकारियों के अलावा जनपद के जिला शासकीय अधिवक्ता– फौजदारी एवं ज्येष्ठ अभियोजन अधिकारी प्रभारी भी अवष्य उपस्थित रहे। यदि किसी अधिकारी की किसी स्तर पर इन अधिनियमों के किसी प्राविधान के बारे में किसी प्रकार की कोई शंका हो तो इस कार्यषाला में उनका निराकरण करा लिया जाये।

2– इन अधिनियमों के सम्यक प्रयोग करने, दरूपयोग रोकने के सम्बन्ध में इस आदेष के माध्यम से निम्नवत दिषा निर्देष आपको दिये जा रहे है। कृपया इनका कडाई से अनुपालन सुनिष्चित कराये –

उ0प्र0 गिरोहबन्द एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम के सम्यक उपयोग करने/दुरूपयोग रोकने के सम्बन्ध में दिषा निर्देष–

1– इस अधिनियम के अन्तर्गत कार्यवाही केवल उन्हीं अपराधियों के विरूद्ध की जाये, जिनकी आपराधिक गतिविधि इस अधिनियम में दिये गये प्राविधान की परिधि के अन्तर्गत आती है ।

*2– किसी गिरोह के विरूद्ध कार्यवाही प्रारम्भ करने के लिए थाना प्रभारी द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए चार्ट तैयार किया जायेगा तथा **चार्ट के अतिरिक्त गिरोह के क्रिया कलापों का विवरण देते हुए** तथा गिरोह के किन किन व्यक्तियों के विरूद्ध कार्यवाही किया जाना प्रस्तावित है, उसका स्पष्ट उल्लेख करते हुए आख्या प्रस्तुत की जायेगी, जो क्षेत्राधिकारी तथा अपर पुलिस अधीक्षक की स्पष्ट संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को प्रस्तुत की जाये।*

3– वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी अपने स्तर पर गिरोह के सदस्यों के अपराधिक विवरण तथा उनके क्रिया कलापों का भली भांति परीक्षणत के उपरान्त जिलाधिकारी के साथ विचार विमर्ष करके इस सूची को अन्तिम रूप प्रदान करेंगे।

4– उक्त आख्या तथा गैंग चार्ट पर वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी एवं जिलाधिकारी के अनुमोदन के उपरान्त अग्रिम कार्यवाही की जायेगी।

5– किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को अपराधिक सूची में सम्मिलित मानना चाहिए, जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप पत्र प्रेषित

किया जा चुका है। जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है उसे आपराधिक विवरण में सम्मिलित न किया जाये।

6–जिन मामलों के आधार पर उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोहबन्द अधिनियम के अन्तर्गत कार्यवाही की गयी है, उसी आधार पर पुनः कार्यवाही न की जाये। अर्थात किसी गिरोह के विरूद्ध उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोहबन्द अधिनियम के अन्तर्गत कार्यवाही करने के बाद कोई नया आपराधिक कृत्य जो इस अधिनियम के प्राविधानों की परिधि में हो, प्रकाष में आने पर ही उ0प्र0 समाज विरोधी क्रिया कलाप के अन्तर्गत कार्यवाही की जाये ।

7– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः दूसरे थाने के प्रभारी द्वारा की जानी चाहिए ।

8– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी से अनुमोदन प्राप्त करने के उपरान्त ही आरोप पत्र न्यायालय प्रेषित किया जाय।

9– गिरोहबन्द अधिनियम के अन्तर्गत मुकदमा पंजीकृत करने के उपरान्त विवेचना के पष्चात न्यायालय आरोप पत्र प्रेषित करने हेतु अनुमोदन देने के पूर्व वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को भली भंति संतुष्ट हो लेना चाहिए कि वास्तव में मामला गिरोहगन्द अधिनियम की परिधि में आता है अथवा नहीं।

10– यहां यह भी स्पष्ट किया जाता है कि यदि किसी जनपद में इस अधिनियम में दिये गये प्राविधानों के सम्बन्ध में किसी अधीनस्थ अधिकारी द्वारा अपने कर्तव्य पालन की उपेक्षा करने अथवा अपने अधिकार का दुरूपयोग का कोई मामला प्रकाष में आता है तो सम्बन्धित थाना प्रभारी एवं दोषी पाये गये अधिकारी के अलावा जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी भी उत्तरदायी माने जायेंगे।

XXX XXXX XXX XXX XXXX XX XXX

सामान्य निर्देष–

1– इन दिषा–निर्देषों के अनुपालन सुनिष्चित कराने की जिम्मेदारी जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी की है।

2– यदि किसी जनपद में इन अधिनियमों के दुरूपयोग किये जाने का कोई मामला प्रकाष में आये, तो किसी भी स्तर पर दोषी अधिकारियों/कर्मचारियों को बचाने का प्रयास न किया जाये, वरन दोष निर्धारण करते हुए तत्परता से दोषी के विरूद्ध कार्यवाही की जाये।

3– इन अधिनियमों के अन्तर्गत दिये गये प्राविधानों का दुरूपयोग किये जाने का यदि कोई मामला प्रथम दृष्टया सही पाया जाये तो सम्बन्धित थाने के प्रभारी एवं अन्य दोषी अधीनस्थ पुलिस कर्मियों को थाने से हटा दिया जाये एवं तत्परता से जांच कराकर उनके विरूद्ध दण्डात्मक कार्यवाही की जाये।

4– प्रत्येक माह जिलाधिकारी एवं वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, प्रभारी अपनी मासिक गोष्ठी में इस आदेष के माध्यम से दिये जा रहे दिषा–निर्देषों के अनुपालन के सम्बन्ध में भी अनुश्रवण किया करेंगे।

5– सभी को यह स्पष्ट किया जाता है कि शासन अथवा पुलिस महानिदेषक उ0प्र0 के संज्ञान में यदि कोई ऐसा मामला आता है कि किसी मामले में इन अधिनियमों का दुरूपयोग किये जाने की जानकारी वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को होने के पष्चात भी पीडित पक्ष को न्याय नहीं दिलाया गया अथवा दोषी अधिकारी, कर्मचारी के विरूद्ध यथेष्ठ कार्यवाही नहीं की गयी है, तो ऐसे मामलों में वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी जिम्मेदार माने जायेंगे।

भवदीय,
(अनिल कुमार)
प्रमुख सचिव

संख्या एवं दिनांक तदैव

प्रतिलिपि–निम्नलिखित को आवष्यक कार्यवाही हेतु–

1– पुलिस महानिदेषक, उ0प्र0।

2– पुलिस महानिदेषक, अभियोजन, उ0प्र0।

3– अपर पुलिस महानिदेषक, सी बी सी आई डी, उ0प्र0।

4– अपर पुलिस महानिदेषक, रेलवेज, उ0प्र0

आज्ञा से,
(दीपिका दुग्गल) विषेष सचिव

संख्या एवं दिनांक तदैव

प्रतिलिपि–निम्नलिखित को अनुपालन सुनिष्चित कराने हेतु–

1– समस्त मण्डल आयुक्त, उ0प्र0।

2– समस्त पुलिस महानिरीक्षक, जोन उ0प्र0।

3– समस्त परिक्षेत्रीय उपमहानिरीक्षक, उ0प्र0।

आज्ञा से,
(दीपिका दुग्गल)
विषेष सचिव

21. Relevant Government Order dated 30.06.2014 reads as under:-

प्रेषक,
राकेश बहादुर
प्रमुख सचिव,
उ०प्र० शासन।

सेवा में,

1.समस्त जिला मजिस्ट्रेट उ०प्र०।
2.वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, समस्त जनपद, उ०प्र०।

गृह (पुलिस) अनुभाग-9 लखनऊः दिनांक 30जून,2014

विषय- उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, 1986 के संबंध में दिशा निर्देश।

महोदय,

श्री रजत सिंह जैन विशेष न्यायाधीश (गैंगेस्टर्स एक्ट)/ अपर जिला जज, बुलन्दशहर के उपर्युक्त विषयक पत्र दि० 20.06.14 (छायाप्रति संलग्न) का संदर्भ ग्रहण करें जिसके द्वारा उ० प्र० गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, 1986 का दुरूपयोग रोके जाने संबंधी शासकीय निर्देशो का समुचित पालन न किये जाने की ओर शासन का ध्यान आकर्षित करते हुए इस संबंध में दिशा-निर्देश जारी किये जाने की अपेक्षा की गयी है।

2- इस संबंध में मुझे यह कहने का निदेश हुआ है कि शासन के पत्र संख्या-12/छः-पु०-11-2004-58(रिट)/2003 दि० 02.01.14 पत्र संख्या-यू०ओ०-6(1)/छः-पु०9-11-गृह (पुलिस) अनुभाग-4 दि० 09.02.11 तथा पत्र संख्या-यू०ओ०42/छः पु० 9-11 गृह (पुलिस) अनुभाग-4 दि० 18.05.11 (छायाप्रतियां संलग्न) द्वारा उ०प्र० गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, 1986 का सम्यक, उपयोग करने एवं इसके दुरूपयोग की रोकथाम हेतु पूर्व में जो दिशा-निर्देश जारी किये गये है, कई प्रकरणों में उनके अनुपालन की ओर समुचित ध्यान नहीं दिया जा रहा है। पूर्व में निर्गत दिशा-निर्देशों के तारतम्य में इस संबंध में पुनः निम्नलिखित दिशा-निर्देश दिये जा रहे है जिनका कृपया जनपद स्तर पर कडाई से अनुपालन सुनिश्चित किया जायेः-

1- उ०प्र० गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, 1986 में उल्लिखित प्राविधानों एवं इस संबंध में समय-समय पर शासन द्वारा जारी दिशा-निर्देशों का अध्ययन इससे संबंधित सभी अधिकारी भलीभांति कर लें। आवश्कतानुसार इस हेतु जिला मजिस्ट्रेट तथा वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक द्वारा एक कार्यशाला आयोजित करा ली जाय, जिसमें जिला शासकीय अधिवक्ता (फौजदारी) और जिलास्तरीय संयुक्त निदेशक, अभियोजन/ज्येष्ठ अभियोजन अधिकारी सहित सभी संबंधित अधिकारियों द्वारा प्रतिभाग किया जाय।

2- इस अधिनियम के अन्तर्गत केवल उन्हीं अपराधियों के विरूद्ध कार्यवाही की जाये, जिनकी आपराधिक गतिविधि इस अधिनियम में दिये गये प्राविधानो की परिधि में आती हो।

3- इस अधिनियम के अन्तर्गत ऐसे सभी मामलों, जिनमें कार्यवाही की गयी है, कि निम्नलिखित समिति द्वारा त्रैमासिक समीक्षा की जाय। समीक्षा में यदि कोई विवेचनाधीन मामला फर्जी पाया जाये तो उसे नियमानुसार समाप्त करके पुलिस अभिलेखों से खारिज किया जाये। साथ-ही-साथ यदि ऐसा मामला न्याायलय भेज दिया गया हो जो समीक्षा में गलत पाया जाता है तो दण्ड प्रक्रिया संहिता 1973 में दिये गये सुसंगत प्राविधानों के अनुरूप उक्त मामले को वापस लेने हेतु नियमानुसार कार्यवाही की जाय।

(क) जिला मजिस्ट्रेट- अध्यक्ष

(ख) वरिष्ठ पुलिस अधीक्षक / पुलिस अधीक्षक- उपाध्यक्ष।

(ग) जिला शासकीय अधिवक्ता (फौजदारी)-सदस्य

(घ) जिलास्तरीय संयुक्त निदेशक अभियोजन/ज्येष्ठ अभियोजन अधिकारी- सदस्य सचिव

(4) इस अधिनियम के अन्तर्गत कार्यवाही प्रारम्भ करने के लिए थाना प्रभारी द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए गैंग चार्ट तैयार किया जाएगा। चार्ट में उक्त गिरोह के समस्त व्यक्तियों के संबंध में विस्तृत क्रिया-कलापो का उल्लेख करते हुए क्षेत्राधिकारी/ अपर पुलिस अधीक्षक की स्पष्ठ संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक को प्रस्तुत की जायेगी।

(5) वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक अपने स्तर पर गिरोह के सदस्यों के आपराधिक विवरण तथा उनके क्रिया कलापो का भलीभांति परीक्षण करने के उपरान्त जिला मजिस्ट्रेट के साथ विचार विर्मश करके इस सूची को अंतिम रूप प्रदान करेंगे। जिला मजिस्ट्रेट के अनुमोदनोपरान्त अग्रिम कार्यवाही की जायेगी।

(6) जिन मामलो में उक्त अधिनियम के अन्तर्गत एक बार कार्यवाही की जा चुकी हो, पुनः उसी या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है उन्हे आपराधिक विवरण में सम्मिलित न किया जाये।

(7) इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः दूसरे थाने के प्रभारी द्वारा ही की जानी चाहिए।

संलग्नक- यथोक्त।

भवदीय

(राकेश बहादुर)
प्रमुख सचिव

22. It will be apt to take note of what has been held and observed by the Apex Court as well as the High Court with regard to the interpretation and application of the various provisions of the Act.

Status of criminal, not punishable- It is not the status of criminal, but the act which is made punishable. The activities of gangsters are offence under the Act since they pose grave threat to the even tempo of the society and, therefore, call for sterner and more deterrent punishment and speedier trial and early booking. **(Ashok Kumar Dixit Vs. State of U.P.; 1987 (34) ACC 164).**

The person who not liable to be punished- A person is not liable to be punished under the Act merely because he happens to be a member of a group. He comes within the clutches of the Act, when he chooses to join a group which indulges in any anti-social activities defined under the Act with use of force for gaining material and advantage to himself or any other person. **(Ashok Kumar Dixit Vs. State of U.P.; 1987 (34) ACC 164).**

Duty of the State to protect personal liberty of its citizens- Duty of State to protect personal liberty of its citizens, the State is duty bound to protect personal liberty of its citizens beyond doubt which is fundamentally guaranteed under Article 21 of the Constitution of India **(Vimal Shukla Vs. State of U.P.; 2019 (1) ARC 299).**

Necessity of deeper application of mind- The imposition of Gangsters Act calls for a deeper application of mind and the satisfaction of the authorities must be based on a definite opinion against an accused person. **(Shubhankar Gupta Vs. State of U.P.; (2019) 1 A.Cr.R. 2)**

Caution for misuse of the provisions- The provisions of the Act cannot be used as a weapon to wreck vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt.

(Ashok Kumar Dixit Vs. State of U.P.; 2007 (2) ACC 683 Alld.)

Judicial scrutiny of the subjective satisfaction- In Gangster Act, a subjective satisfaction is open to limited judicial scrutiny, therefore, it would be wrong to contend that there is a complete embargo on the powers of Court to look at the sufficiency of the ground from any perspective**. [Parvez Vs. State of U.P.; 2021 Crl.J. 4034 (All)(LB)].**

There can be prosecution for single offence/FIR/chargesheet- On a fair reading of the definitions of 'Gang' contained in Section 2(b) and 'Gangster' contained in Section 2(c) of the Gangsters Act, a 'Gangster' means a member or leader or organiser of a gang including any person who abets or assists in the activities of a gang enumerated inclause (b) of Section 2, who either acting singly or collectively commits and indulges in any of the anti-social activities mentioned in Section 2(b) can be said to have committed the offence under the Gangsters Act and can be prosecuted and punished for the offence under the Gangsters Act. There is no specific provision under the Gangsters Act, 1986 like the specific provisions under the Maharashtra Control of Organized Crime Act, 1999 and the Gujarat Control of Terrorism and Organized Crime Act, 2015 that while prosecuting an accused under the Gangsters Act, there shall be more than one offence or the FIR/charge sheet. As per the settled position of law, the provisions of the statute are to be read and considered as it is. Therefore, considering the provisions under the Gangsters Act, 1986 as they are, even in case of a single offence/FIR/charge sheet, if it is found that the accused is a member of a 'Gang' and has indulged in any of the anti-social activities mentioned in Section 2(b) of the Gangsters Act, such as, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person and he/she can be termed as 'Gangster' within the definition of Section 2(c) of the Act, he/ she can be prosecuted for the offences under the Gangsters Act. Therefore, so far as the Gangsters Act, 1986 is concerned, there can be prosecution against a person even in case of a single offence/FIR/chargesheet for any of the anti-social activities mentioned in Section 2(b) of the Act provided such an anti- social activity is by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. **[Shraddha Gupta Vs. State of U.P. and others; (2022) 17 S.C.R. 622 (Para 10)(635-B-G)].**

23. Considering the instant case in the light of the provisions of the Act and relevant Rules, it is evident that the gang chart in this case has been approved summarily without applying its mind as is apparent from the perusal of the gang chart. From the material available on record, it is apparent that the gang-chart was prepared, in which four cases are shown as base cases, which are as case crime Nos.229 of 2019, under Sections 713, 302, 201, 328/34, 411 and 404 IPC, Police Station-Nawabad, District-Jhansi (ii) Case Crime No.594 of 2019, under Sections 420, 406, 506, 504 IPC, Police Station-Nawabad, District-Jhansi (iii) case crime No.476 of 2015, under Sections 441, 447, 427, 506 IPC, Police Station-Nawabad, District-Jhansi (iv) case crime No.482 of 2015, under Sections 302, 120-B/467/468/471/41

9/420 IPC, Police Station-Nawabad, District-Jhansi. In case crime No.229 of 2019, missing report regarding the deceased was lodged with the Police Station concerned and after the investigation, story revealed that the deceased had a inclination to get married with the applicant and in order to get riddance of her and to avoid marriage with her she was done away with and her dead body was removed. This case is based on circumstantial evidence and his name came up on the basis of mere suspicion. In another case which is related with case crime No.594 of 2019 is related with the fraudulent withdrawal of money from the account of deceased, in which, applicant is not shown to have actively and fraudulently withdrawn any amount from her account and same was sent into his account or otherwise misappropriated. As from the record, it is clear that these above two case are apparently committed in private and personal capacity and the same do not come within the purview of the gangsterism. In another case i.e. case crime No.476 of 2015 along with case crime No.482 of 2015 have already been considered for the purpose of approval of the gang-chart, which has not been approved by the District Magistrate concerned vide order dated 04.12.2015. Above both the cases have also been included in the gang-chart on the basis of which, the present criminal proceedings have been launched, whereas in case bearing case crime No.482 of 2015, applicant has already been acquitted by the court concerned, has also been made the basis of the impugned FIR., which is against the provision of aforesaid Rules/G.Os./Notification/Communication by the Administrative Executive Authorities. Furthermore there is no specific mention of offences which have been committed for pecuniary, materialistic and temporal or similar benefits or which disturbs the public order as per Rule 13. Furthermore, quick forwarding action has been taken in this case without caring for the compliance of the relevant procedural safeguards. There should be satisfaction recorded to the effect that there is just and legal basis for taking action under the Act and there is satisfactory basis for persuing the case. The satisfaction so recorded should be there by using the mind independently but in the instant case the same is missing.

24. Considering the aforesaid submissions made by the learned counsel for the parties as well as perusal of records, it is evident from the records that at the time of approving the gang-chart, District Magistrate did not apply his mind as no reasons are recorded by him, resultantly, the lodging of FIR under Gangster Act is with malafide intention, in specific violation of procedural safeguards. It is further evident that the approving authority acted mechanically and the whole exercise lacks application of mind on the parts of the authorities concerned. The applicant has fundamental rights to life which include to live with honour and dignity and fundamental right of under Article 21 of the Constitution of India cannot be interferred with lightly. The applicant has been deprived of his liberty by the mechanical excecise/procedure undertaken on the part of the authorities concerned.

25. The procedural compliance in cases of gangster Act is of utmost importance, departure from the due process of law will give chance and provide fodder to the vested interests with singular agenda to spread false narratives. Verily, gangsterism poses an ominious threat to

public order. Vile and abhorrent acts of gangsterism do evoke collective societal anger and anguish. While the war against gangsterism must be waged by the State with unwavering resolve but a civil democratic society can ill afford sacrificing the procedural safeguards provided under the law, and which is an integrated facet of the due process of law, at the altar of perceived peril to public order.

"The Siren Song that the 'end justifies the means', and that the procedural safeguards are subservient to the overwhelming need to ensure that the accused is prosecuted and punished, must be muzzled by voice of Rule of Law."

26. For all the reasons recorded above, the court is of the view that at the stage of preparing and approving the gang-chart on the basis of materials placed, the competent Authorities should have satisfied themselves that there is a legal basis and justifiction for taking and persuing action against the accused under the Act of 1986. At the stage of approval of the gang-chart, the approving Authority has to be satisfied that a case for action under the Act of 1986 is made out and that satisfaction should be reflected from the gang chart and other records. But in this case, the competent authorities, unhesitatingly just paid lip service to the legislative mandate and unfortunately had undertaken the whole exercise of preparation and approval of the gang chart as a ritualistic formality without due application of mind. Thus, the initiation and continuation of the entire criminal proceedings is persecution and harassment of the accused, amounting to be sheer abuse of process of court and in order to otherwise ensure the ends of justice is liable to be quashed.

27. In such view of the matter, the entire criminal proceedings emanating from charge-sheet dated 29.06.2021 and cognizance order dated 31.08.2021 in case No.618 of 2021 in relation to Case Crime No.286 of 2020, under Section 2/3 of Gangsters and Anti-Social Activities (Prevention Act, 1986, Police Station-Nawabad, District-Jhansi, which is pending before the Special Judge (Gangster Act), Court No.3, Jhansi against the applicant-Sanjay Verma is, hereby, quashed.

28. The Application is, accordingly, **allowed**.

29. A copy of this order be certified to the lower court forthwith.

(2024) 3 ILRA 1029
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/S 482. No. 11082 of 2023

Prem Narayan Tiwari & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Purnendu Chakravarty, Abhishek Awasthi, Pranjal Jain

Counsel for the Opposite Parties:
G.A., Rakesh Chandra Tewari

Criminal Law – Criminal Procedure Code, 1973 - Sections 133, 133(1), 137, 138 & 482 - Application under Section 482 Cr.P.C. - challenging the orders passed by the Sub-Divisional Magistrate and the Additional District and Sessions Judge, respectively, under Sections 133 and 138 Cr.P.C., alleging

procedural irregularities and jurisdictional errors – complaint case – dispute arose from a complaint regarding obstruction of a public way – spot inspection - a conditional order – Revision – impugned order - applicants contended that the Magistrate failed to follow the mandatory procedure under Section 138 Cr.P.C., including giving notice under Section 137 and allowing evidence, and relied improperly on a Lekhpal's report without formal direction or legal examination – opponents argued that the path in question was not a public way and that the matter was a private dispute, making the use of Section 133 Cr.P.C. inappropriate - Despite these objections, the revisional court upheld the Magistrate's order – instant application u/s 482 Cr.P.C. for quashing both orders – court finds that the applicants had admitted the existence of a public way, thereby negating the need for an enquiry under Section 137 Cr.P.C., and the Magistrate's spot inspection confirmed obstruction, and the applicants failed to rebut the factual recitals in the impugned order, which was affirmed by the revisional court – held - proceedings under Section 133 Cr.P.C. are summary in nature and meant to address public nuisances, not private disputes - citing precedents, the Court emphasized that judicial observations are presumed correct unless properly challenged and found no procedural or jurisdictional error warranting interference – consequently, the instant application has no force, accordingly, application is dismissed. (Para – 18, 19, 22)

Application Dismissed. (E-11)

List of referred Cases: -

1. Bhagwati Prasad Vs Delhi St. Mineral Development Corp., (1990) 1 SCC 361,

2. St. of Maharashtra Vs Admane Anita Moti, (1994) 6 SCC 109,

3. Md. Basar Ali Molla Vs St. of W.B., 2006 SCC OnLine Cal 444,

4. Wali Uddin Vs St. of U.P., 1988 (12) ACR 1,

5. Raghubar Dutt Vs Suresh Chandra, 1987 ACR 566,

6. Ramvriksha Vs St. of U.P - 482 petition No.956 of 2002 – decided vide order dated 03.03.2017,

7. Shri Thaneswar Bora Vs Shri Kumud Sharmah, 1986(2) Gauhati Law Reports 161,

8. Narayan Bhagwantrao Gosavi Balajiwale Vs Gopal Vinayak Gosavi, 1959 SCC OnLine SC 54 : (1960) 1 SCR 773 : AIR 1960 SC 100,

9. Arun Kumar & anr.Vs St. of U.P. & ors.- APPLICATION U/S 482 No. 40888 of 2012 decided on order dated 03.12.2012.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant, learned AGA for the State of U.P. and perused the record.

2. By means of the instant application under Section 482 Cr.P.C., the applicants have assailed the order dated 07.05.2022 passed by Sub-Divisional Magistrate, Dalmau, Raebareli (hereinafter referred to as "Magistrate") in exercise of power under Section 138 of Cr.P.C. in Case No. 745 of 2022, Computerized Case No. T202210580500745, under Section 133 of Cr.P.C. as also the order dated 05.09.2023 passed by Additional District and Sessions Judge, IV, Raebareli (hereinafter referred to as "revisional court") in Criminal Revision No. 129 of 2022 (Prem Narayan Tiwari another vs. Dharmendra Kumar Shukla & another).

3. Brief facts of the case are to the effect that an application under Section 133 Cr.P.C. was preferred by one Dharmendra Kumar Shukla, which was registered as Case No. 745 of 2022, in which, the Magistrate concerned issued notice to the opposite parties and in response to the same, applicants herein namely Prem Narayan Tiwari and Manoj Kumar Tiwari

put in appearance and filed their response on 28.04.2022. The response filed by the applicants are as under:-

"धारा 1:- यह कि श्रीमान उप निरीक्षक थाना गदागंज द्वारा दी गई रिपोर्ट दि० 21-3-2022 बेबुनियाद तथा विधि व्यवस्था के विरुद्ध होने के कारण निरस्त होने योग्य है।

धारा 2:- यह कि थाना गदागंज के द्वारा किसी प्रकार का कोई मौके पर मुआइना नहीं किया गया है प्रथम पक्ष के दबाववश फर्जी हैरान व परेशान करने की नियत से फर्जी रिपोर्ट दिखाकर वाद दायर कर दिया है जो गलत है, निरस्त होने योग्य है।

धारा 3:- यह कि प्रथम पक्ष धर्मेन्द्र कुमार के पिता स्व० श्यामसुन्दर शुक्ला से मुझ द्वितीय पक्ष प्रेम नरायन तिवारी से न्यायालय सिविल जज के यहाँ वाद सन 1997 से चल रहा था जिसमें दि० 15-2-2020 को आदेश मुझ द्वितीय पक्ष के हक में हो गया है इसी रंजिश को लेकर यह दूसरा वाद चलाया गया है।

धारा 4:- यहकि प्रथम पक्ष के पिता द्वारा बाउन्ड्री बनवाई जा रही था जिसमें विवाद होने पर प्रथम पक्ष के पिता स्व० श्यामसुन्दर द्वारा 17 फिट का रास्ता छोड़ा गया था सुलहनामा की छायाप्रति संलग्न कर रहे हैं।

धारा 5- यह कि मौके पर जो रास्ता है उसमें कोई अवरोध द्वितीय पक्ष द्वारा नहीं किया गया है अतः रास्ता नाली है जिसको मौके पर देखा जा सकता है।

धारा 6:- यह कि बरसात के कारण गलियारा ऊंचा नीचा हो जाता है इस लिए रास्ते में गड्ढों का बराबर करवाया है द्वितीय पक्ष कोई अवरोध रास्ते में नहीं किया गया है चूंकि द्वितीय पक्ष विकलांग है इसलिए गड्ढा होने से उसे दिक्कत होती है।

धारा 7:- यह कि प्रथम पक्ष द्वारा सुलहनामा होने के बावजूद भी रास्ते के बगल में ईंटा गिट्टी लगाकर रास्ता सकरा किया गया है वह स्वयं ही दोषी है।

धारा 8-यह कि प्रथम पक्ष ने व्यक्तिगत रूप से द्वितीय पक्ष गलत दोषारोपण किया है जो कतई माफी योग्य नहीं है।

धारा 9:-यह कि द्वितीय पक्ष निर्दोष है थाना गदागंज की रिपोर्ट गलत-तथ्यों पर आधारित है द्वितीय पक्ष ने कोई अवरोध नहीं किया है।

अतः श्रीमान् जी से प्रार्थना है कि श्रीमान जी स्वयं मौका मुआइना करके वाद समाप्त करने तथा प्रथम पक्ष के विरुद्ध विधिक कार्यवाही करने की कृपा करें।"

4. From the above quoted portion of the response dated 28.04.2022 filed by the applicants, it is apparent that admittedly the disputed pertains to 'public way' and that the applicants prayed for spot inspection by the concerned Magistrate.

5. From the undisputed orders particularly the orders passed by the Magistrate concerned on 28.04.2022 and 30.04.2022, it appears that Magistrate concerned visited the spot, however, from the record, it appears that the spot memo/inspection report was not prepared on 30.04.2022.

6. It also appears from the record that a report dated 02.05.2022 was submitted by the Lekhpal concerned and the case was fixed for the arguments on 02.05.2022 and thereafter again on 04.05.2022 and thereafter the matter was heard on 05.05.2022 and final order was pronounced on 07.05.2022, impugned herein. The relevant portion of the impugned order dated 07.05.2022 reads as under:-

"उपरोक्त परिप्रेक्ष्य में क्षेत्रीय लेखपाल द्वारा प्रकरण में आख्या दिनांक 02.05.2022 प्रेषित की गयी है, जिसमें उल्लिखित किया गया है कि ग्राम बरारा बुजुर्ग आबादी के अन्तर्गत धर्मेन्द्र शुक्ल का मकान स्थित है। उक्त मकान के सहन की सीध में सम्पर्क मार्ग, आगे बने हुए आर०सी०सी० सड़क तक जाता है। प्रार्थी के मकान के उत्तर-पश्चिम में प्रतिपक्षी प्रेमनरायन तिवारी पुत्र चन्द्रदेव द्वारा अपने मकान के सहन के सामने बने हुए सम्पर्क मार्ग में मिट्टी डालकर ऊँचा कर दिया गया है जिससे प्रार्थी धर्मेन्द्र शुक्ल द्वारा आपत्ति प्रस्तुत की गयी है। प्रार्थी का कहना है कि उसके सीध में जो आगे आर०सी०सी० मार्ग बना हुआ है वह नीचा है वहाँ तक पहुंचने के लिए प्रार्थी द्वारा पूर्व से ही समतलीकरण करते हुए मिट्टी डाली गयी थी। अब वहाँ तक पहुंचने में सम्पर्क मार्ग ऊँचा नीचा हो रहा है जिससे चार पहिया वाहन आदि निकलने में भविष्य में दिक्कत हो सकती है। इस प्रकार स्थलीय निरीक्षण में विदित होता है कि प्रतिपक्षी द्वारा रस्ते में गिट्टी डालकर ऊँचा करना कोई औचित्यपूर्ण नहीं है। थानाध्यक्ष गदागंज द्वारा भी अपनी आख्या में प्रश्नगत रास्ते को मिट्टी डालकर अवरोध उत्पन्न करने का उल्लेख किये जाने संबंधी रिपोर्ट प्रेषित की गयी है, जिसके क्रम में 113(1) द०प्र०सं० की नोटिस निर्गत की गयी है। मौके का मेरे द्वारा भी निरीक्षण किया गया। निरीक्षण में उपरोक्त सम्पर्क मार्ग में मिट्टी डालकर काफी ऊँचा कर दिया गया है, जिससे वाहनों के आवागमन में बाधा उत्पन्न हो गयी है।

पत्रावली पर उपलब्ध आख्याओं एवं अभिलेखीय साक्ष्यों का अवलोकन एवं परीशीलन किया गया। पत्रावली के अवलोकन से स्पष्ट होता है कि द्वितीय पक्ष प्रेमनरायन तिवारी द्वारा प्रश्नगत रास्ते में मिट्टी डाल कर अवरोध उत्पन्न किया गया है एवं सार्वजनिक रास्ते में अवरोध से सार्वजनिक उपताप का स्वरूप हो गया है। अतः उक्त अवरोध को हटाया जाना विधिक दृष्टिकोण से सर्वथा उचित एवं न्यायसंगत है। एतद्द्वारा निम्नलिखित आदेश पारित किये जाते हैं।

आदेश

श्री प्रेमनरायन तिवारी आदि के विरूद्ध दंण्ड प्रकिया संहिता की धारा 133(1) के अन्तर्गत पारित आदेश दिनांक 08.04.2022 को अन्तिम किया जाता है और विपक्षी श्री प्रेमनरायण तिवारी आदि को निर्देशित किया जाता है कि उपरोक्त रास्ते में अनाधिकृत रूप से मिट्टी डालकर किये गये अवरोध को हटा दें। ऐसा न करने पर वे धारा 188 भारतीय दण्ड संहिता के अन्तर्गत दण्डनीय अपराध के लिए दोषी होंगे। इस आदेश की प्रतिलिपि थानाध्यक्ष गदागंज जनपद रायबरेली को इस निर्देश के साथ प्रेषित की जाय कि दिनांक 14.05.2022 तक विपक्षी द्वारा इस आदेश का अनुपालन न किये जाने की दशा में उक्त सार्वजनिक अपदूषण को हटवाकर अनुपालन आख्या तथा अपदूषण हटाने में हुए व्यय के विवरण के साथ इस न्यायालय में दिनांक 18.05.2022 को प्रस्तुत करें।"

7. A perusal of impugned order dated 07.05.2022 indicates that the same is based upon the report of Lekhpal dated 02.05.2022 as also the actual position/aspect of the place in dispute observed by the Magistrate concerned himself while making inspection and the Magistrate after taking note of the same observed that the applicants have obstructed the 'public way' and thereafter, passed the order dated 07.05.2022 directing the applicants to remove the obstructions.

8. The fact that the Magistrate concerned visited the spot has not been refuted by the applicants.

9. Being aggrieved by the order dated 07.05.2022, the applicants preferred the Criminal Revision No. 129 of 2022. A perusal of memo of revision indicates that the order dated 07.05.2022 was assailed before the District and Sessions Judge, Raebareli on the following grounds:-

"(a) That the impugned order dated 07-05-2022 passed by the learned lower court being against the law and facts and not sustainable in the eye of law and liable to be quashed.

(b) That after passing the conditional order dated 08-04-2022 under section 133(1) Cr.P.C. the learned lower court not adopted the proceeding under section 138 Cr.P.C. and passed the impugned order without adopting the procedure under section 138 Cr.P.C. hence the impugned order is bad in law.

(c) That after passing the conditional order and after filing the objection by the revisionists neither the date for taking evidence under section 138 Cr.P.C. was fixed before the learned lower court nor any opportunity of evidence was given by the learned lower court to the parties concerned, violating the procedure laid down under section 138 Cr.P.C. in arbitrary manner. Hence the impugned order dated 07-05-2022 is not sustainable in the eye of law and liable to be quashed.

(d) That needless to say here that under section 133(1) Cr.P.C., after passing the conditional order section 133(1) Cr.P.C., the further procedure under section 138 Cr.P.C. must be followed by the court concerned before passing any final order but in this case the learned lower court was very much hurried to pass the final order in favour of respondent number 1 and the learned lower court passed the impugned order without followed the law of procedure under section 138 Cr.P.C. hence

impugned order is not sustainable in the eye of law as passed and liable to be quashed.

(e) That the impugned order has been passed by the learned lower court on the basis of Lekhpal report summoned after passing the conditional order though it is prejudice and one sided, inspite of this fact, it do not disclose any encroachment on the spot, but the report above have not been examined under the law, which would not be taken as evidence by the learned lower court, hence the learned lower court has committed manifest error by passing the impugned order on basis of irreliable in evidence inexamined the reports above, hence the impugned order is bad in law.

(f) That the learned lower court neither perused nor considered the objections and arguments adduced by revisionists, hence impugned order is bad in law.

(g) That by passing the impugned order the learned lower court has committed the jurisdictional error and material irregularity.

(h) That the learned lower court has failed to exercise its jurisdiction so vested in it under the law by passing the impugned order."

10. The revision filed by the applicants was dismissed by the revisional court on 05.09.2023 with the following observations:-

"उपरोक्त प्रावधानों के परिशीलन से यह स्पष्ट है कि यदि धारा 133 सी०आर०पी०सी० के अन्तर्गत कोई प्रार्थनापत्र प्रस्तुत किया जाता है, तो मजिस्ट्रेट ऐसे साक्ष्य लेने पर जैसा वह ठीक समझे ऐसी बाधा या न्यूसेंस पैदा करने वाले व्यक्ति से यह अपेक्षा करते हुए कि सशर्त आदेश दे सकता है कि वह नियत समय के भीतर ऐसी बाधा या न्यूसेंस को हटा दे अथवा नियत तिथि पर उपस्थित होकर कारण दर्शित करें कि उस आदेश को अंतिम क्यों न कर दिया जाये। धारा 135 दं०प्र०स० ऐसे सशक्त आदेश के सम्बन्ध में नोटिस जारी करने या नियत तिथि को मजिस्ट्रेट के समक्ष उपस्थित होकर कारण दर्शित करने से सम्बन्धित है। यदि ऐसा व्यक्ति मजिस्ट्रेट के समक्ष उपस्थित होता है और वह प्रश्नगत स्थान के सम्बन्ध में लोकाधिकार के अस्तित्व से इंकार करता है, तो मजिस्ट्रेट उसकी जांच करेगा। ऐसी जांच में यदि मजिस्ट्रेट को कोई विश्वसनीय साक्ष्य मिलता है तो वह कार्यवाही को रोक देगा, परन्तु यदि कोई साक्ष्य नहीं मिलता है तो मजिस्ट्रेट के लिए यह आवश्यक है कि धारा 138 के अनुसार मामले में उसप्रकार साक्ष्य ले जैसे सम्मन मामले में लिया जाता है। धारा 139 मजिस्ट्रेट को धारा 137 व 138 के अधीन जांच के प्रयोजनों के लिए स्थानीय अन्वेषण के लिए निर्देशित करने एवं किसी विशेषज्ञ को तलब करने की शक्ति प्रदान करती है।

प्रस्तुत प्रकरण में प्रार्थी धर्मेन्द्र कुमार शुक्ला के प्रार्थनापत्र एवं थानाध्यक्ष गदागंज जनपद रायबरेली की रिपोर्ट के आधार पर उप-जिला मजिस्ट्रेट, डलमऊ, जनपद रायबरेली द्वारा निगरानीकर्ता प्रेम

नरायन तिवारी एवं मनोज कुमार तिवारी के विरूद्ध धारा 133 की उपधारा (1) के अन्तर्गत सशक्त आदेश पारित किया गया तथा उन्हें सार्वजनिक रास्ते में किये गये अवरोध को तुरन्त हटाने या दिनांक 16.04.2022 को उस न्यायालय में स्वयं अथवा अधिवक्ता के माध्यम से उपस्थित होकर कारण दर्शित करने हेतु आदेशित किया गया। दिनांक 28.04.2022 को निगरानीकर्तागण प्रेम नरायन तिवारी एवं मनोज कुमार तिवारी द्वारा उपरोक्त वाद में बयान तहरीरी प्रस्तुत की गयी एवं यह कथन किया गया कि प्रथम पक्ष धर्मेन्द्र कुमार के पिता से द्वितीय पक्ष से सिविल जज के यहां वाद चल रहा है जिसमें दिनांक 15.02.2020 को द्वितीय पक्ष के हक में आदेश हो गया। प्रथम पक्ष के पिता द्वारा बाउण्ड्री बनवायी जा रही थी जिसमें विवाद होने पर प्रथम पक्ष के पिता द्वारा 17 फिट का रास्ता छोड़ा गया था मौके पर जो रास्ता है उसमें कोई अवरोध द्वितीय पक्ष द्वारा नहीं किया गया है। आम रास्ता खाली है। जिसको मौके पर देखा जा सकता है। बरसात के कारण गलियारा ऊंचा-नीचा हो जाता है इसलिए रास्ते में गड्ढ़ों को बराबर करवाया है। <u>विपक्षी/निगरानीकर्तागण द्वारा प्रस्तुत बयान तहरीरी उपरोक्त के अवलोकन से यह स्पष्ट होता है कि इनके द्वारा विवादित भूमि का आम रास्ता होने के तथ्य से इंकार नहीं किया गया था</u> तथा मात्र यह कथन किया गया था कि आम रास्ता खाली है एवं बरसात के कारण भूमि को ऊंचा-नीचा हो जाने के कारण गड्डों को बराबर करवाया गया है। विपक्षी/निगरानीकर्तागण द्वारा अपने बयान तहरीरी में मजिस्ट्रेट से स्वयं मौका मुआइना करके वाद समाप्त करने का भी कथन किया गया था। विद्वान मजिस्ट्रेट द्वारा दिनांक 20.04.2022 को यह आदेश किया गया कि स्थलीय निरीक्षण हेतु उभयपक्ष दिनांक 30.04.2022 को दो बजे अपरान्ह उपस्थित रहे। दिनांक 30.04.2022 को उभयपक्ष की उपस्थिति में स्थलीय निरीक्षण किया गया। मामले में क्षेत्रीय लेखपाल की आख्या भी प्रस्तुत की गयी है, जो पत्रावली पर संलग्न है। लेखपाल की आख्या निम्नवत हैः-

"ग्राम बरारा बुजुर्ग आबादी के अन्तर्गत प्रार्थी धर्मन्द्र शुक्ला का माकान स्थित पाया गया, उक्त माकान के सहन की सीधा में सम्पर्क मार्ग, आगे बने हुए आर०सी०सी० सड़क तक जाता है। प्रार्थी के माकान के उत्तर पश्चिम में प्रतिपक्षी प्रेम नरायन तिवारी पुत्र चन्द्रदेव द्वारा अपने मकान के सहन के सामने बने हुए सम्पर्क मार्ग में मिट्टी डालकर ऊंचा कर दिया गया है जिससे प्रार्थी धर्मेन्द्र शुक्ला द्वारा आपत्ति प्रस्तुत की गयी है। प्रार्थी का कहना है कि उसके सीध में जो आगे आर०सी०सी० मार्ग बना हुआ है वह नीचा है वहां तक पहुंचने के लिए प्रार्थी द्वारा पूर्व से ही समतलीकरण करते हुए मिट्टी डाली गयी

थी। अब वहां तक पहुंचने में सम्पर्क मार्ग ऊंचा-नीचा हो रहा है। जिससे चार पहिया वाहन आदि निकलने में भविष्य में दिक्कत हो सकती है। इस प्रकार स्थलीय निरीक्षण से विदित होता है कि प्रतिपक्षी द्वारा रास्ते में मिट्टी डालकर ऊंचा करना कोई औचित्यपूर्ण कार्य नहीं है।"

विद्वान मजिस्ट्रेट द्वारा प्रार्थी धर्मेन्द्र कुमार शुक्ला प्रथम पक्ष के प्रार्थनापत्र तथा थानाध्यक्ष गदागंज की रिपोर्ट के आधार पर प्रस्तुत प्रकरण में विपक्षी को सशर्त आदेश जारी कर कारण बताने हेतु निर्देशित किया गया था, जिसमे अपनी बयान तहरीरी में एवं विपक्षी/निगरानीकर्तागण ने वादग्रस्त भूमि को आम रास्ता होना स्वीकार किया था। ऐसी दशा में यह प्रश्न विवादित नहीं रह जाता कि क्या विवादित स्थल आम रास्ता है अथवा नहीं चूंकि स्वयं विपक्षी ने उपरोक्त भूमि को आम रास्ता होना स्वीकार किया है, अतः अब मजिस्ट्रेट को इस तथ्य की जांच करनी थी कि क्या उपरोक्त भूमि पर विपक्षी / निगरानीकर्तागण द्वारा कोई अवरोध उत्पन्न किया गया अथवा नहीं, इस सम्बन्ध में मजिस्ट्रेट द्वारा पारित आदेश एवं पत्रावली के अवलोकन से स्पष्ट है कि मजिस्ट्रेट द्वारा उभयपक्ष की उपस्थिति में किये गये स्थलीय निरीक्षण एवं क्षेत्रीय लेखपाल की रिपोर्ट के आधार पर प्रश्नगत आदेश दिनांक 18.05.2022 पारित किया गया था। क्षेत्रीय लेखपाल की आख्या एवं विपक्षी द्वारा की गयी स्वीकृति से संतुष्ट होने पर कि प्रश्नगत सार्वजनिक रास्ते की भूमि पर विपक्षी द्वारा मिट्टी डालकर अवरोध उत्पन्न किया गया है, विद्वान मजिस्ट्रेट द्वारा दिनांक 18.05.2022 को अन्तिम आदेश पारित किया गया जो पूर्णतः विधिक है। प्रश्नगत आदेश में कोई विधिक त्रुटि नहीं है और न ही विद्वान अवर न्यायालय द्वारा प्रश्नगत आदेश पारित करने में अपने क्षेत्राधिकार का अतिक्रमण किया गया है।

अतः उक्त समस्त विश्लेषण से यह स्पष्ट है कि विद्वान अवर न्यायालय द्वारा पारित प्रश्नगत आदेश में कोई अवैधानिकता, अनियमितता या विधिक त्रुटि नहीं है न ही उसमें कोई विकृति दर्शित होती है। प्रश्नगत आदेश पूर्णतः विधिक व न्यायसंगत है, अतः पुष्ट किये जाने योग्य है। निगरानी बलहीन होने के कारण निरस्त होने योग्य है।

आदेश

प्रस्तुत दाण्डिक निगरानी निरस्त की जाती है। अवर न्यायालय द्वारा पारित आदेश दिनांकित 07.05.2022 पुष्ट किया जाता है।

अवर न्यायालय की पत्रावली इस आदेश की प्रति के साथ अविलम्ब प्रति प्रेषित की जाये।"

11. Assailing the impugned orders dated 07.05.2022 and 05.09.2023, the applicants' counsel submitted as under:-

(i) The report as required under Section 310 Cr.P.C. was not prepared by the Magistrate concerned.

(ii) There is no order/direction to the Lekhpal concerned to submit the report and despite this, the Lekhpal submitted a report before the Magistrate concerned and accordingly, this report ought not to have been considered while passing the impugned orders.

(iii) The alleged way is not a public way, as such, use of Section 133 Cr.P.C. by the complainant was nothing but an abuse of process of law.

(iv) A private dispute cannot be settled by way of preferring an application under Section 133 Cr.P.C.

(v) Notice as required under Section 137 was not given by the Magistrate concerned to the applicants (alleged encroachers) and as such, the impugned orders are unsustainable in the eye of law. In this regard, reliance has been placed on the judgment dated 03.12.2012 passed by this Court in ***APPLICATION U/S 482 No. 40888 of 2012 (Arun Kumar And Another vs. State of U.P. And Others),*** relevant portion of which is extracted hereunder:-

"The learned counsel for the applicant submitted that when the applicant had pleaded that the land in suit is not a public way on spot, the learned Executive Magistrate was bound to decide that question before holding the proceeding under section 138 CrPC. In this connection, the learned counsel for the applicant placed reliance on the provisions of section 137 CrPC, which provides:

"137. Procedure where existence of public right is denied.

(1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.

2. If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent court; and if he finds that there is no such evidence, he shall proceed as laid down in section 138.

3. A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial."

A perusal of the aforesaid provision reveals that if the person against whom the order under section 133 CrPC has been made, appears before the Executive Magistrate, the Executive Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the subject matter of the case and if he denies existence of any such right, the proper course for the Executive Magistrate is to inquire into that matter before holding a proceeding under section 138 CrPC. In other words, if the person against whom an order under section 133 has been made, denies the existence of a public right in respect of the

subject matter of the case, the Executive Magistrate has to hold an inquiry to find out whether or not there is any reliable evidence in support of such denial. If there is reliable evidence in support of the denial, the Magistrate has to stay the proceedings of the case until the matter of existence of the public right has been decided by the competent Court. The Executive Magistrate has jurisdiction to proceed under section 138 CrPC, only when there is no reliable evidence to show that the alleged right is a public right or there is no denial of existence of any public right. It may also be mentioned that if the person concerned fails to deny the existence of public right or fails to adduce reliable evidence in support of such right, he will not be permitted to make any such denial in any subsequent proceeding. In view of the legal position as emerged from the provisions of section 137 CrPC, the proper course for the Executive Magistrate was to hold an inquiry to find out whether or not there is reliable evidence in support of the plea that there exists no public way on the disputed land, specially when the applicant had specifically denied the existence of such right."

12. Opposing the present application, Dr. L.P. Mishra, learned Senior Member of Bar assisted by Sri Rakesh Chandra Tewari, submitted as under:-

(i) It is an admission of the applicants that the way in dispute is a 'public way' and the admission is best piece of evidence as held in the judgment of Hon'ble Apex Court passed in the case of ***Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi, 1959 SCC OnLine SC 54 : (1960) 1 SCR 773 : AIR 1960 SC 100*** and accordingly, Magistrate has not committed any illegality in passing the impugned order dated 07.05.2022 affirmed vide order impugned dated 05.09.2023.

(ii) Undisputedly, the Magistrate himself visited the spot and in the order dated 07.05.2022, the Magistrate himself observed that encroachment exits on the way and as such even if the report of Lekhpal is ignored the undisputed fact would be that 'public way' has been obstructed by the applicants.

(iii) It is settled position of law that if the opposite party admits the existence of public right, the Magistrate is not required to hold any inquiry rather he may straightaway proceed under Section 138 of the Code to pass the final order and as the applicants have admitted the existence of 'public way' before the SDM by filing response dated 28.04.2022, the SDM was not required to make any inquiry under Section 137. Under the law the further inquiry is only with regard to ascertain the fact as to whether the opposite party has encroached on the 'public way' or not. The SDM has proceeded correctly in the procedure and the Revisional Court also records its satisfaction. In this regard, reliance has been placed on the judgment passed in the case of ***Shri Thaneswar Bora Vs. Shri Kumud Sharmah, 1986(2) Gauhati Law Reports 161.***

(iv) The Parliament has provided a specific chapter containing summary procedure in the matter of Maintenance of public order and Tranquility (From Section 133 to 143) of Cr.P.C. which is a complete code in regard to the said issue and thus, the other provisions of the Code pertaining to inquiry and trial are not applicable in the subject matter. On this aspect, reliance has been placed on the judgment passed in the case of ***Shri Thaneswar Bora (supra)*** and judgment dated 03.03.2017 passed in 482 petition No.956 of 2002 ***(Ramvriksha Vs. State of U.P).***

(v) The judgment relied upon by the applicant namely Arun Kumar v state of up dated 03.12.2012 passed in 482 petition No. 40888 of 2012 is not applicable as it pertains to the fact where 'public way' was denied.

(vi) The magistrate is not required to ask the applicant about the fact that he denies the existence of the 'public way' or not where written reply is filed admitting the existence of 'public way'. On this aspect, reliance has been placed on the judgment dated 18.09.1992 passed by Bombay High Court in the case of ***ALAX Fernandes v state and others.***

13. Considered the aforesaid and perused the record.

14. In order to decide the present application, this Court finds it appropriate to refer some authorities, in addition to the authorities referred above, wherein the scope of relevant provision of Cr.P.C. i.e. Section 133 to 143 have been taken note of.

15. In the case of ***Raghubar Dutt v. Suresh Chandra, 1987 ACR 566,*** this Court has discussed the scope of Section-137 of Cr.P.C. and observed as follows:-

"5. A bare reading of Section 137 would indicate that the provisions therein are to prevent the Magistrate from arrogating himself the power of civil court. Further the Magistrate need not hold an elaborate enquiry regarding the rights of the parties. The ambit of the enquiry is to find out if there is some prima facie reliable evidence in support of the denial of public right. The Magistrate is not called upon to weigh the evidence in order to determine the rights and title or truth of the denial. But he has just to be satisfied as to whether there is some evidence which could indicate prima facie that it was possible for a competent court to place reliance upon the same. It does not obviously mean that evidence of such a character would definitely establish title of the land. Otherwise in that case the legislature would not have used the words 'just reliable evidence', rather the words used would have been that the Magistrate would decide on the basis of evidence being led as to whether the person against whom the said order has been passed, has a right in the land to create unlawful obstruction in the public way. The language of Section 137(2) of the Code is couched in such a way that the reliable evidence would depend upon the circumstances of each case. To put it differently, it only connotes where the evidence was such that if unrebutted, it would prove the non-existence of public right as alleged by the person against whom conditional order was passed See Lala Bissoomal v. State, 1957 AWR 551, T.N. Sudhakaran v. Dr. L.M. George, 1977 Cri LJ 542 and Jaswant Singh v. Jagir Singh, *1971 SCC OnLine P&H 217 : 1972 Cri LJ 792.* Further the legislature did not use the word 'evidence' which definitely establishes the right to claim. In other words, reliable evidence can be taken to be a form of evidence which is not the basis of unreliable or forged evidence. The duty of a Magistrate is merely to see whether the evidence in support of denial of public right is reliable.

6. In the instant case it is better to refer to the evidence led by the opposite parties to prove the denial of public way or the unlawful obstruction created. It was alleged by the opposite parties that plot No. 394 did not contain public way and there was no such entry like public way in plot No. 394 in revenue papers. Similarly in Khatauni for 1387 to 1392F an area of 8 biswa of plot No. 394 was entered as Goth

and there was no mention about any public way or Rasta. Similarly extract of Khasra for the years 1374 to 1379 F also mentions the area of 8 biswa of plot No. 3 94A as Goth. There was no mention of any public way or Rasta. It was for the applicant to move an application Under Section 133 to explain as to how this entry of Goth was converted into Rasta. This was the question pertaining to right and title. The aforesaid extracts of Khasra and Khatauni were certainly reliable evidence within the meaning of Section 137(2) of the Code. On the basis of such evidence the Magistrate ought to have stayed the proceedings until the matter of existence of such right of public way was decided by a competent court. The Sessions Judge has correctly allowed the revision by the impugned order."

16. In ***Wali Uddin v. State of U.P., 1988 (12) ACR 1,*** this Court has elaborated the language of Section-137(1) of Cr.P.C. and concluded in following terms:-

"23. It is also to be noticed that under Section 137(1) the Legislature has used the word "that after the denial of such right by opposite party the Magistrate shall inquire into the matter" and not that the Magistrate shall adjudicate upon or decide the matter or controversy between the parties. The word 'inquire', means eager, to acquire information. The word 'inquire', according to Shorter Oxford English Dictionary means to search into, to seek knowledge, to make inquisition, to make investigation, to seek information by questioning, to seek or to try to find out. The word reliable evidence having been used and the Magistrate having been directed to inquire into the matter and not to decide or adjudicate upon, it is clear that the person denying the public right has to put forward a just and bonafide claim. In case the Magistrate finds that there is some reliable evidence and certainly not a conclusive evidence in support of the denial of any public right to get the matter decided by a competent Court. I am however, of the view that the Section does not make it clear as to who is the person as to whether first party or the second party, who has to approach the Civil Court. One thing more may be clarified that in case the Magistrate finds that there is no such reliable evidence in that event he shall proceed in view of the provisions of Section 138 of the Code. In the instant case what has been done is entirely different. Even though the Magistrate confirmed the conditional order but the revision has been disposed of by the learned Additional Sessions Judge in total disregard of the provisions of Section 133 read with Section 137 of the Code. The learned Sessions Judge was exercising the same jurisdiction as was to be exercised by the learned Magistrate. He must have also proceeded to decide the case just with a view to make an enquiry as to whether there was some reliable evidence led by the opposite party No. 2 who denied the existence of such right and in case he found that there was reliable evidence his jurisdiction ceases and it was for the civil Court to decide the same."

17. The Calcutta High Court in the case of ***Md. Basar Ali Molla v. State of West Bengal, 2006 SCC OnLine Cal 444*** has considered the aspect of emergency attached with the dispute regarding public nuisance and has held that it does not apply to private nuisance and private dispute and it is never intended to settle a private dispute. The relevant paragraphs of Md. Basar Ali Molla's case (supra) are being reproduced herein below:-

"7. Section 133 Cr. PC relates to passing of order for removal of public nuisance in case of emergency. It does not apply to private nuisance and private dispute and it is never intended to settle a private dispute.

8. It has been laid down in the case reported in 1957 SCC OnLine MP 149 : AIR 1958 MP 350 that Chapter X of the Code of Criminal Procedure deals with "Public Nuisances" and not with private nuisances. The remedy for the latter is the civil suit although what constitutes nuisance may be common to both classes. Section 133 Cr. PC provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other cases the party should be referred to the remedy under the ordinary law.

9. Reference may also be made in the case reported in 1963 SCC OnLine Ker 160 : AIR 1964 Ker 252 where it has been held that Section 133 Cr. PC can be used only where there has been an invasion of public rights. The case reported in 1957 SCC OnLine Pat 135 : AIR 1958 Pat 210 is also relevant in this case' where it has been held that Section 133 Cr. PC cannot be used as a short cut to achieve what one would like to achieve in a Civil Court. The whole object of Section 133 Cr. PC is that the public should not suffer and that such dangers or obstructions caused by the members of the public should be removed at the earliest possible moment.

10. In that case a decision of Allahabad High Court reported in Farzand Ali v. Hakim Ali, 1914 SCC OnLine All 261 was referred. In that case it was held now it is certainly expedient that in all proceedings initiated under Section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute.

11. In the case reported in 1942 SCC OnLine All 103 : AIR 1943 All 19 it has been stated that the proceedings under Section 133 Cr. PC is not intended to settle private dispute between two members of the public.

12. Reference can also be made in the case reported in *Tejmal Punamchand Burad v. State of Maharashtra,* 1991 SCC OnLine Bom 679 where it has been held that Chapter XB of Criminal Procedure Code deals with "public nuisances" and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest.

13. In the instant case there are no dependable materials to hold that the disputed pathway was being used by the public at large but it appears that the same was used by the students and teachers of Sisu Siksha Kendra from 2003 to last week of February, 2005 and the same was not being used from the last week of February, 2005 as existence from the said pathway was destroyed and the same merged with the fishery. So, it does not appear that the public at large is being affected and there was any obstruction of public way or public way has been destroyed and the same requires repair. So, no case of sufferance of public is made out and it does not appear that the Magistrate had to act purely in the interest of the public. There is no invasion of public right. If it assumed that obstruction is caused to the use of the pathway in question by the students, teachers and guardians of students of Sisu Siksha Kendra by the petitioners then it is an obstruction not to the public at large but

to a handful of persons and remedy for said obstruction cannot be had by resorting to provision of Section 133 Cr.PC. If there is any nuisance the same is purely a private nuisance for which Civil Court may be approached for appropriate remedy according to law. There is room for contention that Section 133 Cr.PC also does not contemplate any order for repairing of road which has been abolished and also any order in connection with such repair.

14. In view of my above discussions I hold that both the impugned orders dated 17.1.2006 and 7.7.2006 cannot stand and the same are liable to be set aside. In the result, the instant applications succeed and the same are allowed. The impugned orders passed by the learned Executive Magistrate are hereby set aside. I make no order as to costs."

The crux of above quoted statutory law and the precedents is that the authority under section 133 of Cr.P.C. can be exercised by the executive magistrate, when any unlawful obstruction or nuisance is alleged on any public place or on any way, which is or may be lawfully used by the public, as is the controversy in the present case. However, to ascertain the justification of such allegation, the executive magistrate is required to see as to whether the person against whom the show cause has been issued under Section 133(1) of Cr.P.C. has placed "any reliable evidence" in denial of such allegation or not. While doing so, the executive magistrate is not required to ask for any conclusive evidence and he has to consider the evidence brought on record by the person denying existence of unlawful obstruction or nuisance with an understanding as to whether such evidence can be said to be reliable enough. If that is so, the executive magistrate should not proceed further in the matter and should relegate the parties to the competent civil court for determination of their rights. Even otherwise, the entry in government record regarding the land or passage in question has a direct bearing upon the claim of existence of "any public place" or "any way, which is or may be lawfully used by the public". When the person denying existence of unlawful obstruction or nuisance comes with an explanation that the land or passage in question is actually the land purchased by him through registered sale-deed and such land is not entered in the revenue or municipal record as "public place or public way or government/municipal land", the executive magistrate should not casually brush aside such counter claim or explanation without giving any convincing reason in that regard and proceed only on the basis of some unsubstantiated statements of a few persons.

18. The proceedings under section 133 of Cr.P.C. are summary in nature and are meant for the cases of imminent danger to the public tranquility and peace and the same should not be used or rather misused to scuttle the valuable right of owner of property and that is why, the legislature has in its wisdom used the words "any reliable evidence" in support of such denial, in the event and in case of which he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court as provided under Section 137(2) of Cr.P.C., which is certainly having a different import and connotation than the word 'conclusive evidence'. This language used by the legislature has a limiting influence and works as a guideline while exercising authority under section 133 of Cr.P.C.

19. Upon due consideration of the aforesaid facts of the case and the law

enunciated above, this Court is of the view that in the instant application, no interference is required and the same is liable to be denied. It is for the following reasons:-

(i) In para 5 of the response dated 28.04.2022, the applicants have admitted existence of 'public way'. However, they denied the allegation of creating obstruction over the same.

(ii) In view of admission of existence of 'public way', to the view of this Court, the Magistrate was not under obligation to hold an enquiry as required under Section 137 Cr.P.C. Thus, the the reliance placed on the judgment passed in the case of ***Arun Kumar (supra),*** wherein, the existence of public way was refuted, is misplaced.

(iii) The fact that the Magistrate visited the spot is not in dispute and as per his observation, while making spot inspection, the 'public way' in issue (existence of which is admitted) was found obstructed and recitals in this regard in the impugned order dated 07.05.2022 have not been refuted by the applicants in the memo of revision and accordingly, there would be no justification for disbelieving the said recitals in the impugned order dated 07.05.2022 passed in a summary proceeding under Section 133 Cr.P.C. affirmed vide impugned order dated 05.09.2023, even on the ground that no report as per Section 310 of Cr.P.C. was prepared by the Magistrate.

20. It would be apt to note that in the judgment passed in the case of ***State of Maharashtra v. Admane Anita Moti, (1994) 6 SCC 109,*** the Hon'ble Apex Court observed that *"It is well established that the factual recitals or observations made in a judgment or order are taken to be correct unless rebutted. The burden to rebut it is on the person who challenges it. One of the methods to rebut such observation is to file the affidavit of the person who was present in the Court and to produce such material which may satisfy the Court that the recital in the judgment crept in inadvertently or it was erroneous".*

21. Further, in the case of ***Bhagwati Prasad v. Delhi State Mineral Development Corpn., (1990) 1 SCC 361***, the Hon'ble Apex Court observed that *"It is now settled law that the statement of facts recorded by a court or quasi-judicial tribunal in its proceedings as regards the matters which transpired during the hearing before it would not be permitted to be assailed as incorrect unless steps are taken before the same forum. It may be open to a party to bring such statement to the notice of the court/tribunal and to have it deleted or amended. It is not, therefore, open to the parties or the counsel to say that the proceedings recorded by the Tribunal are incorrect".*

22. Thus, for the reasons aforesaid, ignoring the report of Lekhpal dated 02.05.2022, this Court is of the view that on account of obstruction created by the applicants over 'public way' in dispute, the Magistrate passed the order dated 07.05.2022 affirmed vide order dated 05.09.2023 and as such, the impugned orders dated 07.05.2022 and 05.09.2023 are not liable to be interfered with.

23. For the reasons aforesaid, the instant application has no force. It is accordingly ***dismissed***.

(2024) 3 ILRA 1044
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 13275 of 2018

Madan Mohan Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anshul Kumar Singhal

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 200 & 482 – Indian Penal Code, 1860 - Sections 415 & 420 - Application under Section 482 Cr.P.C. - for quashing of criminal proceedings - Complaint case - applicant pleaded that the dispute stemmed from a long-standing family conflict over trust property originally managed by their grandfather - Despite prior civil suits and a compromise in a Civil Suit, the opposite party later filed a criminal complaint case alleging breach of that compromise - court observed that, fraudulent or dishonest inducement is an essential ingredient of the offence under section 415 IPC and in the present case element of cheating is missing as there is allegation of violation of agreement - held - no case is made out under section 420 IPC is made out against the applicant and a dispute of purely civil nature between the parties has been converted into criminal prosecution of the applicant at the behest of opposite party no. 2, therefore, the impugned criminal proceedings is quashed – hence, the applicant stands allowed.
(Para – 8, 9)
Application Allowed. (E-11)

List of referred Cases: -

1. Gulam Mustafa Vs St. of Karn. (2023) SCC online SC 603,

2. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra, (2021) SCC online SC 315,

3. Archana Rana Vs St. of U.P. & anr., (2021) volume 3 SCC 751,

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

1. Heard Sri Anshul Kumar Singhal, learned counsel for the applicant and Sri Udai Bhan, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings against the applicant in Complaint Case No. 2548, under Section 420 I.P.C., P.S. Hathras Gate, district-Hathras, pending in the court of Chief Judicial Magistrate, Hathras, as well as summoning order dated 19.12.2017.

3. The contention of learned counsel for the applicant is that applicant and opposite party no. 2 are the grandsons of late Netram Sharma, who during his lifetime executed a registered trust deed on 01.01.1945 and the father of the applicant was nominated as Manager of the aforesaid trust, thereafter a registered will deed dated 20.11.1974 was executed by late Netram Sharma, by which all managerial rights of the aforesaid trust was given to Sri Damodar Das (father of the applicant). It was further provided in the aforesaid will deed that heirs of Damodar Das will continue to manage the affairs of the trust. Subsequently, the opposite party no. 2 and his brother started putting their claim over the property of trust, denying the trust deed, as well as will dated 20.11.1974. After the death of Damodar Das, father of opposite party no. 2 has filed a suit bearing Original

Suit no. 48 of 1983 for declaration of ownership regarding trust property. Subsequently, this suit was disposed of on the basis of compromise entered into between the parties regarding trust property. Subsequently, when the the opposite party no. 2 had started interfering the applicant in the enjoyment of the property in question, then the applicant has filed Original Suit No. 201 of 2005 for permanent injunction and declaration. The said suit was decreed by order dated 19.02.2010, in which the applicant was declared Manager of the trust and opposite party no. 2 and his brother were injected from transferring any part of the property of the Dharamshala, though the aforesaid judgment dated 19.02.2010 passed in Suit No. 210 of 2005 was challenged by the opposite party no. 2 in First Appeal No. 213 of 2010 but this Hon'ble Court did not stay the judgment dated 19.02.2010 and only order of status quo was passed. After loosing the litigation, the opposite party no. 2 has filed impugned complaint on 19.06.2017 on the ground that applicant has violated the terms of compromise entered into between the parties in Suit No. 48 of 1983 before the Munsif Court, Hathras.

4. Learned counsel for the applicant has further contended that from the perusal of the impugned complaint, no case under section 420 I.P.C. is made out against the applicant and the ingredients of cheating as defined under Section 415 I.P.C. are missing and there is no allegation that applicant had fraudulently or dishonestly induced to deliver any property.

5. From the perusal of the record, it appears that specific case of opposite party no. 2 in his complaint as well as in his statement recorded under Section 200 Cr.P.C. is that though as per compromise entered into between the parties, during pendency of the Suit No. 48 of 1983, the Dharamshala was given to opposite party no. 2 but in violation of the aforesaid compromise deed and the applicant retained the same with malafide intention. Therefore, even if the entire allegation of the complaint as well statement of complainant recorded under Section 200 Cr.P.C. are taken as true even then case under Section 420 I.P.C. is not made out against the applicant. The Apex Court in number of judgments held that there is tendency of the parties of converting a civil litigation into criminal litigation. Hon'ble Apex Court in ***Gulam Mustafa vs. State of Karnataka (2023) SCC online SC 603*** observed in paragraph 36, which reads as under:

"What is evincible from the extant case-law is that this Court has been consistent in interfering in such matters where purely civil disputes, more often than not, relating to land and/or money are given the colour of criminality, only for the purposes of exerting extra-judicial pressure on the party concerned, which, we reiterate, is nothing but abuse of the process of the court. In the present case, there is a huge, and quite frankly, unexplained delay of over 60 years in initiating dispute with regard to the ownership of the land in question, and the criminal case has been lodged only after failure to obtain relief in the civil suits, coupled with denial of relief in the interim therein to the respondent no. 2/her family members. It is evident that resort was now being had to criminal proceedings which, in the considered opinion of this Court, is with ulterior motives, for oblique reasons and is a clear case of vengeance."

6. Similarly Hon'ble Apex Court in the case of ***M/s Neeharika Infrastructure***

Pvt. Ltd. vs. State of Maharashtra, (2021) SCC online SC 315 in paragraph 60 of the judgement, observed as under:

"In a given case, there may be allegations of abuse of process of law by converting a civil dispute into a criminal dispute, only with a view to pressurise the accused. Similarly, in a given case the complaint itself on the face of it can be said to be barred by law. The allegations in the FIR/complaint may not at all disclose the commission of a cognizable offence. In such cases and in exceptional cases with circumspection, the High Court may stay the further investigation. However, at the same time, there may be genuine complaints/FIRs and the police/investigating agency has a statutory obligation/right/duty to enquire into the cognizable offences. Therefore, a balance has to be struck between the rights of the genuine complainants and the FIRs disclosing commission of a cognizable offence and the statutory obligation/duty of the investigating agency to investigate into the cognizable offences on the one hand and those innocent persons against whom the criminal proceedings are initiated which may be in a given case abuse of process of law and the process. However, if the facts are hazy and the investigation has just begun, the High Court would be circumspect in exercising such powers and the High Court must permit the investigating agency to proceed further with the investigation in exercise of its statutory duty under the provisions of the Code. Even in such a case the High Court has to give/assign brief reasons why at this stage the further investigation is required to be stayed. The High Court must appreciate that speedy investigation is the requirement in the criminal administration of justice."

7. The Hon'ble Apex Court in the case of ***Archana Rana vs. State of U.P. and another, (2021) volume 3 SCC 751*** observed in paragraph 7 & 8 for making out of a case under Section 420 I.P.C. There must be element of cheating since beginning. In paragraph 7 & 8 in the judgment of ***Archana Rana*** (supra) is being quoted as below:

"7. Having heard learned counsel appearing on behalf of the appellant and learned counsel appearing on behalf of the respondent-State and having gone through the averments in the complaint and the chargesheet, even if the averments made in the complaint are taken on their face, they do not constitute the ingredients necessary for the offence under Sections 419 & 420 IPC. As observed and held by this Court in the case of Prof. R.K. Vijayasarathy (supra), the ingredients to constitute an offence under Section 420 are as follows:

i) a person must commit the offence of cheating under Section 415; and

ii) the person cheated must be dishonestly induced to

a) deliver property to any person; or

b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC."

8. "Cheating" is defined under Section 415 of the IPC. The ingredients to constitute an offence of cheating are as follows:

i) there should be fraudulent or dishonest inducement of a person by deceiving him:

The person who was induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or the person who was induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived.

Thus, a fraudulent or dishonest inducement is an essential ingredient of the offence under Section 415 IPC. A person who dishonestly induced any person to deliver any property is liable for the offence of cheating. "

8. As per the observation of the Apex Court as mentioned in ***Archana Rana's*** case, for making out a case under Section 420 I.P.C., there must be element of cheating as defined under Section 415 I.P.C., therefore, cheating is an essential ingredient for an act to constitute an offence under Section 420 I.P.C. Fraudulent or dishonest inducement is an essential ingredient of the offence under Section 415 I.P.C. In the present case element of cheating is missing as there is allegation of violation of agreement.

9. In view of the facts and circumstances of the case, from the perusal of the record and after considering the submissions advanced by learned counsel for the parties, this Court is of the view that no case under Section 420 I.P.C. is made out against the applicant and a dispute of purely civil nature between the parties has been converted into criminal prosecution of the applicant at the behest of opposite party no. 2, therefore, the entire proceedings of the aforesaid case is hereby quashed.

10. The present 482 Cr.P.C. application stands **allowed**.

(2024) 3 ILRA 1047
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.07.2023

BEFORE

THE HON'BLE RAJEEV MISHRA, J.

Application U/S 482. No. 14477 of 2023

Mohd. Azam Khan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Syed Imran Ibrahim

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 54-A, 161, 173(2), 362 & 482 – Indian Penal Code, 1860 – Sections 171-(g) & 504 – Representation of Peoples Act, 1951 – Section 125 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(1)(X) – Indian Evidence Act, - Sections 65-B & 165 - Application U/s 482 Cr.P.C. – challenging two judicial orders related to Special Sessions Trial - stemming from a 2007 incident – a derogatory speech violating the model code of conduct and hurting sentiments of a community - FIR – offence under sections 504 and 171(G) of IPC and under section 125 of the Representation of Peoples Act, and Section 3(1)(X) of the SC/ST Act – investigation – a video cassette of the speech was recovered - St.ments from officials and the recording studio owner confirmed its authenticity - forensic analysis of the cassette was delayed due to procedural issues, and no report was submitted and the cassette was not included in the charge sheet but kept in the case diary - Trial commenced – charge-sheet - court later directed Applicant to provide a voice sample to verify the cassette's contents, which he unsuccessfully sought to recall through a separate application - the Court upheld the

order directing accused-applicant to provide his voice sample for forensic comparison with a disputed cassette allegedly containing a derogatory speech made in 2007 – further court held that, the voice sample would aid in truth discovery and could benefit the accused - However, the Court sustained the applicant's objection regarding procedural compliance under Section 65-B of the Evidence Act, directing that a certificate be obtained from the recording studio proprietor, authenticating the cassette - Once this certificate is submitted, the accused must comply with the voice sample order – considering the above, the application is disposed of.
(Para – 32, 44, 46, 48, 49)

Application Disposed of. (E-11)

List of referred Cases: -

1. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal & ors.– 2020 vol. 7 SCC 1,

2. Ritesh Sinha Vs St. of UP & anr.– 2019 vol. 8 SCC 1.

3. Sharda Vs Dharmpal – 2003 vol. 4 SCC 493.

(Delivered by Hon'ble Rajeev Mishra, J.)

1. This application under Section 482 Cr.P.C. has been filed by accused-applicant Mohd. Azam Khan challenging the order dated 29.10.2022, passed by Additional Sessions Judge/Special Judge (M.P./MLA), Court No.4, Rampur in Special Sessions Trial No.37 of 2018 (State Vs. Mohd. Azam Khan), under Sections 504 and 171(G) IPC, Section 125 Representation of Peoples Act, 1951 and Section 3(1)(X) SC/ST Act, police station Tanda, district Rampur, whereby a direction has been issued to the accused-applicant to give his voice sample so that the Director F.S.L., Moradabad could examine the voice of the audio cassette to ascertain as to whether the inflammatory/derogatory speech recorded in the audio cassette is that of the accused-applicant and the order dated 22.11.2022, whereby the application (paper no.43 kha) filed by the accused-applicant for recall of order dated 29.10.2022 has been rejected.

2. Heard Mr. Syed Imran Ibrahim, the learned counsel for applicant, Mr. Mahesh Chandra Chaturvedi, the learned Additional Advocate General assisted by Mr. Manu Raj Singh, the learned A.G.A.-I and Mr. Prashant Kumar, the learned A.G.A. for State.

3. Record shows that in respect of an incident, which is alleged to have occurred on 07.08.2007, a delayed F.I.R. dated 08.08.2007 was lodged by first informant-opposite party-2, namely, Dheeraj Kumar Sheel and was registered as Case Crime No.959 of 2007, under Sections 504 and 171(G) IPC, Section 125 Representation of Peoples Act, 1951 and Section 3(1)(X) SC/ST Act, police station Tanda, district Rampur. In the aforesaid F.I.R., applicant has been nominated as solitary named accused.

4. The gravamen of the allegations made in the F.I.R. is to the effect that on 07.08.2007, accused-applicant, who was member of Legislative Assembly and a leader of Samajwadi Party, made a speech, which was derogatory, inasmuch as, the words used were offensive in nature as they caused hurt to the sentiments of a particular community and further the said act of the accused-applicant violated the model code of conduct, issued by the Election Commission.

5. After aforementioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime number in terms of Chapter

XII Cr.P.C. He examined the first informant and other witnesses by recording their statements under Section 161 Cr.P.C.. During course of investigation, statement of Gulab Rai-Naib Tehsildar was also recorded by the Investigating Officer on 21.07.2007. This witness in his statement before the Investigating Officer has stated that the entire event which occurred on 07.08.2007 including the inflammatory/derogatory speech of the accused was recorded and the CD cassette of the same was handed over to the Station Officer of the concerned police station, namely, M.P. Singh.

6. Record further shows that second statement of aforesaid witness, namely, Gulab Rai was recorded on 11.01.2008, in which he has stated that the services of one Sanjay, who runs a studio by the name of Pooja Cassette Centre, were taken to record the entire event. This witness further stated that the entire event was video-graphed by the proprietor of aforementioned firm, namely, Sanjay and the video cassette of the same was submitted by him on 09.08.2007 to the police officials.

7. Subsequently, the statement of Sanjay, proprietor of Pooja Cassette Centre, was recorded. This witness in his statement has categorically stated that the event which occurred on 07.08.2007 was recorded by him on the instructions of Gulab Rai, Naib Tehsildar. After recording was completed, the video cassette was handed over by him to Gulab Rai, Naib Tehsildar.

8. After the aforesaid video cassette was received by the Investigating Officer, it appears that an application was filed before court below seeking permission of the court to have voice sample of the accused-applicant so that the veracity of the recovered cassette as to whether the voice recorded therein is that of accused or not could be examined by the Forensic Science Laboratory (here-in-after shall be referred as 'F.S.L.'). It appears that no orders were passed on this application. The said fact derives its sustenance from the recital contained at page 107 of the paper book. Record further shows that the recovered cassette was sent to F.S.L., Lucknow but was returned with the observation that same be sent to F.S.L., Chandigarh. It is apposite to mention here that thereafter the same was sent to F.S.L., Chandigarh for examination but the same was again returned with an objection that it would not be possible to examine the veracity of the cassette without proper documentation/form.

9. From the above conspectus, it is thus clear that during the course of investigation, no forensic report was submitted with regard to the disputed cassette.

10. Ultimately, the Investigating Officer submitted charge-sheet dated 02.03.2009. However, the disputed cassette was not made part of the charge-sheet but remained part of the case-diary, as the recovery memo of the same had been duly prepared. Resultantly, the disputed cassette was deposited in the Malkhana of the concerned police station.

11. After aforementioned charge-sheet dated 02.03.2009 was submitted, the court concerned took cognizance upon same and simultaneously summoned the applicant. Resultantly, Special Sessions Trial no.37 of 2018 came to be registered in the court of Additional Sessions Judge/Special Judge (M.P./M.L.A), Court

No.4, Rampur. The concerned Sessions Judge framed charges against the accused-applicant.

12. The accused-applicant denied the charges so framed and pleaded innocence. Consequently, the trial procedure commenced.

13. The prosecution in discharge of its burden to bring home the charges so framed against the accused-applicant, adduced the following witnesses.

PW-1- Subhash Chandra is an independent witness, but he did not support the prosecution story and was, therefore, declared hostile.

PW-2- Sudesh is also an independent witness, but he also did not support the prosecution story and was, therefore, declared hostile.

PW-3- Banti is an independent witness, but he has not supported the prosecution story and was, therefore, declared hostile.

PW-4- Naresh is an independent witness, but he did not support the prosecution story and was, therefore, declared hostile.

PW-5- Sanjay, who is the owner of firm, namely, Pooja Cassette Centre was thereafter examined. This witness in his deposition categorically stated that on the direction of Mr. Gulab Rai, the Naib-Tehsildar, he recorded the entire event which took place on 07.08.2007 and thereafter handed over the video cassette to Mr. Gulab Rai, Naib Tehsildar.

PW-7- Mahendra Pal Singh was posted as Station House Officer of Tanda police station, district Rampur at the relevant point of time. This witness in his deposition has clearly stated that a public meeting was organized by the Samajwadi Party on 07.08.2007, in which accused-applicant Mohd. Azam Khan made a speech. This witness further stated that in the said meeting an inflammatory/derogatory speech was made by accused-applicant which caused hurt to the sentiments of Balmiki community. However, no immediate action was taken against the applicant in order to prevent public peace and tranquillity. Subsequently, one Dheeraj Kumar Sheel submitted a written report dated 08.08.2007 on the basis of which Case Crime No.959 of 2007, under Sections 504 and 171(G) IPC, Section 125 Representation of Peoples Act, 1951 and Section 3(1)(X) SC/ST Act, police station Tanda, district Rampur came to be registered. According to this witness, on 09.08.2007, Gulab Rai-Naib Tehsildar handed over the CD and cassette to him which was handed over to the Head Muharir, namely, Viresh and an entry with regard to the same was also made at serial number 42 of the General Diary of police station concerned. During the course of deposition of this witness, the audio/video cassette handed over by Gulab Rai-Naib Tehsildar was produced before the Court in a sealed cover.

PW-8- Om Prakash was posted as Circle Officer, Swar, district Rampur at the relevant point of time. He had investigated the concerned Case Crime number. This witness proved the map prepared by him and accordingly the same was marked as Ext-Ka-3. This witness in his deposition has stated that thereafter he recorded the statement of various witnesses including that of Gulab Rai-Naib Tehsildar. He has supported the recovery memo of the Cassette handed over by Gulab Rai-Naib Tehsildar. Thereafter, this witness recorded the statement of Sanjay, proprietor of Pooja Cassette Centre. He further stated that thereafter an application was made before

court below to grant permission for sending the Cassette to F.S.L., Agra. Subsequently, the same was sent to F.S.L., Lucknow but was returned with the observation that the same be sent to F.S.L., Chandigarh. Subsequent to above, the Cassette was sent to F.S.L., Chandigarh but was returned with certain objections. Thereafter, an application was moved before the court concerned to direct the accused-applicant Mohd. Azam Khan to give his voice sample so that the veracity of the voice recorded in the cassette could be ascertained i.e. the same is of accused-applicant or not. At this stage, this witness was transferred.

PW-9- Gulab Rai was working as Naib Tehsildar, Tanda, district Rampur at the relevant point of time. This witness deposed before the court concerned that he had hired the services of a private person to record the entire incident/event which was to be held on 07.08.2007 (public meeting of Samajwadi Party). The person who had conducted recording of the entire event has subsequently handed over the video cassette to him, which was deposited by this witness at the concerned police station. Proceedings with regard to acceptance of the same at the concerned police station were done in front of this witness and in proof thereof signatures of this witness were obtained.

14. After having gone through paper no.6-A with regard to the recovery memo of the CD and Cassette, this witness proved the same. He further deposed that it contains his signatures also. Accordingly, the recovery memo stood proved and was marked as Ext.Ka-4. After looking at the cassette, this witness deposed that it is the same cassette which was given by him. Accordingly, the cassette was marked as Material Ext.Ka-1, the plastic bag was marked as Material Ext.Ka-2 and the white cloth was marked as Material Ext.Ka-3. Thereafter, this witness has proved the fact that information with regard to the speech made in public meeting held on 07.08.2007 was given to the District Magistrate, Rampur. He has further deposed that Dheeraj Kumar Sheel, who belongs to scheduled caste community, was present at the time of occurrence and was sitting in a corner. This witness was also examined by the court. As certain questions were put to this witness under Section 165 of Indian Evidence Act, therefore, the provisions of Section 165 of the Evidence Act which have a material bearing on the controversy in hand as well as the questions put to the accused by the court need to be noted. Accordingly, the same are reproduced herein-under :-

"165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the

documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

"Question asked by court to P.W-9 Gulab Rai U/s 165 Evidence Act.

Question-01- The audio cassette placed by prosecution as Exibit-1 is played in open court in presence of counsel for both sides and PW-9 Gulab Rai has been asked if he identifies the voice ? The recorded statement was made by whom & when ?

Ans- Yes, it is the speech of accused Azam Khan. He had delivered it in Tanda in year 2007.

Question-02- Do you know difference between audio & video recording ?

Ans- I do not know difference between audio & video recording.

Question-03- At the spot, audio recording was done or video recording ?

Ans- At the spot, only voice was recorded.

Opportunity given to accused for cross-examination."

15. **PW-10**- Gyananjay Singh who was working as Circle Officer, Swar, district Rampur at the relevant point of time was also examined. Various questions were put to this witness by the Court under Section 165 Indian Evidence Act. Accordingly, the same are extracted herein-under :-

"U/s 165 Evidence Act – के तहत कोर्ट द्वारा पूछे गये प्रश्न-

प्रश्न - क्या कैसेट वस्तु प्रदर्श-1 आपने आरोप पत्र के साथ न्यायालय में दाखिल किया था?

Ans- जी नहीं।

प्रश्न- आप इस के I.O. थे आपने प्रश्नगत कैसेट आरोप पत्र के साथ क्यों नहीं दाखिल की?

Ans- प्रश्नगत कैसेट का परीक्षण पूर्ण नहीं हो पाया था जिसके लिए माननीय न्यायालय से पूर्व विवेचक द्वारा दिनांक 24.01.2008 को अनुमति प्राप्त कर के दिनांक- 15.02.2008, को एफ०एस०एल० लखनऊ भेजवाया गया था। लखनऊ में परीक्षण न होने कारण वहां से चण्डीगढ़ भेजा गया था। वहां से कतिपय विन्दुओं पर आपत्ति के साथ वापस भेज दी गयी।

प्रश्न- आरोप पत्र दाखिल करते समय वक्त क्या आपके द्वारा बतौर I.O. सप्लीमेंटरी इन्वेस्टीगेशन की सूचना न्यायालय को दी गयी या सप्लीमेंटरी इनवेस्टीगेशन की अनुमति मांगी गयी?

Ans – सूचना नहीं दी गयी।

प्रश्न- आरोप पत्र दाखिल करते समय प्रश्नगत कैसेट कहा पर थी ?

उत्तर - प्रश्नगत कैसेट थाने के माल खाने में दाखिल थी।

प्रश्न- प्रश्नगत कैसेट एक डॉकूमेन्ट्री इविडेन्स थी, आरोप पत्र के साथ दाखिल न कर के मालखाने में किसके आदेश से और क्यों दाखिल की गयी थी?

उत्तर- क्योंकि, कैसेट की जांच पूर्ण नहीं हो सकी थी जांच के लिए माननीय न्यायालय के समक्ष श्री आजम खां के आवाज का नमूना लिया जाना था। जो पूर्ण नहीं हो पाया था। बाद परीक्षण माननीय न्यायालय में दाखिल किया जाता, विवेचना में विलम्ब हो रहा था पर्याप्त साक्ष्य पाते हुए विवेचना में आरोप पत्र प्रेषित की गयी थी।

प्रश्न - एफ०एस०एल० को जब कैसेट भेजा गया था, Voice सेंपल के साथ भेजा गया था कि, बिना Voice सेंपल के भेजा गया था?

उत्तर- बिना Voice सेंपल के भेजा गया था।

प्रश्न - बतौर I.O. क्या आपने कथित कैसेट को यह जानने के लिए कि, आरोपित अपराध गठित होता है और आरोप पत्र में लगी धाराएं आकृष्ट होती है, कभी सुना ? या कभी सुनने की कोशिश की ?

उत्तर - कथित कैसेट पूर्व विवेचक द्वारा माननीय न्यायालय के समक्ष वास्ते परीक्षण शील बन्द किया गया था इसलिए मेरे द्वारा कथित कैसेट को नहीं खोला गया।

Cross by defence counsel (Advo. Nasir Sultan) on same day

यह कहना सही है कि, मै ऑडियों कैसेट व वीडियो कैसेट का अन्तर जानता हूँ। दौरान विवेचना मुझे जानकारी हुई कि, इस मामले से सम्बन्धित वीडियो कैसेट बनाई गयी थी। मेरे संज्ञान में नहीं है कि, केवल आडियो कैसेट बनाई गयी कि नहीं। यह बात सही है कि, केस डायरी में केवल वीडीयो कैसेट की बात का उल्लेख है। केस डायरी के पर्चा नं०-9 में सी डी (काम्पैक्ट डिस्क) का उल्लेख है। कैसेट अलग चीज होती है। और काम्पैक्ट डिस्क अलग चीज होती है।

प्रश्न - क्या संजय के द्वारा वीडियो ग्राफी की गयी?

उत्तर - जी हाँ।

वीडियो ग्राफी दिनांक 7.08.2007 को की गयी। जो कैसेट 07.08.2007 को तैयार की गयी उसे मयसील मोहर दिनांक 9.08.2007 को सायं 17.10 पर पहली बार माल खाने में दाखिल की गयी जो कि, नायब तहसीलदार द्वारा थाने पर दाखिल की गयी।

प्रश्न - 7.08.2007, 08.08.2007 तथा 9.08.2007 तक वीडियो ग्राफी की कैसेट किसके पास रही?

उत्तर - वह केवल कैसेट थी इसे पूर्व विवेचक ही स्पष्ट कर सकतें है।

प्रश्न - केस डायरी में क्या इस बात का उल्लेख है कि, उक्त कैसेट 3 दिन यानि (7.08.2007, 08.08.2007 तथा 9.08.2007 के 17.10) तक किस के पास रही?

उत्तर - कैसेट 09.08.2007 को थाने पर दाखिल किया गया। केस डायरी में

इसका हवाला नहीं इस अवधि में किसके पास रही।

यह बात सही है कि, वीडियो ग्राफर संजय फर्द प्रदर्श क-04 का न तो गवाह है न उसके हस्ता० है। यह बात सही है प्रदर्श क-04 में संजय की मौजूदगी का कोई उल्लेख नहीं है।

सील करते समय नमूना मोहर बनाया गया था नमूना मोहर पत्रावली पर उपलब्ध नहीं है। बाद में कहा कि, माल खाने में माल के साथ होगा।

सी०डी० कैसेट का उल्लेख है काम्पैक्ट डिस्क का उल्लेख नहीं है।

प्रश्न - पूर्व विवेचक द्वारा दौरान विवेचना आवाज का नमूना लेने हेतु न्यायालय में प्रार्थना पत्र प्रेषित करना बताया है उस प्रार्थना पत्र का आपको ज्ञान है अगर है तो उस पत्र का हस्र क्या हुआ और कब उसका निस्तारण हुआ?

उत्तर - इन सब बातो का कोई उल्लेख केस डायरी में नहीं है केवल प्रार्थना पत्र देने का उल्लेख है।

प्रश्न - आपके कथनानुसार सेम्पल लेने का प्रार्थना पत्र न्यायालय में प्रस्तुत करने का उल्लेख है। विवेचक होने के नाते आपने उस प्रार्थना पत्र की कोई जानकारी प्राप्त की ? और कोई उसकी पैरवी की ?

उत्तर - इस सम्बंध में मौखिक रुप से थानाध्यक्ष को निर्देश दिया गया था। किन्तु इस सम्बंध में कोई प्रगति नहीं हुई।

प्रश्न - क्या आपने संजय का नायब तहसीलदार गुलाब राय तथा थानाध्यक्ष का 161 Cr.P.C. का बयान अंकित किया।

उत्तर - मेरे द्वारा नहीं किया गया था पूर्व विवेचक द्वारा लिया गया था।

यह कहना गलत है कि, मुझे बहुजन समाज पार्टी की सरकार की प्रभाव में पूर्व ग्रसत होकर आरोप पत्र प्रस्तुत किया हो।

यह कहना भी गलत है कि, नियमानुसार विवेचना न की गयी हो।"

16. After the statement-in-chief/examination-in-chief of aforementioned witnesses were recorded, the court concerned i.e. Additional Sessions Judge/Special Judge (M.P./MLA), Court No.4, Rampur passed an order dated 29.10.2022 observing therein that since there is no F.S.L. report to prove, that the voice recorded in the audio cassette is that of the accused, therefore, he directed that for just and fair adjudication of the case, the accused shall give his voice sample and the same be sent along with the audio cassette to F.S.L., Moradabad to give its report regarding the same i.e. whether the voice recorded in the disputed cassette is that of accused or not. This order is on record at page 111 of the paper book as Annexure-14.

17. Feeling aggrieved by the said order dated 29.10.2022 referred to above, the accused-applicant filed an application dated 31.10.2022 (Paper No.-43 kha) before court below praying therein that the order dated 29.10.2022 referred to above be recalled. The court below by means of

order dated 22.11.2022 rejected the above-mentioned application (paper no.43 kha).

18. Thus, feeling aggrieved by the above orders dated 29.10.2022 and 22.11.2022 passed by court below, accused-applicant has approached this Court by means of present application under Section 482 Cr.P.C..

19. Mr. Syed Imran Ibrahim, the learned counsel for applicant contends that the orders impugned in present application are not only illegal but without jurisdiction. Consequently, the same are liable to be quashed by this Court.

20. According to the learned counsel for applicant, PW-7 Mahendra Pal Singh, PW-8 Om Prakash, PW-9 Gulab Rai, PW-10 Gyananjay Singh in their depositions before the court below have neither been categorical nor consistent with regard to the nature of the disputed cassette, as to whether the same is an audio cassette or a video cassette. The court below without deciding the issue as to what is the nature of the disputed cassette has proceeded to pass the impugned order dated 29.10.2022 directing the applicant to give his voice sample. He, therefore, submits that court below has not exercised its jurisdiction diligently but in a casual and cavalier fashion. As such, the order dated 29.10.2022 is manifestly illegal, as the same is not the outcome of diligent exercise of jurisdiction by court below.

21. It is next contended by the learned counsel for applicant that from the evidence that has emerged on the record of above mentioned Sessions Trial, it is apparent that recording of the event, which occurred on 07.08.2007, was done/ videographed by one Sanjay, owner of Pooja Cassette Centre, Rampur. The said recording was done by the proprietor of aforesaid firm on the request of Gulab Rai-Naib Tehsildar in his private capacity. There is nothing on record to show that directions were issued to aforesaid Naib Tehsildar by any senior Administrative/Police Officer to get the event recorded which was to take place on 07.08.2007. He, therefore, submits that the disputed cassette is the outcome of an extra judicial act performed by the Naib Tehsildar, namely, Gulab Rai and therefore, the same is neither credible nor worthy of reliance. It is thus urged that the disputed cassette, therefore, cannot be taken into consideration by court below for deciding the guilt of the accuse-applicant.

22. Disputing the impugned order dated 29.10.2022, the learned counsel for applicant contends that the disputed cassette was handed over initially by Sanjay, the owner of Pooja Cassette Centre to Gulab Rai. However, at the time of handing over of the disputed cassette, the requisite certificate was not given, which is mandatorily required to be submitted in terms of Section 65-B of the Indian Evidence Act. In the absence of the requisite certificate, the disputed cassette could not have been accepted by the police on the record of the concerned case crime number. However, in ignorance of above, the same was accepted and made part of the case-diary, inasmuch as, the recovery memo of the same was prepared, which is duly exhibited from the case-diary. Since the disputed cassette was accepted without the requisite certificate, the same is not worthy of consideration and therefore wholly irrelevant for deciding the guilt of the accused-applicant, if any, on the basis of same.

23. With reference to the material on record, the learned counsel for applicant further submits that even when the disputed cassette was placed before the court below along with the recovery memo of the same, the court below without ascertaining the fact as to whether there is a requisite certificate regarding the same in terms of Section 65-B of the Indian Evidence Act or not on the record proceeded to admit the same in evidence and, accordingly, the recovery memo, disputed cassette, plastic bag and white cloth were admitted in evidence and marked as Material exhibits ka-1, ka-2, ka-3, and ka-4. He further submits that even if the disputed cassette has been admitted in evidence as material exhibit, yet the same cannot be relied upon by the court below against the applicant in the absence of requisite certificate required to be submitted along with an electronic piece of evidence in terms of Section 65-B of the Indian Evidence Act.

24. To buttress his submissions, the learned counsel for applicant has relied upon the three Judges Bench judgement of Apex Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others (2020) 7 SCC 1.** Reference has been made to paragraphs 52 to 59 of the said report. For ready reference the same are extracted herein-under :-

"52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the Cr.P.C..

53. In a recent judgment, a Division Bench of this Court in State of Karnataka v. M.R. Hiremath [State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515 : (2019) 3 SCC (Cri) 109 : (2019) 2 SCC (L&S) 380] , after referring to Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] held : (M.R. Hiremath case [State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515 : (2019) 3 SCC (Cri) 109 : (2019) 2 SCC (L&S) 380] , SCC p. 523, paras 16-17)

"16. The same view has been reiterated by a two-Judge Bench of this Court in Union of India v. Ravindra V. Desai [Union of India v. Ravindra V. Desai, (2018) 16 SCC 273 : (2020) 1 SCC (Cri) 669 : (2019) 1 SCC (L&S) 225] . The

Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu v. State of Haryana [Sonu v. State of Haryana, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , in which it was held : (Sonu case [Sonu v. State of Haryana, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , SCC p. 584, para 32)

'32. … The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency.'

17. Having regard to the above principle of law, the High Court [M.R. Hiremath v. State, 2017 SCC OnLine Kar 4970] erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

(emphasis in original)

54. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 Cr.P.C., which reads ["207. Supply to the accused of copy of police report and other documents.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of costs, a copy of each of the following—(i) the police report;(ii) the first information report recorded under Section 154;(iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;(iv) the confessions and statements, if any, recorded under Section 164;(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court."] as follows, is mandatory. Therefore, the electronic evidence i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it

enables the accused to prepare for the trial before its commencement.

55. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial. As recognised by this Court in CBI v. R.S. Pai [CBI v. R.S. Pai, (2002) 5 SCC 82 : 2002 SCC (Cri) 950] , the only exception to this general rule is if the prosecution had "mistakenly" not filed a document, the said document can be allowed to be placed on record. The Court held as follows : (SCC p. 85, para 7)

"7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court."

This extract is taken from Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 : (2020) 4 SCC (Civ) 1 : (2020) 3 SCC (Cri) 1 : (2020) 2 SCC (L&S) 587 : 2020 SCC OnLine SC 571 at page 52

56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 Cr.P.C. or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.

57. The High Court of Rajasthan in Paras Jain v. State of Rajasthan [Paras Jain v. State of Rajasthan, 2015 SCC OnLine Raj 8331] , decided a preliminary objection that was raised on the applicability of Section 65-B to the facts of the case.

57.1. The preliminary objection raised was framed as follows : (SCC OnLine Raj para 3)

"3. (i) Whether transcriptions of conversations and for that matter CDs of the same filed along with the charge-sheet are not admissible in evidence even at this stage of the proceedings as certificate as required under Section 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the service provider concerned and it was not produced along with charge-sheet in the prescribed form and such certificate cannot be filed subsequently."

57.2. After referring to Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , the High Court held : (Paras Jain case [Paras Jain v. State of Rajasthan,

2015 SCC OnLine Raj 8331] , SCC OnLine Raj paras 15-23)

"15. Although, it has been observed by the Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the court are completely shut and it can not be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the court. One of the principal issues arising for consideration in the above case before the Hon'ble Court was the nature and manner of admission of electronic records.

16. From the facts of the above case, it is revealed that the election of the respondent to the Legislative Assembly of the State of Kerala was challenged by the appellant Shri Anwar P.V. by way of an election petition before the High Court of Kerala and it was dismissed vide order dated 16-11-2011 by the High Court and that order was challenged by the appellant before the Hon'ble Supreme Court. It appears that the election was challenged on the ground of corrupt practices committed by the respondent and in support thereof some CDs were produced along with the election petition, but even during the course of trial certificate as required under Section 65-B of the Evidence Act was not produced and the question of admissibility of the CDs as secondary evidence in the form of electronic record in absence of requisite certificate was considered and it was held that such electronic record is not admissible in evidence in absence of the certificate. It is clear from the facts of the case that the question of stage at which such electronic record is to be produced was not before the Hon'ble Court.

17. It is to be noted that it has been clarified by the Hon'ble Court that observations made by it are in respect of secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act and if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions in Section 65-B of the Evidence Act.

18. To consider the issue raised on behalf of the petitioners in a proper manner, I pose a question to me whether an evidence and more particularly evidence in the form of a document not produced along with the charge-sheet cannot be produced subsequently in any circumstances. My answer to the question is in negative and in my opinion such evidence can be produced subsequently also as it is well-settled legal position that the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record.

19. Relevant portion of sub-section (1) of Section 91 Cr.P.C. provides that whenever any court considers that the production of any document is necessary or desirable for the purposes of any trial under the Code by or before such court, such court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons. Thus, a

wide discretion has been conferred on the court enabling it during the course of trial to issue summons to a person in whose possession or power a document is believed to be requiring him to produce before it, if the court considers that the production of such document is necessary or desirable for the purposes of such trial. Such power can be exercised by the court at any stage of the proceedings before judgment is delivered and the court must exercise the power if the production of such document is necessary or desirable for the proper decision in the case. It cannot be disputed that such summons can also be issued to the complainant/informer/victim of the case on whose instance the FIR was registered. In my considered view, when under this provision court has been empowered to issue summons for the producment of document, there can be no bar for the court to permit a document to be taken on record if it is already before it and the court finds that it is necessary for the proper disposal of the case irrespective of the fact that it was not filed along with the charge-sheet. I am of the further view that it is the duty of the court to take all steps necessary for the production of such a document before it.

20. As per Section 311 Cr.P.C., any court may, at any stage of any trial under the Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Under this provision also wide discretion has been conferred upon the court to exercise its power and paramount consideration is just decision of the case. In my opinion, under this provision it is permissible for the court even to order production of a document before it if it is essential for the just decision of the case.

21. As per Section 173(8) Cr.P.C. carrying out a further investigation and collection of additional evidence even after filing of charge-sheet is a statutory right of the police and for that prior permission of the Magistrate is not required. If during the course of such further investigation additional evidence, either oral or documentary, is collected by the police, the same can be produced before the court in the form of supplementary charge-sheet. The prime consideration for further investigation and collection of additional evidence is to arrive at the truth and to do real and substantial justice. The material collected during further investigation cannot be rejected only because it has been filed at the stage of the trial.

22. As per Section 231 Cr.P.C., the prosecution is entitled to produce any person as a witness even though such person is not named in the charge-sheet.

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form."

58. In Kundan Singh [Kundan Singh v. State, 2015 SCC OnLine Del 13647 : (2016) 1 DLT (Cri) 144] , a Division Bench of the Delhi High Court held : (SCC OnLine Del para 50)

"50. Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , holding that Section 65-B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65-B(4) is mandatory. Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 Cr.P.C. or, at the appellate stage under Section 391 Cr.P.C.. Evidence Act is a procedural law and in view of the pronouncement in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] partly overruling Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65-B."

59. Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence."

25. In the light of above-noted observations made by the Apex Court, the learned counsel for applicant contends that it is now well settled that an electronic piece of evidence cannot be relied upon in the absence of the certificate which is mandatorily required under Section 65-B of the Evidence Act. As the disputed cassette is not accompanied by the requisite certificate therefore the same cannot be relied upon in evidence. Consequently, no directions could have been issued by court below to the applicant to give his voice sample for securing the F.S.L. report regarding the said cassette.

26. It is lastly contended by the learned counsel for applicant that the issue as to at what stage the police can ask or obtain the voice sample of an accused is no longer res-integra and is now set at rest. In this regard, reference is made to the judgement of Apex Court in **Ritesh Sinha Vs. State of U.P. and another (2019) 8 SCC 1.**

27. Learned counsel for applicant has referred to paragraph 27 of the aforesaid report which reads as under :-

"In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice

for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose of the appeals in terms of the above"

28. With reference to above (i.e. paragraph 27 of the said judgement), the learned counsel for applicant contends that the Apex Court has declared in unequivocal terms that the voice sample of an accused can be obtained by the Investigating Officer only during the course of investigation and not subsequently. Since in the present case, the police report in terms of Section 173(2) Cr.P.C. i.e. charge-sheet has already been submitted against the applicant therefore, the order impugned dated 29.10.2022 passed by the court below being in clear violation of above judgement of the Apex Court is, therefore, un-sustainable and thus liable to be quashed by this Court.

29. The court below has committed a grave error in rejecting the application filed by the accused-applicant for recall of the order dated 29.10.2022, vide order dated 22.11.2022. He then concluded by submitting that the orders impugned in the present application are thus liable to be quashed by this Court and the application be allowed.

30. Per contra, Mr. Mahesh Chandra Chaturvedi, the learned Additional Advocate General has opposed the present application. He submits that the order impugned dated 29.10.2022 is perfectly just and legal. The court below has not committed any illegality in passing the order dated 29.10.2022 or in rejecting the recall application filed by the applicant seeking recall of the order dated 29.10.2022, vide order dated 22.11.2022. He further submits that procedure is an aid to justice and therefore the rigours of procedure cannot be construed in such a manner so as to prevent the court from discovering the truth. When the order impugned is examined in the light of above, it cannot be said that any prejudice has been caused to the applicant on account of the impugned order, inasmuch as nothing has been decided against applicant, but only a direction has been issued to applicant to give his voice sample.

31. According to the learned Additional Advocate General, so far as challenge to the order dated 22.11.2022 passed by court below, whereby the recall application filed by accused-applicant seeking recall of the order dated 29.10.2022 is concerned, no illegality has been committed by the court below in rejecting the recall application. Attention of the Court was invited to the provisions contained in Section 362 Cr.P.C. and on basis thereof he contends that since there is a specific bar under the Code i.e. Criminal Procedure Code restraining the criminal court from reviewing or recalling an order passed by them, thus a court of criminal jurisdiction has no jurisdiction to recall an order. In view of above, the recall application filed by accused-applicant seeking recall of order dated 29.10.2022 was itself misconceived and, therefore, the court below has not committed any illegality in rejecting the said application.

32. With regard to the merits of the order dated 29.10.2022 passed by the court below, learned Additional Advocate General contends that it is explicit from record that an application for obtaining the

voice sample of accused-applicant was filed by the Investigating Officer before court below at the first opportunity i.e. during the pendency of investigation. However, the said application remained pending as the court concerned did not pass any order on the same i.e. either allowing it or rejecting it. As such, it cannot be said that there was any lackadaisical approach on the part of the Investigating Officer in seeking the order of the court to direct the accused to give his voice sample. It is well settled that an act of court prejudices none. He thus contends that if the application filed by the prosecution seeking a direction from court to direct the accused to give his voice sample was not decided by the court below during the pendency of investigation then merely on the basis of the observations of the Supreme Court as noted above it cannot be contended that court below has no jurisdiction to grant such permission at subsequent stage. Aforesaid circumstance as has emerged in this case has not been dealt with by the court in it's judgement referred to above. There is no such injunction issued by the Supreme Court that even if the application was filed at the investigation stage but if it was not allowed before the submission of the police report, the court cannot allow the same subsequently. Apart from above, it is explicit from the record that the disputed cassette was sent to the F.S.L. Agra and F.S.L. Chandigarh during the pendency of investigation but the same was not examined for one reason or the other. He, therefore, submits that in view of above, it cannot be said that the Investigating Officer was not diligent about the sensitivity of the matter and that appropriate steps were not undertaken by him at the appropriate time to ascertain the guilt of the accused-applicant in the crime in question, on the basis of the disputed cassette.

33. In the submission of the learned Additional Advocate General when the order impugned is examined in the light of above, it is apparent that court below in an honest and pragmatic manner, has directed that voice sample of accused-applicant be obtained to ascertain the guilt of the accused-applicant (regarding the inflammatory/derogatory speech) in the crime in question. Moreover, the order impugned does not by itself convict the accused-applicant but the consequences of the same shall be an aid to decide the guilt of the accused-applicant in the crime in question, if any.

34. The learned Additional Advocate General further contends that there is no time limit for obtaining the requisite certificate in respect of an electronic evidence submitted before the court concerned and relied upon by either of the parties. In this regard, he has referred to the judgement of the Apex Court in **Arjun Panditrao Khotkar** (supra) relied upon by the learned counsel for applicant and has referred to paragraph 59 of the report to buttress his submission. For ready reference, the same is again reproduced herein-under :-

"59. Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence."

35. On the above premise, he submits that non submission of requisite certificate by the person from whose custody the

electronic evidence has come before the court will only be an irregularity and not an illegality and, therefore, capable of being rectified. The requisite certificate can be submitted before court concerned any time but before the delivery of judgement.

36. With reference to the observations made by the Apex Court in paragraph 27 of the judgement in **Ritesh Sinha (supra),** the learned Additional Advocate General has placed before court the said judgement in extenso. He has invited the attention of the Court to the questions, which fell for consideration before the Court. For ready reference, both the questions which fell for consideration before the Court, are being reproduced herein-below :-

"5. Two principal questions arose for determination of the appeal which have been set out in the order of Ranjana Prakash Desai, J. dated 7-12-2012 in the following terms :(Ritesh Sinha case2, SCC p.364, para 3)

3.1. Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence ?

3.2. Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorise the investigating agency to record the voice sample of the person accused of an offence ?"

37. With reference to question no.2 which emerged for adjudication before the Bench, learned Additional Advocate General contends that in the present case the court itself has directed the accused to give his voice sample. The matter is not under investigation, inasmuch as, the police report in terms of Section 173 (2) Cr.P.C. has already been submitted. However, in the present case, the ratio laid down by the Apex Court as noted above shall not be an embargo on the power of the court to direct the accused to give his voice sample as the application regarding same was already filed by the Investigating Officer during the course of investigation but the said application remained pending. This fact is clearly discernable from the recital contained at page 107 of the paper book. Therefore, the order impugned cannot be dislodged on that ground. There is no fault on the part of prosecution. Moreover, an act of court prejudices none.

38. At this juncture, the learned Additional Advocate General has again reiterated his earlier submissions (which have been noted in the preceding paragraphs of this judgement from where the submissions of the learned Additional Advocate General have been taken note of). He, therefore, contends that since the order passed by the court is with reference to Section 165 of Indian Evidence Act and there being no fetters on the power of the court to obtain such material which shall be helpful in discovering the truth, the order impugned cannot be said to be illegal or the outcome of casual exercise of jurisdiction in terms of Section 165 Indian Evidence Act.

39. Attention of the Court was then invited by the learned Additional Advocate General to the provisions contained in Section 293 Cr.P.C. and on basis thereof he contends that since F.S.L. report is exempted from any proof in evidence, therefore, the present application has been

engineered only to defeat the cause of justice and hence the same is liable to be rejected.

40. The learned A.G.A. has then submitted that the direction issued by the court is for the benefit of the accused himself. Taking a hypothetical view that in case the applicant does not give his voice sample and therefore no F.S.L. report can be obtained to ascertain that the voice recorded in the cassette is that of accused, then an adverse inference can be drawn against applicant. In this regard, he has referred to the judgement of the Supreme Court in **Sharda Vs. Dharmpal (2003) 4 SCC 493.**

41. The learned Additional Advocate General has also referred to Section 54-A Cr.P.C. which has been introduced in the year 2005. Expanding the scope of the term ”Identification” occurring in this Section, he submits that the same can also be construed to mean identification of the voice of accused also. When the order impugned is examined in the light of above, no irregularity can be attached to the same.

42. On the above conspectus, the learned Additional Advocate General submits that present application is liable to be dismissed.

43. It is lastly urged by the learned A.G.A. that the accused-applicant himself has agreed to give his voice sample. In this regard, reference is made to paragraphs 28 and 41 of the affidavit filed in support of the present application. For ready reference, the same are reproduced herein-under :-

“28. That it is submitted that the applicant is not shying away from giving his voice sample, however, he only insists that the proper procedure of the same be followed.

41. That in the light of the facts and circumstances mentioned herein above, it is once again submitted here that the applicant is ready to give his voice sample; however his only request is that the authenticity of the CD be first looked into, and then once the F.S.L. submits a report in that regard, he may be asked to give his voice sample.”

44. Having heard the learned counsel for applicant, the learned Additional Advocate General assisted by the learned A.G.A. for State, and upon perusal of record, this Court finds that the issue as to what is the nature of the disputed cassette is a question of fact and will not have material bearing on the merits of the order impugned dated 29.10.2022. Once the original cassette was itself placed before the court and has been admitted into evidence as Material exhibit Ka-1, therefore, the correct description of the same can be taken note of by the court in its judgement. Merely on the ground that court below without deciding the nature of the disputed cassette i.e. whether it is an audio cassette or a video cassette had directed the accused-applicant to give his voice sample, the order impugned dated 29.10.2022 cannot be said to be illegal causing prejudice to the applicant and therefore liable to be set aside. This Court, therefore, finds that the aforesaid submission raised by the learned counsel for applicant has been made only to be rejected. Accordingly, the court declines to delve into the said submission.

45. With regard to the power of the court to direct an accused to give his voice sample with reference to the judgement of the Apex Court in the case of **Ritesh Sinha (supra),** this Court finds that the controversy involved in aforesaid case before the Apex Court was in respect of a matter which was at the stage of investigation as is exhibited from question no.2 reproduced herein-above. It is an un-disputed fact that in the present case, a police report in terms of Section 173 (2) Cr.P.C. i.e charge-sheet has already been submitted. Thereafter, charges were framed against accused-applicant. Resultantly the trial has commenced.

46. However, the judgement of the Supreme Court in the case of **Ritesh Sinha (supra)** relied upon by the learned counsel for applicant is not attracted in the present case. As per the said judgement, a Magistrate has been conferred with the jurisdiction to direct an accused to give his voice sample for the purpose of investigation. However, the Court finds that in the present case, an application was duly filed by the prosecution before court below during the course of investigation to direct the accused to give his voice sample. However, the said application remained pending as no order was passed thereon. The judgement relied upon by the learned counsel for applicant does not deal with such an eventuality. No fault can be attributed to the prosecution either, nor the prosecution can be made to suffer on that account. Even otherwise, it is well settled that an act of court prejudices none. Simply because no order was passed by court concerned on the application filed by the prosecution during the course of investigation cannot be construed to mean that the court has no jurisdiction to direct the accused-applicant to give his voice sample subsequently. In view of above, the impugned order dated 29.10.2022 is thus not liable to be interfered with.

47. Having dealt with the submissions urged by the learned counsel for applicant and the objection raised by the learned A.G.A. and the material on record, this court does not find any good ground to set aside the orders impugned.

48. However, the Court finds that the only objection raised by the applicant which is tenable in law is that only when there is a requisite certificate of the competent person only then the disputed cassette is worthy of consideration and can be relied upon. Since the objection raised by the applicant relates to a procedural irregularity coupled with the fact that the judgement of the Apex Court in **Arjun Panditrao Khotkar (supra)** does not prohibit from obtaining the requisite certificate i.e. the one required in terms of Section 65-B of the Evidence Act at the subsequent stage of trial but before the delivery of judgement, the objection raised by the learned counsel for applicant is liable to be sustained.

49. Considering the above this application is disposed of finally with a direction that court below shall obtain a certificate from Sanjay (proprietor of Pooja Cassette Centre) who had recorded the entire event which occurred on 07.08.2007 and thereafter handed over the cassette to Mr. Gulab Rai-Naib Tehsildar in terms of Section 65-B of the Indian Evidence Act. After such certificate has been submitted before court by Sanjay, the applicant shall give his voice sample as already directed vide order dated 29.10.2022.

48. With the aforesaid direction, this application is finally **disposed of.**

(2024) 3 ILRA 1067
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Application U/S 482. No. 22434 of 2023

Mustafa @Chautha ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Manoj Kumar Mishra

Counsel for the Respondents:
G.A., Sri Anil Kumar, Sri Saurabh Sachan, Sri Ramesh Kumar Singh

Criminal Law – Criminal Procedure Code, 1973 - Sections 311& 482 – Indian Penal Code, 1860 - Sections 294, 323, 504 & 506 - Application under Section 482 Cr.P.C. – for quashing of impugned trial court's order whereby Applicant's application moved under Section 311 Cr.P.C. to recall and re-examine PW-8 was rejected – Trial pending – certain necessary to be asked from PW-8, therefore, applicant moved an application u/s 311 Cr.P.C. – Applicant relied upon the judgment of the Apex Court in the matter of P. Sanjeeva Rao Vs The St. of A.P.' wherein Hon'ble Apex Court held that even at the cost of delay of proceedings, application u/s 311 Cr.P.C. has to be allowed to impart complete justice – per contra opposite party no. 2 contented that raising questions under 311 Cr.P.C. Application are not relevant, trial is pending at final hearing stage and further, change of counsel cannot be ground for recalling the witness, once his testimony has been recorded and cross-examination has been closed – court finds that a change in legal representation does not justify reopening cross-examination, which should have been completed immediately after the examination-in-chief - The Court held that recalling a witness at a late stage, especially for frivolous questioning prompted by a change in counsel, is not permissible - The Court reiterated that the power under Section 311 Cr.P.C. must be exercised with caution and only for compelling reasons – hence, relying on different precedents from higher courts, the Court found no merit in the Section 482 application - and dismissed it accordingly.
(Para –13, 14, 15)

Application Dismissed. (E-11)

List of referred Cases: -

1. AG Vs Shiv Kumar Yadav, (2016) 2 SCC 402,

2. Girish Vs St. of U.P. & anr.(Application U/S 482 No. 4300 of 2020); 2020 SCC Online All 1062,

3. Vinod Kumar Vs St. of Punj.; (2015) 3 SCC 220,

4. P. Sanjeeva Rao Vs The St. of A.P.; Criminal Appeal Nos. 874-875 of 2012 (arising out of S.L.P. (Crl.) Nos. 4286-87 of 2011),

5. VSN. Patil Vs K. Niranjan Kumar & ors.; (2021) 3 SCC 661.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the applicant, learned A.G.A. for the State and Sri Ramesh Kumar Singh, Advocate holding brief of Sri Anil Kumar, learned counsel for opposite party No. 2.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 15.05.2023 passed by Special Judge (POCSO Act)/Additional Session Judge, Mirzapur in S.T. No. 18 of 2014 (State Vs. Mustafa), arising out of Case Crime No. 581 of 2013, under Sections- 294, 323, 504, 506 I.P.C., Police Station- Kotwali Dehat, District- Mirzapur.

3. Learned counsel for the applicant submitted that during the course of trial, it

was found that certain questions are necessary to be asked from P.W.-8(Dr. Afzal Ahmad), therefore, applicant has moved application under Section 311 Cr.P.C to summon P.W.-8(Dr. Afzal Ahmad). It is next submitted that the questions proposed to be asked are very relevant for fair trial and justice to accused. He next submitted that the Apex Court in the matter of ***P. Sanjeeva Rao vs. The State of A.P.; Criminal Appeal Nos. 874-875 of 2012 (arising out of S.L.P. (Crl.) Nos. 4286-87 of 2011)*** has taken view that in all eventuality, even at the cost of delay of proceedings, application under section 311 Cr.P.C. has to be allowed to impart complete justice. The trial court, without appreciating the facts as well as considering the law laid down by the Apex Court, has rejected the application under Section 311 Cr.P.C. vide order dated 15.05.2023, which is bad and liable to be set aside.

4. Per contra, learned counsel appearing for opposite party No. 2 submitted that from the perusal of impugned order, it is apparently clear that defense has examined all the witnesses and matter was also listed for final hearing. At this stage, applicant has changed his counsel and now under the advise of a new counsel, applicant has filed application under Section 311 Cr.P.C. raising four questions after two and a half years after closing of cross-examination of P.W.-8 (Dr. Afzal Ahmad). While deciding the application under Section 311 Cr.P.C., learned trial court has considered all aspects and also returned finding upon the questions so raised. He firmly submitted that questions are not relevant and further, change of counsel cannot be ground for recalling the witness, once his testimony has been recorded and cross-examination has been closed.

5. I have considered rival submissions advanced by counsel for parties and perused the records.

6. From the perusal of impugned order, it is undisputed that after change of counsel, application dated 05.04.2023 under Section 311 Cr.P.C. has been filed for recalling the P.W.-8 (Dr. Afzal Ahmad), after around three years from the date of closing of cross-examination for asking four questions, which are being quoted herein-below:-

"प्रश्न-1 क्या प्रदर्श क-6 में अंकित चोट दिनांक 14-09-2013 को समय 8.00 बजे सुबह आना संभावित है?

प्रश्न-2 साक्षी संख्या-8 से यह भी पूछा जाना आवश्यक है कि चोट की अवधि की गणना किस आधार पर किया है?

प्रश्न-3 क्या यह चोटें दिनांक 13-09-2013 को 6.25 बजे शाम आना सम्भावित है?

प्रश्न-4 ट्रामेटिक स्वेलिंग के चोट की अवधि की गणना का आधार क्या है?"

7. While deciding the application, learned Judge has given detailed finding observing that ample opportunity was given to the applicant for examination of witness and case was listed for final hearing on 15.03.2023. At this stage, application dated 05.04.2023 under Section 311 Cr.P.C. has been filed by a new counsel, who has filed Vakalatnama only on 15.03.2023 on behalf of applicant.

8. Now, coming to the questions proposed to be asked from P.W.-8 (Dr. Afzal Ahmad). Question Nos. 2 & 4 are purely of academic nature, may be useful for medical student while examining the injury and question Nos. 1 & 3 are also having no relevance for trial as all facts relating to the time of injury is already mentioned in the injury report, which cannot be replied by P.W.-8 (Dr. Afzal Ahmad) at this belated stage. Therefore, all the questions are having no relevance for fair trial and adjudication of the case.

9. Now, coming to the judgments relied upon by learned counsel for parties.

10. So far as judgment of ***P. Sanjeeva Rao (Supra)*** is concerned, in that case, cross-examination of other witnesses was not completed and during that period application was filed for recalling the witnesses, but in the present case, after change of counsel, on his advice, application under Section 311 Cr.P.C. has been filed for recalling the P.W.-8 (Dr. Afzal Ahmad) for asking four questions, which are having no relevance with regard to the trial as earlier discussed. Therefore, this judgment would not come in rescue of applicant.

11. Apex Court in the matter of ***Vinod Kumar vs. State of Punjab; (2015) 3 SCC 220*** has held that it is not appreciable to call a witness for cross-examination after such a long span of time. Relevant paragraphs of the judgment is quoted below:-

"57.1 Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2 As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics.

57.3 There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4 In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a

long time. It is anathema to the concept of proper and fair trial.

57.5 The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort.

Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute."

12. Again, Apex Court in the matter of ***AG vs. Shiv Kumar Yadav; (2016) 2 SCC 402*** has taken consistent view that change of counsel cannot be a ground for recalling the witness.

13. This Court in the matter of ***Girish vs. State of U.P. and another (Application U/S 482 No. 4300 of 2020); 2020 SCC Online All 1062*** relying on the judgment of ***Shiv Kumar Yadav(Supra)*** has rejected the application filed for summoning the P.W.-1 for cross-examination. Relevant paragraphs of the judgment is quoted below:-

"5. Learned A.G.A. has also relied upon the judgment of Hon'ble Apex Court in **AG v. Shiv Kumar Yadav, (2016) 2 SCC 402.** The relevant paragraphs of the aforesaid judgment are quoted below:

"27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily.

While the party is even permitted to correct its bona fide error and may be

entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court[47]*. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap.

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted."

6. Considering the facts and circumstances of the case, arguments advanced and after going through the entire judgment, this court is of the view that the arguments advanced by the counsel is not

sustainable and that the plea can not be taken by the revisionist's counsel that he has been subsequently engaged, therefore, one more opportunity may be given to him. It is within the rights of the litigant to engage any counsel at any stage but the engagement of the new counsel and the dawn of fresh wisdom upon the first informant cannot be allowed to further delay the matter. The circumstances under which the application was rejected out are sufficiently shown in the impugned order. The impugned order does not reflect any element of inconsistency or any abuse of court's process which may persuade this Court to interfere in the same."

14. Further, Apex Court in the matter of ***V.N. Patil vs. K. Niranjan Kumar and others; (2021) 3 SCC 661*** has clearly held that power under Section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution. Relevant paragraphs of the judgment is quoted below:-

"13. The scope of Section 311 Code of Criminal Procedure which is relevant for the present purpose is reproduced hereunder:

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

14. The object underlying Section 311 Code of Criminal Procedure is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred Under Section 311 Code of Criminal Procedure has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion."

15. The principles related to the exercise of the power Under Section 311 Code of Criminal Procedure have been well settled by this Court in Vijay Kumar v. State of Uttar Pradesh and Anr. 2011 (8) SCC 136.

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred Under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in Mannan Shaikh and Ors. v. State of West Bengal and Anr. 2014 (13) SCC 59 and thereafter in Ratanlal v.

Prahlad Jat and Ors. 2017(9) SCC 340 and Swapan Kumar Chatterjee v. Central Bureau of Investigation 2019 (14) SCC 328. The relevant paras of Swapan Kumar Chatterjee (supra) are as under:

"10. The first part of this Section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred Under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every Court is to discover the truth. Section 311 Code of Criminal Procedure is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested Under Section 311 Code of Criminal Procedure has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

15. In the light of facts mentioned herein-above, this Court is of the view that at a very belated stage, witness cannot be recalled for asking frivolous questions and that too on the advice of a new counsel. The law is very well settled that change of counsel cannot be a ground for recalling the witness. Not only this, after examination-in-chief, cross-examination should have been completed on the very same date and at this very belated stage, there would be no purpose for cross-examination as it is practically not possible for a witness to reply such technical questions. Power under Section 311 Cr.P.C. is always to be exercised very consciously for a very strong and unrebuttable reasons and not in a very casual manner as in the present case.

16. Therefore, under such facts and circumstances of the case as well as judgments of Apex Court and this Court, instant 482 application lacks merit and is accordingly, **dismissed**.

17. No order as to costs.

(2024) 3 ILRA 1073
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482. No. 23246 of 2023

Sahabi Khatoon ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Satya Priya Upadhyay

Counsel for the Opposite Parties:
G.A., Sri Om Prakash Yadav, Sri Prashant Kumar Singh

Criminal Law - Code of Criminal Procedure, 1973 - Sections 126(3) - Against rejection of recall application - Validy of - Applicant (wife) filed application u/s 125 Cr.P.C. - Opposite party no. 2 (husband) filed objections - Applicant's St.ment recorded, yet due to dilatory tactics of opposite party no. 2, proceedings remained pending for over twenty-one years - On account of his non-cooperation, Family Court thrice directed ex parte proceedings ,but each time recalled orders on applications by opposite party no. 2 - Opposite party no. 2, employed as Surveyor in coal fields earning Rs. 96,616/- per month, has not paid any maintenance to applicant since 2002 - Even interim maintenance order directing payment of Rs. 5,000/- p.m has not been complied with - Recovery warrant for Rs. 12,00,000/- issued u/s 125(3) Cr.P.C. has neither been complied with nor challenged - Application u/s 126(2) Cr.P.C. filed by opposite party no. 2 after statutory limitation period of three months without delay condonation application - Perusal of impugned order reveals that Family Court recorded specific findings against opposite party no. 2 regarding his conduct and dilatory tactics adopted by him in proceedings u/s 125 Cr.P.C. for last 21 years - Court observed that plea of opposite party no. 2 was untenable and he misused judicial process - Despite these, recall application u/s 126(2) Cr.P.C. allowed without recording cogent reasons, contrary to mandate of proviso to Section 126(2) Cr.P.C., which clearly St.s setting aside ex parte order only upon showing good cause - Thus, impugned order, quashed. (Para 8, 10)

Application allowed. (E-13)

List of Cases cited:

1. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316

2. Delhi Admn. Vs Gurdip Singh Uban, (2000) 7 SCC 296

3. Dnyandeo Sabaji Naik Vs Pradnya Prakash Khadekar, (2017) 5 SCC 496, (Paras 13, 14

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

1. Heard Mr. Satya Priya Upadhyay, learned counsel for the applicant, Mr. Rabindra Kumar Singh, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, learned Brief Holder for the State of U.P./opposite party no. 1 and Mr. Om Prakash Yadav, learned counsel appearing on behalf of opposite party no. 2.

Relief

2. The instant application under Section 482 Cr.P.C. has been preferred by the applicant-Sahabi Khatoon with a prayer to quash the order dated 05.06.2023 passed by Additional Principal Judge, Family Court, Ballia in Criminal Misc. Case No. 321 of 2022 *(Jamal Khan vs. Sahavi Khatoon),* whereby an application under Section 126(2) Cr.P.C. of the opposite party no.2 has been allowed.

Issue

3. The principle question of law that falls for consideration of this Court in the present litigation is whether the Family Court was justified in allowing the recall application U/s 126(2) of the Criminal Procedure Code, 1973 (for short 'the Cr.P.C.') of the opposite party no. 2 (husband).

Crux of the matter

4. This case is an illustration of how a matter can be delayed for years and also an example of abuse of the process of the Court. The proceeding under Section 125 Cr.P.C. is pending for the last 21 years and no amount of maintenance has been paid to the wife by the husband who is a salaried person and presently he is getting a salary of Rs. 96,616/- per month.

Factual Matrix

5. Brief facts of the case which are required to be stated are as under :-

5.1-The applicant-Sahabi Khatoon is wife of opposite party no. 2 namely Jamal Khan. The marriage of the applicant with the opposite party no. 2 was solemnized on 12.06.1986 and from their wedlock, three sons were born but on account of acrimonious relation between them, their marriage was not successful and as a result thereof, the opposite party no.2 divorced her after 13 years of marriage but he kept his three sons with him. Thereafter she has been thrown out of her matrimonial home on 20.07.1999 by the opposite party no.2. As such, the applicant has been living in her parental home since July, 1999.

5.2-On 20.12.2002, applicant moved an application under Section 125 Cr.P.C. claiming maintenance of Rs. 2,000/- per month from the opposite party no. 2 who at that time was getting salary of Rs. 15,000/-, in which opposite party no. 2 has filed an objection after one year and three months on 29.03.2004.

5.3-The opposite party no. 2 after filing his objection became absent, therefore, the Family Court passed an order dated 26.06.2005 to proceed ex-parte in the matter but the said order was recalled after about three months vide order dated 12.09.2005, subject to payment of cost of Rs. 300/-.

5.4-Thereafter, opposite party no. 2 again became absent, therefore, Family Court, second time passed an order dated 09.10.2006 to proceed ex-parte in the matter but again, opposite party no. 2 moved an application for recall of the order dated 09.10.2006, which was allowed after two years and seven months vide order dated 26.05.2009, subject to payment of cost of Rs. 500/-.

5.5-In the mean time, the evidence of the applicant was recorded on 15.12.2006 and date was fixed for her cross-examination by the opposite party no. 2 but he, with a view to linger on the proceedings, did not cross-examine her. After fixing several dates, last opportunity to the opposite party no. 2 for cross-examination was given on 13.12.2011 but again he did not comply the said order and on account of his non co-operation, proceeding was lingered on.

5.6-The Family Court for the third time, passed an order on 01.11.2012 to proceed ex-parte in the matter but again, on the recall application filed by the opposite party no. 2, the order dated 01.11.2012 has been recalled.

5.7-At this stage, after about twelve years of the pendency of the proceeding under Section 125 of Cr.PC., applicant moved an application dated 10.11.2014 seeking interim maintenance of Rs. 10,000/- per month from the opposite party no. 2 mentioning therein that the opposite party no. 2 is posted on the post of Surveyor in coal field (colliery), District Burdwan and getting salary of Rs. 60,000/- per month. In the interim maintenance application, it is also mentioned by the applicant that she is aged about 45 years and has no means of her livelihood. The said application dated 10.11.2014 of the

applicant has been allowed vide order dated 05.05.2015 directing the opposite party no. 2 to pay Rs. 2,000/- per month towards an interim maintenance to the applicant.

5.8-Later on, applicant became ill, therefore, she could not pursue her case. As a result thereof, her main application under Section 125 Cr.P.C. was rejected on 25.11.2017 for want of prosecution. Thereafter, applicant moved a recall application dated 21.04.2018 under Section 126 Cr.P.C. for recall of the order dated 25.11.2017, which has been allowed vide order dated 10.12.2018 and the order dated 25.11.2017 has been recalled restoring the case on its original number.

5.9-Thereafter fresh notice was issued to the opposite party no.2 and publication was also done in the news paper on 19.12.2019. On 13.01.2020, service of notice on the opposite party no.2 was treated sufficient and further on 12.02.2020 order was passed to proceed ex-parte in the matter. Thereafter application under Section 125 Cr.P.C. of the applicant was allowed vide order dated 18.12.2021 directing the opposite party no. 2 to pay a sum of Rs. 5,000/- per month to the applicant from the date of presentation of the application under Section 125 Cr.P.C. but no amount of maintenance has been paid by the opposite party no. 2, therefore, applicant having no option left moved an application under Section 125(3) Cr.P.C. for recovery of a sum of Rs. 12,00,000/- from the opposite party no. 2, on which recovery warrant for recovery of Rs. 12,00,000/- has been issued against the opposite party no. 2 on 25.01 2023.

5.10-As soon as the opposite party no. 2 came to know about the above application under Section 125 (3) of the applicant, he moved an application under Section 126(2) Cr.P.C. dated 20.04.2022 for recall of ex-parte order dated 18.12.2021 mainly on the ground that there was a compromise between the applicant and opposite party no. 2 and it was agreed between them that they will not appear in the proceeding under Section 125 Cr.P.C.. It is also alleged by the opposite party no. 2 that he was not aware about the proceedings under Section 125 Cr.P.C. initiated by the applicant as no notice or summon was received to him.

5.11-Against the said application dated 20.04.2022, applicant has filed an objection dated 26.08.2022 denying the grounds taken by the opposite party no. 2 in his recall application dated 20.04.2022.

5.12-The Family Court vide order dated 05.06.2023 has allowed the recall application dated 20.04.2022 of the opposite party no. 2 by observing that misuse of judicial process done by the opposite party no. 2 can be compensated by imposing harsh penalties. Accordingly, the order dated 18.12.2021 has been recalled subject to payment of cost of Rs. 80,000/- by the opposite party no. 2 till 04.08.2023 with the observation that in case, the said order is not complied with by the opposite party no. 2, the order dated 05.06.2023 shall automatically become ineffective.

5.13-The opposite party no. 2 did not pay Rs. 80,000/- in compliance of order dated 05.06.2023 within time by 04.08.2023 and on the last day, he moved an application dated 04.08.2023 seeking further time, which has been allowed on the same day by the Family Court without giving opportunity of hearing to the applicant and to file objection on the said application granting one month further time to him to comply the order dated 05.06.2023 by 04.09.2023.

5.14-Thereafter, opposite party no. 2 deposited a sum of Rs. 80,000/- on 04.09.2023.

5.15-The above order dated 05.06.2023 is the subject matter of challenge in the present application by the applicant-wife.

Submissions on behalf of applicant (wife)

6. The main substratum of argument of learned counsel for the applicant is that after recall of final order dated 18.12.2021, the above proceeding under Section 125 Cr.P.C. again got pending since 2002 but till date, no maintenance has been paid by the opposite party no. 2. The application of the applicant for granting interim maintenance had been allowed vide order dated 05.05.2015 but said order has neither been complied with nor has been challenged by the opposite party no. 2. Much emphasis has been given by contending that though the Family Court, in the impugned order dated 05.06.2023 has recorded the finding that the opposite party no. 2 was very much aware about the proceeding under Section 125 Cr.P.C., even then the recall application under Section 126(2) Cr.P.C. of the opposite party no. 2 has been illegally allowed without any cogent reason, therefore, the same is liable to be quashed. It is also submitted that since in the order dated 05.06.2023, it was observed that in case, said order is not complied with by the opposite party no.2, the same shall automatically stands ineffective, then on non compliance of the condition mentioned in the order dated 05.06.2023 by the opposite party no.2, Family Court was not empowered to modify the order dated 05.06.2023 vide order dated 04.08.2023 granting one month further time to the opposite party no. 2 to deposit Rs. 80,000/- without giving opportunity of hearing to the applicant, as such, the order dated 04.08.2023 is also illegal in view of Section 362 Cr.P.C.

Submissions on behalf of opposite party no. 2 (husband)

7. On the other hand, learned counsel appearing on behalf of opposite party no. 2 submits that after granting further time by the Family Court on 04.08.2023, opposite party no. 2 has deposited a sum of Rs. 80,000/- on 04.09.2023 and proceeding under Section 125 Cr.P.C. is going on but he could not dispute any factual argument advanced on behalf of the applicant, as noted above. The opposite party no.2 in his counter affidavit dated 02.11.2023 also did not say any thing about payment of maintenance to applicant. On putting query and giving offer to the opposite party no.2 for payment of arrears of amount of interim maintenance, learned counsel for the opposite party no. 2, upon instruction, submits that opposite party no.2 is not inclined to pay any amount of interim maintenance to the applicant pursuant to order dated 05.05.2015 and he flatly refused to pay single penny to the applicant.

Discussion

8. Having heard the submissions of learned counsel for the parties and perusing the record, I find that the application under Section 125 Cr.P.C. was filed by the applicant (wife) 20.12.2002, in which the opposite party no. 2 (husband) had filed an objection on 20.03.2004. The statement of the applicant was recorded way back in the year 2006, but on account of delaying tactic adopted by the opposite party no.2 as noted above in preceding paragraph no. 5, the proceeding is still pending for the last twenty one years. On non co-operation of opposite party no. 2, thrice Family Court passed the order to proceed ex-parte in the matter on 23.06.2005, 26.05.2009 and

01.11.2012 but on the recall applications filed by the opposite party no. 2, said orders have been recalled thrice. The applicant is posted on the post of Surveyor in coal field (colliery), District Burdwan and he is presently getting salary of Rs. 96,616/- per month but since 2002 till date, not a single penny has been paid by him to the applicant towards her maintenance. The order dated 05.05.2015, whereby opposite party no.2 was directed to pay an interim maintenance of Rs. 5000/-, has also not been complied with. On the application under Section 125(3) Cr.P.C. of the applicant, recovery warrant for recovery of Rs. 12,00,000/- from the opposite party no. 2 has been issued on 25.01.2023 but the said order has also not been complied with nor challenged by the opposite party no. 2. The application under Section 126(2) Cr.P.C. has been moved by the opposite party no.2 after statutory limitation period of three months without delay condonation application.

9. Here it would be relevant to quote Section 126 Cr.P.C., which reads as under:-

Section 126 Cr.P.C.

(1) Proceedings under section 125 may be taken against any person in any district-

(a) where he is, or

(b) where he or his wife, resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons- cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms at to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

10. On perusal of impugned order dated 05.06.2023, I find that the Family Court has recorded several findings against the opposite party no. 2 about his act and conduct as well as *modus-operandi* adopted by him for delaying the proceeding under Section 125 Cr.P.C. for the last 21 years. It is also mentioned by the Family Court that court is not agree with the plea of the opposite party no. 2 and he has misused the judicial process, even then recall application under Section 126(2) Cr.P.C. of the opposite party no.2 has been allowed without recording cogent reasons, whereas proviso to Section 126(2) Cr.P.C. clearly states that ex-parte order may be set-aside upon 'good cause' only.

11. As per Black's law dictionary, the term 'good cause' generally means a substantial reason amounting in law to legal excuse for failing to perform an act required by law. Phrase 'good cause' depends upon circumstances of individual case and finding of its existence lies largely

in discretion of officer or court to which decision is committed.

12. In the present case, no strong reason sufficient in law to presume good cause has been shown by the Family Court while allowing the recall application of opposite party no. 2 vide impugned order dated 05.06.2023, hence, the same is not sustainable in the eyes of law.

13. The purpose and object of Section 125 Cr.P.C. is to provide immediate relief to an applicant. The remedy provided by Section 125 Cr.P.C. is summary in nature. The Amendment Act, 2001 also introduced an express provision for grant of 'interim maintenance' under Section 125 Cr.P.C and power has been vested to the concerned Court to order for making a monthly allowance towards interim maintenance during pendency of the petition. The third proviso to Section 125 Cr.P.C. (inserted vide Act 50 of 2001 w.e.f. 24.09.2001) provide that the proceeding for interim maintenance, shall as far as possible, be disposed of within 60 days from the date of service of notice on the contesting spouse.

14. The Apex Court in the case of **Chaturbhuj vs. Sita Bai, (2008) 2 SCC 316** has held as under:-

"Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by the Apex Court in ***Captain Ramesh Chander Kaushal Vs. Veena Kaushal*** *falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves."*

15. In the light of object of Section 125 Cr.P.C., the Family Court cannot delay grant of maintenance to wife and there is no escape for a able bodied husband from the responsibility of giving sustenance money to his wife despite soured relations. The delay in adjudication by the family Court is not only against human right but also against basic embodiment of dignity of an individual. The husband cannot take subterfuges to deprive her of the benefit of living with dignity.

16. The husband cannot be permitted to exploit the slow justice delivery system to deny what was legitimately due to the wife for her. It is well settled that the dilatory tactics by any of the parties in a proceeding under Section 125 Cr.P.C. has to be sternly dealt with, for which family Court has to be alive to the fact that the litigation before him pertains to emotional fragmentation and delay can feed it to grow.

17. It is the responsibility of the Court to ensure that the wheels of justice turn swiftly, especially when it comes to matters as vital as spousal maintenance. Delay in providing maintenance not only exacerbates the financial hardship faced by wife but also perpetuates a sense of insecurity and inequality. Legal process should not become impediments to timely justice.

18. It is also well settled that the finality of the judgment is absolutely imperative and great sanctity is attached to the final judgment. Permitting the parties to

reopen the concluded judgments without any reasonable justification is clearly an abuse of the process of law and would have far-reaching adverse impact on the administration of justice. In the present case, the opposite party no. 2 has four times filed recall application as noted above which amounts to obstructing the administration of justice and interference with the due course of judicial proceedings.

19. The Apex Court in **Delhi Admn. v. Gurdip Singh Uban, (2000) 7 SCC 296** deprecated the practice of filing of applications for "clarification", "modification" or "recall" of final judgments or orders. It was held in the said judgment that a party cannot be permitted to circumvent or bypass the circulation procedure provided in the provision pertaining to review and indirectly obtain a hearing in the open Court by filing an application for modification or recall. Such an application deserves to be dismissed with costs.

20. The Apex Court in the case of **Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar, (2017) 5 SCC 496** has held as under:-

"13. This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth.

14. Courts across the legal system—this Court not being an exception—are choked with litigation. Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the infrastructure. Productive resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay. Unfortunately, as the present case exemplifies, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The present case is an illustration of how a simple issue has occupied the time of the courts and of how successive applications have been filed to prolong the inevitable. The person in whose favour the balance of justice lies has in the process been left in the lurch by repeated attempts to revive a stale issue. This tendency can be curbed only if courts across the system adopt an institutional approach which penalises such behaviour. Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also

necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate causes simply by the weight of undeserving cases which flood the system. Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice. We commend all courts to deal with frivolous filings in the same manner."

Result

21. As a fallout and consequence of above discussion, the impugned order dated 05.06.2023 passed in Criminal Misc. Case No. 321 of 2022 is liable to be quashed and is hereby quashed and the order dated 18.12.2021 passed in Maintenance Case No. 1500091 of 2014 (old no.381/2002), *(Sahavi Khatoon Vs.Jamal Khan),* under Section 125 Cr.P.C. by the Principal Judge, Family Court, District Ballia is restored.

22. This Court is of the view that in different circumstances, an inherent power may be exercised in different ways to achieve its ultimate object. Accordingly, in order to secure the end of justice, the applicant-Jamal Khan (husband) is directed to pay entire arrears of maintenance amount to the applicant-Sahabi Khatoon (wife) within one month in accordance with above order dated 18.12.2021 (i.e. at the rate of Rs.5,000/-per month from the date of presentation of the application under Section 125 Cr.P.C. dated 20.12.2002) and in future also he shall pay the current amount of maintenance on the 10th day of each month to the applicant, failing which, learned Family Court concerned shall immediately initiate recovery proceeding, etc. against the opposite party no.2 (husband) in accordance with law in order to ensure the payment of entire amount of maintenance to the applicant, who has not received single penny for the last 21 years.

23. Accordingly with the aforesaid observations and directions, the instant application under Section 482 Cr.P.C. filed by the applicant-Sahabi Khatoon (wife) is ***allowed***.

(2024) 3 ILRA 1081
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Application U/S 482. No. 24793 of 2023

Parashuram & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Yatish Kumar Dwivedi

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

Criminal Law - Indian Penal Code, 1860 - Section 498-A & 326 - D.P. Act, 1961 - Sections ¾ - Opposite party no. 2, father of victim, lodged F.I.R. against applicants - It was alleged that marriage of his daughter with applicant no. 1, was solemnized and due to non-fulfillment of additional dowry demand, she was subjected to cruelty and they sent back to her parental home - After investigation, charge-sheet submitted against all accused persons -After framing of charge, trial proceeded and St.ments of informant and victim, wife of applicant no. 1,

recorded as PW-1 and PW-2, wherein they supported prosecution case - Counsel for applicants contends that parties settled their dispute before Gram Pradhan and elite people of village - Victim and informant moved application before Civil Judge (J.D.), seeking reconsideration in light of compromise, but no order passed thereon - Held, allegations disclose that on non-fulfillment of dowry demand, applicant nos. 5 and 6 held hand of victim, applicant no. 1 severed her nipples with sharp weapon, applicant no. 4 gagged her mouth, and applicant nos. 2 and 3 held her legs and assaulted her - Further, "sambal" was inserted in her genital by her husband, causing bleeding - Victim, in her deposition, fully supported prosecution version, affirming permanent severance of her nipples - Thus, application lacks merit, dismissed. (Para 3, 5, 7, 9)

Application dismissed. (E-13)

List of Cases cited:

1. Gian Singh Vs St. of Punj. & ors.., (2012) 10 SCC 303

2. Ramgopal & anr. Vs St. of M.P., 2021 SCC OnLine SC 834

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

1. This application under Section 482 Cr.P.C. has been filed by the applicants to quash the case no. 880 of 2012 *(State vs. Parashuram & others)* arising out of case crime no. 670 of 2012, under Sections 498-A, 326 I.P.C. and Sections 3/4 D.P. Act, Police Station Charkhari, District Mahoba, pending in the court of Civil Judge (J.D.)/Judicial Magistrate, Charkhari on the basis of compromise.

2. Heard Mr. Y.K.Dwivedi, learned counsel for the applicants, Mr. Rabindra Kumar Singh, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, Brief Holder for the State of U.P./opposite party no. 1 and Mr. Vivek Kumar Singh, learned counsel appearing on behalf of the opposite party no. 2.

3. The brief facts of the case which are required to be stated are that the opposite party no. 2, who is father of the victim, lodged a F.I.R. dated 04.07.2012 with regard to an incident which took place on 02.07.2012 at Case Crime No. 670 of 2012 for the offence under Sections 498-A I.P.C. and 3/4 Dowry Prohibition Act, Police Station Charkhari, District Mahoba against the applicants alleging inter-alia that the marriage of his daughter was solemnized on 26.06.2012 with the applicant no. 1-Parashuram but on account of non-fulfillment of additional demand of the accused persons in the marriage, they sent his daughter to his house after committing cruelty with her. F.I.R. further alleges that Parashuram (husband of his daughter) cut her both nipples and also caused injury in her genitals.

4. The victim was medically examined on 04.07.2012 and following injuries were found on her body:-

(i) Abrasion of about 2x2 cm in size over left side of cheek 8 cm anterior to tragus.

(ii) Amputation of both side of nipple with contusion over the left side of breast. Scab present over the both nipple site.

(iii) Abrasion of 1x1/2 cm in size over the left lateral side of leg, 15 cm above from left ankle joint.

(iv) Pt complain of pain over the genital and surrounding.

As per opinion of the doctor, the injury nos. 1 and 3 are caused by hard and blunt object, whereas the injury no. 2 is caused by sharp edged object, which are grievous in nature. Regarding the injury no. 4, no definite opinion can be given by the doctor, therefore, the victim was referred to P.H. Mahoba for MLE of genital and surrounding area for expert opinion.

5. After culmination of investigation, charge-sheet dated 15.07.2012 has been submitted against the applicant no.1-Parashuram (husband) under Sections 498-A, 326 I.P.C. and Section 3/4 D.P. Act and charge-sheet dated 26.09.2012 has been submitted against all other five accused persons under Sections 498-A, 326 I.P.C. and Section 3/4 D.P. Act. After framing of charge, trial proceeded and statement of the informant as well as victim who is wife of the applicant no. 1 has been recorded as PW-1 and PW-2 on 29.05.2015, in which they have supported the prosecution case.

6. Here it would be relevant to quote the statement of the victim/PW-2.

"साक्षी इन्द्रकुमारी पत्नी परशुराम उर्म 24 वर्ष पेशा गृहणी हाल पता- ग्राम स्थालट थाना चरखारी ने सशपथ बयान किया कि-मेरी शादी 3 वर्ष पूर्व हुई थी। मेरी शादी में सभी घरेलू सामान जेवर जंजीर कपड़े तल्ले मेरे बाप ने दिये थे। ससुराल वाले परशुराम, काशीराम, राजेश सभी मोटर साइकिल, 50,000 रूपये मॉगते थे। बदलुआ, काशीबाई, कमलेश भी दहेज मॉगते थे। दहेज की मॉग को लेकर 28 तारीख को काशीबाई, कमलेश ने हाथ पकड़ा और परशुराम धारदार ब्लेड जैसा पैना चाकू जैसा हथियार था, से मेरे दोनों निप्पल काट लिये। चिल्लाया किन्तु बदलूआ ने मुँह दबया था। राजेश व धनीराम ने मेरा पॉव पकड़ रखा था। पटका था, मारा पीटा था। चप्पल से मारा पीटा था। सब्बल गुप्तांग में डाल दिया था। कह रहे थे कि अपने माता पिता से 50,000 नकद व गाडी ले आना। इसलिए ये सब किये थे। 2 तारीख को मुझे मैके छोड़ गये। राजेश छोड़ गये। मैनें अपनी माता को सुबह बताया कि मेरे साथ क्या-क्या हुआ। रिपोर्ट कराने थाने गये थे। पिता जी ने प्रधान के लड़के से प्रा०पत्र लिखाकर रिपोर्ट करायी थी। चार तारीख महोबा में दरोगा जी ने भेजकर डाक्टरी करायी थी। दरोगा जी ने बाद में मेरा 15 तारीख को बयान लिया था। मेरे घर आकर बयान लिये थे। मेरे शरीर के दोनों निप्पल अब नहीं है। स्थायी रूप से शरीर से अलग हो गये है। मेरे साथ जो भी घटना हुई वह दहेज की मॉग को लेकर हुई।

xxxxxxxxx<u>जिरह द्वारा अधिवक्ता काशीबाई व कमलेश</u>

मेरी शादी 26 तारीख को हुई थी। विदा होकर ससुराल गयी थी। इनकी ससुराल पहुंची। ससुराल में चार दिन रही। याना नयाना की रश्में या कोई रश्में नहीं हुई। फिर कही रश्में हुई। देवता पूजन हुआ। चार दिन भी ससुराल में प्रेम से नहीं रही। मेरे पिता जी ने ससुराल वालों से कहा कि मायके लिवा आओ तो वे मैके ससुराल में मेरा कोई इलाज नहीं हुआ। जब मैं मायके आयी बेहोश थी। मुझे राजेश पकड़कर लाया था। मुझे अस्पताल में होश आया। मेरी नन्द काशी बाई की शादी में गयी। मेरे साथ हुई घटना 29 तारीख की रात में 12-1 बजे हुई थी। मैं पति पत्नी थे। इसके बाद सलाह करके बाकी लोग आ गये। सब्बल डालने से खून निकला था। 10-15 मिनट तक निकला था। सब्बल परशुराम ने डाला था। सब्बल डालते समय सभी

अभियुक्त थे। मेरे चिल्लाने पर मोहल्ले का कोई भी नहीं आया मेरा मुंह दबाये थे। मैं वहाँ किसी को जानती नहीं थी तो बताती किससे। मैंने अपने पिताजी को सभी मुल्जिमान के नाम बताये थे। राजेश रात भर मेरे यहाँ रूका था। चूँकि राजेश रात भी रूका था इसलिये रात में नहीं बताया। सुबह राजेश खाना पीना खाकर गया था। रोका किया कि नहीं मुझे नहीं पता और दरोगा जी ने मेरा बयान 15 तारीख को गाँव आकर लिया था। मम्मी पापा का भी बयान लिया था। जिस समय अभियुक्त गण ने वारदात की उस समय मैं बेपरदा थी। यह कहना गलत है कि मेरे साथ कोई वारदात नहीं हुई। यह भी कहना गलत है कि दरेज की कोई माँग नहीं हुई।

xxxxxxxxx<u>जिरह द्वारा शेष अभियुक्त</u>

बारात सालर गयी थी। शादी में कोई विवाद नहीं हुआ था। जब मायके से ससुराल आयी हंसी खुशी विदायी हुई थी। 27 ता० को ससुराल आ गयी थी। 28 तारीख को ससुराल में अच्छे से रहे। घटना 29 तारीख की रात्रि की है। रात्रि 11 बजे मैं अपने कमरें में थी। मेरे पति मेरे पास आये। पति पत्नी के बीच दाम्पत्य धर्म का निर्वहन नहीं हुआ। मेरे पति मुझे गाली गलौज दे रहे थे। 29 तारीख के पहले भी पति ने गाली गलौज दिया था। यह पूछने पर कि पति ने पहले कब गाली दिया था? साक्षी ने कहा कि 4 बजे।

प्रश्न- आपके स्तनों को पति ने दाँतों से पकड़ लिया था?

उत्तरः- नहीं।

घटना मेरे बेडरूम की थी। कमरे में लालटेन जल रही थी। निप्पल पर चोट पहुँची तो मैं चिल्लायी तो कोई नहीं आया। मैं इस दर्द को सुबह तक सहती रही। सुबह कोई इलाज नहीं कराय गया। दरोगा जी ने घटना के बारे में पूछताछ की। मैनें दरोगा जी को पूरी घटना बतायी थी। 29 से 3 के बीच ससुराल वालों से मायके जाने की इच्छा व्यक्त की थी। मायके से कोई लेने नहीं आया था। पापा ने भेजने के लिए कहा था। कि बदलुआ (ससुर) से कहा था कि हम लेने नीं आऐंगे तुम भेज दो। मैं सारा सामान दे दूंगा। घटना के बाद मैं सामान्य स्थित में नहीं थी। जबरदस्ती बनी रही। भोजन पानी कर लेती थी। नहीं किया तो नहीं किया। जिस दिन ससुराल से मायके गयी, उस दिन घटना के बारें में किसी को कुछ नहीं बताया। अगले दिन सुबह अपनी मम्मी को बताया। अपने घाव भी दिखाये। पापा को मैने व मम्मी ने भी बताया। पापा को पूरी घटना बतायी थी। कुछ भी नहीं छिपाया था। जैसा मैने पापा को बताया था। वैसा ही पापा ने रिपोर्ट की थी। रिपोर्ट कराने मैं भी गयी थी। दरोगा जी ने मुझसे भी पूछा था। दरोगा जी को भी पूरी घटना बतायी थी। हम अपने पापा चाचा के साथ अस्पताल गये। अस्पताल में डाक्टर 4-5 चोटें बतायी थी। सभी चोटों का डाक्टर साहब ने मुआइना किया था। अदालत में भी मेरे बयान हुए थे। अदालत में भी घटना के बारे में बताया था। थाने के बाद बाँदा में लिखा पढ़ी की थी। वही बातें वहाँ भी लिखी थी जो थाने की एफ.आई.आर. में थी। शिकायत (बाँदा वाली) कहाँ लिखायी गयी, इसकी मुझे जानकारी नहीं है। यह कहना गलत है कि मेरा पति मुझे चाहता है। अगर चाहता होता तो 3 साल में खबर न लेता."

7. The main substratum of argument of learned counsel for the applicants is that

on 07.01.2018, the parties concerned have settled their dispute outside the Court and in presence of Gram Pradhan and other elite people of village, compromise took place and it was agreed that the accused persons will keep the victim well and in a dignified manner in her matrimonial home. Thereafter, the victim and informant moved an application before Civil Judge (J.D.), Mahoba mentioning therein that the victim is living in her matrimonial home for the last two years and she does not want any action in the matter against the accused persons, therefore, the matter may be re-examined in the light of compromise but no order has been passed on the said application. Learned counsel for the applicant, in support of his submission, placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Gian Singh vs. State of Punjab and others,** (2012) 10 SCC 303 and **Ramgopal and another vs. State of Madhya Pradesh,** 2021 SCC OnLine SC 834. On the strength of aforesaid facts, it is argued that now the criminal proceeding against the applicants is liable to be quashed.

8. On the other hand, learned A.G.A. opposed the submissions of the learned counsel for the applicants by contending that the allegations levelled against the applicants are heinous in nature. It is a case of extreme cruelty which is not private in nature but against the society at large, therefore, criminal proceeding/trial against the applicants, which is at the advanced stage, cannot be quashed. However, learned counsel appearing on behalf of the opposite party no. 2 did not oppose the prayer of the applicants.

9. Having heard the learned counsel for the parties and perusing the record, I find that as per allegations against the applicants on non-fulfillment of demand of dowry, the applicant no. 6-Smt. Kashi Bai and applicant no. 5-Smt. Kamlesh held the hand of the victim and applicant no. 1-Parashuram, who is husband of the victim, cut her both nipples with a sharp edged weapon like a blade/knife. The victim shouted but the applicant no. 4-Badalua kept her mouth shut. Applicant no. 3-Rajesh Prajapati and applicant no. 2-Dhaniram Prajapati were holding her leg and she was beaten with slippers. "*Sambal*" was also put in her genital as they were asking to bring Rs. 50,000/- cash and a car from her parent that is why all this cruelty was done with the victim. I also find that the victim, in her examination-in-chief, recorded before the trial court has supported the prosecution case and also stated that both of the nipple of her body are no more and permanently separated. Her husband-Parashuram had inserted "sambal" in her genital, due to which bleeding has come out. The incident took place in her bedroom where lantern was burning. She screamed but no one came. She was suffering from pain till morning and no treatment was done in the morning. This Court is of the view that it is a case of extreme cruelty and barbarian act on the part of accused persons, while daughters-in-law's are pride of the house. Such incident are beyond imagination and it is a rare case. It is well settled that every case turns on its own facts. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

10. It need no emphasis that the inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline en-grafted in such power viz; (i) to secure the

ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or First Information Report may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case. The gravity and nature of the crime are the relevant consideration before exercising the inherent power under Section 482 Cr.P.C. Heinous and serious offences of mental depravity or offences which involve moral turpitude or moral fabric of the society or have the potential to impact the society at large cannot be fittingly quashed even the victim or victim's family and the offender have settled the dispute. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective.

11. As a fallout and consequence of above discussion, this Court is not inclined to accept the submissions made on behalf of the applicants. The relief as sought for by the applicants is not liable to be allowed.

12. The application lacks merit, and is accordingly, ***dismissed***.

13. The copy of this order be sent to the concerned trial Court within a week.

(2024) 3 ILRA 1086
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.10.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 25402 of 2017

Pritam Singh Raghuvanshi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Swetashwa Agarwal

Counsel for the Opposite Parties:
G.A., Sri Abhishek Tripathi

Criminal Law – Criminal Procedure Code, 1973 - Sections 200, 202, 202(1), 202(2) & 482 – Indian Penal Code, 1860 - Sections 415 & 420 - - Negotiable Instruments Act, 1881 - Sections 138: -

Application under Section 482 Cr.P.C. - for quashing of criminal proceedings - Complaint case - Allegation pertains to a commercial transaction, lacking ingredients of cheating - alleged issuance of a dishonoured cheque in a business transaction - Summoned under - Grounds for Quashing – Complaint filed after an inordinate delay of 11 years, indicating mala fide intent - No proceedings initiated under Section 138 of the Negotiable Instruments Act - Mandatory inquiry under Section 202 Cr.P.C. not conducted, despite applicant residing outside Magistrate's jurisdiction – Court finds that - No prima facie case made out under Section 420 IPC - Delay and absence of N.I. Act invocation weaken the complaint – court finds that, magistrate failed to record satisfaction or conduct inquiry as mandated under Section 202(1) Cr.P.C. - filing of complaint deemed an abuse of process to exert undue pressure – held – dispute between the parties is purely a commercial dispute and the remedy for the same lies under civil remedy and the opposite party no. 2 has given the colour of criminality to the purely business transaction and also there is no element of cheating – consequently, proceeding of the complaint case with the summoning order is quashed – accordingly, application is allowed.
(Para – 10, 11, 13, 15, 18)

Application Allowed. (E-11)

List of referred Cases: -

1. Prof. R.K. Vijayasarathy & anr.Vs Sudha Seetharam & anr., reported in (2019) 16 SCC 739,

2. Archana Rana Vs St. of U.P. & anr., reported in (2021) 3 SCC 751,

3. Vijay Dhanuka Vs Najima Mamtaj, reported in (2014) 14 SCC 638,

4. Govind Prasad Kejriwal Vs St. of Bihar & ors., reported in 2020 (16) SCC 714,

5. Birla Corporation Limited Vs Adventz Investments & Holdings Ltd., reported in 2019 (6) SCC 610

6. Randheer Singh Vs St. of U.P. & ors., reported in (2021) 14 SCC 626,

7. Vijay Dhanuka Vs Najima Mamtaj, reported in (2014) 14 SCC 638,

8. Lalankumar Singh & ors.Vs Sate of Maharashtra, reported in 2022 SCC online SC 1383,

9. Gulam Mustafa Vs St. of Karn. & anr.; 2023 SCC online SC 603.

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

1. Heard Sri Swetashwa Agarwal, learned counsel for the applicant and Sri Brijesh Kr. Dwivedi, learned A.G.A. for the State.

2. Present application under Section 482 Cr.P.C. has been filed for quashing the entire criminal proceedings arising out of Complaint Case No. 1151 of 2017, M/s Deepak Agro vs. M/s Raghu, under Section 420 IPC, Police Station- Transport Nagar, District- Meerut along with the impugned summoning order dated 01.03.2017 passed by the A.C.J.M. Court No. 8, Meerut.

3. As per the impugned complaint, applicant and opposite party No.2 were having business relationship and during the course of business, opposite party No.2 supplied tractor accessories and other parts on different dates in the year 2006 to the applicant. Bill was also raised. It was further alleged that the applicant instead of making payment had also given cheque dated 25.1.2008 of Rs. 38,628/-, but subsequently, this cheque was bounced when presented before the bank. Thereafter, the applicant kept on assuring for making payment to opposite party No.2, but no payment was made. Finally, a complaint was filed in the year 2017. In support of his complaint, Vishal Gupta, who was manager of opposite party No.2, was also examined and the court below after perusal of the complaint and statement, summoned the applicant u/s 420 I.P.C.

4. Learned counsel for the applicant has challenged the impugned proceeding on the following grounds:-

i. The dispute between the applicant and opposite party no. 2 is purely a business transaction and no case is made out as the same is purely a civil dispute and there are no ingredients of cheating as defined under Section 415 I.P.C., therefore, no offence under Section 420 I.P.C. is made out;

ii. As the applicants were residing at a place which is outside from the jurisdiction of the Magistrate concerned, the mandatory inquiry as required under Section 202(2) Cr.P.C. was not conducted for the purpose of deciding whether or not there is sufficient ground for proceeding;

iii. The impugned complaint was filed after the expiry of eleven years from the date of transaction; therefore, impugned proceeding was initiated with mala fide reason to extract money from applicant.

5. In support of his case, learned counsel for the applicant has also relied upon the following judgments of Hon'ble Apex Court:

a) ***Govind Prasad Kejriwal vs. State of Bihar and Others, reported in 2020 (16) SCC 714.***

b) ***Birla Corporation Limited vs. Adventz Investments & Holdings Ltd., reported in 2019 (6) SCC 610.***

c) ***Lalankumar Singh & Others vs. Sate of Maharashtra, reported in 2022 SCC online SC 1383.***

d) ***Randheer Singh vs. State of U.P. and Others, reported in (2021) 14 SCC 626.***

e) ***Gulam Mustafa vs. State of Karnataka and another; 2023 SCC online SC 603.***

6. Per contra, learned AGA has submitted that while passing the impugned summoning order, learned Magistrate formed his opinion regarding prima facie case after the examination of complainant and witnesses which is sufficient for the inquiry as required under Section 202(1) Cr.P.C. as per the mandate of ***Vijay Dhanuka v. Najima Mamtaj***, reported in ***(2014) 14 SCC 638*** case.

7. I have considered the rival submissions and perusal of record, it is clear from the complaint as well as impugned order that transaction between the applicant and the opposite party no. 2, was done in the year 2006 and initially two cheques were also issued by the company of applicant to opposite party no. 2. Though, it was alleged in the complaint that both the cheques were bounced but the opposite party no. 2 had not filed any complaint under Section 138 N.I. Act and subsequently after almost eleven years, impugned complaint was filed. From the perusal of complaint, it is clear that it was purely a case of business transaction between the parties and there was no element of cheating at the time of business transaction.

8. For making out a case under Section 420 IPC, element of cheating must be there as required under Section 415 IPC. Section 415 IPC and Section 420 IPC are quoted hereunder:

"415. Cheating.?Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". Explanation.?A dishonest concealment of facts is a deception within the meaning of this section."

"420. Cheating and dishonestly inducing delivery of property.?Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

9. Similar dispute was also came into question before the Hon'ble Apex Court in the case of ***Prof. R.K. Vijayasarathy and another vs. Sudha Seetharam and another, reported in (2019) 16 SCC 739.*** Relevant paragraphs of the aforesaid judgment is quoted hereunder:

"17. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

18 Section 420 of the Penal Code reads thus:

Section 420. Cheating and dishonestly inducing deliver of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable to being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.?

19. The ingredients to constitute an offence under Section 420 are as follows:

i) A person must commit the offence of cheating under Section 415; and

ii) The person cheated must be dishonestly induced to

(a) deliver property to any person; or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.

20. Cheating is an essential ingredient for an act to constitute an offence under Section 420."

10. The aforesaid judgment was further relied upon by Hon'ble Apex Court in the case of ***Archana Rana vs. State of Uttar Pradesh and another,*** reported in ***(2021) 3 SCC 751*** wherein the Hon'ble Apex Court observed that for making out a case under Section 420 I.P.C., there must be ingredients of cheating as required under Section 415 of IPC. On applying the above principle to the fact in question, it is clear that there was no ingredient of cheating. There was allegation that bouncing of cheques given by applicant during business transaction in the year 2006 but complaint under Section 138 N.I. Act was not filed and impugned complaint was itself filed after 11 years of bouncing of cheques. Therefore, no offence under Section 420 IPC is made out.

11. So far as the second question regarding enquiry under Section 202(1) Cr.P.C. is concerned when the accused persons were residing at a place beyond the territorial jurisdiction of the Magistrate concerned. This question was also considered by the Hon'ble Apex Court in the case of ***Vijay Dhanuka v. Najima Mamtaj,*** reported in ***(2014) 14 SCC 638,*** in which Hon'ble Apex Court observed that in such cases, inquiry under Section 202(1) Cr.P.C. is mandatory and in the inquiry under Section 202(1) Cr.P.C., Court is required to examine witnesses along with the complainant and only then Magistrate must make his opinion about prima facie case. Paragraph 14 of the ***Vijay Dhanuka (supra)*** case is as follows:

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(g) of the Code, the same reads as follows:

"2. (g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

It is evident from the aforesaid provision, every inquiry other than a trial

conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

12. This issue was again considered by the Hon'ble Apex Court in the case of ***Govind Prasad Kejriwal vs. State of Bihar and Others,*** reported in 2020 (16) SCC 714. In this case, Hon'ble Apex Court, in paragraph 6.5 observed that while conducting the inquiry under Section 202 Cr.P.C., Magistrate is required to consider whether the prima facie case is made out or not or whether the criminal proceedings initiated are abuse of process of law or the Court and also whether the dispute is of purely a civil nature or whether the civil dispute is tried to be given a colour of criminal dispute. Paragraph 6.5 of the case passed in ***Govind Prasad Kejriwal (supra)*** is quoted as under:

"6.5. Now so far as the reliance placed on the decision of this Court in the case of National Bank of Oman vs. Barakara Abdul Aziz (Supra) relied upon by the Learned Advocate appearing on behalf of the complainant is concerned, we are of the opinion that in the facts and circumstances of the case, the said decision shall not be of any assistance to the complainant. It cannot be disputed that while holding the inquiry under Section 202 Cr.P.C. the Magistrate is required to take a broad view and a prima facie case. However, even while conducting/holding an inquiry under Section 202 Cr.P.C., the Magistrate is required to consider whether even a prima facie case is made out or not and whether the criminal proceedings initiated are an abuse of process of law or the Court or not and/or whether the dispute is purely of a civil nature or not and/or whether the civil dispute is tried to be given a colour of criminal dispute or not. As observed hereinabove, the dispute between the parties can be said to be purely of a civil nature. Therefore, this is a fit case to quash and set aside the impugned criminal proceedings."

13. The above question was also considered in the judgment of the Hon'ble Apex Court in the case of ***Birla Corporation Limited vs. Adventz Investments & Holdings Ltd., reported in 2019 (6) SCC 610.*** In that case, Hon'ble Apex Court observed that in the inquiry under Section 202 Cr.P.C., the Magistrate is only concerned with the allegations made in the complaint or evidence in support of the averment made in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused. It was also observed that purpose of inquiry under Section 202 Cr.P.C. is to determine whether a prima facie case is made out and whether there is sufficient ground of proceeding against the accused. Paragraphs 26, 27 & 60 of the aforesaid judgment is quoted as under:

"26. Complaint filed under Section 200 Cr.P.C. and enquiry contemplated under Section 202 Cr.P.C. and issuance of process:- Under Section 200 of the Criminal Procedure Code, on presentation of the complaint by an individual, the Magistrate is required to

examine the complainant and the witnesses present, if any. Thereafter, on perusal of the allegations made in the complaint, the statement of the complainant on solemn affirmation and the witnesses examined, the Magistrate has to get himself satisfied that there are sufficient grounds for proceeding against the accused and on such satisfaction, the Magistrate may direct for issuance of process as contemplated under Section 204 Cr.P.C. The purpose of the enquiry under Section 202 Cr.P.C. is to determine whether a prima facie case is made out and whether there is sufficient ground for proceeding against the accused.

27. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 Cr.P.C. or whether the complaint should be dismissed by resorting to Section 203 Cr.P.C. on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 Cr.P.C., the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused."

"60. The object of investigation under Section 202 Cr.P.C. is "for the purpose of deciding whether or not there is sufficient ground for proceeding". The enquiry under Section 202 Cr.P.C. is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused. The issuance of process should not be mechanical nor should be made as an instrument of harassment to the accused. As discussed earlier, issuance of process to the accused calling upon them to appear in the criminal case is a serious matter and lack of material particulars and non-application of mind as to the materials cannot be brushed aside on the ground that it is only a procedural irregularity. In the present case, the satisfaction of the Magistrate in ordering issuance of process to the respondents is not well founded and the order summoning the accused cannot be sustained. The impugned order of the High Court holding that there was compliance of the procedure under Section 202 Cr.P.C. cannot be sustained and is liable to be set aside."

14. From perusal of the aforesaid judgment, it is clear that the Magistrate while issuing summons upon receiving complaint must satisfy himself after making necessary inquiry that prima facie case is made out against the applicant. In the present case learned Magistrate has not recorded any reason showing his satisfaction that despite being business transaction and complaint was filed after 11 years of that transaction, prima facie case u/s 420 I.P.C. is made out against the applicant. Therefore, this court held that in the present case Magistrate has not conducted mandatory inquiry as required by Section 202(1) Cr.P.C.

15. Therefore, considering the facts and circumstances of the case and keeping in mind the law discussed above, the dispute between the complainant and opposite party no. 2 is purely a commercial dispute and the remedy for the same lies

under civil remedy and the opposite party no. 2 has given the colour of criminality to the purely business transaction and there is no element of cheating. Therefore, Section 420 Cr.P.C. is not made out.

16. Hon'ble Apex Court in the case of ***Randheer Singh vs. State of U.P. and Others,*** reported in (2021) 14 SCC 626 in paragraphs 28 and 33 has observed that when the dispute of civil nature has been given colour of criminal offence, then it should be quashed:

"28. In Paramjeet Batra (supra), this Court held that :-

"12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court."

33. In this case, it appears that criminal proceedings are being taken recourse to as a weapon of harassment against a purchaser. It is reiterated at the cost of repetition that the FIR does not disclose any offence so far as the Appellant is concerned. There is no whisper of how and in what manner, this Appellant is involved in any criminal offence and the charge sheet, the relevant part whereof has been extracted above, is absolutely vague. There can be no doubt that jurisdiction under Section 482 of the Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice. Whether a complaint discloses criminal offence or not depends on the nature of the allegation and whether the essential ingredients of a criminal offence are present or not has to be judged by the High Court. There can be no doubt that a complaint disclosing civil transactions may also have a criminal texture. The High Court has, however, to see whether the dispute of a civil nature has been given colour of criminal offence. In such a situation, the High Court should not hesitate to quash the criminal proceedings as held by this Court in Paramjeet Batra (supra) extracted above."

17. Similar observation was made by the Apex Court in the judgement of ***Gulam Mustafa vs. State of Karnataka and another; 2023 SCC online SC 603*** in paragraph 36 as under:-

"36. What is evincible from the extant case-law is that this Court has been consistent in interfering in such matters where purely civil disputes, more often than not, relating to land and/or money are given the colour of criminality, only for the purposes of exerting extra-judicial pressure on the party concerned, which, we reiterate, is nothing but abuse of the process of the court. In the present case, there is a huge, and quite frankly, unexplained delay of over 60 years in initiating dispute with regard to the ownership of the land in question, and the

criminal case has been lodged only after failure to obtain relief in the civil suits, coupled with denial of relief in the interim therein to the respondent no.2/her family members. It is evident that resort was now being had to criminal proceedings which, in the considered opinion of this Court, is with ulterior motives, for oblique reasons and is a clear case of vengeance."

18. It is also clear from the record that impugned complaint was filed after 11 years of disputed money transaction with ulterior motive.

19. In view of the above, proceeding of the Complaint Case No. 1151 of 2017, M/s Deepak Agro vs. M/s Raghu, under Section 420 IPC, Police Station- Transport Nagar, District- Meerut along with the impugned summoning order dated 01.03.2017 passed by the A.C.J.M. Court No. 8, Meerut, is hereby quashed.

20. Accordingly, the application is **allowed**.

(2024) 3 ILRA 1093
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 27006 of 2015

Abhishek Jain ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Ajay Kumar Pandey, Sri Satish Trivedi, Sri Sheshadri Trivedi

Counsel for the Respondents:
G.A., Sri Jai Raj, Sri Kamlesh Kumar Tiwari

Criminal Law – Criminal Procedure Code, 1973 - Sections 200, 202, 202(1), 202(2) & 482 – Indian Penal Code, 1860 - Sections 415 & 420 - - Negotiable Instruments Act, 1881 - Sections 7, 9, 138, 142(1) & 142(1)(a) - Application under Section 482 Cr.P.C. – for quashing of the summoning order as well as the entire proceedings – dishonour of cheque - Complaint Case - applicant argued that opposite party no. 2 is neither the *payee* nor the *holder* in due course of the cheque, making the complaint legally untenable under Section 142(1)(a) of the Act – complainant countered that the cheque was issued to a proprietorship firm owned by him, thereby making him the holder in due course and entitled to file the complaint - Applicant disputes the firm's status, claiming it is a partnership, which would invalidate the complaint filed in an individual capacity – while relying on precedents including *Rathish Babu Unnikrishnan Vs St. (NCT of Delhi)*, court held that, the complainant, who claimed to be the proprietor of a firm is legally entitled to file the complaint as a "holder in due course" - Even if the firm were a partnership, the partner would still qualify to maintain the complaint – since a partnership firm is not a separate legal entity from its partners - therefore, the complaint even on behalf of the partner of a firm in his own name is maintainable – court being not found any good ground to interfere in the instant case in exercise of jurisdiction under section 482 of the Cr.P.C. – accordingly, application is dismissed.
(Para – 10, 14, 16)

Application Dismissed. (E-11)

List of referred Cases: -

1. Milind Shripad Chadurkar Vs Kalim M. Khan & anr.– Criminal Appeal No. 643/2011,

2. Rathish Babu Unnikrishnan Vs St. of (NCT of Delhi) – 2022 SCC Online SC 513,

3. Tanna and Modi Vs CIT – 2007 vol. 7 SCC 434,

4. CIT Vs R M Chidambaram Pillai – 1977 vol. 1 SCC 431,

5. Munish Ram Vs Municipal Committee – 1979 vol. 3 SCC 83.

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Ajay Kumar Pandey, learned counsel for the applicant, Sri Jai Raj, learned counsel for opposite party no.2 and Sri Pankaj Srivastava, learned A.G.A. for the State.

2. The instant application U/S 482 has been filed seeking quashing the impugned summoning order dated 05.12.2014 as well as entire proceedings of Complaint Case No.3473 of 2014 (Prasant Sharma Vs. Abhishek Jain), under Section 138 of Negotiable Instruments Act, 1881, Police Station Hariparvat, District Agra, pending in the Court of Additional Chief Judicial magistrate, Court No.VIII, Agra.

3. Learned counsel for the applicant submits that in the instant case, the complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act") has been filed by the opposite party no.2, whereas he was not the payee of the said cheque, therefore, the complaint is not maintainable. Learned counsel for the applicant relying upon the provisions of Section 142 (1) (a) of the N.I. Act submits that such complaint is maintainable only on behalf of the payee or the holder in due course of the cheque. Learned counsel for the applicant submits that the opposite party no.2 herein is neither the payee nor the holder in due course of the cheque as has been defined in Section 7 and 9 of the N.I. Act, 1881.

4. Learned counsel for the opposite party no.2, on the other hand, submits that undisputedly the cheque in the instant case was issued in favour of Raj Rajeshwari Enterprises which is the proprietorship of the opposite party no.2, who has filed a complaint being the proprietorship firm. Thus, the complaint by the opposite party no.2 in his individual name is maintainable as he becomes holder in due course of the said cheque. In support of submissions made by learned counsel for the applicant he placed reliance upon the judgment dated 03.03.2011 of Apex Court in the case of ***Criminal Appeal No.643 of 2011 (Milind Shripad Chandurkar Vs. Kalim M. Khan & another).***

5. However, learned counsel for the applicant disputes that the said Raj Rajeshwari Enterprises is not a proprietorship but a partnership firm, therefore, he submits that complaint in the individual name of one of such partnership firm is not maintainable. Learned counsel for the applicant further submits that such Raj Rajeshwari Enterprises is not a partnership firm, is not disputed by the opposite party no.2 in the counter affidavit filed by him.

6. Learned A.G.A. for the State also submits that even partner or the proprietor of a firm is holder in due course of the cheque, therefore, such complaint is maintainable in the name of a partner or a proprietor of such firm in individual capacity as well. Learned A.G.A. for the State has placed reliance on a judgment of Apex Court in ***Rathish Babu Unnikrishnan Vs. State (NCT of Delhi), 2022 SCC OnLine SC 513.***

7. Having heard learned counsel for the parties, this Court has carefully gone through the record of this case and from perusal of the record it is found that it will be relevant to take note of Sections 7, 9,

142 (1) (a) of the N.I. Act, which reads as under:-

"Section 7 of N.I. Act, 1881 defines "payee" as the person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid.

"Section 9 defines "holder in due course" as any person who for consideration became the possessor of a cheque if payable to a bearer or the payee or endorsee thereof.

Section 142 (1) (a) provides that the complaint under Section 138 N.I. Act is to be filed either by the payee of the said cheque or the holder in due course of the said cheque."

8. From the aforesaid provisions, it is crystal clear that a complaint under Section 138 of the Act can be filed by the payee of the cheque or the holder in due course. The definition of holder in due course is wide enough and includes any person, who comes in possession of the said cheque for consideration.

9. In the case of ***Milind Shripad Chandurkar (supra),*** the Apex Court has held as under:-

"In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act, 1881 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern."

10. In the instant case, the opposite party no.2, claims himself to the proprietor of the firm Raj Rajeshwari Enterprises, thus in considered opinion of this Court, a proprietor of a firm is covered within the definition of holder in due course and complaint by him under Section 138/142 of N.I. Act is maintainable.

11. In **Tanna and Modi vs. CIT, (2007) 7 SCC 434,** the Apex Court has held that the partnership firm is not an independent legal entity thus it is not a juristic person. Under the partnership Act, a partner of a partnership firm represents the firm itself and he has an implied authority in terms of Section 19 of the Partnership Act.

12. Similarly in **C.I.T. vs. R.M. Chidambaram Pillai, (1977) 1 SCC 431,** the Apex Court has held that a partnership form is not a legal person even though it has some attributes of personality. Partnership is a certain relation between persons, with the product of agreement being, to share the profits of a business. 'Firm' is a collective noun, a compendious expression of designate an entity, not a person.

13. In **Munshi Ram vs. Municipal Committee, (1979) 3 SCC 83**, the Apex Court has held that partnership firm is not a legal entity separate and distinct from partners and is only compendious description of individuals who compose the firm.

14. Therefore, the partners of a partnership firm are not different legal

entities. They are one and the same. Therefore, even if the submission of applicants be assumed to be true that the cheque was issued in favour of the partnership firm than the partner of the said firm becomes the holder in due course of the said cheque, which is capable of maintaining a complaint against the drawer of the cheque in terms of Section 142(1) of Negotiable Instrument Act.

15. In ***Rathish Babu Unnikrishnan (Supra)*** the Apex Court considering the scope of interference while exercising jurisdiction under Section 482 Cr.P.C., in complaint case lodged under Section 138 of N.I. Act, has held as under:-

"16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore, when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."

16. From the aforesaid observations made by the Apex Court, it is crystal clear that if the cheque is issued in the name of a firm, whether proprietorship or partnership firm, the proprietor or the partner as the case may be, becomes the holder in due course and he can sue in his own name and it is not necessary for him to sue in a trading name, though others can sue such firm in the trading name. Therefore, the instant complaint filed by the opposite party no.2, claiming himself to be a proprietor of the said firm in whose name the said cheque is issued by the applicant herein, in the considered opinion of this Court, complaint is maintainable. Even if the contention of applicant be accepted that the said Raj Rajeshwari Enterprises is a partnership and not a proprietorship firm, it will not help the applicant herein as even the partnership firm does not have a different legal identity and is not a juristic person. Therefore, a partner of the firm also becomes the holder in due course of the cheque within the meaning of Section 142 (1) of the N.I. Act. Thus, the complaint even on behalf of the partner of a firm in his own name is maintainable. Otherwise, also in the instant case, the applicant does

not dispute that the cheque was issued in the name of the said Raj Rajeshwari Enterprises and the said cheque was dishonoured and demand notice was issued by the opposite party no.2, he has failed to comply with the said notice. Therefore, in view of the presumption under Section 139 of the N.I. Act and as per the law laid down by the Apex Court, this Court does not find any good ground to interfere in the instant case in exercise of jurisdiction under Section 482 Cr.P.C.

17. Accordingly, the instant application is devoid of merit and is hereby **dismissed**.

(2024) 3 ILRA 1097
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 31175 of 2017

Mohit Soni ...Applicant
Versus
State of U.P. & Anr. ... Opposite Parties

Counsel for the Applicant:
Sri Ashok Gupta, Sri Rakesh Kumar Singh, Sri Shesh Kumar Srivastava, Sri Viresh Mishra, Sri Aakash Kishan

Counsel for the Opposite Parties:
G.A., Sri Rajiv Dwivedi, Sri Satya Prakash Maurya, Sri Shashi Kumar Verma, Sri C.P. Awasthi

Criminal Law - Indian Penal Code, 1860 - Sections 493, 376, 504 & 506 - Charge Sheet - Quashing of - Counsel for applicant submits that after exchange of pleadings, opposite party no.2 filed joint compromise affidavit before Trial Court, and her counsel does not dispute this fact - In compromise, opposite party no.2 declared she does not wish to pursue case as she is now married to someone else and settled, and continuation of prosecution would only cause harassment - Further submitted as per FIR itself, applicant and opposite party no.2 were in live-in relationship for over six years, and following disputes arising when marriage did not materialize, present prosecution initiated by opposite party no.2 - Held, where Court finds that alleged heinous offence is not made out on facts, and parties amicably settled their disputes, leaving only remote and bleak chances of conviction, continuation of proceedings would result in oppression and prejudice to both sides - In such circumstances, proceedings may be quashed u/s 482 Cr.P.C. on basis of compromise - FIR and St.ments u/s 161 and 164 Cr.P.C. reveal no element of deception at inception, relationship was consensual with family approval - Promise of marriage not false from beginning, but owing to subsequent developments, applicant declined to marry - Facts indicate failed live-in relationship rather than commission of offence - No offence u/s 376 IPC made out against applicant - Opposite party no.2, being an adult, was aware no marriage had taken place - Relationship was consensual, voluntary and known to both families - No inducement or lack of consent disclosed - Hence, no case u/s 493 IPC is made out - Impugned order, quashed. (Para 3, 14, 23)

Application disposed of. (E-13)

List of Cases cited:

1. Jiyaullah Vs St. of U.P. & anr., Application u/s 482 No. 5419 of 2021

2. Kapil Gupta Vs St. of NCT of Delhi & Anr., Criminal Appeal No. 1217 of 2022, dated 10.08.2022

3. Shiji Vs Radhika : (2011) 10 SCC 705, (Paras 17 to 19)

4. Gian Singh Vs St. of Punj. & anr. : (2012) 10 SCC 303, (Paras 52 to 58, 61)

5. Narinder Singh & ors..Vs St. of Punj. : (2014) 6 SCC 466, (Paras 29.1 to 29.7)

6. Prabatbhai Aahir @ Prabatbhai Bhimsinghbhai Karmur & ors..Vs St. of Gujarat & anr. : (2017) 9 SCC 641, (Paras 16, 16.1 to 16.10)

7. Dr. Dhruvaram Murlidhar Sonar Vs St. of Maharashtra : (2019) 18 SCC 191, (Paras 8, 13, 24)

8. St. of Karnataka Vs M. Devendrappa [St. of Karnataka v. M. Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539], (Para 6)

9. Vineet Kumar Vs St. of U.P. [Vineet Kumar v. St. of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633], (Para 41)

10. Shambhu Kharwar Vs St. of U.P. : 2022 SCC Online SC 1032, (Paras 8 to 10)

11. St. of HP Vs Mango Ram : (2000) 7 SCC 224

12. Jiyaullah Vs St. of U.P. & anr., Application u/ 482 No. 5419 of 2021, (Paras 14, 15, 17, 18)

13. Kapil Gupta Vs St. of NCT of Delhi & Another, Criminal Appeal No. 1217 of 2022, SLP (CRL.) No. 5806 of 2022, dated 10.08.2022, (Paras 16, 17)

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Aakash Kishan, Advocate holding brief of Sri Ashok Gupta, learned counsel for the applicant, Sri C.P. Awasthi, Advocate holding brief of Sri Shashi Kumar Verma, learned counsel for the opposite party no.2 and Sri Prem Prakash Tripathi, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the Charge Sheet No. 114/17 dated 20.06.2017 in Case No. 3056/IX of 2017 (State vs. Mohit Soni), arising out of Case Crime No. 201 of 2017 u/S 493, 376, 504, 506 I.P.C., P.S.- Rajapur, District-Chitrakoot, pending in the court of learned Chief Judicial Magistrate, Chitrakoot.

3. Learned counsel for the applicant submits that in the instant case, after the pleadings were exchanged, the opposite party no.2 has filed a joint affidavit in the form of compromise before the learned Trial Court, which has been taken on record by the learned Trial Court and learned counsel for the opposite party no.2 does not dispute the said fact. In the said compromise, the opposite party no.2 has stated that she does not wish to prosecute her case against the the applicant herein as she has already married to someone else and is settled in her life and the instant prosecution would cause further harassment to her. In addition to the same, learned counsel for the applicant further submits from the plain allegations made in the F.I.R., the applicant and opposite party no.2 were in physical relationship or rather were in live- in relationship with each other for more than six years and due to some dispute later on between the parties, when the applicant herein could not marry the opposite party no.2, the instant prosecution has been lodged by the opposite party no.2 herein against the applicant herein.

4. Learned counsel for the applicant has further relied upon the judgement of this Court dated 15.09.2023 in ***Application u/S 482 No. 5419 of 2021 (Jiyaullah vs. State of U.P. and Another),*** wherein it has been held that where the consensual physical relationship between the parties was a longstanding relationship with the consent of their parents, then, no offence u/S 376 of I.P.C. shall be made out.

5. Learned counsel for the applicant has further relied upon the judgement of the

Apex Court in ***Criminal Appeal No. 1217 of 2022 (Kapil Gupta vs. State of NCT of Delhi & Anr.) dated 10.08.2022.*** Learned counsel for the applicant submits that when the complainant herself is not supporting the prosecution case and has applied for withdrawing the prosecution of the accused persons, then, it will end nothing else but an acquittal, therefore, it will be futile to keep the prosecution pending in the courts, which are already humongously overburdened.

6. Learned counsel for the opposite party no.2 do not dispute the fact of compromise between the parties. It is further stated by learned counsel for opposite party no.2 that the opposite party no.2 has already married to someone else and is living happily, therefore, the pendency of the criminal case will be further harassment to the new matrimonial life of the opposite party no.2. In view thereof, she wants the instant proceedings to be quashed.

7. In view of the compromise between the parties and the nature of relationship between the parties, learned counsel for the State do not object to quashing of the instant proceedings on the basis of the compromise between the parties.

8. Having heard the learned counsels for the parties, this Court has carefully perused the records of the case and on perusal of the records, the following questions arises for determination of this Court:

I) Whether while exercising the power u/S 482 Cr.P.C., this Court can quash the proceedings in non-compoundable cases involving heinous crimes like rape etc., on the basis of compromise between the parties?

II)Whether if all the allegations as alleged by the opposite party no.2 in the F.I.R. and in her statements u/S 161 and 164 of Cr.P.C., and believed to be true on its face value, whether the offence u/S 376 & 493 I.P.C. and other offences against the applicant are constituted?

III) whether in view of the developments and the present status of the parties and in view of the compromise between the applicant and the opposite party no.2, what are the chances of conviction of the applicant and whether the pendency of the prosecution against the applicant could cause oppression and harassment of the applicant as well as that of the opposite party no2? and

IV) Whether in a case where an offence of heinous crime like rape is alleged and on given facts, prima facie the offences is not constituted and the parties in view of the further developments in the status of the parties and the victim has already moved ahead in life and in view of such developments, the prosecutrix has entered into a compromise with the applicant and did not wish to prosecute the case any further against the applicant/accused, it will not be a duty of the courts while exercising u/S 482 Cr.P.C., to quash such proceedings to secure ends of justice?

9. **Question No. 'I'-** To find the necessary answers of these questions, it will be relevant to note the few decisions of the Apex Court. In ***Shiji vs. Radhika: (2011) 10 SCC 705,*** the Apex Court held as under:

"17. It is manifest that simply because an offence is not compoundable under Section 320 CrPC is by itself no reason for the High Court to refuse exercise of its power under Section 482

CrPC. ***That power can in our opinion be exercised in cases where there is no chance of recording a conviction against the accused and the entire exercise of a trial is destined to be an exercise in futility.*** *There is a subtle distinction between compounding of offences by the parties before the trial court or in appeal on the one hand and the exercise of power by the High Court to quash the prosecution under Section 482 CrPC on the other. While a court trying an accused or hearing an appeal against conviction, may not be competent to permit compounding of an offence based on a settlement arrived at between the parties in cases where the offences are not compoundable under Section 320****, the High Court may quash the prosecution even in cases where the offences with which the accused stand charged are non-compoundable. The inherent powers of the High Court under Section 482 CrPC are not for that purpose controlled by Section 320 CrPC.***

18. Having said so, we must hasten to add that ***the plenitude of the power under Section 482 CrPC by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and the nature of the power itself demands that its exercise is sparing and only in cases where the High Court is, for reasons to be recorded, of the clear view that continuance of the prosecution would be nothing but an abuse of the process of law.*** *It is neither necessary nor proper for us to enumerate the situations in which the exercise of power under Section 482 may be justified. All that we need to say is that the* ***exercise of power must be for securing the ends of justice and only in cases where refusal to exercise that power may result in the abuse of the process of law.*** *The High Court may be justified in declining interference if it is called upon to apaslipreciate evidence for it cannot assume the role of an appellate court while dealing with a petition under Section 482 of the Criminal Procedure Code. Subject to the above, the High Court will have to consider the facts and circumstances of each case to determine whether it is a fit case in which the inherent powers may be invoked.*

19. Coming to the case at hand, we are of the view that the incident in question had its genesis in a dispute relating to the access to the two plots which are adjacent to each other. It was not a case of broad daylight robbery for gain. It was a case which has its origin in the civil dispute between the parties, which dispute has, it appears, been resolved by them. That being so, ***continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception" will be a futile exercise that will serve no purpose.*** *It is noteworthy that the two alleged eyewitnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. The continuance of the proceedings is thus nothing but an empty formality. Section 482 CrPC could,* ***in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the courts below."***

10. Section 482 of the Code of Criminal Procedure saves the inherent power of the High Court and it reads as under:

"482. Saving of inherent powers of High Court.- Nothing in this Code shall be deemed to limit or affect the inherent

powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

11. In ***Gian Singh vs. State of Punjab and Another : (2012) 10 SCC 303***, the Full Bench of the High Court has observed as under:

"52. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code.

53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, ***"nothing in this Code" which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e. to prevent abuse of the process of any court or otherwise to secure the ends of justice.*** *As has been repeatedly stated that Section 482 confers no new powers on the High Court; it merely safeguards existing inherent powers possessed by the High Court necessary to prevent abuse of the process of any court or to secure the ends of justice****. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.***

54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court, or (ii) to secure the ends of justice, is a sine qua non.

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. ***Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.***

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided.

*57. **Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence.** They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, **the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.***

*58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does **so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor.** No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. **In respect of serious offences like murder, rape, dacoity, etc., or other** offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, **the settlement between the offender and the victim can have no legal sanction at all.** However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or **the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably**, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed.*

61. The position that emerges from the above discussion can be summarised thus : the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the

guideline engrafted in such power viz. : (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. ***Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society.*** *Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc.* ***or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute.*** *In this category of cases, the High Court may quash the criminal proceedings* ***if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."***

12. In ***Narinder Singh & Ors. vs. State of Punjab : (2014) 6 SCC 466,*** this Court has laid down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties in exercising its power u/S 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement at its discretion with direction to continue with the criminal proceedings:

"29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis

petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or ***arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.***

29.5. While exercising its powers, the High Court is to examine as to whether ***the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.***

29.6. Offences under ***Section 307 IPC*** *would fall in the category of heinous and serious offences* ***and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC.*** *For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.*

*29.7. While deciding whether to exercise its power under Section 482 of the Code or not****, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation****, the High Court may be liberal* ***in accepting the settlement to quash the criminal proceedings/investigation.*** *It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed.* ***Likewise, those cases where the charge is framed***

but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, *as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."*

13. In ***Prabatbhai Aahir Alias Prabatbhai Bhimsinghbhai Karmur and others vs. State of Gujarat and Another : (2017) 9 SCC 641,*** the Apex Court has summarized the broad principles with regard to quashing of the criminal proceedings on the basis of compromise between the parties:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous

and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7. As ***distinguished from*** *serious offences,* ***there may be*** *criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.*

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the ***High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and***

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

14. In the light of the aforesaid decisions of the Apex Court, following propositions emerges which are relevant to the instant case. Section 482 of the Criminal Procedure Code preserves the inherent power of the High Court to prevent the abuse of process of any Court or to secure the hands of justice:

a) the power to quash the criminal proceedings u/S 482 Cr.P.C., is attracted even when the offences is non-compoundable;

b) though in the case involving heinous and serious offences, normally the inherent powers ought not to have been exercised on the basis of compromise between the parties. However, there is no absolute bar that each and every case where heinous crimes are alleged can never be quashed. It will depend upon the facts and circumstances of each case and while exercising such powers, the ultimate object is to see whether by exercising such powers and quashing the criminal proceedings, whether the ends of justice will be secured; and

c) If on the facts of the case, the Court is satisfied that prima facie the offence alleged which is of heinous and serious in nature is not constituted on the facts of the case and parties have settle their disputes through compromise and further in view of such compromise, there are remote and bleak possibilities of conviction of the accused persons and the continuation of such criminal proceedings would cause oppression and prejudice, not only to the accused but the victim as well such proceedings can be quashed in exercise of power u/S 482 of Cr.P.C., on the basis of settlement between the parties.

15. **Question No. 'II'-** To determine the questions whether on the given facts of the case, the offence u/S 376 I.P.C., is made out against the applicant herein. It will be relevant to note few decisions of the Apex Court, which are as under.

16. In **Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra : (2019) 18 SCC 191,** the Apex Court has held as under:

"8. It is well settled that exercise of powers under Section 482 CrPC is the exception and not the rule. Under this section, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions "abuse of process of law" or "to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of process of law or the ends of justice could only be secured in accordance with law, including procedural law and not otherwise.

13. It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of the inherent powers.

24. In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

17. In ***State of Karnataka v. M. Devendrappa [State of Karnataka v. M.***

Devendrappa, (2002) 3 SCC 89 : 2002 SCC (Cri) 539] , it was held by the Apex Court that while exercising powers under Section 482 CrPC, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It was further held as under :

"6. ... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. ***When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."***

18. Recently, in ***Vineet Kumar v. State of U.P. [Vineet Kumar v. State of U.P., (2017) 13 SCC 369 : (2017) 4 SCC (Cri) 633] ,*** the Apex Court has observed as under :

"41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. ... Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of oppression or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding. ... the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."

19. Similarly, in ***Shambhu Kharwar vs. State of U.P. : 2022 SCC Online SC 1032,*** the Apex Court has held as under:

"8. In Bhajan Lal (supra) this Court formulated the parameters in terms of which the powers in Section 482 of CrPC may be exercised. While it is not necessary to revisit all these parameters again, a few that are relevant to the present case may be set out. The Court held that quashing may be appropriate:

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

[...](7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the

accused and with a view to spite him due to private and personal grudge."

9. In Dhruvaram Murlidhar Sonar v. State of Maharashtra,6 a two Judge Bench of this Court while dealing with similar facts as the present case reiterated the parameters laid down in Bhajan Lal (supra) held that:

"13. It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

(emphasis supplied)

10. An offence is punishable under Section 376 of the IPC if the offence of rape is established in terms of Section 375 which sets out the ingredients of the offence. In the present case, the second description of Section 375 along with Section 90 of the IPC is relevant which is set out below.

"375. Rape - A man is said to commit "

rape" if he - […] under the circumstances falling under any of the following seven descriptions Firstly …Secondly. - Without her consent.

[…]Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

xxx

90. Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or…"

20. In Pramod Suryabhan Pawar v. State of Maharashtra, a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in Sonu @ Subhash Kumar v. State of Uttar Pradesh,8 observed that:

"12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action…[…]

14. […] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled…[…]

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations,

there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act…[…]

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

(emphasis supplied)

12. In the present case, the issue which had to be addressed by the High Court was whether, assuming all the allegations in the charge- sheet are correct as they stand, an offence punishable under Section 376 IPC was made out. Admittedly, the appellant and the second respondent were in a consensual relationship from 2013 until December 2017. They are both educated adults. The second respondent, during the course of this period, got married on 12 June 2014 to someone else. The marriage ended in a decree of divorce by mutual consent on 17 September 2017. The allegations of the second respondent indicate that her relationship with the appellant continued prior to her marriage, during the subsistence of the marriage and after the grant of divorce by mutual consent."

21. In ***State of HP vs. Mango Ram : (2000) 7 SCC 224,*** a three Judge Bench of the Apex Court held that consent for the purpose of Section 375 I.P.C. requires voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the act but after having fully exercised the choice between resistance and assent whether there was consent or not is to be ascertained only careful perusal of relevant circumstances.

22. In the ***Application u/S 482 No. 5419 of 2021 (Jiyaullah vs. State of U.P. and Another),*** on similar facts this Court has held that where there was long-standing consensual relationship between the parties with the approval of the family members, no offence u/S 376 I.P.C. will be made out. In ***Jiyaullah (Supra),*** this Court has held as under :-

14. From the aforequoted judgments, it is apparent that the powers u/S 482 Cr.P.C. vested in the High Court is with the purpose and objective of advancement of justice. In case, the High Court is of an opinion that the process of the Court is being abused by persons with some oblique motive, the Court has to thwart such an attempt at the very threshold and the judicial process cannot be allowed to be converted into an instrument of oppression and harassment. It is also a settled position of law that if there are materials to indicate that the criminal proceedings is initiated with mala fide intentions and with an ulterior motive,

it is the duty of the High Court to quash such proceedings in exercise of powers u/S 482 Cr.P.C.

15. In Section 375 I.P.C., where the offence of rape is constituted when the sexual intercourse is committed against the will of women and without her consent. A women is said to consent only when she freely agrees to submit herself while in free and unconstrained possession of physical and moral power to act in a manner she wanted. Consent implies the exercise of free and untrammelled right to forbid or withhold what is being consented to.

17. Thus, from the cumulative reading of the judgments passed by the Apex Court in Shivashankar (supra), Pramod Suryabhan Pawar (Supra), Sonu alias Subhash Kumar (supra), Dr. Dhruvaram Murlidhar Sonar (supra) and Mango Ram (supra), it is apparent that when there is a longstanding relationship between the parties under the promise of marriage. It is to be seen that whether such promise of marriage was false at the inception or it is a subsequent breakdown of relationship and refusal to marry amounts to breach of such promise, which was genuinely made at the inception of such relationship.

18. The expression "against her will" would ordinarily mean that the intercourse was done by man with a women despite her resistance and opposition. On the other hand, the expression "without her consent" would comprehend an act of reason accompanied by deliberation."

23. In the instant case, it is an admitted fact that the opposite party no.2 was having consensual physical relationship due to love and affection between them since last six years and many times, the opposite party no.2 became pregnant and as per the F.I.R. itself the opposite party no.2 and this relationship was well known to both the families since last six years from the lodging of the report. From the F.I.R. and statements u/S 161 & 164 Cr.P.C., of the prosecutors, it is clear that from its inception, there was no cheating on behalf of the applicant and the relationship between them was with the approval of the families. Subsequently, after some developments, the applicant has broken his promise to marry the opposite party no.2 which has resulted in registration of the F.I.R. From the allegations made, it is apparent that the promise to marry by the applicant herein was not false from its inception, however, due to later developments, the applicants has denied to marry the opposite party no.2. Therefore, in view of the aforesaid judgments, prima facie no offence u/S 376 I.P.C., is established as the relationship between the parties was of consensual nature which had the approval of both the families and the initial promise by the applicant to marry the opposite party no.2 was not false. It is only after subsequent developments between the parties, the applicant herein had refused to marry her. It was indeed a live-in relationship between the parties, which has ultimately failed, for which the instant F.I.R. has been lodged by the opposite party no.2. Therefore, in the considered view of this Court, prima facie no offence u/S 376 I.P.C. is made out against the applicant herein.

So far as the offence u/S 493 I.P.C., is concerned in the instant case, the opposite party no.2 was an adult female and she very well knew that the applicant has not married to her. However, out of love and affection, she was having the physical relationship with the applicant and the fact that relationship did not end in the marriage, it is evident enough from the allegations made in the F.I.R. Therefore, it

can't be said that there was any inducement by the applicant to have co-habitation with him under a belief of lawful marriage. Since, the applicant herein was an adult partner in the relationship and was well aware of the consequences of such relationship and which had the approval of the families as well and they had the continuous physical relationship out of their free will. It is not the case of the opposite party no.2 that the applicant had the relationship either against her will or without her consent. Therefore, the offence against the applicant are also not be made out prima facie on the facts of the case u/S 493 I.P.C.

24. **Question No. 'III'** :- It has been submitted by the counsels for the applicant as well as for the opposite party no.2, due to lapse of time the opposite party no.2 has already moved ahead in life and has married someone else and pendency of the instant prosecution against the applicant at the behest of the opposite party no.2 will be a continuous harassment to the opposite party no.2 in her new matrimonial life. In view thereof, the opposite party no.2 had accepted the situation and has entered into a compromise with the applicant and do not want to prosecute the case against the applicant herein. In view of the aforesaid compromise between the parties, there are very remote and bleak chances of conviction of the applicant herein and the pendency of this prosecution will be a futile exercise and in view of the settled matrimonial life of the opposite party no.2 and further developments in her life, pendency of the instant prosecution against the applicant will cause oppression and harassment not only of the applicant but that of the opposite party no.2 as well. In the case of ***Kapil Gupta vs. State of NCT of Delhi & Another : Criminal Appeal No. 1217 of 2022 (@ SLP (CRL.) No. 5806 of 2022)*** dated ***10.08.2022,*** the Apex Court in para '16' & '17' has held as under:

"16. In both the cases, though the charge sheets have been filed, the charges are yet to be framed and as such, the trial has not yet commenced. It is further to be noted that since the respondent No.2 herself is not supporting the prosecution case, even if the criminal trial is permitted to go ahead, it will end in nothing else than an acquittal. If the request of the parties is denied, it will be amounting to only adding one more criminal case to the already overburdened criminal courts.

17. In that view of the matter, we find that though in a heinous or serious crime like rape, the Court should not normally exercise the powers of quashing the proceedings, in the peculiar facts and circumstances of the present case and in order to give succour to Respondent No. 2 so that she is saved from further agony of facing two criminal trials, one as a victim and one as an accused, we find that this is a fit case wherein the extraordinary powers of this Court be exercised to quash the criminal proceedings."

Therefore, in the facts and circumstances of the case, in the light of the aforesaid judgement of the Apex Court, the instant case is a fit case to be quashed as there are very remote and bleak chances of conviction of the applicant. Looking at the facts and circumstances of the case, specifically in view of the compromise between the parties and the pendency of the instant prosecution would cause oppression and harassment not only to the applicant but also to the opposite party no.2.

25. **Question No. 'IV'**:- Since, in the instant case, this Court has already held prima facie no offence u/S 376 or 493

I.P.C., is made out against the applicant. The victim/opposite party no.2 has already married to someone else and has moved ahead in life and the pendency of the instant case will cause further harassment to her and she has already entered into a compromise with the applicant and had given statement on oath before the learned Trial Court that she don't want to prosecute this case against the applicant which has also been reiterated by the opposite party no.2 before this Court. Therefore, in the considered view of this Court, it will be duty of this Court to exercise the powers u/S 482 Cr.P.C., to quash the instant proceedings to secure the ends of justice not only to the applicant but also to save the opposite party no.2 from further harassment.

26. In view of the aforesaid discussions, since there was no prima facie case u/S 376 or 493 against the applicant herein and further the parties have entered into a compromise as the opposite party no.2 has already moved ahead in life and as settled in a new matrimonial life with someone else, the pendency of the instant case will be a further harassment to her and in view of the aforesaid discussions, there are very bleak and remote chances of conviction to the applicant on the given facts of the case, therefore, the Charge Sheet No. 114/17 dated 20.06.2017 and entire proceedings in Case No. 3056/IX of 2017 (State vs. Mohit Soni), arising out of Case Crime No. 201 of 2017 u/S 493, 376, 504, 506 I.P.C., P.S.- Rajapur, District-Chitrakoot, pending in the court of learned Chief Judicial Magistrate, Chitrakoot, are hereby ***quashed***.

27. The instant application is ***disposed of*** accordingly.

(2024) 3 ILRA 1113
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2023

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application U/S 482. No. 43676 of 2023

Mahipal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Dewendra Singh, Sri Mehdi Abbas

Counsel for the Opposite Parties:
G.A., Sri Satyendra Narayan Singh

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 156(3), 173(2) & 482 - Indian Penal Code, 1860 - Sections 307, 323, 324 & 326- Application u/s 482 – for quashing criminal proceedings based on a compromise - FIR – offence of acid attack – opposite party no. 2, in his counter affidavit confirming that the parties have amicably settled their dispute and he has no objection to the FIR being quashed, citing diminished chances of conviction – the St. Counsel opposed the prayer - court finds that, undisputedly, during the acid attack victims were suffered serious deep burn injuries on vital parts of their bodies and the offence is grave and affects society at large - under section 482 Cr.P.C. courts have inherent powers to quash proceedings in non-compoundable offences, however, such discretion must be exercised cautiously, especially in heinous crimes that impact society - referring to Supreme Court judgments in *Gian Singh Vs St. of Punj.* and *St. of M.P. Vs Laxmi Narayan*, the Court held that - the compromise cannot override the gravity of the offence – consequently, without meaning any expression of opinion on the merits of the case, application stands dismissed.
(Para – 14, 15, 16)

Application Dismissed. (E-11)

List of referred Cases: -

1. Mohabbat and 2 others Vs St. of U.P. & anr.- (Application U/S 482 No. 702 of 2019),

2. Hayyat & anr.Vs St. of U.P. & anr.(Application U/S 482 No. - 796 of 2019),

3. Gian Singh Vs St. of Punj. reported in (2012) 10 SCC 303,

4. St. of M.P. Vs Laxmi Narayan & ors.- 2019 AIR (Supreme Court) 1296,

5. St. of M.P. Vs Laxmi Narayan & ors., 2019(5) SCC 688.

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants Mahipal and his three co-accused persons have jointly filed this petition under Section 482 Code of Criminal Procedure for quashing of the criminal proceedings arising out of the Case Crime No. 456 of 2010, under Section 307 IPC registered at Police Station Nai Mandi, District Muzaffar Nagar which is subject matter of the Sessions Trial No. 170 of 2011, titled State vs. Mahipal and others, pending before the Additional District and Sessions Judge, Muzaffar Nagar, on the basis of the compromise dated 12.10.2023 (Annexure No. 4).

2. The above noted case was registered on the basis of the statement of Rishipal son of Kadam Singh, wherein he alleged that Mahipal, resident of his village keeps on breaching the ridge (Dol) of agricultural land and despite requesting him to not to do so, he tends to enter into a quarrel. My son Praveen Kumar is running a grocery shop and sons of Mahipal are also running a shop for selling hydro and acid. Today at around 3:00 PM, my son was on the shop and my nephews Sachin and Pradeep Kumar were also there when Mahipal alongwith his sons Neetu, Lalit, and father namely Sukhpal came to our shop, who alongwith Sukhpal exhorted that everyday you raise complaint regarding breach of ridge (Dol), so today we will eliminate you. Upon this all the four assailants who were carrying acid in a container, with an intention to kill my son Praveen and nephews Sachin, Pradeep threw acid upon them, and it resulted in serious injuries to all of them. This incident was witnessed by Baburam son of Paldu resident of Sikhreda and Ravindra son of Madan resident of Sarmujheda, Police Station Nai Mandi, Muzaffar Nagar. At the time of incident, I was purchasing petrol from a petrol pump for my truck and on receiving the information, I reached at the spot and the witnesses told that the injured have been taken to the hospital. On these broad allegations, the above FIR was registered for the alleged commission of offences punishable under Section 307 IPC.

3. After registration of the case, the police carried out investigation and submitted the final report bearing Charge Sheet no. 118 of 2010 dated 8.5.2010 under Section 173(2) Cr.P.C against the applicants-accused for alleged commission of offence punishable under Section 307 IPC.

4. Learned counsel for the applicants submits that pursuant to the final report, the case was committed before the court of sessions for trial and during the pendency of the same, with the intervention of the respectable persons of the village, the parties have agreed to resolve the dispute and the compromise arrived at on 12.10.2023 is appended with this application as Annexure No. 4. Learned Counsel has invited the attention of the Court to the compromise and further

submitted that on the basis of this settlement, the cross case registered at the instance of applicants bearing Case Crime No. 456A of 2010, i.e. Sessions Trial No. 1109 of 2012, under Sections 323, 324, 326 is also settled and the parties do not want to contest the case against each other.

5. Learned counsel has referred to the decision of this Court in ***Mohabbat and 2 others vs. State of U.P. and another (Application U/S 482 No. 702 of 2019)*** and the decision in ***Hayyat and another vs. State of U.P. and another (Application U/S 482 No. - 796 of 2019*** and submitted that following the decision of Hon'ble Supreme Court in ***Gian Singh vs. State of Punjab reported in (2012) 10 SCC 303,*** this Court has quashed the criminal proceedings relating to the alleged commission of offence punishable under Section 307 IPC. He prays that the petition be allowed and the criminal proceedings pending against the applicants be quashed on the basis of the compromise.

6. At this stage, learned counsel for the respondent no. 2 namely Rishipal has filed the counter affidavit which is taken on record.

7. Learned counsel for the respondent no. 2 has stated that indeed the parties have amicably settled the dispute and he has no objection in case, the prayer made by the applicants for quashing of the FIR is accepted. According to the learned counsel for respondent no. 2, in view of the compromise of the parties, the chances of conviction have become weak, therefore, no useful purpose would be served by continuing with the criminal proceedings.

8. The prayer is opposed by the learned State Counsel who has argued that the offences are serious and in such cases, the compromise between the parties is meaningless as the nature of the offence is not against an individual, but is against the society. He prays that the petition be dismissed.

9. During the course of hearing, it is not disputed by the learned counsel for the applicants and the learned counsel for the respondent no. 2 that in the alleged occurrence, victim Sachin had suffered serious deep burn injuries on vital parts of his body, i.e. face, front of chest upper part, front of neck, both upper arms, front of thigh, right denum of foot etc. and similarly the other two injured namely Praveen and Pradeep also suffered deep burn injuries on the vital parts of their bodies.

10. Learned counsel for the parties have been heard and with their assistance, the case file has been perused.

11. After hearing the learned counsel for the parties and considering their submissions, this Court finds that the solitary ground of compromise set up in this petition for quashing of the criminal proceedings is not worth acceptance considering the manner of the commission of offences, as well as the nature and seriousness of the injuries suffered by the victims. No doubt, by interpretation, the High Courts and the Hon'ble Supreme Court have injected some elasticity in quashing criminal proceedings, relating to the non-compoundable offences, through exercise of inherent powers under Section 482 Code of Criminal Procedure, but such a relaxation cannot be construed as an absolute one and would depend upon various factors including the magnitude of the offences, manner of the commission of offences, weapons used in the crime etc. and effect on the society.

12. By now it is well settled that the penal laws are aimed to deter the citizens from resorting to the commission of crime, and if, the offences of heinous nature are allowed to be compromised, it would adversely impact the object of penal laws. If, the power under Section 482 Cr.P.C. is permitted to be exercised in respect of the heinous crimes, then it would certainly encourage the criminals to take law in their own hands. At this stage, this Court deems it appropriate to refer the decision of Hon'ble Supreme Court in ***Gian Singh vs. State of Punjab reported in (2012) 10 SCC 303***, wherein the Apex Court while examining the exercise of inherent powers under Section 482 Cr.P.C. on the basis of compromise in relation to the serious offences made the following observations:-

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences."

13. Apart from the above decision, the Hon'ble Supreme Court in the ***State of Madhya Pradesh vs. Laxmi Narayan and others reported in 2019 AIR (Supreme Court) 1296*** further laid down the principles for quashing of the criminal proceedings on the strength of compromise, in non-compoundable offences by exercising inherent powers under Section 482 Cr.P.C. The relevant portion of the judgment is extracted below:-

"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of

mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

14. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 IPC mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the fire arm also in commission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused."

14. Thus, in view of the above decision of the Hon'ble Supreme Court, the

citations relied upon by the learned counsel for the applicants in ***Mohabbat's case (supra)*** and ***Hayyat,s case (supra)*** would not be applicable as in the said cases, the above noticed principles laid down by Hon'ble Supreme Court in the case of ***State of Madhya Pradesh Vs. Laxmi Narayan and others, 2019(5) SCC 688*** had not been noticed.

15. Now while reverting to the facts of the case in hand, this Court finds that as per prosecution, the applicants were carrying acid with them and caused serious burn injuries to Sachin, Pradeep and Praveen and the manner of crime as narrated by the complainant Rishipal in the FIR is horrendous as they came to the shop of victims and threw acid on them. Further, this is a case where the applicant accused have given their own version relating to the occurrence as a cross case bearing Case Crime No. 456A of 2010 under Section 323, 324 326 IPC, Police Station Nai Mandi, District Muzaffar Nagar lodged at their instance for having suffered injuries at the hands of complainant etc., is also pending adjudication.

16. Consequently, considering the facts and circumstances of this case, this Court has no hesitation in holding that the sole ground of compromise raised by the applicants in this petition for quashing of the criminal proceedings is rejected.

17. Resultantly, without meaning any expression of opinion on the merits of the case, the application under Section 482 Cr.P.C. is dismissed.

(2024) 3 ILRA 1118
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.01.2024

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Application U/S 482. No. 45380 of 2023

Shishir Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajay Senger

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

Criminal Law – Criminal Procedure Code, 1973 - Sections 156(3), 200, 202, 202(1) & 482 – Indian Penal Code, 1860 - Sections 328 & 376-D - Protection of Children from Sexual Offences (POCSO) Act, 2012 – Sections 5-G & 6: - Application under Section 482 Cr.P.C. – for quashing the summoning order as well as the entire criminal proceedings – complaint case – under Sections 376D IPC and Sections 5G/6 of the POCSO Act – victim alleges repeated sexual assault by the applicant from 2015 to 2020 and again in 2023, supported by her St.ment u/s 200 Cr.P.C. and corroborated by two witnesses u/s 202 Cr.P.C. - Trial court being found prima facie evidence and issued a summoning order - applicant contended that the complaint is fabricated due to business rivalry and highlights inconsistencies such as the complainant's refusal to undergo timely medical examination, lack of corroborative medical evidence, vague witness St.ments, absence of specific dates and locations, and failure to raise alarm or report the alleged incidents over several years - he also argues procedural lapses in the summoning order and trial court did not examine the matter u/s 202(1) Cr.P.C. knowing that the applicant was residing beyond the jurisdiction of court – Court finds that, trial court while initially summoning the applicant failed to consider key procedural and evidentiary lapses, including the absence of any reference to the medical report in the complaint, lack of injuries noted in the report and the complainant's refusal to undergo a court-directed medical examination without

any coercion - Additionally, the Court did not conduct a mandatory inquiry under Section 202(1) Cr.P.C. despite the applicant residing outside its jurisdiction, and the complainant had not reported the alleged incidents spanning several years to any authority or family - Given these deficiencies, the Court held that the summoning order against the applicant to be unsustainable and set – with clarification that this order does not affect the summoning of co-accused.
(Para –17, 18, 19, 20, 21, 22, 23, 24, 26)

Application Partly allowed. (E-11)

List of referred Cases: -

1. Vijay Dhanuka & ors.Vs Najima Mamtaj & ors., (2014) 14 SCC 638,

2. Birla Corporation Limited Vs Adventz Investments and Holdings Limited & ors., 2019 AIR (SC) 2390,

3. Dhruvaram Murlidhar Sonar Vs St. of Maharashtra - (2019) 18 SCC 191,

4. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426,

5. [Inder Mohan Goswami Vs St. of Uttaranchal, (2007) 12 SCC 1 ,

6. Pramod Suryabhan Pawar VS St. of Maharashtra & anr., (2019) 9 SCC 608,

7. Pepsi Foods Ltc. & anr.Vs Special Judicial Magistrate & ors., (1998) 5 SCC 749,

8. National Bank of Oman Vs Barakara Abdul Aziz & anr., (2013) 2 SCC 488,

9. Chhote Lal Vs St. of UP & anr.(Application u/s 482 No. 39702 of 2017, decided on 18.04.2019).

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

1. Heard Sri Ajay Sengar, learned counsel for the applicant, Sri Ajay Singh, learned counsel for the complainant and learned AGA for the State.

2. Present application has been filed by the applicant under Section 482 Cr.P.C. praying for quashing the entire proceedings of Complaint Case No. 0009 of 2023, arising out of Criminal Case No. 0164 of 2023 (Smt. Vibha Prajapati vs. Shishir Gupta & Others) under Sections 376D of IPC and Section 5G/6 of the POCSO Act, 2012, Police Station Kotwali Orai, District Jalaun, pending before the learned Additional District & Sessions Judge/Special Judge (POCSO Act), Jalaun at Orai.

3. Opposite party no. 2 filed a complaint against the applicant and other persons under Sections 328 and 376 of IPC and Section 5/6 of the POCSO Act, 2012 Police Station Kotwali Orai, District Jalaun.

4. The allegations in the complaint are summarised thus:

4.1. The applicant, who was working as a Contractor, opened an office in the name and style of S. K. Enterprises in the house of one R.S. Gupta at Tulsi Nagar, Orai, District Jalaun. Opposite party no. 2 came to know that there was a vacancy of a Clerk and a Stenographer in the office of the applicant. She met the applicant in the year 2015 for such job and was asked to approach after one week. She was offered a job of Clerk in the office of the applicant on monthly payment of Rs. 5000/-.

4.2. After 15-20 days, the applicant called the complainant at his office at 9:00 PM. When she reached the office at around 8:30 PM, she found the applicant and one Ajit Singh to be present

there. She was offered a cup of coffee by the applicant. After consuming it, she lost her senses. When she regained consciousness, she found that there were no cloths on her body. The applicant and Ajit Singh had committed rape with her.

4.3. When the complainant informed that she will file a complaint against them with the police, they showed her an obscene video and threatened to make this video public in case she filed any complaint or told her family about this incident. The applicant and Ajit Singh raped her on several occasions after this, under the pretext of leaking the obscene video.

4.4. During the nationwide lockdown in 2020, the applicant closed his office at Orai. There was no communication between the applicant and the complainant during 2020 to 2023. In the month of September 2023, the applicant called the complainant and asked her to work with him again, but she refused. The applicant showed some indecent photographs and video to her and threatened to make these photos and video public in Orai and send it to her family members if she does not accompany him.

4.5. She became very frightened. She was taken to an unknown house by the applicant where Sardar Ajit Singh was already present. They raped her without her consent. Thereafter they took her in the car and after some distance removed her and left from there saying that they have opened their office in Noida. She has to come there whenever called otherwise she would have to face serious consequences. Firoz Khan and Ghanshyam were passing from there at that time. Upon enquiring with her, she narrated the entire incident to them.

5. Sri Ajay Sengar, Learned counsel for the applicant submitted that:

5.1. One Ritesh Gupta, resident of Madhya Pradesh is also a Railway Contractor and has business rivalry with the applicant. He felt enemity with the applicant. He planned to implicate the applicant in this heinous crime. The complainant is managed by the gang of false criminal litigations.

5.2. After recording the statement of the complainant under Section 200 of Cr.P.C., the Court concerned directed the Chief Medical Officer, Jalaun by order dated 04.10.2023, to medically examine her and submit his report. But the complainant refused to undergo internal and external medical examination on 18.10.2023. The Chief Medical Officer, Jalaun submitted his report to the Court concerned about the refusal made by the complainant on 20.10.2023.

5.3. The complainant produced her medical report before the Court concerned on 7.11.2023, stating that she could not get herself medically examined earlier because she was under mensuration period and one month had passed since the alleged occurance so she did not undergo medical examination. She was also hospitalised from 7.10.2023 and 8.10.2023.

5.4. Two witnesses produced and mentioned by the complainant in her complaint, did not disclose any date, time and place of occurrence. They also did not state anything about the knowledge of the business and status of the applicant.

5.5. Both the witnesses are chance witnesses and the Learned Court concerned did not make any attempt to examine their veracity and, therefore, their evidence cannot be relied upon. Moreover, PW-2-Divesh Diwaker stated that the entire

incident was narrated to him by the complainant herself.

5.6. The complaint was filed on 30.09.2023. A medical report dated 12.09.2023 i.e. prior to the date of filing of the complaint, was filed by the complainant subsequently. This medical report was prepared at Jhansi and the complications referred to in the said report do not corroborate the version of rape with the complainant. Moreover, the complainant did not give any reference of her medical examination dated 12.09.2023 in her complaint. Therefore, there was no medical evidence on record which could demonstrate that the complainant was raped by the applicant.

5.7. Though the complainant stated that since 2015, the applicant had committed rape with her, she did not raise any alarm and did not make any complaint thereto to any of the authority or to her family members. She remained silent about the incident.

5.8. Learned Court concerned before passing the summoning order did not examine the matter under Section 202(1) of Cr.P.C. that the applicant was residing beyond its jurisdiction.

5.9. There is no evidence in the form of video clip, mobile clip or any photograph which could demonstrate that the applicant committed rape with the complainant, as alleged. No date, time and place of occurrence had been mentioned by the complainant although it is alleged that the applicant continued to rape her for over a period of more than five years.

5.10. The applicant never resided at Orai. He does not know co-accused Sardar Ajit Singh as he is a resident of District Faizabad.

6. To buttress his arguments, learned counsel for the applicant relied upon the judgments of the Supreme Court in **Pepsi Foods Ltc. and Another vs. Special Judicial Magistrate and Others,** (1998) 5 SCC 749 and **National Bank of Oman vs. Barakara Abdul Aziz and Another,** (2013) 2 SCC 488 and a judgment of this Court in **Chhote Lal vs. State of UP & Another** (Application u/s 482 No. 39702 of 2017, decided on 18.04.2019).

7. It is also submitted by learned counsel for the applicant that the turnover of the applicant is in crores and his total income assessed under the Income-tax is Rs. 3,35,87,780/- in the Assessment Year 2023-24. The applicant had paid income tax of Rs. 1,05,92,058/- on this income. It is also submitted that this is also one of the reasons to falsely implicate the applicant in this case to fetch money from him.

8. *Per contra,* learned AGA and learned counsel for the complainant submitted that:

8.1. The complainant does not know any Ritesh Gupta, as alleged by the applicant. Therefore, the allegations made by the applicant are incorrect. The fact of the case and the evidence adduced by the complainant and the witnesses are subject to trial. The Court will arrive at a rightful conclusion only on the basis of evidence produced by the complainant during the trial. It is also stated that at this stage, the defence of the applicant cannot be taken into consideration.

8.2. The complainant during her statement under Section 200 of Cr.P.C., consistently corroborated the facts of the incident. Apart from her, two witnesses, who were passing through the area where the applicant left her after committing her rape, have also during their statement under

Section 202 Cr.P.C. corroborated the case of the complainant.

8.3. PW-1-Ghanshyam, during his statement under Section 202 Cr.P.C. stated that two persons dropped a girl from their Car and threatened her. He enquired from the complainant what happened. She informed that two persons, namely, the applicant-Shishir Gupta and another person, Ajit Singh had committed rape with her. Prior to this also, they had committed rape with her at several times.

8.4. The same statement was given by another witness, namely, PW-2 Divesh Diwaker. There is no denial of statements of the complainant and the witnesses by the applicant.

8.5. The medical report produced by the complainant before the learned Court concerned is not fabricated as the medical report had been issued by the Government Hospital.

9. There is an allegation against the applicant that in the year 2015, he provided a job to the complainant in his office. After 15-20 days, lured her in his office on pretext of some official work. He offered a cup of coffee to her with some intoxicated substance. She lost her senses after consuming that coffee. When she regained consciousness, she found herself naked. She apprehended that the applicant and another accused had committed rape with her. When the complainant informed them that she will file a complaint against them, they showed her an obscene video and threatended her that if any complaint is lodged with the police or if she informed her family about the incident, they would make the video public. Under the threat of this video, the applicant and another person continued to rape her several times later.

10. In September 2023, the applicant called the complainant to work with him again but she refused. The applicant then showed some indecent photographs and video and threatened her that if she would not come with him, he would make the photographs and video public in Orai and would also send them to her family.

11. She got frightened. She was taken to an unknown house by the applicant where Sardar Ajit Singh was already present. They raped her without her consent. They took her in a car and after some distance removed her and left her there. Firoz Khan and Ghanshyam were passing from there at that time. Upon enquiring, she narrated the entire incident to them.

12. The Hon'ble Supreme Court in **Pramod Suryabhan Pawar VS State of Maharashtra and another, (2019) 9 SCC 608** has considered the principles, scope, and ambit of the powers of the Court under Section 482 Cr.P.C. and held that:

6. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been

consistently followed and reiterated by this Court. In Inder Mohan Goswami v. State of Uttaranchal [Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1 : (2008) 1 SCC (Cri) 259] , this Court observed : (SCC p. 10, paras 23-24):

"23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of the court, and

(iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

7. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The Court in Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] noted that quashing may be appropriate where: (SCC pp. 378-79, para 102)

"102. … (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

***

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

8. In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in *Dhruvaram Murlidhar Sonar v. State of Maharashtra* [*Dhruvaram Murlidhar Sonar v. State of Maharashtra,* (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100] , (*Dhruvaram Sonar*) : (SCC para 13)

"13. It is clear that for quashing the proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

13. In **Pepsi Foods Ltd. And Another vs. Special Judicial Magistrate And Other (supra),** the Apex Court observed in paragraph 28, as under:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

14. In **National Bank of Oman vs. Barakara Abdul Aziz And Another (supra),** the Apex Court, further explaining the text, observed as under in paragraphs 9:

"9. The duty of a Magistrate receiving a complaint is set out in Section 202 of the Cr.P.C. and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this Section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 of the Cr.P.C. is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 of the Cr.P.C. is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the Court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made our; and

(iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have."

15. In **Birla Corporation Limited vs. Adventz Investments and Holdings Limited & Others,** 2019 AIR (SC) 2390, the Apex Court observed as under:

31. Under the amended sub-section (1) to Section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be made by a police officer or by such other

person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused.

32. By Cr. P.C. (Amendment) Act, 2005, in Section 202 Cr.P.C. of the Principal Act with effect from 23.06.2006, in sub-section (1), the words "…and shall, in a case where accused is residing at a place beyond the area in which he exercises jurisdiction…" were inserted by Section 19 of the Criminal Procedure Code (Amendment) Act, 2005. In the opinion of the legislature, such amendment was necessary as false complaints are filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire. Notes on Clause 19 reads as under:-

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

33. Considering the scope of amendment to Section 202 Cr.P.C. in Vijay Dhanuka and Others vs. Najima Mamtaj and Others, (2014) 14 SCC 638, it was held as under:-

"12. ….The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar and Another (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488."

16. An order passed by the Court, summoning the accused to face trial, must reflect that it has applied its mind to the facts of the case and the law applicable thereto. The Court cannot act merely because a complaint had been made and two witnesses in support of the allegations are produced before it. It has to examine the nature of allegations made in the complaint and the evidence, both oral and documentary, in support thereof and whether that would be sufficient for the complainant to succeed in bringing home charge against the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before

summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

17. Perusal of the impugned summoning order goes to show that considering the material evidence as available on record, the Learned Court opined that there was sufficient prima facie evidence about the commission of the crime by the applicant as alleged by the complainant in her complaint. The Court therefore summoned the applicant to face the trial.

18. The Learned Court completely lost sight of the fact that no date and time of incident were mentioned by the complainant. She made allegations that she was subjected to rape by the applicant and another accused for a long period, i.e. from 2015 to 2020 and in the year 2023. But she did not mention the date and time of any of such incidents in her complaint. The witnesses of the complainant stated before the court merely on the basis of the information given by the complainant.

19. While passing the impugned order, the Learned Court completely ignored the fact that no refrence of the medical report (paper no. 18 kha) was made by the complainant in her complaint. This certificate was issued by District Male Hospital, Jhansi on 12.09.2023. In this medical certificate, no injury on the person of the complainant was found which can demonstrate that she was subjected to gang rape. Pertinent to note that the Court concerned, after recording the statement of the complainant under section 200 Cr.P.C., directed the Chief Medical Officer, Jalaun at Orai to conduct medical examination of the complainant, but she refused to undergo for her medical examination. She stated before the Medical Officer that she does not want to get her internal and external medical examination done. There was no pressure upon her to not get her medical examination done.

20. Thereafter, she moved an application before the Court concerned stating therein that when she appeared before the medical officer Orai for her medical examination, she was undergoing monthly menstruation cycle and since a month had passed since the date of the incident, therefore she she did not consent to get her medical examination done. This fact was not informed by her to the Medical Officer.

21. In the absence of any medical evidence to corroborate the allegations made by the complainant, the Court erroneously arrived at a conclusion that, prima facie, there was evidence of committing gang rape by the applicant and other accused person with the complainant.

22. The Learned Court also failed to conduct an enquiry under Section 202(1) of Cr.P.C. to examine the veracity of prosecution witnesses. Since the applicant is a resident of District Ghaziabad and his address of Ghaziabad was also mentioned by the complainant in her complaint, therefore, to ascertain whether the concerned Court has jurisdiction to entertain the complaint, an enquiry under Section 202(1) of Cr.P.C. was mandatory to be conducted by the court.

23. It is also noteworthy that as with regard to the allegation made by the

complainant that she was subjected to rape by the applicant for a long duration (i.e. from 2015 to 2020 and in September 2023), she neither raised any alarm to that effect nor informed her parents or other family members. She never approached the local authorities to file a complaint about it. Therefore, it appears that only for the purpose of harassing the applicant, false and concocted allegations are levelled against him by the complainant.

24. In view of the discussion made above, the application is ***partly allowed***. Summoning order dated 10.11.2023 under Section 376D IPC and 5G/6 POCSO Act, 2012 passed by Additional District and Sessions Judge/ Special Judge, Jalaun at Orai in Complaint Case No.0009 of 2023 arising out of criminal case no.0164 of 2023 (Smt. Vibha Prajapati Vs Shishir Gupta and others) to the extent it summons the applicant is hereby **set aside.**

25. No order as to cost.

26. It is made clear that by this order, summoning of non-applicant Sardar Ajit Singh, who is also an accused and have been summoned, has not been set aside.

(2024) 3 ILRA 1127
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Civil Misc. Arbitration Application No. 2 of 2022
With
Civil Misc. Arbitration Application No. 5 of 2023

M/s Jaypee Infratech Ltd. ...Applicant
Versus
M/s EHBH Services Pvt. Ltd. & Anr.
...Opp. Parties

Counsel for the Applicant:
Sri Rohit Gupta, Sri Kashif Zaidi, Sri Kali Gupta (Azad)

Counsel for the Opp. Parties:
Sri Sudhanshu Kumar

Arbitration and Conciliation Act, 1996 – Sections 2(1)(e), 11, 29A(4),(5)&(6) – Definition of "Court" – Jurisdiction for Extension of Arbitral Mandate and Substitution of Arbitrator – Interpretation of "unless the context otherwise requires" – Conflict with Section 11 – Judicial Hierarchy.

Applications under Section 29A(4)&(5) of the Arbitration and Conciliation Act, 1996 were filed seeking extension of the mandate of the Arbitral Tribunal in two separate domestic arbitrations. In the first (ARBT No. 2 of 2022), disputes arose from rent agreements for dhaba facilities along the Yamuna Expressway; arbitration invoked in 2019; proceedings delayed due to negotiations, Covid-19, objections, and applications; opposite parties refused mutual extension under Section 29A(3). In the second (ARBT No. 5 of 2023), disputes related to a construction contract with U.P. PWD; pleadings completed in 2022; mandate expired in 2023; respondent refused consent for extension.

The Court framed the question: Whether powers under Sections 29A(4),(5)&(6) in domestic arbitration are exercisable exclusively by the High Court (irrespective of ordinary original civil jurisdiction or appointment under Section 11), or by the Principal Civil Court/Commercial Court as per Section 2(1)(e).

Applicants contended that "Court" in Section 29A must be read contextually with Section 11; power to substitute under Section 29A(6) akin to appointment; literal application of Section 2(1)(e) leads to conflict/anomaly violating judicial hierarchy. Opposite parties argued for strict adherence to Section 2(1)(e); no absurdity in Principal Civil Court exercising powers; distinction between appointment (Section 11) and substitution (Section 29A(6)).

Held: Genesis of Section 29A traced to need for time-bound arbitration; phrase "unless the context otherwise requires" in Section 2(1) allows contextual interpretation. Literal reading of "Court" under Section 2(1)(e) creates conflict with Section 11 where High Court/Supreme Court appoints arbitrator; substitution under Section 29A(6) akin to appointment. Purposive interpretation required to avoid absurdity and preserve hierarchy. Where arbitrator appointed under Section 11 by High Court/Supreme Court, only that Court has jurisdiction under Section 29A. Where appointment not by High Court/Supreme Court (e.g., mutual/statutory), Principal Civil Court under Section 2(1)(e) has jurisdiction.
Conflicting single bench views noted (Indian Farmers Fertilizers Coop. Ltd. v. Manish Engineering Enterprises, 2022; A'Xykno Capital Services Pvt. Ltd. v. State of U.P., 2023; Lucknow Agencies v. U.P. Avas Vikas Parishad, 2019). Matter referred to Larger Bench on: Whether, where arbitrator appointed by Supreme Court/High Court, only that Court can hear Section 29A application? Whether, where appointment by parties/statute (not High Court/Supreme Court), Court under Section 2(1)(e) can exercise Section 29A powers including substitution under Section 29A(6)?

Applications adjourned sine die pending Larger Bench decision.

Case Law Discussed:
1. Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750

2. Lots Shipping Company Ltd. v. Cochin Port Trust, MANU/KE/1142/2020 (Kerala HC)

3. Nilesh Ramanbhai Patel v. Bhanubhai Ramanbhai Patel, MANU/GJ/1549/2018 (Gujarat HC)

4. Tara Chand Sumit Construction Co. v. Delhi Development Authority, MANU/DE/1034/2020 (Delhi HC)

5. Amit Kumar Gupta v. Dipak Prasad, 2021 SCC OnLine Cal 2174 (Calcutta HC)
6. Cobra Instalaciones Y Servicios, S.A. v. Maharashtra State Electricity Distribution Co. Ltd. (Bombay HC)

7. Indian Farmers Fertilizers Coop. Ltd. v. Manish Engineering Enterprises, MANU/UP/0515/2022 (Allahabad HC)

8. A'Xykno Capital Services Pvt. Ltd. v. State of U.P., 2023 (4) AWC 3662 (Allahabad HC)

9. Lucknow Agencies v. U.P. Avas Vikas Parishad, MANU/UP/0885/2019 (Allahabad HC)

10. Various Supreme Court judgments on statutory interpretation (e.g., Whirlpool Corporation v. Registrar of Trade Marks, (1998) 8 SCC 1; K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53).

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. These are applications filed under Section 29(A)(4) and Section 29(A)(5) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act'), praying for the extension of the mandate of the Arbitral Tribunal in order to complete the arbitration proceedings.

2. Since Civil Misc. Arbitration Application No.2 of 2022 and Civil Misc. Arbitration Application No.5 of 2023 raise similar question of law, they are being taken up together.

FACTS

3. The factual matrix in ARBT 2 of 2022 has been delineated below:

a. By an agreement dated February 7, 2003 executed between Taj Expressway Industrial Development Authority (now known as the Yamuna Expressway Industrial Development Authority, hereinafter referred to as the 'YEIDA') and M/s Jaiprakash Industries Limited (subsequently name changed to M/s Jaipraksh Associates Limited (hereinafter referred to as the 'JAL'), JAL

was granted concession for arrangement of finances, design, engineering, construction and operation, of the expressway between Noida and Agra, and to collect & retain toll from the vehicles using the expressway during the term of 36 years, commencing from the date of commercial operation of the expressway plus any extension thereto (hereinafter referred to as the 'Yamuna Expressway Project').

b. A Special Purpose Vehicle (SPV) was incorporated by JAL for the implementation of the project under the name of Jaypee Infratech Limited (hereinafter referred to as the 'Applicant'). All the rights and obligations of JAL under the agreement dated February 7, 2003, were transferred to the Applicant by an assignment agreement dated October 19, 2007, executed by and between YEDIA, JAL, and the Applicant. Thereafter, a project transfer agreement was executed between JAL and the Applicant on October 22, 2007, and all assets, rights, and privilege and all liabilities, obligations, and duties relating to the Yamuna Expressway Project were transferred to the Petitioner.

c. YEIDA, in discharge of its obligations under the agreement dated February 7, 2003, transferred lands for development of the Yamuna Expressway Project and other facilities etc. to the Applicant through various lease agreements. The Applicant was desirous of setting up Dhaba facility at locations namely Km 107 LHS and Km 100 RHS, respectively, across the Yamuna Expressway Project from Greater Noida to Agra. For this purpose, the Applicant, constructed & developed structures i.e. Permanent Facility Complexes at places located at Km 107 LHS and Km 100 RHS respectively.

d. M/S Ehbh Services Private Limited (hereinafter referred to as the 'opposite party No.1') approached the Applicant to set up, operate, and run a Dhaba and submitted its offer to provide the same at both Km 107 LHS and Km 100 RHS. Thereafter, the opposite party No.1 acting through Mr. Furkan Khan, Authorized Signatory of the opposite party No.1 (hereinafter referred to as the 'opposite party No.2') entered into Rent Agreements on December 9, 2013, for both the locations i.e. Km 107 LHS and Km 100 RHS for the aforesaid purpose.

e. Due to certain disputes having arisen between the parties, the Applicant sent a legal notice dated January 12, 2019, under Section 106 of the Transfer of Property Act, 1872 terminating the lease deed on expiry of the lease period. Thereafter, by a letter dated March 07, 2019, pursuant to Clause 14 of the agreement between the parties, the Applicant advised the opposite parties to be present for a meeting to amicably resolve the dispute on March 15, 2019.

f. Since the disputes between the parties could not be resolved through amicable settlement, the Applicant vide its letter dated June 15, 2019, invoked the arbitration clause under Clause 14.1 of the Rent Agreement. Vide another letter dated June 22, 2019, the Applicant appointed the Sole Arbitrator to decide the disputes between the parties. The Sole Arbitrator entered into reference on June 25, 2019.

g. Vide email dated October 17, 2019, the opposite parties informed the Sole Arbitrator that they desire to settle the matter through negotiations and sought suspension of the arbitral proceedings till November 20, 2019, without prejudice to their legal rights. This was agreed to by the Applicant. Thereafter, arbitral proceedings were suspended till December 12, 2019, at the request of the opposite parties.

h. On February 26, 2020, the Sole Arbitrator passed an order rejecting the application of the opposite parties filed under Section 12 & 13 of the Act and fixed schedule for completion of the pleadings and put the next date for May 16, 2020. Thereafter, vide its email dated March 21, 2020, the opposite parties submitted an application under Section 16 of the Act and sought adjournment of the date fixed for hearing on account of the outbreak of Covid – 19 epidemic.

i. Vide its order dated May 10, 2021, the Sole Arbitrator rejected the application under Section 16 of the Act filed by the opposite parties.

j. On October 10, 2021, another meeting was held and a fresh schedule for completion of the pleadings was fixed and the case was listed on January 7, 2022. The meeting fixed for January 7, 2022, was postponed as the counsel of the opposite party had tested positive for Covid – 19 and finally the case was fixed for February 7, 2022.

k. Parties had filed their pleadings, but the opposite party objected to the filing of the rejoinder on the ground that the same was filed beyond the time fixed. The delay was condoned vide order dated February 7, 2022, and case was fixed for admission, denial of the documents, and filing of the necessary affidavits on March 15, 2022. The counsel of the opposite parties fell ill and the time to file the affidavits by the opposite parties was extended till March 31, 2022.

l. The case was taken up on March 31,2022. The opposite parties filed an application under Order 11 of the Code of Civil Procedure, 1908 seeking interrogatories and discoveries. The Applicant was granted time to file its reply. The case was again taken up on May 28, 2022, and arguments were heard on the application of the opposite party preferred under Order 11 of the Code of Civil Procedure, 1908. The matter was reserved for June 30, 2022, as there were vacations in June. There were directions issued to the opposite party to file an affidavit to the effect whether the opposite party is willing to extend the time by six months as provided under Section 29A of the Act.

m. Vide email dated July 14, 2022, the opposite party refused to extend the time by another six months. Accordingly vide its order dated July 16, 2022, the Sole Arbitrator asked the Applicant to take appropriate action under the provisions of the Act.

n. The Applicant then filed the instant application being ARBT 2 of 2022 under Section 29A(4) of the Act seeking extension of time by another one year so that the arbitration proceedings can be completed.

4. The factual matrix in ARBT 5 of 2023 is delineated below:

a. Claims/Disputes in the instant case arise out of and in connection with a contract agreement bearing bond no. 06/SE Meerut Circle/12-13 dated December 21, 2012 executed between the Applicant (M/S Verma Constructions) and the opposite party (UP Public Works Department) pertaining to the work related to the construction of the approach road and the additional approach road of bridge over river Ganga on Chetawala Ghat near Bhikund village in Hastinapur, Tehsil Mawana, District Meerut (UP) on Bill of Quantity Basis.

b. Due to failure of the parties to resolve such claims/disputes amicably, the Applicant (M/S Verma Constructions) invoked arbitration vide Arbitration vide its notice dated January 9, 2021, in accordance

with the Contract Agreement, which was thereafter referred before the Sole Arbitrator for adjudication in terms of the said Contract Agreement.

c. The Arbitral Tribunal fixed the first date of hearing as April 29, 2021, and directed the Parties to file their Claim Petition, Defence, Rejoinder, etc. The parties were only able to complete their pleadings on May 16, 2022. The period prescribed under Section 29A of the Act expired on May 16, 2023. The Arbitral Tribunal vide its order dated June 26, 2023, requested the parties to seek appropriate approval from the management with respect to mutual extension of six months as provided under Section 29A(3) of the Act.

d. Counsel for the applicant gave its consent vide email dated August 8, 2023. However, the counsel for the Respondent vide email dated August 8, 2023, refused to give consent.

e. Due to failure of the parties to mutually extend the mandate of the Arbitral Tribunal, the Applicant filed the instant application being ARBT 5 of 2023 under Section 29A(4) of the Act before this Court.

QUESTION OF LAW FRAMED BY THIS COURT

5. During the course of the hearings, this Court had formulated the following question of law and asked the parties to make their submissions in accordance with the same:

"Whether in the case of domestic arbitration, the powers under Sections 29A(4), 29A(5), and 29A(6) of the Act can be exercised by the Commercial Court/Principal Civil Court or the powers can exclusively be exercised by a High Court irrespective of the fact that the High Court does not have ordinary original civil jurisdiction and irrespective of the fact that the original appointment was not made by the High Court?"

CONTENTIONS OF THE APPLICANT IN ARBT 2 OF 2022

6. Mr. Rohan Gupta, counsel appearing on behalf of the applicant in ARBT 2 of 2022 has made the following submissions based on the question of law formulated by this Court:

a. The word 'Court' occurring in Section 29A of the Act should be interpreted to mean the High Court, irrespective of whether in a particular case, the arbitrator has been appointed by mutual consent of the parties or under Section 11 of the Act.

b. The word Court stands defined under Section 2(1)(e) of the Act, as the commercial court or the High Court with original jurisdiction, for domestic arbitrations. Since the power under Section 29A of the Act to substitute an arbitrator necessarily includes the power to appoint an arbitrator, the term Court in Section 29A of the Act must be read with Section 11 of the Act in order to make the Act workable and to avoid conflict in the appointments done under Section 11 of the Act and Section 29A of the Act. It was not the intention of the legislature to give the power of appointment to the Commercial Courts.

c. The phrase "unless the context otherwise requires" used in Section 2(1)(e) of the Act requires the definition of the word "Court" used in Section 29A of the Act to be interpreted in the context it has been used in and the definition as provided in Section 2(1)(e) of the Act will not apply.

Section 29A of the Act is required to be read with Section 11 of the Act.

d. The phrase "If the Context otherwise requires" occurring in Section 2(1)(e) of the Act has been interpreted in the judgments of the Gujarat High Court in **Nilesh Ramanbhai Patel and Others v. Bhanubhai Ramanbhai Patel** reported in **MANU/GJ/ 1549/2018**, the Kerala High Court in **Lots Shipping Company Limited v. Cochin Port Trust** reported in **MANU/KE/1142/2020**, the Delhi High Court in **Delhi Development Authority v. Tara Chand Sumit Construction Co.** reported in **MANU/DE/1034/2020**, and the Calcutta High Court in **Amit Kumar Gupta v. Dipak Prasad**, reported in, **2021 SCC OnLine Cal 2174.**

e. In **Lots Shipping Company (supra)**, the Kerala High Court has given a purposive interpretation to the term "Court" used in Section 29A of the Act, in the context of Section 11 of the Act rather than literal interpretation.

f. Power to appoint an arbitrator lies only with the High Courts and the Supreme Court under Section 11 of the Act. Power to substitute an arbitrator under Section 29A(6) of the Act or an arbitral panel is akin to the power to appoint an arbitrator or an arbitration panel and therefore this provision is not to be read in isolation but along with Section 11 of the Act. Reliance in this regard was placed on the judgments in **Nilesh Raman Bhai Patel (supra), Indian Farmers Fertilisers Cooperative Ltd. v. Manish Engineering Enterprises** reported in **MANU/UP/ 0515/2022, Amit Kumar Gupta (supra), Cobra Instalaciones Y Servicious, S.A. v. Maharashtra State Electricity Distribution Company Limited** delivered in **MA No. 1920/2019,** and **Tara Chand (supra).**

g. If the power to substitute (which is akin to appointment) is given to Civil Court under Section 29A of the Act, it would be in teeth of the powers conferred under Section 11 of the Act. Conflict would arise between the power of the superior courts to appoint an arbitrator under Section 11 of the Act and those of the Civil Court to substitute those arbitrators under Section 29A of the Act. Reliance was placed on the judgments in **Nilesh Raman Bhai Patel (supra)**, and **Tara Chand (supra)**.

h. An anomalous situation will arise if the word Court used in Section 29A of the Act is interpreted in a literal manner, wherein identical powers could be exercised in a contrary manner, prejudicial to the hierarchy of the Courts. Section 11 of the Act was amendment by Act 3 of 2016 w.e.f. October 23, 2015, along with the insertion of Section 29A. There is no other purpose of substituting the words Chief Justice or his designate with the words High Court and Supreme Court in Section 11, unless the legislature wanted to clarify that the power to appoint an arbitrator is only to vest with the High Courts and Supreme Court. Reliance was placed in this regard on the judgments in **Lots Shipping Company (supra)**, and **Nilesh Raman Bhai (supra).**

i. The term Court referred to in Section 29A of the Act would mean the High Court irrespective of whether the appointment of the arbitrator was made under Section 11 of the Act. Section 29A of the Act empowers the Court to substitute an arbitrator or an arbitral panel, which is akin to the power of appointment and therefore, it would be the High Court only in case of domestic arbitration which would have exclusive jurisdiction to hear an application under Section 29A of the Act.

CONTENTIONS OF THE OPPOSITE PARTY IN ARBT 2 OF 2022

7. Mr. Sudhanshu Kumar, counsel appearing on behalf of the opposite parties has made the following submissions on the question of law framed by this Court:

a. Section 29A of the Act was added by Act 3 of 2016 w.e.f. October 23, 2015, prescribing the time limit for making an arbitral award. Clause 4 of Section 29A of the Act provides for termination of the mandate of the arbitrator on the expiry of the time period unless the same is extended by the "Court". Clause 6 leaves it open for the Court to substitute one or all of the arbitrators while considering the extension of the time period under Clause 4. On applying the definition of the word "Court" given in Section 2(1)(e) of the Act to the word "Court" as appearing in Section 29A of the Act it is clear that the powers under Section 29A of the Act can only be exercised by the principal Civil Court or High Court having ordinary original civil jurisdiction, but not by a High Court not exercising ordinary original civil jurisdiction, such as this Court.

b. The phrase "Unless the context otherwise requires" qualifying the definition clause in Section 2, can be applied to deviate from a clear and unambiguous definition of a word only when the otherwise context is discernible from the intention of the legislature and adhering to definition clause would lead to absurdity.

c. It is important to state here that the current definition of "Court" has also been inserted by the means of the Act No. 3 of 2016 whereby in case of an arbitration other than international commercial arbitration, the 'Court' means the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction. In the case of international commercial arbitration, it is only the High Court which comes under the definition of 'Court' with the principal Civil Court being excluded. Thus, the Union Legislature, intentionally and consciously, while making a distinction between the definition of the "Court" under Section 2(1)(e) of the Act as applicable to international commercial arbitration (Clause ii) vis a vis arbitration other than international commercial arbitration (Clause i), did not make any such distinction for the purposes of Section 29A of the Act. Under such circumstances, to hold that the powers under Section 29A of the Act can exclusively be exercised by the High Court even if it does not have ordinary original civil jurisdiction would go against the intention of the Legislature.

d. Similarly, the explanation to Section 47 of the Act was also amended by the very same Act 3 of 2016 and the meaning of "Court" was amended to exclude the Principal Civil Court and to include only High Court. However, no such explanation was incorporated in Section 29A of the Act. Even though Section 47 of the Act relates to foreign awards but the fact that no clarification was made in Section 29A of the Act similar to Section 47 of the Act further suggests that the intention of the legislature was to make the definition of "Court" as appearing in Section 2(1)(e) of the Act applicable to Section 29A of the Act.

e. It is also important to remember that when Section 29A of the Act was inserted by Act 3 of 2016, Section 11 of the Act was also amended and the words "Chief Justice or any person or institution designated by him" were

substituted by "Supreme Court or, as the case may be, the High Court or any person or institution designated by such court". Thus, while legislature specifically used the words "High Court" in Section 11 of the Act, it did not do so in Section 29A of the Act and conferred that jurisdiction under "the Court". This further shows the clear intention of the legislature in not conferring the power to High Court for exercise of jurisdiction under Section 29A of the Act.

f. It is necessary to state here that the jurisdiction for appointment of arbitrator has been conferred upon the High Courts or the Supreme Court by the statute i.e. the Act. The same is not exercised by High Courts or the Supreme Court as a Constitutional Court and is not an inherent power of the High Courts or the Supreme Court. In fact, by Section 3 of the Amendment Act of 2019, which is yet to be notified, the jurisdiction to appoint arbitrator has been conferred under Section 11 of the Act to the arbitral institutions and the same has been taken away from the High Courts and the Supreme Court. Thus, the power to appoint an arbitrator is not considered by the Legislature as so sacrosanct or holy that the same can only be exercised by the High Courts or the Supreme Court. In fact, even in the existing provision, the power to appoint an arbitrator can be exercised by "any person or institution" designated by High Courts or the Supreme Court.

g. The same statute which confers High Courts with the jurisdiction to appoint an arbitrator, has conferred the principal civil courts with the jurisdiction to substitute an arbitrator and there is no inconsistency or absurdity in this. In fact, conferring powers under Section 29A of the Act to the Court within the meaning of Section 2(1)(e) of the Act brings consistency to the arbitration proceedings, irrespective of the fact as to who appointed the arbitrator. An anomaly would arise in a situation where an arbitrator is being appointed by the parties or a person or institution as referred above, while powers under Section 29A of the Act are being exercised by the High Courts.

h. The jurisdiction to appoint an arbitrator is different from the jurisdiction to substitute an arbitrator as both operate in separate fields. While an arbitrator is required to be appointed by the High Courts under Section 11 if the parties fail to reach an agreement regarding the initial appointment of the arbitrator, the power to substitute an arbitrator under Section 29A(6) comes into picture only when the time limit for making an arbitral award expires. While exercising jurisdiction under Section 29A(6), the Court is not examining the legality of the initial appointment but the conduct of the arbitrator in the arbitral proceedings and whether the continuation of such arbitrator would further delay the proceedings. The enquiry entailed under Section 29A(6) of the Act is completely different from that under Section 11(5) or Section 11(6) of the Act. Thus, the view that the substitution of arbitrator appointed by the High Court, by the principal Civil Court would be in the teeth of the powers of the High Court is erroneous and imaginary.

i. Once the arbitration proceedings commence, the procedure remains same, irrespective of the fact that whether arbitrator has been appointed by the parties or the High Court or Supreme Court. A High Court appointed arbitrator is also subject to the provisions of Sections 12 and 13 of the Act and his mandate can also be terminated under Sections 14 and 15 of the Act in the same manner as an arbitrator appointed by the parties. Similarly, the time limit and procedure contemplated in

Section 29A of the Act is also same for High Court appointed arbitrators and arbitrators appointed by the parties. High Courts do not exercise any supervisory or other control over the arbitrator appointed by them and such arbitrator has the same status as an arbitrator appointed by parties.

j. This, there is no conflict in the power of the High Courts or the Supreme Court to appoint an arbitrator under Section 11 of the Act and power of the Court including Principal Civil Court to substitute an arbitrator under clause 6 of Section 29A of the Act. High Courts or the Supreme Court exercise a limited jurisdiction under Section 11(5) or Section 11(6) of the Act for appointment of arbitrator. The Court does not retain any jurisdiction over the arbitrator appointed/nominated by it and they become functus officio after the appointment of the arbitrator(s). Reference is made to the judgment of the Supreme Court in **Nimet Resources Inc. and Another v. Essar Steels Ltd.** reported in **2009 (17) SCC 313**.

k. If the powers under Section 29A(4), Section 29A(5), and Section 29A(6) are held to be exercised exclusively by the High Courts irrespective of the fact that the original appointment was not made by the High Courts, it would amount to judicial legislation and adding or incorporation something which is neither in the statute or nor is in conformity with the intention of the legislature. Reliance is placed on the judgment of this Court in **A'Xykno Capital Services Private Limited v. State of U.P.** reported in **2023 (4) AWC 3662 (All).**

l. Therefore, it is submitted that the powers under Section 29A(4), Section 29A(5), and Section 29A(6) of the Act can be exercised only by the Court as defined under Section 2(1)(e) of the Act i.e. the principal Civil Court/Commercial Court or the High Court exercising original civil jurisdiction but not by a High Court not exercising original civil jurisdiction, particularly when the initial appointment of the arbitrator was not done by the said High Court.

ANALYSIS

8. I have heard the learned counsel appearing on behalf of the parties, and perused the materials on record.

9. Before delving into the legal controversy in the instant case, I feel it is pertinent to discuss the genesis of Section 29A of the Act and the purpose behind the said section.

SECTION 29-A GENESIS

10. Before the Act came into force, the Arbitration Act, 1940 (hereinafter referred to as the 'Act of 1940') in the First Schedule (read with Section 3 of the Act of 1940) contained the time limit for making an arbitral award:

*"**3. Provisions implied in arbitration agreement**.—An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.*

THE FIRST SCHEDULE

[See Section 3]

IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.

2. If the reference is to an even number of arbitrators the arbitrators shall

appoint an umpire not later than one month from the latest date of their respective appointments.

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow."

11. Section 28 of the Act of 1940 provided the Court with the power to enlarge the time for making an award :

***"28. Power to Court only to enlarge time for making award.**—(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.*

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

12. As can be seen, under the Act of 1940, specific provisions regulated the time limits for making arbitral awards. Section 3 of the Act of 1940, as outlined in the First Schedule, mandated that arbitrators must issue their award within four months of commencing the reference, or after receiving written notice from any party to the arbitration agreement. Additionally, the Act of 1940 allowed for extensions of this period at the sole discretion of the Court. Unlike the Act, there was no provision allowing the parties to extend the period by mutual consent. Section 28 of the Act of 1940 empowered the court to enlarge the time for making an award, regardless of whether the initial deadline had passed or whether an award has been made. Notably, any provision in the arbitration agreement granting arbitrators or the umpire authority to extend the time for making the award without unanimous consent from all the parties was deemed void under this provision.

13. When the Act came into force in 1996, it lacked a provision regarding the time limit for making an award, a feature present in the preceding Act of 1940. In its 176th Report on "The Arbitration and Conciliation (Amendment) Bill, 2001", the Law Commission of India (hereinafter referred to as the "LCI") underscored the necessity for substantial reforms to expedite the arbitral process comprehensively, whether proceedings were under the Act or the Act of 1940. As part of its recommendations, the Commission proposed the introduction of Section 29A to the Act, stipulating that arbitrators should have one year to render an award, with an option available to the parties to grant an extension of up to one additional year. If the award remained outstanding beyond this period, parties have the liberty to approach the Court for resolution. Notably, under the envisaged Section 29A outlined in the LCI's report, arbitrators themselves could request an extension from the Court if the parties

failed to do so. This proposed amendment aimed to instil a more structured and time-bound approach to the arbitration process, facilitating efficiency and expediency in dispute resolution. Relevant paragraph from the 176th LCI Report is being extracted below:

"Next, for future arbitrations under the 1996 Act, the arbitrators will have one year and thereafter another period not exceeding one year as agreed by the parties, under the proposed S. 29-A, for passing the award. Thereafter, if the award is not passed, parties are to move the Court for extension and if the parties do not apply, the arbitrators can also apply for the same. Till the application is made, the arbitration proceedings are suspended, but once an application is made to the Court, the arbitration proceedings shall continue and are not to be stayed by the Court. On the other hand, the Court shall pass an order within one month fixing the time schedule or it may also pass orders as to costs taking into account various factors which have led to the delay and also the amount already spent towards fee etc. The Court will continue to pass such orders granting time and fixing the procedure, till the award is passed. The above procedure is also to be applied to arbitrations which are pending under the 1996 Act for more than three years as provided in S. 33 of the amending Act. Applications under S. 34(1) to set aside awards and appeals under S. 37(1) are to be disposed of within six months and appeals under S. 37(2) within three months from the date of commencement of the amending Act. A similar procedure is envisaged for future applications and appeals."

14. The Section 29-A as was proposed by the 176th Report of the LCI to be inserted in the Act has been extracted below:

*"**21. Insertion of new Section 29-A.**— After S. 29 of the Principal Act, the following section shall be inserted, namely:—*

"29-A. Speeding up of proceedings and time-limit for making awards.— (1) The arbitral tribunal shall make its award within a period of one year after the commencement of arbitral proceedings, or within such extended period as specified in sub-ss. (2) to (4).

(2) The parties may, by consent, extend the period specified in sub-s. (1) for a further period not exceeding one year.

(3) If the award is not made within the period specified in sub-s. (1) and the period agreed to by the parties under sub-s. (2), the arbitral proceedings shall, subject to the provisions of sub-ss. (4) to (6), stand suspended until an application for extension is made to the Court by any party to the arbitration, or where none of the parties makes an application as foresaid, until such an application is made by the arbitral tribunal.

(4) Upon filing of the application for extension of time under sub-s. (3), suspension of the arbitral proceedings shall stand revoked and pending consideration of the application for extension of time before the court under that sub-section, the arbitral proceedings shall continue before the arbitral tribunal and the court shall not grant any stay of the arbitral proceedings.

(5) The Court shall, upon such application for extension of time being made under sub-s. (3), whether the time for making the award as aforesaid has expired or not and whether the award has been made or not, extend the time for making of the award beyond the period referred to in

sub-s. (1) and the period agreed to by the parties under sub-s. (2).

(6) The Court shall, while extending the time under sub-s. (5), pass such orders as to costs or as to the future procedure to be followed by the arbitral tribunal, after taking into account—

(a) the extent of work already done;

(b) the reasons for delay;

(c) the conduct of the parties or of any person representing the parties;

(d) the manner in which proceedings were conducted by the arbitral tribunal;

(e) the further work involved;

(f) the amount of money already spent by the parties towards fee and expenses of arbitration;

(g) any other relevant circumstances,

and the Court shall pass such orders from time to time with a view to speed up the arbitral process, till the award is passed:

Provided that any order as to future proceedings passed by the Court shall be subject to such rules as may be made by the High Court in this behalf for expediting the arbitral proceedings.

(7) The parties cannot by consent, extend the period beyond the period specified in sub-s. (1) and the maximum period referred to in sub-s. (2) and save as otherwise provided in the said sub-sections, any provision in an arbitration agreement whereby the arbitral tribunal may further extend the time for making the award, shall be void and of no effect.

(8) The first of the orders of extension under sub-s. (5) together with directions, if any, under sub-s. (6), shall be passed by the court, within a period of one month from the date of service on the opposite party."

15. The proposal for the insertion of Section 29-A in the Act by the LCI stemmed from a critical need to address the extensive delays and associated costs plaguing arbitral awards in India. LCI recognized the pressing need for time-bound processes to expedite arbitral proceedings comprehensively. Crucially, the proposed Section 29-A aimed to imbue the court with the authority to grant extensions strictly, imposing costs if necessary, and delineating future procedural steps for the tribunals to follow, thereby fostering efficiency and expediency. LCI's proposal was underpinned by the observation of delays ranging from five to fourteen years in arbitration proceedings, even without court intervention, emphasizing the adverse consequences of eliminating time-limits. Consequently, the proposed Section 29-A sought to strike a balance between expediting proceedings and ensuring fairness by allowing for extension under judicial oversight while preventing undue delays through stringent court scrutiny.

16. In the proposed Section 29-A by the 176th LCI Report, the High Court was granted the power to prescribe "future procedure" by making rules. Relevant paragraph from the said report has been extracted below:

"(27) Section 29-A : This section is proposed to be introduced fix time-limits for passing of the award and also for speeding up the arbitral process. No provision was made in the 1996 Act fixing time-limit for the passing of the award, on the ground that extension applications in the Court were not being disposed of early enough and that there were long delays. It is proposed to initially grant a period of one year, after commencement of the

arbitration and also to permit parties to agree for extension up to a maximum of another one year. Thereafter, if there is further delay, the proceedings will stand suspended until an application is made in the Court, either by the parties or if the parties do not do so, until an application for extension is filed by the arbitral tribunal. The moment an application, is filed the arbitration proceedings can restart. It is proposed to be provided that there will be no stay of the arbitration proceedings pending consideration of the application for extension of time and that, pending the application, the arbitral tribunal shall proceed with the arbitration proceedings. The Court shall extent the time for passing the award and shall fix the time schedule and further procedure, by taking into consideration the reasons for the delay, the conduct of the parties, the manner in which proceedings were conducted by the arbitral tribunal, the amount of money spent already towards fee and expenses, the extent of work that is already done and the extent of work that remains to be done. The Court will passed orders from time to time till the award is passed. This provision has become necessary in view of the peculiar conditions prevailing in India even after the 1996 Act. Sub-s. 8 of the proposed S. 29-A requires that the first order on the extension application shall be passed within one month from the date of service on the opposite party. ***The 'future procedure' can be prescribed by the High Court by making rules under S. 82. (para 2.21.6)*** *(Emphasis Added)*

17. Thereafter, based on the recommendations of the 176th Report by LCI, Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on December 22, 2003. Then, in July 2004, Government of India constituted a committee under the chairmanship of Dr. Justice B.P. Saraf to study the implication of the recommendations made by the 176th LCI Report. As far as Section 29A as proposed by the 176th LCI Report was concerned, Justice Saraf Committee recommended the deletion of the proposed Section 29A. Relevant paragraph from Justice Saraf Committee's Report has been extracted below:

"The Committee is, of the opinion that neither any time limit should be fixed as contemplated by the proposed section 29A nor should the court be required to supervise and monitor arbitrations with a view to expediting the completion thereof. None of these steps is conducive to the expeditious completion of the arbitral proceedings. Moreover, court control and supervision over arbitration is neither in the interest of growth of arbitration in India nor in tune with the best international practices in the field of arbitration. The Committee is of the opinion that with the proposed amendment the arbitral tribunal will become an organ of the court rather than a party-structured dispute resolution mechanism. The Committee, therefore, recommends the deletion of the proposed section 29A from the Amendment Bill."

18. After Justice Saraf Committee submitted its report, the Amendment Bill was referred to the Department Related Standing Committee on Personnel, Public Grievances, Law and Justice for examination. The Committee recommended that since many provisions of the proposed Amendment Bill were contentious and the Amendment Bill gave room for excessive court intervention, the Amendment Bill may be withdrawn. Given

the same, the Arbitration and Conciliation (Amendment) Bill, 2003 was withdrawn from the Rajya Sabha.

19. Nearly a decade after the 2003 Amendment Bill was withdrawn, the Arbitration and Conciliation (Amendment) Bill, 2015 was introduced in the Lok Sabha on December 3, 2015. While majority of the amendments proposed by the 2015 Amendment Bill were based on the 246th Report By LCI, the insertion of Section 29A as proposed by the 2015 Amendment Bill was on the basis of the 176th Report by LCI, since the 246th Report by LCI contained no recommendation for the insertion of Section 29A into the Act or any such section regulating the time limit for making an arbitral award.

20. The Section 29A as proposed by the 2015 Amendment Bill is extracted below:

"15. After section 29 of the principal Act, the following new sections shall be inserted, namely:—

"29A. (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

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

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

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period: Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

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

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

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and

endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

21. Section 29A as inserted by the Amendment Act of 2015 was recommended to be further amended by the "High Level Committee to Review The Institutionalisation of Arbitration Mechanism In India" constituted under the chairmanship of Justice B.N. Srikrishna. The Committee recommended the following amendments to Section 29A as it existed then:

"1. A new sub-section may be inserted in section 29A limiting the applicability of the section to domestic arbitrations only. International commercial arbitrations may be left outside the purview of the timelines provided in section 29A.

2. Section 29A(1) may be amended such that the time in section 29A(1) starts to run post completion of pleadings. Further, a time period of 6 months may be provided for submission of pleadings.

3. Section 29A(4) may be amended to provide that if an application under section 29A(5) is filed before a court, the mandate of the arbitral tribunal continues till the application is disposed.

4. Section 29A(9) may be amended to add that if the application is not disposed of within the period mentioned therein, it is deemed to be granted.

5. A new sub-section should be inserted in section 29A providing that where the court seeks to reduce the fees of the arbitrator(s), sufficient opportunity should be given to such arbitrator(s) to be heard."

22. Based on the aforesaid report, the Arbitration and Conciliation (Amendment) Bill, 2019 was introduced and the Section 29A of the Act as it exists today came into force.

23. To summarise, Section 29A of the Act which regulates the time limit for making arbitral awards, emerged from a series of legislative and consultative processes aimed at addressing the need for expeditious dispute resolution in India. The genesis of Section 29A of the Act can be traced back to the Act of 1940, which contained provisions specifying time limits for making arbitral awards. Under Section 3 of the Act of 1940, arbitrators were required to issue their awards within four months of commencing the reference, with the option for extensions which could solely be granted by the Courts contained under Section 28 of the Act of 1940.

However, when the Act originally came into force in 1996, it lacked a provision addressing time limits for making arbitratal awards, leading to delays in arbitration proceedings. Recognizing the need for substantial reforms to expedite the arbitration process, LCI proposed the introduction of Section 29A in its 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001. This proposed section mandated that arbitrators must issue awards within one year of commencing proceedings, with an option for parties to grant a further one-year extension. If the award remained outstanding beyond this period, parties could approach the court for resolution. The proposed Section 29A aimed to instil a more structured and time-bound approach to arbitration, facilitating efficiency and expediency in dispute resolution. It empowered the court to grant extensions strictly, imposing costs if necessary, and also granted the power to

the Courts to delineate future procedural steps for arbitral tribunals to follow. However, Justice Saraf Committee recommended the deletion of Section 29A, arguing against fixing time limits and excessive court intervention in arbitration proceedings. Subsequently, the Arbitration and Conciliation (Amendment) Bill, 2015, reintroduced Section 29A based on the LCI's recommendations, emphasizing the need for time-bound arbitration proceedings. The inserted section mandated that awards be made within twelve months of the tribunal entering upon the reference, with an option for parties to agree to a six-month extension. Failure to meet these deadlines would result in termination of the arbitrators' mandate unless the court granted an extension, with potential fee reductions for delays attributable to the tribunal. The High-Level Committee to Review The Institutionalisation of Arbitration Mechanism In India, chaired by Justice B.N. Srikrishna, recommended further amendments to Section 29A to refine its applicability and streamline procedural aspects. The resulting Arbitration and Conciliation (Amendment) Bill, 2019, incorporated these recommendations, leading to the enactment of the current Section 29A. In summary, Section 29A of the Act originated from efforts to expedite arbitration proceedings in India. It represents a balance between time-bound processes and fairness in dispute resolution, empowering courts to oversee extensions and streamline procedural aspects while preserving the autonomy of arbitrators.

SECTION 29-A: DEFINING THE "COURT"

24. The origin of the instant dispute revolves around the definition of the term "Court" occurring in Section 29A of the Act. I have extracted the Section 29A of the Act below:

*"[**29-A. Time limit for arbitral award.** — [(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:*

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.]

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

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

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

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

[Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.]

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the court.

(6) While extending the period referred to in sub-section (4), it shall be open to the court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

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

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

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

25. The word "Court" is defined in Section 2(1)(e) of the Act as follows:

2. Definitions.

(1) In this Part, unless the context otherwise requires,

(a) ...

(b) ...

(c) ...

(d) ...

(e) "Court" means—

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

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

26. Generally, while interpreting a particular term in a statute, Courts tend to defer to the meaning of that term provided in the definition clause. The definition clause is a crucial component of any statute or legislation. While it may appear to be a mere introductory section, the definition clause plays a pivotal role in providing clarity, precision, and consistency in the application and interpretation of the statute. Its importance cannot be overstated, as it significantly influences the understanding and implementation of the law by the Courts, legal professionals, and individuals or entities affected by the statute. While the

definition clause is a fundamental aspect of interpreting a statute, there are certain circumstances under which it may not be applied or given primacy in the interpretation process. One of these circumstances is contextual ambiguity. In some cases, the definition provided in the statute's definition clause may not fully address the ambiguity or uncertainty present in the statutory provision being interpreted. Courts may look beyond the definition clause and consider extrinsic sources such as legislative history, statutory purpose, and the context of the provision to ascertain the legislature's intent.

27. To my mind, the usage of term "unless the context otherwise requires" as it occurs in the begning of Section 2 that precedes all the definitions equires emphasis. The phrase "unless the context otherwise requires" often accompanies definition clauses, introducing an element of flexibility in the interpretation of defined terms. The including of "unless the context otherwise requires" in a definition clause acknowledges that while a specific definition may be provided, there are circumstances where the context of the statute may necessitate a different interpretation to achieve the legislative intent or purpose. This flexibility ensures that the defined term is not rigidly interpreted in isolation but is instead considered within the broader context of the statute. The phrase "unless the context otherwise requires" serves as a safeguard against interpreting a defined term in a manner that would lead to absurd or unreasonable results. In cases where strict adherence to the literal definition would produce outcomes contrary to the legislative intent or purpose, courts can invoke this phrase to adopt a more contextual interpretation that aligns with the overall objectives of the statute.

28. Legislative intent is a central consideration in statutory interpretation, aiming to discern the purpose or objective behind the enactment of a statute. The inclusion of "unless the context otherwise requires" acknowledges the primacy of legislative intent in interpretation. Courts must consider the broader context of the statute, including its purpose, objectives, and underlying policy considerations, to determine whether a deviation from the literal definition is warranted to give effect to legislative intent.

29. In **K. Balakrishna Rao v. Haji Abdulla Sait** reported in **(1980) 1 SCC 321**, the Supreme Court, stated that the definition clause in a statute does not necessarily apply in all possible contexts in which a word defined by the definition clause is used in a statute:

"17. It is appropriate to refer at this stage to the following passage occurring in Craies on Statute Law (Sixth Edn.) at p. 99:

"In Brett v. Brett [(1826) 2 Addams 210, 216] Sir John Nicholl, M.R. said as follows: 'The key to the opening of every law is the reason and spirit of the law; it is the animus imponentis, the intention of the law-maker expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connection with its whole context, meaning by this as well the title and preamble as the purview or enacting part of the statute'."

***

24. A definition clause does not necessarily in any statute apply in all possible contexts in which the word which is defined may be found therein. The opening clause of Section 2 of the principal Act itself suggests that any expression defined in that section should be given the meaning assigned to it therein unless the context otherwise requires. The two-fold reasoning of the Division Bench for holding that the building in question was not a 'buildine' is that on June 10, 1964 (i) there was no lease in force and hence it was not let, and (ii) that on that date the plaintiff had no intention to lease it and therefore it was not to be let. We are of the view that the words "any building . . . let . . .", also refer to a building which was the subject-matter of a lease which has been terminated by the issue of a notice under Section 106 of the Transfer of Property Act and which has continued to remain in occupation of the tenant. This view receives support from the definition of the expression "tenant" in Section 2(8) of the principal Act which includes a person continuing in possession after the termination of the tenancy in his favour. If the view adopted by the Division Bench is accepted then it would not be necessary for a landlord to issue a notice of vacancy under Section 3 of the principal Act when a building becomes vacant by the termination of a tenancy or by the eviction of the tenant when he wants to occupy it himself. In law he cannot do so. He would be entitled to occupy it himself when he is permitted to do so under Section 3(3) or any of the provisions of Section 3-A of the principal Act. This also illustrates that the view of the Division Bench is erroneous. We, therefore, hold that the building in question was a "building" within the meaning of that expression in Section 2(2) of the principal Act on the date on which Section 3 of the Amending Act became operative."

30. The importance of the phrase "unless the context otherwise requires" in a definition clause was propounded by the Supreme Court in the case of **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others reported in (1998) 8 SCC 1**:

"26. High Court has been defined in Section 2(h) as the "High Court having jurisdiction under Section 3" which, in its turn, provides that it shall be that High Court within the limits of whose appellate jurisdiction the office of the Trade Marks Registry referred to in each of the sub-clauses (a) to (e) is situate.

27. We have to consider the meaning of these definitions in the context of other relative provisions of the Act so as to find an answer to the question relating to the extent of jurisdiction of the Registrar and the High Court functioning as "Tribunal".

28. Now, the principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely "unless there is anything repugnant in the subject or context". Thus there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word had been used and that will be giving effect to the opening sentence in the definition section, namely "unless there is anything repugnant in the subject or context". In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such

words relating to such matter and interpret the meaning intended to be conveyed by the use of the words "under those circumstances". (see Vanguard Fire and General Insurance Co. Ltd. v. Fraser & Ross [AIR 1960 SC 971 : (1960) 3 SCR 857])"

31. Further reference on the importance of the interpreting a particular definition in the context in which it is used can be made to the judgment of the Supreme Court in **K.V. Muthu v. Angamuthu Ammal** reported in **(1997) 2 SCC 53:**

"10. Apparently, it appears that the definition is conclusive as the word "means" has been used to specify the members, namely, spouse, son, daughter, grandchild or dependant parent, who would constitute the family. Section 2 of the Act in which various terms have been defined, opens with the words "in this Act, unless the context otherwise requires" which indicates that the definitions, as for example, that of "family", which are indicated to be conclusive may not be treated to be conclusive if it was otherwise required by the context. This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature.

11. While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.

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

32. As far as occurrence of the term "unless the context otherwise required" in Section 2(1)(e) of the Act is concerned and its significance in interpreting the term "Court" as used in Section 29A of the Act, reference can be made to the judgment of the Kerala High Court in **Lots Shipping Company (supra)**, wherein the Kerala High Court laid emphasis on the rule of purposive interpretation and held that the term "Court" contained in Section 29A of the Act requires a contextual interpretation since interpreting the term in its literal meaning under Section 2(1)(e) of the Act would lead to a situation where identical powers are being exercised in a contrary manner, affecting the hierarchy of the courts. Relevant paragraphs have been reproduced below:

"9. Question to be decided is whether the term "court" contained in Section 29A(4) requires a contextual interpretation apart from the meaning contained in Section 2(1)(e)(i) of the Act. A contextual interpretation is clearly permissible in view of the rider contained in sub-section (1) of Section (2), "unless the context otherwise requires". As argued by the counsel on either side and as submitted by the learned Amicus Curiae, a contextual interpretation is required since the power conferred on the court under Section 29A, especially under sub-sections (4) and (5), are more akin to the powers conferred on

the Supreme Court and the High Court, as the case may be, under Sections 11(6), 14 & 15 of the Act, for appointment, termination of mandate and substitution of the arbitrator. It is pointed out that, the amendments introduced in the year 2015, with effect from 23.10.2015, has recognized the judgment of the Constitutional Bench of the apex court in SBP & Company v. M/s. Patel Engineering Company Ltd. and another [MANU/SC/1787/2005 : (2005) 8 SCC 618] and conferred the power of appointment on the Supreme Court or the High Court. The amendment has not in any manner enhanced the power of the principal civil court, which continues only with respect to matters provided under Sections 9 and 34 of the Act. It is significant to note that the orders passed by the principal civil court of original jurisdiction under Sections 9 and 34 are made appealable under Section 37 of the Act. So also, order if any passed refusing to refer the parties to arbitration under Section 8 of the Act, was also made appealable under Section 37(1)(a) of the Act. Section 29A was introduced to make it clear that, if the arbitration proceedings is not concluded within 18 months, even if the parties have consented for an extension, it cannot be continued unless a judicial sanction is obtained. The power to grant extension by the court is introduced under an integrated scheme which also allows the court to reduce the fees of the arbitrator or to impose cost on the parties and/or to substitute the arbitrator(s). The power of extension is to be exercised on satisfying "sufficient cause' being made out. In all respect, such power conferred under Section 29A for permitting extension with respect to the proceedings of arbitration, is clearly akin to the powers conferred under Sections 14 & 15 of the Act. The absence of any provision for an appeal with respect to the exercise of such power under Section 29A, in the nature as mentioned above, would indicate that the power under Section 29A is not to be exercised by the principal civil court of original jurisdiction. Otherwise, it will create anomalous situation of identical powers being exercised in a contrary manner, prejudicial to the hierarchy of the courts. In a case where appointment of an arbitrator is made under Section 11(6) of the Act by the High Court or the Supreme Court, as the case may be, it would be incongruous for the principal civil court of original jurisdiction to substitute such an arbitrator or to refuse extension of the time limit as provided under Section 29A, or to make a reduction in the fees of the Arbitrator. Therefore a purposive interpretation becomes more inevitable.

10. In Shailesh Dhairyawan(supra) it was observed that, "the principle of "purposive interpretation" or "purposive construction" is based on the understanding that the court is supposed to attach the meaning of the provisions which will serve the "purpose" behind such a provision. The basic approach should be to ascertain what is it designed to accomplish. In the interpretive process, the court is supposed to realise the goal that the legal text is designed to realise. The statutory interpretation of a provision is never static, but is always dynamic. Though the literal rule of interpretation, till some time ago, was treated as the "golden rule", it is now the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or may lead to absurdity. If it brings about an end, which is at variance with the purpose of statute, that cannot be countenanced.

11. Taking note of the principle enunciated herein above and on the basis

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

33. Reference can also be made to the judgment of the Gujarat High Court in **Nilesh Ramanbhai Patel (supra),** wherein the Gujarat High Court propounded that the term "Court" in Section 29A of the Act must be interpreted in a matter which does not conflict with Section 11 of the Act. Relevant paragraphs have been extracted below:

"11. Perusal of this Section would show that time limits have been introduced for completion of arbitral proceedings. Sub-section (1) of Sec. 29A provides that the award shall be made within a period of twelve months from the date the Arbitral Tribunal enters upon the reference. This expression "to have entered upon the reference" is also explained through the explanation below sub-sec. (1). Sub-section (2) is in the nature of incentive for completing the arbitral proceedings expeditiously. Sub-section (3) of Sec. 29A provides for extension of such period as specified in sub-sec. (1) by consent of the parties for a period not exceeding six months. Sub-section (4) of Sec. 29A provides that if the award is not made within the period specified in sub-sec. (1) or the extended period specified in sub-sec. (3), the arbitrator's mandate shall terminate, unless the Court has, either prior to or after expiry of the period, extended the period. Sub-section (5) of Sec. 29A provides that the extension under sub-sec. (4) would be granted on an application of any of the parties only for sufficient cause and on such terms and conditions as may be imposed by the Court. Sub-section (6) of Sec. 29A which is of considerable importance, provides that while extending the period referred under sub-sec. (4), it would be open for the Court to substitute one or all of the arbitrators and if such substitution is made, the arbitral proceedings shall continue from the stage already reached and on the basis of evidence or material already collected. As per sub-sec. (7), the re-constituted Tribunal shall be deemed to be in continuation of the previously appointed arbitral Tribunal. Under sub-sec. (8), the Court is given power to impose actual or exemplary cost on any of the parties. This Section makes detailed provisions providing time period for completion of arbitration, for extension of time, such time who can extend such time and under what circumstances and subject to what conditions the time may be extended. It also provides that if the award is not passed within the initial period or extended period, the mandate of the arbitrator would terminate. Section 29A of the Act is thus a complete Code by itself.

12. In case of State of West Bengal v. Associated Contractors, reported in MANU/SC/0793/2014 : 2015 (1) SCC 32, the Supreme Court interpreted the term

'Court' as defined under Sec. 2(1)(e) of the Act as to mean only the Principal Civil Court of original jurisdiction in a District or High Court having civil jurisdiction in the State. No other Court, including the Supreme Court, is contemplated under Sec. 2(1)(e) of the Act. In case of State of Jharkhand v. Hindustan Construction Company Ltd., reported in MANU/SC/1596/2017 : 2018 (2) SCC 602, this was further elaborated by a Constitutional Bench of the Supreme Court holding that the definition of term 'Court' contained in Sec. 2(1)(e) of the Act, was materially different from its predecessor Section contained in Sec. 2(c) of the Arbitration Act, 1940 and that Supreme Court cannot be considered to be a Court within the meaning of Sec. 2(1)(a) even if it retains seisin over the arbitral proceedings. The decision in case of Associated Contractor (supra) was affirmed.

13. Ordinarily, therefore, I would have accepted the contention of learned Advocate Shri Mehta that the term 'Court' defined in Sec. 2(1)(e) in the context of the power to extend the mandate of the arbitrator under sub-sec. (4) of Sec. 29A would be with the principal Civil Court. However, this plain application of the definition of term 'Court' to Sec. 29A of the Act poses certain challenges. In this context, one may recall that the definition clause of sub-sec. (1) of Sec. 2 begins with the expression "in this part, unless the context otherwise requires". Despite the definition of term 'Court' contained in Sec. 2(1)(e) as explained by the Supreme Court in above-noted judgments, if the context, otherwise requires that the said term should be understood differently, so much joint in the play by the statute is not taken away.

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

15. This provision thus make a few things clear. Firstly, the power to extend the mandate of an arbitrator under sub-sec. (4) of Sec. 29A beyond the period of twelve months or such further period it may have been extended in terms of sub-sec. (3) of Sec. 29A rests with the Court. Neither the arbitrator nor parties even by joint consent can extend such period. The

Court on the other hand has vast powers for extension of the period even after such period is over. While doing so, the Court could also choose to substitute one or all of the arbitrators and this is where the definition of term 'Court' contained in Sec. 2(1)(e) does not fit. It is inconceivable that the Legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by the High Court or Supreme Court. Even otherwise, it would be wholly impermissible since the powers for appointment of an arbitrator when the situation so arises, vest in the High Court or the Supreme Court as the case may be in terms of sub-secs. (4), (5) and (6) of Sec. 11 of the Act. If therefore, there is a case for extension of the term of an arbitrator who has been appointed by the High Court or Supreme Court and if the contention of Shri Mehta that such an application would lie only before the Principal Civil Court is upheld, powers under sub-sec. (6) of Sec. 29A would be non-operatable. In such a situation, sub-sec. (6) of Sec. 29A would be rendered otiose. The powers under sub-sec. (6) of Sec. 29A are of considerable significance. The powers for extending the mandate of an arbitrator are coupled with the power to substitute an arbitrator. These powers of substitution of an arbitrator are thus concomitant to the principal powers for granting an extension. If for valid reasons the Court finds that it is a fit case for extending the mandate of the arbitrator but that by itself may not be sufficient to bring about an early end to the arbitral proceedings, the Court may also consider substituting the existing arbitrator. It would be wholly incumbent to hold that under sub-sec. (6) of Sec. 29A the Legislature has vested powers in the Civil Court to make appointment of arbitrators by substituting an arbitrator or the whole panel of arbitrators appointed by the High Court under Sec. 11 of the Act. If we, therefore, accept this contention of Shri Mehta, it would lead to irreconcilable conflict between the power of the superior Courts to appoint arbitrators under Sec. 11 of the Act and those of the Civil Court to substitute such arbitrators under Sec. 29A(6). This conflict can be avoided only by understanding the term "Court" for the purpose of Sec. 29A as the Court which appointed the arbitrator in case of Court constituted Arbitral Tribunal.

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

17. I am conscious that the learned Single Judge of Kerala High Court in case of M.A.U.R.C. Construction (Private) Ltd. v. M/s. B.E.M.L. Ltd., reported in 2017 SCC OnLine Ker. 20520, has taken a different view. In context of sub-sec. (4) of Sec. 29A of the Act, the learned Judge has concluded that the power would vest only with the Civil Court. In this judgment, the complications which may arise if such a view is adopted in the context of the provisions of sub-sec. (6) of Sec. 29A have not been discussed. I am unable to pursue myself to adopt this view.

18. The rest of the decisions of the other High Courts cited before me do

not directly touch this issue. In those judgments the High Courts were concerned with the provisions of Secs. 14 and 15 of the Act pertaining to the challenge procedure in which context the question of appropriate Court was examined. Shri Abhisek Mehta however had also cited the judgment of Supreme Court in case of Lalitkumar V. Sanghavi (D) Through L.Rs. Neeta Lalit Kumar Sanghavi v. Dharamdas V. Sanghavi, reported in MANU/SC/0166/2014 : 2014 (7) SCC 255, in which again the question considered by the Supreme Court was that which Court can examine the question whether the mandate of the arbitrator stood legally terminated or not. In this context, reference was made to the definition of term 'Court' under Sec. 2(1)(e), and it was held that it would be the Court of civil jurisdiction alone which can entertain such a question. Again the situation in the present case is vastly different."

34. In **Tara Chand (supra),** the Delhi High Court held that the power to extend the mandate of the arbitrator under Section 29A of the Act would lie before the Court which has the power to appoint the arbitrator under Section 11 of the Act. Relevant paragraphs have been extracted below:

"22. Section 11(5) and (6) of the Act relate to appointment of Arbitrators by the High Court or the Supreme Court, as the case may be and details the procedure to do so, therein. In case of International Commercial Arbitration, the power of appointment is vested only with the Supreme Court while in other arbitrations, High Court has the power to make appointment in terms of sub-Sections (5) or (6) of the Act.

23. Section 29A came to be inserted in the Statute by the Amending Act 3 of 2016 with effect from 23.10.2015. The Section has been extracted above. Perusal of the Section indicates that it provides for timelines within which the Award has to be made, including the timeline up to which the Tribunal can extend the mandate with the consent of the parties. The power of the Court to extend the mandate has no timelines, as is clear from reading the relevant provision. One of the important provisions of this Section is the power of the Court to substitute one or all of the Arbitrators, while extending the mandate.

24. Sub-Section (1) of Section 29A provides a time limit of 12 months within which the Award shall be made. Prior to the Amendment of 2019, the starting point of the 12 months was the date when the Arbitral Tribunal entered upon reference, but post 2019 Amendment, the commencement date is when the pleadings before the Arbitral Tribunal are completed. Sub-Section (3) enables the Arbitral Tribunal to extend the period of 12 months by a further period of six months, with the consent of the parties. Sub-Section (4) of Section 29A provides that if the Award is not made within the statutory period of 12 months or the extended period under sub-Section (3), the mandate of the Arbitrator shall terminate, unless the Court, either prior thereto or after the expiry of the period, extends the mandate. The extension, of course, would be granted on an application by any of the parties, but only for sufficient cause and on such terms and conditions as may be imposed by the Court and this is so stipulated in sub-Section (5) of Section 29A.

25. Section 29A of the Act, incorporates an important provision by way of sub-Section (6) and which, in my opinion, is relevant for deciding the controversy in the present case. This provision confers on the Court a significant

power of substituting one or all of the Arbitrators, while extending the mandate under sub-Section (4), if the need arises and in case, such substitution is made by the Court, the Arbitral proceedings shall continue from the stage already reached and on the basis of evidence or material, already collected. Therefore, when it comes to the time limits for passing the Award or the extension of mandate, the Section is a complete Code in itself.

26. When one looks at the definition of the term 'Court' under Section 2(1)(e) of the Act, it is clear that in case of International Commercial Arbitration, the Court would mean the High Court, in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of the sui or the High Court having jurisdiction to hear appeals of Courts subordinate to that High Court. However, in cases of arbitration other than International Commercial Arbitration, Court would be the Principal Civil Court of original jurisdiction in a District and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide questions forming subject matter of the arbitration if the same had been the subject matter of the suit. This definition has been substituted by way of the Amendment Act 3 of 2016, which came into effect from 23.10.2015.

27. If the definition of the term 'Court' is looked into, no doubt the contention of the respondent seems plausible that the power to extend the mandate of the Arbitrator would lie with the Principal Civil Court. However, on a careful analysis, in my opinion, this interpretation would lead to complications and would perhaps be in the teeth of the powers of the Courts under Section 11 of the Act. Thus, the question that poses a challenge is, whether the term 'Court' can be interpreted differently in the context of Section 29A. In my view, sub-Section (1) of Section 2 of the Act itself gives that answer, as it begins with the expression "in this part, unless the context otherwise requires".

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

29. In case a petition under Section 29A of the Act is filed before the

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

30. Similarly, in case of International Commercial Arbitration, if one was to follow the definition of the term Court under Section 2(1)(e) and apply the same in a strict sense, then it would be the High Court exercising Original or Appellate jurisdiction which would have the power to extend the mandate and substitute the Arbitrator. In such a situation, the High Court would be substituting an Arbitrator appointed by the Supreme Court which would perhaps lead to the High Court over stepping its jurisdiction as the power to appoint the Arbitrator is exclusively in the domain of the Supreme Court. Thus, in the opinion of this Court, an application under Section 29A of the Act seeking extension of the mandate of the Arbitrator would lie only before the Court which has the power to appoint Arbitrator under Section 11 of the Act and not with the Civil Courts. The interpretation given by learned counsel for the respondent that for purposes of Section 29A, Court would mean the Principal Civil Court in case of domestic arbitration, would nullify the powers of the Superior Courts under Section 11 of the Act."

35. In **Cabra Instalciones Y Servicios (supra)**, the Bombay High Court came to a conclusion that in light of the fact that substantive powers have been conferred under Section 29A of the Act upon the Court, a High Court cannot hear an application under Section 29A of the Act, when original appointment of the arbitrator in a given case was done by the Supreme Court. Relevant paragraphs have been extracted below:

"6. A perusal of Section 29-A would show that it is a substantive and a comprehensive provision inter alia dealing with the time limits for making of an arbitral award and extension of such time limits. Sub-section (1) provides that the award "shall" be made by the arbitral tribunal within a period of twelve months from the date the arbitral tribunal enters upon the reference. As to what is the deemed date for the tribunal to have entered the reference is provided in the 'Explanation' to sub-section (1). Sub-section (2) provides that if an award is made within a period of six months, from the date the arbitral tribunal enters upon the reference, then the arbitral tribunal

shall be entitled to receive such amount of additional fees as the parties may agree. Sub-section (3) provides that the parties may by consent extend the period of twelve months specified in subsection (1) for making an award for a further period not exceeding six months. Sub-section (4) provides that when an award is not pronounced within the time specified in sub-section (1) which is within twelve months or the extended period i.e., six months specified in sub-section (3), the mandate of the arbitral tribunal would stand terminated, unless the Court has, either prior to or after the expiry of the period so specified, extended the period. As per the provisions of sub-section (5), extension of period referred to in sub-section (4) may be granted on an application of any of the parties and which may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court. Sub-section (6) is of significance which provides that while extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrators so appointed under Section 29A would be deemed to have received the said evidence and material. Sub-section (7) provides that in the event of an arbitrator(s) being appointed under Section 29A, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

7. On a plain reading of Section 29A alongwith its sub-sections, it can be seen that for seeking extension of the mandate of an arbitral tribunal, these are substantive powers which are conferred on the Court and more particularly in view of the clear provisions of sub-section (6) which provides that while extending the period referred to in sub-section (4), it would be open to the Court to substitute one or all the arbitrators, which is in fact a power to make appointment of a new/substitute arbitrator or any member of the arbitral tribunal. Thus certainly when the arbitration in question is an international commercial arbitration as defined under Section 2(1)(f) of the Act, the High Court exercising power under Section 29A, cannot make an appointment of a substitute arbitral tribunal or any member of the arbitral tribunal as prescribed under sub-section (6) of Section 29-A, as it would be the exclusive power and jurisdiction of the Supreme Court considering the provisions of Section 11(5) read with Section 11(9) as also Sections 14 and 15 of the Act. It also cannot be overlooked that in a given case there is likelihood of an opposition to an extension application and the opposing party may pray for appointment of a substitute arbitral tribunal, requiring the Court to exercise powers under sub-section (6) of Section 29-A. In such a situation while appointing a substitute arbitral tribunal, when the arbitration is an international commercial arbitration, Section 11(9) would certainly come into play, which confers exclusive jurisdiction on the Supreme Court to appoint an arbitral tribunal.

8. Thus, as in the present case once the arbitral tribunal was appointed by the Supreme Court exercising powers under Section 11(5) read with Section 11(9) of the Act, in my opinion, this Court lacks jurisdiction to pass any orders under Section 29-A of the Act, considering the statutory scheme of Section 29-A. It would only be the jurisdiction of the Supreme Court to pass orders on such application

under Section 29-A of the Act when the arbitration is an international commercial arbitration. The insistence on the part of the petitioner that considering the provisions of sub-section (4), the High Court would be the appropriate Court to extend the mandate of the arbitral tribunal under Section 29-A, would not be a correct reading of Section 29A as the provision is required to be read in its entirety and in conjunction with Section 11(9) of the Act."

36. In **Magnum Opus IT Consulting Private Limited v. Artcad Systems** reported in **MANU/MH/3337/2022**, the Bombay High Court expounded that when the High Court or the Supreme Court appoints the arbitrator, the term "Court" used in Section 29A of the Act would require a contextual interpretation given the rider provided in Section 2(1)(e) of the Act. Relevant paragraphs have been extracted below:

"23. It is pertinent to note that Section 2 begins with "unless the context otherwise requires". In Hindustan Construction Ltd. (supra) the Hon'ble Supreme Court while considering the contention that the term 'Court' can be assigned different meaning depending on the context, referred to a three Judge Bench decision in CST vs. United Medical Agency MANU/SC/0396/1980 : (1981) 1 SCC 51 wherein it was held that "It is a well-settled principle that when a word or phrase has been defined in the interpretation clause, prima facie that definition governs whenever that word or phrase is used in the body of the statute. But where the context makes the definition clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are, therefore, normally enacted subject to the usual qualification- "unless there is anything repugnant in the subject or context", or "unless the context otherwise requires", Even in the absence of the express qualification to that effect such a qualification is always supplied."

24. In a recent judgment in Pasl Wind Solutions Pvt. Ltd. Vs. Ge Power Conversion India, MANU/SC/0295/2021 a three Judge Bench of the Hon'ble Supreme Court has reiterated that "normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied... "

25. It is pertinent to note that Section 29-A authorizes the 'Court' not only to extend the mandate of the Arbitrator but also to substitute the Arbitrator. The meaning of the word 'Court' as defined in Section 2(1)(e) of the Arbitration and Conciliation Act is subject to the requirement of the context. Hence, when the High Court or the Supreme Court, as the case may be, appoints the Arbitrator in exercise of jurisdiction under Section 11, the term 'Court' would require contextual interpretation, which is permissible in view of the rider contained in Sub Section 1 of Section 2 of the Arbitration and Conciliation Act. Any other interpretation would create anomalous situation and irreconcilable conflict between the power of the superior court to appoint an Arbitrator and the power of the District Court to substitute such Arbitrator in exercise of powers under Section 29-A. Such conflict can be avoided only by purposive interpretation.

26. In the instant case, the District Court has substituted the arbitrator in exercise of powers under Section 29-A of

the Arbitration and Conciliation Act. It is not in dispute that the arbitration proceedings had commenced under section 18 of the MSMED Act. The Council had not concluded the Arbitration within a period of 90 days as stipulated under sub-section 5 of section 18 of MSMED Act or within the time limit under section 29-A of the Arbitration and Conciliation Act. In fact, there was absolutely no progress in the Arbitration for a period of over 03 years and inaction of the Arbitrator had rendered the Arbitral Scheme under section 18 nugatory. There being no provision under the MSMED Act to extend the mandate of the arbitrator or substitute the arbitrator, the only remedy available to the Respondent was to approach the Court under section 29-A of the Arbitration Act and accordingly, the Respondent filed an application under section 29-A before the District Court, Nashik.

27. It is not in dispute that the District Court, Nashik is the principle Civil Court of original jurisdiction in the district having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit. As noted above, in the instant case, the Arbitration proceedings had commenced under section 18 of the MSMED Act. The Arbitrator was neither appointed under section 11 of the Arbitration and Conciliation Act nor substituted by this Court, by order dated 17/11/2017. By this order, this Court had only revived the arbitration proceedings which were closed by the Council. Hence, in the context of the present matter, interpreting the word 'Court' to mean principal civil court of original jurisdiction does not lead to an anomalous situation and does not give rise to conflict of powers. On factual aspects the decisions in Cabra Instalaciones, Nilesh Patel and Tara Chand (supra) are distinguishable. Hence, there is no scope to depart from the normal rule of giving effect to the meaning of the term 'Court' as defined in the Act."

37. A Division Bench of the Patna High Court in **South Bihar Power Distribution Company Limited and Others v. Bhagalpur Electricity Distribution Company Private Limited and Others** reported in **MANU/BH/0467/2023** held that Section 2(e), Sections 11(4),11(5), and 11(6), and Sections 29A (4),(5),and (6) of the Act need to be read together and it is the Court which has the power to appoint the arbitrator before which an application for extension of time will lie. Relevant paragraphs have been extracted below:

"82. This definition of the word 'Court' is preceded by the term, 'in this Part, unless the context otherwise requires' which bears in ordinary sense in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction is a district, and includes the High Court in exercise of its ordinary original civil jurisdiction. But we are more concerned with the process of appointment of arbitrators and their substitution as it would be seen that the definition of Court under Section 2 (e) has no relevance with regard to appointment and substitution of arbitrator.

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85. Thus, Sub-section (4) of Section 11 provides that if a party fails to appoint an arbitrator within thirty days from the date of receipt of a request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by

the Supreme Court or as the case may be, the High Court or any person or institution designated by such court. In the case at hand, the Arbitral Tribunal was constituted on appointment of Arbitrators being made by the parties and thereafter the appointed Arbitrators nominated the Presiding Arbitrator. But the question arises whether the learned District Judge was correct in his approach in extending the time of learned Arbitral Tribunal? No doubt Section 29A (4) provides that extension of mandate of appointment of Arbitrator (s) by the court either prior or after the expiry of the period so specified.

86. Now, a piquant situation arises. If the power to appoint Arbitrator has been vested with High Court and Supreme Court under Section 11 (4) of the Act, legislature would never intended its substitution under Section 29 A (6) by the court of principal civil judge as it appears from the plain reading of Section 2(e)(i). But the meaning of Court for the purpose of Section 29A would be different from what it is under Section 34 and Section 37 of the Act.

87. In the present case, though the Arbitrator was appointed by the parties themselves, but in case of any dispute they would otherwise have been appointed by the High Court or the Supreme Court as the case may be and taking cue from this provision under Section 11 (4), 11 (5) and 11 (6) of the Act, we can say that if the Principal Civil Court cannot substitute the Arbitrators, by corollary, it cannot extend the period of Arbitrator(s) under Section 29A (4). Otherwise it would give rise to conflict between the power of the High Court as well as the Supreme Court to appoint Arbitrators under Section 11 of the Act and those of the principal civil courts to substitute them under Section 29 (A) (6). Moreover initially when SBPDCL failed to appoint Arbitrator, BEDCPL approached this Court by filing Request Case No.06 of 2016 and during pendency of the aforementioned case, SBPDCL appointed its Arbitrator.

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91. Thus, the cumulative reading of Section 2 (e), Section 11 (4) (5) (6) and Section 29 A (4) and (6) of the Act makes it crystal clear that the court which could grant extension of time could only be the court which has the power to appoint the Arbitrators and not the Principal Civil Court which is the court for other purpose under the Act. Otherwise, the conflict between the power of the superior courts to appoint Arbitrators under Section 11 of the Act and powers of the Principal Civil Court to substitute such Arbitrators under Section 29 A (6) of the Act could not be reconciled. So, we find and hold that the learned District Judge erred while granting the extension of time to the learned Arbitral Tribunal."

38. In **Amit Kumar Gupta (supra)**, the Calcutta High Court held that the meaning of word "Court" as defined in Section 2(1)(e) of the Act is subject to the requirement of context and it is in that context, the word "Court" used in Section 29A of the Act must be interpreted. Relevant paragraphs have been extracted below:

"16. Section 29A of the Act of 1996 has dealt with the time limit for arbitral award. Sub-section (1) of Section 29A has prescribed the time limit for arbitration other than international commercial arbitration. It has prescribed that endeavour should be made to dispose an international commercial arbitration within the time limit prescribed. Sub-section (2) of Section 29A has allowed the

arbitral tribunal to receive additional fees if the award is made within the time limit prescribed. Sub-section (3) of Section 29A of the Act of 1996 has allowed the parties to agree to extension for making the award. However, the period of extension has been prescribed not to exceed six months. Sub-section (4) of Section 29A has empowered the Court to extend the period to complete the arbitration reference. The first proviso to such sub-section has allowed the Court to reduce the fees of the arbitral tribunal, if the Court finds that the delay is attributable to the arbitral tribunal. Second proviso has provided that, the arbitral reference of the arbitrator shall continue till the disposal of an application under sub-section (5). The third proviso has required the Court to afford an opportunity of hearing to the arbitrator before the fees is reduced. Sub-section (5) of Section 29A has allowed the parties to make an application for extension of time to complete the reference. It has noted that, an extension to complete the reference can be granted when sufficient cause has been shown and on such terms and conditions as may be imposed by the Court. Sub-section (6) of Section 29A has allowed the Court to substitute one or all of the arbitrators. Sub-section (7) of Section 29A has stipulated that, in the event, the arbitrator or arbitrators are appointed under Section 29A then, the reconstituted arbitral tribunal shall be deemed to be in continuation of the previously appointed arbitral tribunal. Sub-section (8) of Section 29A has recognised the power of the Court to impose only actual or exemplary costs upon any of the parties. Sub-section (9) of Section 29A of the Act of 1996 has stipulated that an application under sub-section (5) of Section 29A should be disposed of by the Court as expeditiously as possible and endeavour should be made to dispose of the same within the period of 60 days from the date of service of notice on the opposite party.

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

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

the power of appointment under Section 11."

39. What emerges from the judgments of the Supreme Court as cited above is that the Supreme Court has consistently emphasized the importance of interpreting statutory definitions in the context in which they are used, rather than adhering strictly to their literal meaning. These judgments underscore the dynamic nature of statutory interpretation and highlight the significance of considering the broader context, purpose, and objectives of the statute. In **Whirlpool Corporation (supra)**, the Supreme Court elucidated on the significance of the phrase "unless the context otherwise requires" in a definition clause. The Supreme Court emphasized that all statutory definitions should be read subject to the qualification expressed in the definition clause, acknowledging that a defined term may have a different meaning in different sections of an Act depending upon the subject or context. This approach ensures that statutory interpretations remain responsive to the diverse contexts in which they operate, thereby facilitating a nuanced and contextual understanding of statutory provisions. Furthermore, in the Supreme Court's decision in **Angamuthu Ammal (supra)**, the Court further reinforced the principle that definitions in statutes, even if indicated to be conclusive, must be interpreted in light of the context and scheme of the statute. The Court emphasized that interpretations of definitions should not only be consistent with the context but should also aid in achieving the purpose intended by the legislature. Additionally, where a definition is preceded by the phrase "unless the context otherwise requires", the Court held that the definition should be applied and given effect to, but this rule may be departed from if there is something in the context to show that the definition could not be applied. The aforesaid judgments highlight the dynamic and purposive approach adopted by the Supreme Court in interpreting statutory definitions. They emphasize that statutory interpretation is not a mechanical exercise but requires a careful analysis of the context, purpose, and objectives of the statute. By considering the broader context in which statutory definitions are used, Courts can ensure that statutory interpretations align with legislative intent and serve the overarching goals of the statute. The Supreme Court has time and again reaffirmed the principle that statutory definitions should not be interpreted in isolation but should be analysed in conjunction with the surrounding provisions and the statute's overarching objectives. This approach ensures that statutory interpretations remain dynamic, responsive, and consistent with legislative intent, thereby promoting clarity, effectiveness, and fairness in the application of the law.

40. What can be inferred from the various High Court judgments as relied upon by the parties and cited above my me, is that while the definition of the term 'Court" under Section 2(1)(e) of the Act may initially suggest that the power to extend the mandate lies with the Principal Civil Court, the context of Section 29A of the Act necessitates a broader interpretation of this term. As can be seen, High Courts have held that the term 'Court" in the context of Section 29A of the Act should be understood to include the court that has the power to appoint the arbitrator under Section 11 of the Act. This interpretation avoids potential conflicts between the powers of different courts and ensures

coherence within the statutory framework. The power of the Court to substitute one or all of the arbitrators while extending the mandate under Section 29A(6) of the Act is a significant aspect of the provision. This power enables the Court to address situations where the existing arbitrator may not be able to effectively conclude the proceedings within the specified timeline. In cases where the original appointment of the arbitrator was made the Supreme Court or the High Court, the power to substitute arbitrators rests exclusively with the High Court or the Supreme Court, depending on the Court whichmade the appointment. This interpretation as arrived at by multiple High Courts and this Court, preserves the hierarchy of judicial authority and avoids a protentional conflict between the provisions contained under Section 29A of the Act and Section 11 of the Act.

41. This Court in **Lucknow Agencies Lko. v. U.P. Avas Vikas Parishad and Others** reported in **MANU/UP/0885/2019**, in a case where the appointment of the arbitrator was made by Housing Commissioner, concluded that since this Court does not exercise ordinary original civil jurisdiction, an application under Section 29A of the Act would lie before the Court within the meaning of Section 2(1)(e) of the Act:

"7. As this matter relates to an Arbitration other than International Commercial Arbitration it is Section 2(1) Clause (e)(i) as substituted by the Act No. 3 of 2016 which shall apply in this case.

8. On a bare perusal of the aforesaid definition of the term 'Court' it means that the Principal Civil Court of original jurisdiction in a District and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit but does not include any Civil Court of a great interfere to such principal Civil Court or any Court of small causes. On a bare reading of the said definition it is evident that the principal Civil Court of original jurisdiction in the District is the court of the District Judge.

9. As regards the Allahabad High Court is concerned, it does not have ordinary original civil jurisdiction to decide the questions forming the subject matter of the arbitration at hand as a subject matter of a suit. Even if the unamended definition of Court is taken into consideration it does not make much of a difference to the case at hand, as, even there the jurisdiction for extending the period under Sub-section 4 and 5 of Section 29-A would lie before the Principal Civil Court of original jurisdiction in a District or the High Court having ordinary original civil jurisdiction to try the subject matter of Arbitration in a Suit. The application under Section 11 of the Act, 1996 is maintained before the High Court in view of the specific term 'High Court' used therein, whereas, the term used in Sub-section 4 and 5 of Section 29-A is 'Court' and not the High Court.

10. As regards the reference to provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 is concerned, Section 4 of the said Act deals with constitution of Commercial Division of High Court and the very opening line of Subsection 1 says- 'in all High Courts, having ordinary civil jurisdiction'. Ordinary civil jurisdiction refers to ordinary original civil jurisdiction as is evident from Rule 7 and 10 of the Act, 2015. As already stated hereinabove, the

Allahabad High Court does not have ordinary civil jurisdiction to try commercial disputes, therefore, there is no question of any commercial dispute being initiated before the Commercial Division of the High Court by way of a suit based on valuation, as, the prerequisite implied by the use of the words- 'having ordinary civil jurisdiction' appearing in Sub-section 1 of Section 4 is not satisfied. This is also clear from a bare reading of Section 7 of the Act, 2015 which relates to jurisdiction of Commercial Divisions of High Court and the opening sentence of the said provision is-'all suits and applications relating to commercial disputes of a specified value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court. Furthermore, Section 10 of the Act, 2015 specifically deals with the topic of jurisdiction in respect of arbitration matters, which reads as under:-

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

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

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

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

11. On a bare reading of the aforesaid provision it is evident that if an Arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court. Now, this provision applies where the High Court exercises original civil jurisdiction to try suits involving commercial dispute as deferred in Section 2(1)(c) of the Act, 2015 as is evident from the use of the words 'filed on the original side of the High Court'. The Allahabad High court does not exercise original civil jurisdiction involving commercial disputes as defined in Section 2(1)(c) of the Act, 2015 as is evident from Rule 1 to 9 of Chapter VIII of the Allahabad High Court Rules, 1952. Moreover, Sub-section 3 of Section 10 of the Act, 2015 very categorically provides that if an arbitration is other than an

international commercial arbitration, all applications or appeals arising out of such arbitration under the Act, 1996 that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. Therefore, in the facts of the present case as the Allahabad High Court does not exercise original civil jurisdiction involving commercial disputes the application under Section 29-A of the Act, 1996 relating to a commercial dispute would lie before the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted and in an Arbitration relating to a non commercial dispute it would lie before the principal civil court of original jurisdiction i.e. the Court of District Judge as referred hereinabove. This is how the Act of 1996 and the Act, 2015 have to be read together to arrive at a harmonious understanding of the two Acts in matters of Arbitration."

42. However, in **Indian Farmers Fertilizers (supra)**, this Court took a divergent view on factual grounds since Section 29A(6) of the Act was not considered by this Court in **Lucknow Agencies (supra)**, and the arbitrator in **Lucknow Agencies (supra)**, was appointed by the Housing Commissioner and not the High Court. This Court concluded that when the High Court has appointed an arbitrator under Section 11 of the Act, it is only the High Court which can hear an application under Section 29A(4) and Section 29A(5) of the Act:

"29. From the reading of Section 2(1)(e) it is clear that in case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction or the High Court, which exercises its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration, shall be the court.

30. While, section 11 provides for power of appointment of arbitrators. Sub-section (2) provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. It is where the parties failed to arrive in the appointment of arbitrators that the power has been vested with the High Court with the appointment of arbitrators for domestic arbitration and the Supreme Court in the matters of international commercial arbitration. Sub-sections (4), (5) and (6) read together provide the manner in which these two superior courts step in, in the appointment of arbitrator.

31. Section 29-A is a substantive provision which was inserted w.e.f. 23.10.2015 for speedy disposal of cases relating to arbitration with the least Court intervention. The statement of objects and reasons to the amending Act No. 3 of 2016 provided that as India had been ranked as 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

32. Sub-section (1) of Section 29A provides for the period within which the arbitration proceedings are to be completed i.e. 12 months. Further sub-section (3) of Section 29A takes care that in case the award is not made as per sub-

section (1), by the consent of the parties, the period can be extended for further six months.

33. The Act puts a cap upon extension beyond period of eighteen months and sub-section (4) of Section 29A provides that in case the award is not made within the extended period, it is only the Court on the application of the parties may extend the period. Sub-section (6) of Section 29A is of great relevance as it provides the power to the Court to substitute one or all the arbitrators and the arbitral proceedings shall continue from the stage already reached and on the basis of evidence and material already on record.

34. Thus, the power to substitute the arbitrator as mandated in subsection (6) of Section 29A vest only with the Court. This provision cannot be read in isolation but with Section 11, which provides for appointment of arbitrator.

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

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

37. The Calcutta High Court in Amit Kumar Gupta (supra) had in categorical terms held that the power to substitute the arbitrator given in sub-section (6) of Section 29A has to be read with the power of appointment under Section 11. The same view has been reiterated by the Gujarat High Court in case of Nilesh Ramanbhai Patel (supra).

38. The Division Bench of Kerala High Court in case of M/s. Lots Shipping Company Limited (supra) had clearly held that the power to grant extension by Court is introduced under an integrated scheme which also allows the Court to reduce the fees of the arbitrators or to impose cost on a party and/or to substitute the arbitrators. The power of extension is to be exercised on satisfying the "sufficient cause" being made out. According to the Court, the powers conferred under Section 29A for permitting extension with respect to proceedings of arbitration, is clearly akin to the powers conferred under Section 14 and 15 of the Act.

39. The Court further recorded that the absence of any provision for an appeal with regard to the exercise of powers under Section 29A, would be indicative of the fact that power under Section 29A is not to be exercised by principal Civil Court of original jurisdiction.

40. The anxiety of respondent's counsel as to the Section 42 of the Act read with Section 2(1)(e) has no relevance in the scheme of the Act while dealing with Sections 11 and 29A of the Act, as Section 42 will get attracted only when the Courts are dealing matters other than that of appointment and removal of arbitrators. The section clearly provides that where any application in respect of an arbitration agreement is made to the Court, that Court alone has jurisdiction over the arbitral proceedings and all the subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

41. In case of Garhwal Mandal Vikas Nigam Ltd. (supra), the Apex Court while clarifying the position as to the challenge of an award made by an arbitrator appointed by the High Court or Supreme Court under Section 11 shall be made under Section 34 of the Act of 1996 before the principal Civil Court of original jurisdiction as contemplated under Section 2(1)(e) of the Act.

42. Thus the argument from the side opposite as to the award cannot be challenged before the principal Civil Judge made by the arbitrator appointed by this Court has been dealt in extenso by Hon'ble Apex Court in the judgment referred above.

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

44. Reliance placed on the various decisions by the respondent's counsel relate to the definition of the word "court" under Section 2(1) (e) prior to the amendment of year 2015. In none of the judgment placed before the Court Sections 11 and 29A of the Act has been taken into consideration.

45. As far as decision of coordinate Bench of this Court in case of M/s. Lucknow Agencies and Another (supra) is concerned, the arbitrator was appointed by the Housing Commissioner and not by the High Court exercising power under Section 11 of the Act. The Court while considering the provisions of Section 29A(4) and (5) held that it was the principal Civil Court where the application for extension of time for arbitral award was maintainable and not before the High Court. In the said judgment there was no consideration as to subsection (6) and (7) of Section 29A of the Act. The said decision is distinguishable on the facts of the present case.

46. In the present case this Court exercising power under Section 11 of the Act has appointed the arbitrator way back in the year 2014.

47. Thus, the question framed above stand answered holding that the application for extension of time for arbitral award moved under Section 29A is maintainable before this Court."

43. The counsel appearing on behalf of the opposite parties strongly emphasized that the term "Court" used in Section 29A of the Act must be interpreted in its literal sense, and the phrase "if the context otherwise requires" will not come into play here. However, literally interpreting the term "Court" in Section 29A as used in Section 2(1)(e) of the Act would lead to certain anomalous situations. Section 29A of the Act also gives the power to the Court hearing an application under the said section to substitute an arbitrator. The element of substitution involved in Section 29A, to my mind, qualifies the term "Court" used in the said section to be interpreted in a different manner than the one provided under Section 2(1)(e) of the Act if the original appointment of the arbitrator(s) was made under Section 11 of the Act for two reasons. Firstly, the power to substitute is akin to the power of appointment, which under Section 11 of the Act has been conferred upon the Supreme Court or the High Courts. Counsel for opposite parties impressed upon this Court that there is nothing holy about the appointment process under Section 11 of the Act, since by the Amendment of 2019 to the Act, power to appointment has now

been conferred upon arbitral institutions designated by the Supreme Court or the High Courts. To me, this argument does not hold much water since despite the said change, overall supervision and power to designate arbitral institutions remains with the Supreme Court or the High Courts. Furthermore, this Court cannot be influenced by the said amendment to Section 11 of the Act, since the same is yet to be notified. Coming to the second reason, it is inconceivable that power to appoint an arbitrator would lie with the Supreme Court or the High Courts under Section 11 of the Act but will also lie with the Civil Courts or Commercial Courts under Section 29A(6) of the Act. And given that the initial appointment of the arbitrator may have occurred under Section 11 of the Act, and under Section 29A(6), the Court is empowered to substitute an arbitrator, interpreting the term "Court" in the manner as prescribed under Section 2(1)(e) of the Act would lead to a conflict between Section 11 and Section 29A(6) of the Act. Provisions of a statute are to be read together, and not in isolation, to avoid such conflict. The contention put forth by the counsel for the opposite parties regarding the literal interpretation of the term "Court" suggests a strict adherence to the language of the statute without considering contextual factors. However, statutory interpretation is not merely a matter of linguistic analysis but also involves consideration of legislative intent, statutory purpose, and the broader legal framework within which the statute operates.

44. The term "Court" in Section 29A of the Act must be interpreted in a manner that does not conflict with Section 11 of the Act. This interpretation aligns with the principle that provisions of a statute should be read together and not in isolation to avoid conflicts. Section 29A of the Act provides for a comprehensive framework for the completion of arbitration proceedings within specific time limits, including provisions for extension of the mandate and substitution of arbitrators. Power to extend the mandate of an arbitrator under Section 29A of the Act includes the power to substitute arbitrator(s). A contextual interpretation is required while interpreting the term "Court" in Section 29A of the Act because the powers conferred on the Court under Section 29A of the Act, especially regarding the substitution of arbitrators, are akin to the powers conferred upon the Supreme Court and the High Courts under Section 11 of the Act. If literal interpretation is accorded to the term "Court" in Section 29A of the Act, it would lead to a situation where both the Courts under Section 2(1)(e) of the Act, and the Supreme Court and the High Courts, are exercising similar powers of appointment. This is contrary to the legislative intent and also goes against hierarchy of the courts. Literal Interpretation is to be followed unless it leads to absurdity and anomalies. Therefore, the principle of literal interpretation would not apply while interpreting the term "Court" under Section 29A of the Act. The judgments of the various High Courts discussed above highlight the importance of harmonizing the provisions of Section 29A of the Act with other sections of the Act and ensuring that the interpretation of the term "Court" aligns with the purpose and objectives of the Act.

45. The difficult situation which would arise in literally interpreting the term "Court" used in Section 29A of the Act, was recently highlighted by the High Court

of Bombay in the case of **K.I.P.L. Vistacore Infra Projects J.V. v. Municipal Corporation of the city of Ichalkarnji** reported in **MANU/MH/0513/2024**. Relevant paragraphs have been extracted below:

"13. The legislature, therefore, has consciously used the word 'Court' which is empowered to extend the mandate of the Arbitrator, if it has expired as it is that 'Court' which has appointed the Arbitrator and while extending the period, if the Court finds that the proceedings have been delayed for the reasons attributable to the Arbitral Tribunal, then it is even empowered to reduce fees of the Arbitrator(s), in the manner set out in the proviso.

The term 'Court' used in Sub-Section (4) as well as in the Scheme of Section 29A, would therefore, have to be construed as a 'Court' in reference to the context. It is highly inconceivable that an Arbitrator is appointed by the High Court or Supreme Court in case of International Commercial Arbitration and the Principal Civil Court of Original Jurisdiction in a district which is sub ordinate to the High Court, shall exercise the power under Sub-Section (4) or or that matter power under Sub-Section (6) of substituting Arbitrator while extending the period referred in Sub-Section 4.

Apart from this, Sub-Section (7) and (8) are also illustrative of the intention of the legislature that it never intended to strictly construe the term 'Court' as defined in Section 2(1) of the Act.

14. The provision contained in Form of Section 29A inserted by the Amendment Act No. 3 of 2016, which contemplated the timeline for conclusion of the arbitral proceedings with an intention to encourage arbitration as a speedy mode of resolution of disputes. Section 29-A is a scheme in itself which, in order to conclude the arbitration in an expedient manner provided for entitlement of the Tribunal to receive such amount of additional fees as the parties agree if the Award is within a period of six months after the Tribunal enters the reference. It provides a mechanism if the Award is not made within the period specified or the extended period of six months as upon the expiry of this period, the mandate of the Arbitrator shall terminate unless the Court extend the period.

The power to be exercised in extending the mandate of Tribunal is of great significance since neither the parties themselves by consent are empowered to extend the mandate but for the period of six months when it can by consent extend the period by six months, but for further extension, it is only the Court which can be approached and upon being satisfied that the mandate of the Tribunal deserve an extension on sufficient cause being shown upon such terms and conditions as the Court may impose, the mandate can be extended.

If the power under Section 29A is to be exercised by Principal Civil Court of the District, though it may be competent to extend the mandate, but when the question of substitution arises, an anomalous situation would result as an Arbitrator appointed by the High Court or Supreme Court shall stand substituted by the Principal Civil Court, as an appointment of the Arbitrator in any case under Section 11 is the prerogative of the High Court in case of Domestic Arbitration and the Supreme Court, in case of International Arbitration.

15. This situation would pose a difficulty as it would permit the Civil Courts to substitute and appoint Arbitrators, which were appointed by the

High Court under the guise of the power to be exercised under Section 29A of the Act by construing that the term' Court' would be assigned the strict meaning as per Section 2 of the Act.

A Consistent view to the effect that the above exercise would permit the Court subordinate to High Court or the Supreme Court, to substitute an Arbitrator, is reflected though various judicial pronouncements including the decision from Bombay High Court in case of Cabra Instalaciones Y. Servicios (supra) as well as Delhi High Court in case of Tara Chand Sumit Construction Co. (supra).

The Delhi High Court has gainfully referred to the decision in case of Cabra Instalaciones Y. Servicios and a decision of Gujarat High Court in case of Nilesh Ramanbhai Patel (supra) which again proceed on the same logic that the powers for extending the mandate of an Arbitrator under Section 29A are coupled with the power to substitute an Arbitrator and they are concomitant and, therefore, if for valid reasons the Court find that it is a fit case for extending the mandate of the Arbitrator that by itself may not be sufficient to bring about an early end to the Arbitration Proceedings and the Court may also consider substituting the Arbitrator in the existing arbitral proceedings, but if interpretation which was sought to be canvassed that under Sub-Section (6) of Section 29A, the powers are vested in Civil Court i.e. to substitute an Arbitrator or a full panel of Arbitrators appointed by the High Court under Section 11, it would lead to irreconcilable conflict between the powers of the superior Courts to appoint an Arbitrator under Section 11 and those of the Civil Courts to substitute such Arbitrators under Section 29- A(6).

Nilesh Ramanbhai Patel (supra), therefore clearly held that this conflict can be avoided only by interpreting the term 'Court' for the purpose of Section 29A as the Court which appointed the Arbitrator in case of the Court which constituted arbitral tribunal."

46. The counsel for the opposite parties harped on the fact that the usage of the words "Court" and omission of the word "High Court" or "Supreme Court" in Section 29A of the Act is a conscious choice and reflects the will of the legislature. I find myself unable to agree with the same. If the legislature intended every occurrence of the term "Court" in all the sections of the Act to mean the same, the phrase "unless the context otherwise requires" used in Section 2(1)(e) of the Act would be rendered meaningless, ineffective and otiose. The very usage of the said phrase in Section 2(1)(e) is reflective of the legislative intent that the interpretation of term "Court" is subject to the context in which it has been used. The inclusion of the phrase "unless the context otherwise requires" underscores the legislature's intent to allow for a flexible and context-sensitive interpretation of the terms within the Act. The argument regarding the deliberate legislative choice to use the term "Court" uniformly across all sections of the Act lacks sufficient consideration of the principle of contextual interpretation and the broader framework of statutory construction.

47. The counsel for the Respondent contended that by the Amendment Act of 2015 by which Section 29A of the Act was inserted, explanation to Section 47 of the Act was also amended, and the word 'High Court' was specifically added to the explanation. Therefore, counsel contended that the usage of the word "Court" in Section 29A and not 'High Court" or

"Supreme Court" is a conscious choice by the legislature. To me, this argument does not bear much weight for the simple reason that while the explanation to Section 47 of the Act was amended by the virtue of the recommendation made the 246th Report by the LIC, the insertion of Section 29A of the Act was not recommended by 246th LIC Report but instead the insertion of Section 29A in the Act can be traced back to the 176th Report by LIC, as has been discussed earlier. Furthermore, the recommendations in the 176th Report by LIC did not contain any provision for substitution. Accordingly, when the amendment actually took place with the inclusion of substitution in Section 29(6), the legislative obviously did not contemplate or deliberate upon the anamoly that may arise.

CONFLICTING DECISION OF THIS COURT AND REFERENCE TO A LARGER BENCH

48. In a departure from the view taken by this Court in **Indian Farmer Fertilizers** (supra), this Court in **A'Xykno Capital Services (supra)**, held the decision rendered in **Indian Farmer Fertilizers (supra)** to be per incuriam. In **A'Xykno Capital Services (supra)**, this Court had concluded that the term "Court" as envisaged under Section 29A of the Act read with Section 2(1)(e) of the Act does not include a High Court not having original civil jurisdiction as in the case of this Court and an application as such under Section 29A of the Act would be maintainable only in the Principal Civil Court of original jurisdiction in a district. This Court in the **A'Xykno Capital Services (supra)** further held that the power to substitute an arbitrator under Section 14 of the Act is not akin to the power to substitute under Section 29A of the Act. The Court in **A'Xykno Capital Services (supra)** made a reference to the judgment of the Supreme Court in **Nimet Resources (supra)**, wherein the Supreme Court held that it is only a High Court exercising original civil jurisdiction where an application under Section 14 of the Act would be maintainable.

49. However, I find myself unable to agree with the view taken in **A'Xykno Capital Services (supra)**. Firstly, when the judgment of the Supreme Court was rendered in **Nimet Resources (supra)**, Section 14 of the Act, as it existed then, contained no provision for substitution, wherein it does contain the provision for substitution now. In **Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal** reported in **MANU/SC/0588/2022,** the Supreme Court, while taking the amended Section 14 into consideration concluded that, while the termination of an arbitrator would lie before the Court as defined under Section 2(1)(e) of the Act, the parties after such termination, will have to follow the rules that were applicable to the initial appointment of the arbitrator. Relevant paragraphs from **Swadesh Kumar Agarwal (supra)** have been extracted below:

"6.5. Sections 14 and 15 provide for termination of the mandate of the arbitrator. Section 14 of the Act, 1996 provides that the mandate of the arbitrator shall terminate and he shall be substituted by another arbitrator in case of any eventuality mentioned in Section 14(1)(a). As per Sub-section (2) of Section 14, if a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1), a party may, apply to the "court" to decide on the termination of the mandate. The expression "court" is defined

Under Section 2(e) of the Act, 1996, which reads as under:

(e) "Court" means—

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

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

6.6. Section 15 provides other grounds for termination of the mandate of the arbitrator. It provides that in addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate (a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties.

Where the mandate of an arbitrator is terminated on the aforesaid grounds mentioned in Section 15(1)(a) and (b) in such a situation a substitute arbitrator shall have to be appointed and that too, according to the Rules that were applicable to the appointment of the arbitrator being replaced.

6.7. Therefore, on a conjoint reading of Section 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(a) of the Act, 1996 and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the concerned "court" as defined Under Section 2(e) of the Act, 1996. The concerned court has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the concerned court as provided Under Section 14(2) of the Act, 1996.

So far as the termination of the mandate of the arbitrator and/or termination of the proceedings mentioned in other provisions like in Section 15(1)(a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties, the dispute need not be raised before the concerned court. For example, where the sole arbitrator himself withdraws from office for any reason or when both the parties agree to terminate the mandate of the arbitrator and for substitution of the arbitrator, thereafter, there is no further controversy as either the sole arbitrator himself has withdrawn from office and/or the parties themselves have agreed to terminate the mandate of the

arbitrator and to substitute the arbitrator. Thus, there is no question of raising such a dispute before the court. Therefore, the legislation has deliberately provided that the dispute with respect to the termination of the mandate of the arbitrator Under Section 14(1)(a) alone will have to be raised before the "court". Hence, whenever there is a dispute and/or controversy that the mandate of the arbitrator is to be terminated on the grounds mentioned in Section 14(1)(a), such a controversy/dispute has to be raised before the concerned "court" only and after the decision by the concerned "court" as defined Under Section 2(e) of the Act, 1996 and ultimately it is held that the mandate of the arbitrator is terminated, thereafter, the arbitrator is to be substituted accordingly, that too, according to the Rules that were applicable to the initial appointment of the arbitrator. Therefore, normally and generally, the same procedure is required to be followed which was followed at the time of appointment of the sole arbitrator whose mandate is terminated and/or who is replaced."

50. The reasoning as adopted in **A'Xykno Capital Services (supra),** will lead to a situation wherein although not intended by the legislature, power of substitution under Section 29A(6) would be bestowed upon the Court as defined under Section 2(1)(e) of the Act even when the initial appointment of the arbitrator(s) may have been made under Section 11 of the Act by the High Courts or the Supreme Court. Each provision in the Act, is required to be interpreted in the context under which it has been used. Literal rule of interpretation is not the only rule of interpretation. Section 29A of the Act, as interpreted in **A'Xykno Capital Services (supra),** creates absurdity by putting two provisions of the Act, in direct conflict with each other. Section 29A of the Act, cannot be read in isolation with Sections 11 and 14 of the Act. The judgment in **A'Xykno Capital Services (supra)** further goes against the principle of judicial hierarchy.

51. In **A'Xykno Capital Services (supra),** this Court also held that the power to substitute an arbitrator under Section 29A of the Act is not akin to the power to appoint an arbitrator under Section 11(6) of the Act. This, in my view, is an erroneous reasoning. The usage of the term "appointed" in Section 29(7) of the Act indicates that substitution under Section 29(6) of the Act amounts to appointment:

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

52. Furthermore, the distinguishing of the judgment of **Lucknow Agencies (supra)**, in **Indian Fertilizers (supra),** was held as erroneous by this Court in **A'Xykno Capital Services (supra)**. To my view, this could not have been done. The judgments in **Lucknow Agencies (supra)** and **Indian Fertilizers (supra)** were delivered on different factual scenarios and therefore, the varying interpretation of Section 29A of the Act in the said judgments was not in conflict with each other. Where a High Court or the Supreme Court has not appointed the arbitrator, the Court within the meaning of Section 2(1)(e) of the Act can exercise the powers contained under Section 29A of the Act as the same would not lead to a conflict with the provisions contained under Section 11 of the Act and will also not go against the principal of judicial hierarchy. However, in

case, where the appointment of the arbitrator(s) has been made under Section 11 of the Act, it is only the Court which appointed the arbitrator(s) that can hear an application under Section 29A of the Act.

53. In **State of Punjab v. Devans Modern Breweries Ltd.** reported in **MANU/SC/0961/2003**, the Supreme Court propounded that given the principle of judicial discipline, a coordinate bench is bound to follow the decision of an earlier coordinate bench or refer the matter to a larger bench. Relevant paragraph has been extracted below:

"360. Judicial discipline envisages that a coordinate bench follow the decision of earlier coordinate bench. If a coordinate bench does not agree with the principles of law enunciated by another bench, the matter may be referred only to a larger bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, MANU/SC/0304/2002 : [2002]254ITR99(SC) ; followed in State of Tripura v. Roop Chand Das and Ors., But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

54. A Similar view was reiterated by the Supreme Court in **Central Board of Dawoodi Bohra Community and Others v. State of Maharashtra and Others** reported in **MANU/SC/1069/2004:**

"(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. ***It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.****" (Emphasis Added)*

55. In light of the same, I am of the view that the controversy involved in the interpretation of the term 'Court" in Section 29A of the Act is required to be placed before a Larger Bench in view of the conflicting decisions of this Court.

PRINCIPLES

56. Principles that emerge based on the foregoing discussion and a consideration of various judgments of the Supreme Court and the High Courts have been summarised below:

a. Definition clause is a central consideration while interpreting the meaning of a particular term in a Section and generally the Courts are expected to adhere to the meaning as provided in the definition clause. However, in cases, where adhering to the meaning as provided in the definition clause leads to some absurdity or contextual ambiguity, then the Courts while interpreting a particular word can depart from the rule of literal interpretation and look at extrinsic sources such as legislative

history, statutory purpose, and the context of the provision.

b. When the phrase "unless the context otherwise requires" precedes a definition clause, it acknowledges the varying circumstances that may arise while interpreting a particular statute, which may necessitate according a different meaning to a given term, than the one that has been provided in the definition clause. If a particular term has to be accorded the same meaning throughout the statute, even if it leads to repugnancy and absurdity, the usage of phrase "unless the context otherwise requires" would become otiose.

c. Literal rule of interpretation is not the only rule of interpretation and the rule of purposive interpretation also needs to be kept in mind, especially in cases, where literal interpretation may lead to absurd and unintended consequences, or where such interpretation would go against the very purpose of a particular statute.

d. Even though Section 29A uses the term "Court" the same must be read as "High Court" in the case of a domestic commercial arbitration, and as "Supreme Court" in the case of an international commercial arbitration, in cases where the initial appointment of the arbitrator(s) was made by the Supreme Court or the High Courts, as the case maybe. This is to avoid conflict within two different sections of the Act, namely, Section 11 of the Act, and Section 29A of the Act and preserve the principle of judicial hierarchy. Legislature never intended to bestow the power of appointment of the arbitrator(s) to the Civil Courts/Commercial Courts, and giving the Civil Courts/Commercial Courts, the power to substitute an arbitrator under Section 29A(6) of the Act when the original appointment was made by the Supreme Court or the High Court would amount to defeating the intent of the legislature.

e. The power to substitute an arbitrator(s) under Section 29A(6) of the Act is similar to the power to appoint an arbitrator(s) under Section 11 of the Act. Moreover, if a Civil Court/Commercial Court exercises the powers under Section 29A of the Act in a case where the High Court/Supreme Court appointed the arbitrator(s), the same would create an anomalous situation wherein a Supreme Court/High Court appointee is subject to the supervision of a lower court.

f. However, in cases, where the original appointment was not made by the Supreme Court/High Court, the Court within the meaning of Section 2(1)(e) of the Act, can exercise powers under Section 29A of the Act, including the power of substitution under Section 29A(6) of the Act. This would avoid conflict between different provisions of the Act and also give effect to Section 29A of the Act, both in letter and in spirit.

CONCLUSION AND DIRECTIONS

57. Since conflicting decisions by different Single Benches of this Court exist on a similar question of law, I am of the opinion that a Larger Bench needs to be constituted to settle the conflicting views adopted by different Single Benches of this Court on the following questions of law :

1. Whether in a case where the appointment of the arbitrator(s) has been made by the Supreme Court or the High Court, it is only the Supreme Court or the High Court, respectively, that can hear an application under Section 29A of the Act ?

2. Whether in a case where the appointment of the arbitrator(s) was made under the agreement contained between the parties (including statutory appointments

under MSMED Act, NHAI Act, etc.) and not by the High Court or Supreme Court, the Court as defined under Section 2(1)(e) of the Act can exercise the powers under Section 29A of the Act, including the power of substitution contained in Section 29A(6) of the Act ?

58. Accordingly, the Registry of this Court is directed to place this matter before the Hon'ble the Chief Justice for constitution of a larger bench as per the Allahabad High Court Rules.

59. This Court acknowledges the diligence and eloquence of counsel appearing for parties in ARBT 2 of 2022 and ARBT 5 of 2023 in rendering assistance to this Court on the Question of Law as was put forward by this Court during the course of arguments. I would also like to put on record my appreciation for the painstaking research and assistance in drafting by my legal intern Mr. Jaspreet Singh.

60. In light of the aforesaid discussion, ARBT 2 of 2022 and ARBT 5 of 2023 are adjourned sine die till the larger bench returns its decision on the questions of law.

61. Urgent photostat-certified copies of this order, if applied for, should be readily made available to the parties upon compliance with requisite formalities.

(2024) 3 ILRA 1173
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2024

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Crl. Misc. Bail Cancellation Application No. 48 of 2020

G.S. Raghav ...Applicant

Versus

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

Counsel for the Applicant:
Sri Rahul Chaudhary

Counsel for the Opp. Parties:
G.A., Sri Pratik Chandra

Criminal Law - Indian Penal Code, 1860 - Sections 420, 406, 409 & 120B - Applicant sought cancellation of bail granted to opposite party no.2 (Aditya Goel) on 30.09.2019 in Case Crime No. 1889 of 2018 for embezzlement of Rs.2,45,30,623 through a company, alleging violation of bail conditions. Court held: (1) Opposite party no.2 violated bail condition of attending and cooperating in trial by filing 14 personal exemption applications (from 30.01.2023 to 16.01.2024), allowed mechanically by trial court without reasoned orders, obstructing trial progress. (2) Trial court failed to enforce bail conditions, undermining justice by issuing template orders for exemptions. (3) Serious allegations of fund siphoning (Rs.1,30,00,000 to personal account) and involvement in multiple shell companies not adequately addressed by trial court. (4) Bail cancellation not ordered, but trial court directed to ensure accused presence, avoid routine exemptions, and expedite trial while strictly enforcing bail conditions (Dolat Ram Vs St. of Har., (1995) 1 SCC 349; Deepak Yadav Vs St. of U.P., 2022 SCC Online SC 672). Application disposed of with liberty to applicant to seek redressal before trial court, which must decide within 60 days. Judgment to be circulated to all District Judges and Judicial Training Institute. (Paras 11-20)

Application Disposed of.

Case Law Cited:

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

2. Deepak Yadav Vs St. of U.P., 2022 SCC Online SC 672 (Para 11)

3. St. of Guj. Vs Jaswantlal Nathhalal, (not directly relevant, cited by opposite party) (Para 6)

4. Aneeta Hada Vs Godfather Travels & Tours, (2012) 5 SCC 661 (not directly relevant, cited by opposite party) (Para 6)

5. Madhavrao Jiwajirao Scindia Vs Sambhajirao Chandrojirao, (1988) 1 SCC 692 (not directly relevant, cited by opposite party) (Para 6)

6. Dalip Kaur & Ors Vs Jagnar Singh, (2009) 14 SCC 696 (not directly relevant, cited by opposite party) (Para 6)

7. St. of U.P. Vs Amarmani Tripathi, (2005) 8 SCC 21 (not directly relevant, cited by opposite party) (Para 6)

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Rahul Chaudhary, learned counsel for the applicant/informant, learned A.G.A. for the State-respondent, and perused the records.

2. The instant application has been preferred by the applicant/informant- G.S. Raghav, seeking cancellation of bail of the accused/opposite party no.2- Aditya Goel, in Case Crime No.1889 of 2018, under sections 420, 406, 409 and 120B IPC, Police Station Kavi Nagar, District Ghaziabad, who was enlarged on bail by a co-ordinate Bench of this Court in Criminal Misc. Bail Application No.40534 of 2019, titled Aditya Goel v. State of U.P.

3. Succinctly, the prosecution case is that the accused/opposite party no.2 is associated with a company facing serious allegations of embezzling funds amounting to Rs.2,45,30,623/-. The gist of the accusation is that Earth Iconic Infrastructure Limited is a wholly owned subsidiary company of Earth Infrastructure Limited, where the father and other relatives of opposite party no.2 (the accused) serve as Directors and induced the petitioner/complainant to invest in their company with promises of substantial return in the phased manner. Additionally, the accused issued 41 post-dated cheques of Rs.75,21,059/- each, intended for monthly deposit and clearance. However, 13 out of these cheques were dishonoured. During the investigation, it was revealed that the accused company failed to fulfil its promise of construction and did not refund the invested amount to the innocent investors.

4. After completion of the investigation, the police filed a supplementary charge sheet against the opposite party no.2, i.e., the accused, on 21.6.2019 under sections 420, 406, 409, and 120B IPC. Following the arrest on 9.6.2019, the opposite party no.2 was released on bail by an order dated 30.9.2019 passed in Criminal Misc. Bail Application No.40534 of 2019 by a co-ordinate Bench of this Court. The relevant paragraph of the order is extracted herein below:

"1. The applicant will continue to attend and cooperate in the trial pending before the Court concerned on the date fixed after release.

2. He will not tamper with the witnesses.

3. He will not indulge in any illegal activities during the bail period.

It is further directed that the identity, status and residence proof of the sureties be verified by the authorities concerned before they are accepted.

In case of breach of any of the above conditions, the trial court will be at liberty to cancel the bail."

5. Aggrieved by the violation of the bail conditions, the informant/applicant has

preferred the instant petition for cancellation of the bail stating *inter-alia;* (i) the opposite party no.2 is a habitual offender and indulged in huge embezzlement of the public money received from the innocent investors/home buyers, (ii) Earth Iconic Infrastructure Limited, i.e. company's fund has been siphond of in M/s Jubilion Infracon Private Limited, M/s Murlidhar Infostock and Realtors Private Limited, M/s Groot Builders Private Limited, Sanwary Women Power Private Limited in which the opposite party no.2 is one of the Directors along with his mother and wife, (iii) Rs.1,30,00,000/- have been transferred to personal account of opposite party no.2 between 30.1.2016 to 1.11.2018, (reference is invited to Annexure No.5 to the instant application), (iv) the opposite party no.2 is a Director in numerous shell companies located at various parts of the country,(v) opposite party no.2 obtained bail by concealing material facts from the Court withholding that he is arrayed as accused in multiple FIRs of similar nature, (reference is invited to paragraph no.30 of the rejoinder affidavit), (vi) the opposite party no.2 was first appeared on 20.4.2023 before the trial court and thereafter on subsequent dates i.e. 30.1.2023, 21.2.2023, 13.3.2023, 30.6.2023, 17.7.2023, 4.8.2023, 17.8.2023, 25.8.2023, 13.9.2023, 6.10.2023, 20.10.2023, 5.12.2023, 19.12.2023 and 16.1.2024 filed applications for personal exemption, which were erroneously allowed by the trial court without appreciating the bail conditions on the basis of which the opposite party no.2 was enlarged on bail, (vii) the opposite party no.2 has violated the bail conditions on numerous occasions by successively avoiding appearance before the trial court, thereby the trial is not progressing because of the non - cooperation of the accused, (viii) in view of the conduct and breach of the bail conditions, the opposite party no.2, deserved to remain in jail so that trial could proceed and justice could be done to the innocent investors, (ix) the other co-accused persons, who were enlarged on bail by the court are also failing to comply with the bail terms by filing fictitious personal exemption applications and taking benefit of the erroneous orders passed by the trial court in this regard, (x) and if the trial does not proceed due to the non-cooperation of the accused persons, the entire essence of the criminal justice system would fail, causing irreparable loss to the functioning of trial courts.

6. On perusal of the various orders passed in the instant petition, it reveals that a notice of service was served upon the opposite party no.2, but no one turned up to represent his case before this Court, forcing this Court to issue bailable warrants to the sureties vide order dated 29.3.2023, thereafter, the sureties appeared and opposite party no.2 through his counsel sought time to file counter affidavit, and the same was filed on 13.7.2023 *inter-alia* stating that (i) opposite party no.2 was student in the year 2016 and is not named in the FIR, (ii) there is no forgery of documents, thereby, the investigating officer has dropped section 467/468/471 IPC during the investigation qua accused persons, (iii) the instant application has been filed to create pressure on the accused persons to return the money, (iv) the opposite party no.2 has never met the complainant nor signed the document in this regard, (v) the matter is ceased with the NCLT and the NCLT has been pleased to invoke moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 and suspended the Board of Directors of the company, and placed the management of

the company under the control of Resolution Professional, (vi) the complainant and the home buyers have an appropriate remedy under section 7 of the Insolvency and Bankruptcy Code, 2016, (vii) the Directors of the company have settled the matter qua some of the home buyers, and therefore, proceedings on their behalf have been quashed by the Court, (viii) the opposite party no.2 has relied upon *State of Gujarat v. Jaswantlal Nathhalal1; Aneeta Hada v. Godfather Travels & Tours2; Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao3, Dalip Kaur & ors v. Jagnar Singh4, State of U.P. v. Amarmani Tripathi5*, to fortify his submissions.

7. In the written submissions, the opposite party, no.2, reiterated the same arguments raised in the counter affidavit. These points are not addressed separately for the sake of brevity. However, the essence of the submissions is that the directors of the company cannot be held vicariously liable for the criminal acts committed by the company's agents or employees. Furthermore, proceedings under the Insolvency and Bankruptcy Code 2016 have been initiated against the accused company. Therefore, the criminal court is not vested with the authority to prosecute the opposite party no.2.

8. The core and sole issue to be determined before this Court is whether the opposite party no.2, i.e., the accused, has violated the terms and conditions of the bail order dated 30.9.2019, passed in Criminal Misc. Bail Application No.40534 of 2019, during the pendency of the trial, and not the issues raised and argued by the opposite party no.2. Essentially, bail was granted subject to three conditions: (i) the applicant will continue to attend and cooperate in the trial pending before the concerned Court on the date fixed after release, (ii) he will not tamper with the witnesses, and (iii) he will not engage in any illegal activity during the bail period. It was also made clear that in case of a breach of any of the above conditions, the trial court will be at liberty to cancel the bail.

9. The instant application has been pending before this Court since 18.1.2020, and despite various opportunities on numerous occasions, it could not be decided. Therefore, after hearing the counsel for the applicant and upon perusal of the material placed on record, including the counter affidavit and written submissions filed by the opposite party no.2, this Court has proceeded to decide the instant application.

10. Now, reverting to the contentions raised in the counter affidavit and written submissions filed by the accused/opposite party no.2, it is observed that the decisions cited by the accused/opposite party no.2 are not relevant to the facts, circumstances, and issues involved in this case. Therefore, there is no point in referencing those judgments, as none of the aforementioned citations address the parameters decided by the Supreme Court for the cancellation of bail in a series of judgments.

11. In ***Dolat Ram and others v. State of Haryana6***, the Supreme Court has laid down the grounds for cancellation of bail. The relevant portions of the judgment6 are underlined herein as follows (i) interference or attempt to interfere with the due course of administration of justice; (ii) evasion or attempt to evade the due course of justice; (iii) abuse of the concession granted to the accused in any manner; (iv) possibility of the accused absconding; (v) likelihood

of/actual misuse of bail; (vi) likelihood of the accused tampering with the evidence or threatening witnesses. The three-judge bench of the Supreme Court in Deepak Yadav v. State of Uttar Pradesh and Another case7 went a step beyond the Dolat Ram case (supra) and held that the cancellation of bail cannot be limited to the occurrence of supervening circumstances as the constitutional courts have inherent power and discretion to cancel the bail of an accused even in the absence of supervening circumstances and draw the following illustrative circumstances where the bail can be cancelled. The relevant paragraph is extracted hereinbelow:

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

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

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

33.4. Where bail has been granted on untenable grounds.

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

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

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

12. In view of the foregoing discussions, this Court has observed that the opposite party no.2 is facing serious allegation of embezzlement of funds, including siphoning of huge amounts into the companies controlled and operated by opposite party no.2, i.e. (i) M/s Jubilion Infracon Private Limited, (ii) M/s Murlidhar Infostock Realtors Private Limited, (iii) M/s Groot Builders Private Limited, (iv) Sanwary Women Power Private Limited in which the opposite party no.2 is one of the Director either along with his mother or wife or both, besides transfer of Rs.1,30,00,000/- to his personal account between 30.1.2016 to 1.11.2018 from the companies account; (v) the opposite party no.2/accused has filed personal exemption applications fourteen times, all of which were allowed by the trial court in a mechanical manner by passing template orders. No reasons are provided in any of the orders granting the personal exemption attached to the instant application.

13. The co-ordinate Bench of this Court, while enlarging the opposite party no.2 on bail had put the accused to unambiguous terms i*nter-alia;* (i) the applicant will continue to attend and cooperate in trial pending before the Court concerned on the date fixed after release, (ii) he will not tamper with the witnesses, (iii) he will not indulge in any illegal activity during the bail period, (iv) it was also made clear that in case of breach of

any above conditions, the trial court will be at liberty to cancel the bail.

14. Upon perusing the orders passed by the trial court, which are part of the supplementary affidavit dated 5.2.2020 filed by the applicant as Annexure No. SA-1, it is observed that the accused/opposite party no.2 has successively filed fourteen exemption applications. Regrettably, these applications were allowed by the trial court without assigning any reasons. This circumstance compelled the complainant/applicant to file the instant application. It demonstrates that the accused/opposite party no.2 deliberately and intentionally violated the bail terms to obstruct the trial court proceedings. Moreover, the trial court failed in its duty to exercise the discretion granted to it, including the authority to cancel bail in case of any breach of the conditions set forth in the impugned order dated 30.9.2019. The routine issuance of such template orders undermines the litigant's confidence in the judicial system and carries significant consequences for upholding the rule of law.

15. In consideration of the prayer made by the applicant and in furtherance of the pursuit of justice, it is hereby directed that the trial court shall (i) ensure the presence of all the accused at each and every hearing to expedite the trial court proceedings, (ii) refrain from routinely granting personal exemption to the accused through template orders, (iii) ensure the presence of opposite party no.2 including all the accused at every hearing unless justifiable and persuasive reasons for non-appearance are provided, which shall be duly recorded in the orders, (iv) pass the order on exemption application while considering the bail conditions imposed by the courts upon granting the bail to the accused, (v) the trail court shall scrupulously and invariably ensure the compliance of bail conditions imposed by the respective Courts in each accused's case, (vi) complete the trial expeditiously.

16. In numerous instances, it has been observed that once bail is granted, the accused fails to cooperate with the trial courts and continuously files successive exemption applications for personal appearances on fictitious grounds. The trial court routinely allows these applications through template orders without providing reasons for their approval. Such orders lack the subjective satisfaction of judges for their allowance, rendering them devoid of legal force and unsustainable in the eyes of the law. Although discretionary power, the granting of such orders should be exercised judiciously and not as a matter of routine. It observed that the trial court routinely issues template orders for personal exemption applications, which contravene the spirit of the bail orders. An example illustrating the nature of such orders is provided hereinafter."

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पत्रावली पेश हुई अभियुक्त .....हाजिर है, शेष की हाजिरी माफी प्रार्थनापत्र आज के लिए स्वीकृत.....

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17. In view of the foregoing discussion—particularly in the offences forming part of Chapters XVI, XVII, and XVIII of the Indian Penal Code, besides other offences of the Penal Code comprising offences in special statutes—it is mandatory for trial courts to comply with the terms of the bail order strictly, and the

conditions dictated in bail orders shall be followed by the trial courts unfailingly.

18. The disregard of the bail conditions specified in the bail orders by either party to the litigation or the trial courts is detrimental to the criminal justice system and requires scrutiny. Failure to adhere to the terms of the bail order shall be deemed deliberate and may amount to (i) interference or attempted interference with the due administration of justice; (ii) evasion or attempted evasion of the due process of justice, (iii) abuse of the concession granted to the accused in any manner; (iv) the possibility of the accused absconding; (v) the likelihood of or actual misuse of bail; (vi) the likelihood of the accused tampering with evidence or threatening, or otherwise influencing witnesses. Hence, it is imperative for trial courts to accord the utmost importance to personal exemption applications. Such applications should be adjudicated upon by taking into account the conditions outlined in the bail orders. Furthermore, the aforementioned proposition shall be duly considered and kept in mind while deciding the personal exemption application.

19. If the complainant or prosecution finds that the bail conditions are not being adhered to, they may file an appropriate application before the concerned court. The court should decide on such applications within a reasonable time, not exceeding 60 days from the date of filing, and proceed with the trial, utilizing the provisions outlined in Chapter VI of the Code of Criminal Procedure, as well as any other statutory provisions and relevant laws as may be deemed fit and proper by the court in the facts and circumstances of the case.

20. With the aforementioned observations, the instant application is **disposed of**, granting the applicant the liberty to seek redressal of their grievances from the court of Additional Chief Judicial Magistrate—III, Ghaziabad. The court is directed to adjudicate upon the applicant's application expeditiously in accordance with this order.

21. The Registrar (Compliance) of this Court shall disseminate a copy of this judgment to all District Judges for distribution among all Courts under their jurisdiction and, additionally, to the Director of the Judicial Training and Research Institute, Lucknow, to promote awareness and facilitate implementation through training programmers.

(2024) 3 ILRA 1179
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.03.2024

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Misc. Bail Application No. 2391 of 2024

Deepanshu Srivastava ...Applicant
Versus
Union of India ...Opp. Party

Counsel for the Applicant:
Shivanshu Goswami, Mukesh Kumar Tewari, Purnendu Chakravarty

Counsel for the Opp. Party:
Digvijay Nath Dubey, Dipak Seth

Criminal Law - Central Goods and Services Tax Act, 2017 – Sections 69, 70, 73, 74 & 132 – Code of Criminal Procedure, 1973 – Sections 41 & 41A –Economic Offences – Reasons to Believe – Arrest and Detention – Input Tax Credit Fraud

The applicant, Deepanshu Srivastava, sought bail in Case Crime No. 316 of 2024 under Section 132 of the CGST Act, 2017, for allegedly creating 271 shell companies to fraudulently avail and misappropriate input tax credit (ITC) worth Rs. 122.99 crores without supplying goods. Arrested on 02.02.2024, the applicant argued illegal detention, lack of tax assessment under Section 74, vague arrest memo, and no necessity for further custody as no custodial remand was sought. The Union of India opposed, citing the applicant's confession, recovery of incriminating documents, and the serious nature of economic offences. Held: The court, relying on Arnesh Kumar Vs St. of Bihar ((2014) 8 SCC 273), Satender Kumar Antil Vs CBI ((2021) 10 SCC 773), and P.VS Ramana Reddy Vs Union of India (MANU/TL/0064/2019), found that the arrest order lacked specific reasons beyond the offence's gravity, failing to justify continued detention under Section 69 CGST Act. The court noted that prosecution and tax assessment could proceed simultaneously, but the absence of custodial remand, completed investigation, and retracted St.ments supported bail. The applicant was granted bail with stringent conditions, considering the offence's maximum five-year punishment and the need to balance personal liberty with societal interests.

Case Law Cited:

1. Arnesh Kumar Vs St. of Bihar, (2014) 8 SCC 273

2. Satender Kumar Antil Vs CBI, (2021) 10 SCC 773

3. P.VS Ramana Reddy Vs Union of India, MANU/TL/0064/2019

4. The St. of Guj. Vs Choodamani Parmeshwaran Iyer, MANU/SC/0992/2023

5. Radheyshyam Kejriwal Vs St. of West Bengal, 2011 (266) E.L.T. 294 (SC)

6. Y.S. Jagan Mohan Reddy Vs CBI, (2013) 7 SCC 439

7. Nimmagadda Prasad Vs CBI, (2013) 7 SCC 466

8. Devchand Kalyan Tandel Vs St. of Guj., (1996) 6 SCC 255

9. The St. of Jharkhand Vs Dhananjay Gupta, Criminal Appeal No. Nil of 2023 (SC, 07.11.2023)

10. Bijender Vs St. of Har., Criminal Appeal No. Nil of 2024 (SC, 06.03.2024)

11. Ashish Kakkar Vs Union of India, Writ Tax No. 834 of 2023 (All. HC, 13.07.2023)

12. Paras Jain @ Rohan Jain Vs Union of India (All. HC, 29.07.2022)

13. Ravindra Nath Sharma @ Ravubder Sharma Vs Union of India, Criminal Misc. Bail Application No. 26376 of 2023 (All. HC, 10.07.2023)

14. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791

15. Sanjay Chandra Vs CBI, (2012) 1 SCC 40

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Shri Satish Chandra Mishra, learned Senior Counsel assisted by Shri Purnendu Chakravarty and Shri Mukesh Kumar Tewari, learned counsels for the applicant and Shri Dipak Seth, learned counsel appearing on behalf of Union of India and perused the record.

2. This bail application has been moved by the accused-applicant-**Deepanshu Srivastava** for grant of bail in Case Crime No. 316 of 2024, under Section 132 of Central Goods and Services Tax Act, 2017, Police Station DGGI, Lucknow Zonal Unit, District Lucknow, during trial.

3. Learned Senior Counsel appearing for the accused-applicant while pressing the bail application submits that the applicant has been falsely implicated in

this case and without any sufficient reasons and basis and without assessing any tax liability the applicant has been arrested and detained in prison since 02.02.2024.

4. While drawing the attention of this Court on Sections 69, 73, 74 and 79 as well as Section 62 of the Central Goods and Services Tax Act, it is vehemently submitted that at first the department is required to assess the tax liability to be paid by an assesse and it is only thereafter any proceeding under Section 69 of the Central Goods and Services Tax Act with regard to the arrest of the accused person or assesse may be undertaken. It is vehemently submitted that till date no tax liability is shown to have been assessed by the department and without there being any sufficient or cogent reasons he has been placed behind the bars.

5. While drawing the attention of this Court towards the arrest-memo, a copy of which has been placed at Page No.23 of the paper book, it is vehemently submitted that no grounds have been shown in this arrest-memo which may justify the arrest of the applicant and a vague language has been used in the arrest memo in order to show that the provisions of the Central Goods and Services Tax Act, 2017 have been violated without specifying the alleged act or omission of the applicant.

6. It is also submitted that the applicant was detained in illegal custody for three days from 30.01.2024 till 02.02.2024 by the department and thereafter he has been challaned.

7. It is further submitted that no notice has either been given under Section 74 of the G.S.T. Act and when the applicant was presented before the remand court, the offences were shown as bailable but subsequently without there being any basis many other companies have been shown to be associated with the applicant as shell companies with which the applicant is not having any connection or concern.

8. While drawing the attention of this Court towards the *'panchnama/recovery-memo'*, with regard to Shalimar Mannat, Barabanki, it is stated that the recovery, as shown by the department from this house is not having any significance in the eye of law as the same has not been made in presence of the applicant and no signature of applicant has been obtained on this recovery-memo and, thus, the same is barred by Section 100 of the Cr.P.C.

9. It is also submitted that no incriminating article has been recovered from the premises of applicant and statement of some persons are shown to have been recorded by the department under duress with regard to the formation of some shell companies by the applicant in order to evade tax liability.

10. It is vehemently submitted that applicant is languishing in jail in this case since 02.02.2024 and while producing the applicant before the Magistrate after his illegal arrest, the department has requested for judicial remand and no custody remand was requested, which primafacie reflect that further detention of the applicant is not required by the investigating agency and despite the investigation is complete, the complaint is not being filed deliberately to deny the facility of bail to the applicant. The alleged offences against the applicant are punishable with maximum imprisonment of five years and as the investigation has almost completed, the detention of the applicant is not required anymore.

11. It is further submitted that the applicant has cooperated in the investigation and has appeared before the investigating officer as and when his presence was required. However, at the very first occasion available to him, he has retracted his statement shown to have been recorded before the investigating officer. Applicant undertakes that he will cooperate with the investigation as well as with the trial.

12. Learned Senior Counsel has relied on the law laid down by the Division Bench of this Court of date 13.07.2023 passed in ***Writ Tax No. 834 of 2023 (Ashish Kakkar vs. Union of India and another),*** a single Judge judgment of this Court dated 29.07.2022 passed in ***'Paras Jain @ Rohan Jain vs. Union of India',*** a single Judge judgment of this Court of date 10.07.2023 passed in ***Criminal Misc. Bail Application No. 26376 of 2023 (Ravindra Nath Sharma @ Ravubder Sharma vs. Union of India).***

13. Shri Dipak Seth, learned counsel appearing on behalf of Union of India vehemently opposes the prayer of bail of the applicant on the ground that the submission, which has been raised before this Court with regard to the fact that in absence of any tax liability, the criminal prosecution is not permissible, is not an argument which may have the support of the law as in all tax matters prosecution and adjudication are connected with each other and may go on simultaneously. In this regard reliance has been placed on the law laid down by the Hon'ble Supreme Court in ***'Radheyshyam Kejriwal vs. State of West Bengal, 2011 (266) E.L.T. 294 (S.C.).***

14. It is next submitted that the instant is not a case of under payment of tax liability or evasion of tax but it is a case of fraud where without supplying any goods the input tax has been received and misappropriated.

15. Shri Dipak Seth has drawn the attention of this Court towards the statement of the applicant recorded under Section 70 of the Goods and Services Tax Act in order to show that the applicant has admitted his involvement in the crime.

16. The attention of this Court has also drawn by Shri Dipak Seth on the statement of the applicant recorded on 26.02.2024 while he was confined in prison in order to show that the applicant is not at all cooperating with the investigation.

17. It is further submitted that on 30.01.2024 and 31.01.2024 statement of many persons have been recorded, which reveals that applicant has opened various shell companies in order to receive input tax illegally and none of these persons whose statements have been recorded has retracted his statement.

18. While drawing the attention of this Court towards the C.A.-5 (Page No.116) of the counter affidavit/objections filed by the Union of India, it is submitted that the reasons for arrest have been recorded by the authority concerned before causing the arrest of the applicant.

19. The attention of this Court has also been drawn towards the statement of Shubham Singh, extract of which, has been placed at Page No.71 of the paper book, in order to show that the applicant has opened many bogus firms and companies in order to claim input tax illegally. The statement of Gaurav Tripathi placed at Page No. 119 of the objections is also highlighted in

order to show that the Flat No. B-2 situated at Shalimar Mannat, Barabanki was taken on rent by Shri Gaurav Tripathi on the instigation of the applicant.

20. While drawing the attention of this Court towards the law laid down by the Hon'ble Supreme Court in ***Y.S. Jagan Mohan Reddy vs. Central Bureau of Investigation (2013) 7 SCC 439, Nimmagadda Prasad vs. C.B.I. (2013) 7 SCC 466*** and ***Devchand Kalyan Tandel vs. State of Gujarat and another (1996) 6 SCC 255,*** it is submitted that economic offences are of a class of their own and they have to be taken up at a different pedestal as they are causing irreparable injury to the economic health of the country and are required to be dealt with iron hands. In this regard, the law laid down by the Hon'ble Supreme Court vide order dated 07.11.2023 passed in ***Criminal Appeal No. Nil of 2023, arising out of S.L.P. (Crl.) No. 10810 of 2023, 'The State of Jharkhand vs. Dhananjay Gupta @ Dhananjay Prasad Gupta'*** has been highlighted, wherein it is opined that at any rate mere claim of innocence or undertaking to participate in the trial or absence of specific allegation cannot be assigned as reasons for grant of bail in case of offences of serious nature. It is requested that having regard to the magnitude of the crime wherein the State has been inflicted loss of crores of rupees of input tax, the applicant is not entitled to be released on bail.

21. In rebuttal, learned Senior Counsel appearing for the applicant has drawn the attention of this Court towards Section 69 of the Central Goods and Services Act and submits that custody remand of the applicant has not been sought at the time of remand of accused by the department and also that the cooperation in the investigation doesn't mean that applicant should confess his guilt as proposed by the department and it should be taken as enough cooperation if the applicant had appeared before the investigating officer in response to the summons issued to him and the applicant in this case has remained present before the investigating officer as and when he was summoned and ultimately arrested illegally. It is again reiterated that the offences is punishable with upto 05 years' of imprisonment and keeping in view the fact that still no assessment of tax has been calculated and no formal complaint or F.I.R. has been lodged, applicant is entitled for bail.

22. Having heard learned counsel for the parties and having perused the record, the case of the prosecution, as is emerging from the record is to the tune that the Director General of G.S.T. Intelligence, Lucknow Zonal Unit is investigating a case of fraudulent availment and passing of input tax credit of G.S.T, by preparing fake invoices without any actual supply of goods by several firms created, managed and run by the applicant and it is found that the applicant has created a number of bogus firms for the purpose of issuing fake invoices to facilitate their clients in availing and utilizing fake input tax credit and allegations are to the tune that applicant is the master mind of the entire racket and input tax credit of high magnitude has been obtained without supplying of any goods.

23. The counter affidavit filed by the Department would further reveal that initially the input tax credit illegally taken by applicant was found to be of Rs. 90 crores and the number of fake firms were about 53 as on 17.02.2024 and on further

investigation till 29.02.2024 the number of fake firms created, managed and run by the applicant has reached 271 and the investigation is still going on. The allegations are that without paying a single penny to the government as tax huge amount of input tax credit has been availed. It is also alleged that 09 places belonging to the applicant were searched on 30.01.2024 and consequent to these searches huge number of incriminating documents and electronic devices showing creation of fake firms were found from the premises including the residence of the applicant and his offices.

24. It is further alleged that 18 Laptops, 14 Pen drives, 24 SIM Cards, 44 mobile phones, 74 credit/debit cards, six hard disk drives, 251 stamps of various fake firms, 26 cheque books of various fake firms and more than 500 files, record books of fake firms, bilty books and other fake documents have also been found. The statement of the applicant was recorded under Section 70 of the CGST Act on 30.01.2024, 01.02.2024 and 02.02.2024, wherein he alleged to have confessed his guilt and by creating false/shell companies and without paying any tax, input tax credit to the magnitude of Rs. 14.87 crores is confessed to have been earned and utilized. It is also alleged that during the course of investigation, the statement of one Mohit Singh and Shubham Singh, proprietors of shell firms were recorded, wherein they admitted that these shell firms were established and managed by the applicant. During physical verification, 14 major suppliers and 06 transporters were also found to be non-existent and various *Dharmkanta's* also accepted that the weighing slips found during preliminary investigation were not issued by them. It is stated in para no.9 of the counter affidavit that till now the amount of fraud found by the investigation has reached Rs. 122.99 crores.

25. Learned Senior counsel appearing for applicant vehemently submits that without adopting the procedure, as provided under Section 74 of the CGST Act, no further proceedings including the arrest of the applicant may be undertaken and also that the alleged offences are punishable with upto 05 years of imprisonment.

Reliance has also been placed on the law laid down by the Hon'ble Supreme Court in ***Satender Kumar Antil Vs. Central Bureau of Investigation and others*** *: (2021) 10 SCC 773*, while learned counsel appearing for the Department has placed reliance on the law laid down by the Hon'ble Supreme Court in ***Radheyshyam Kejriwal (supra)*** in order to show that the proceedings of prosecution and adjudication may go on simultaneously, it is vehemently submitted by learned counsel appearing for Union of India that it is not a case of paying less tax or any discrepancy in the payment of tax rather it is a case where without supplying any goods the input tax credit has been illegally taken and misappropriated.

26. Learned Senior counsel appearing for the applicant has drawn the attention of this Court towards the memo of arrest of the applicant in order to show that no ground of arrest has been mentioned therein while learned counsel appearing for the Department has drawn the attention of this Court towards C.A.-5 (Page No.116) of their counter affidavit in order to show that the reasons for arrest has been recorded by the appropriate authority and the law provides only of recording of reasons and

not of communicating the same. It is also highlighted on behalf of Department that applicant is not cooperating in the investigation and when he was interrogated in jail, he did not cooperate in the investigation and has not given replies.

27. Learned Senior counsel appearing for applicant on the other hand while relying on the law laid down by the Division Bench of this Court of date 13.07.2023 passed in ***Writ Tax No. 834 of 2023 (Ashish Kakkar vs. Union of India and another), 'Paras Jain @ Rohan Jain vs. Union of India'*** and in ***Ravindra Nath Sharma @ Ravubder Sharma (supra),*** submits that the law leans in favour of bail and when the offence is punishable with upto five years' of imprisonment, the further detention of the applicant would be a futile exercise.

28. Learned counsel appearing for Union of India, however, relied on ***Y.S. Jagan Mohan Reddy (supra)*** and ***Nimmagadda Prasad (supra)*** in order to show that the economic offences are of a class of their own and, therefore, are to be dealt with differently and applicant is not entitled for bail.

29. Perusal of the provisions contained under Section 73 and 74 of the CGST Act would reveal that a mechanism has been provided therein with regard to the determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilfull mis-statement or suppression of facts. Section 74 of the CGST Act provides for assessment of tax by the proper officer by issuing a notice to the assesee, however, sub-section 11 of Section 74 of the CGST Act would suggest that if the tax, which has been calculated along with the interest payable or the penalty is deposited, all proceedings in respect of the said notice shall be deemed to be concluded. However, perusal of explanation one attached with Sub-section 11 of Section 74 of the 'Act' would reveal that the expression 'all proceedings' in respect of the said notice emerging under Sub-section 11 shall not include proceedings under Section 132 of the 'Act'. Thus, it may be inferred that even if all the tax liability including penalty, etc. has been deposited, it would be only the 'notice' which would be discharged and the proceedings with regard to Section 132 of the CGST Act shall remain alive. Thus, there seems force in the submissions made by learned counsel for the Department that the process of prosecution and assessment may go on simultaneously.

30. In ***P.V. Ramana Reddy and Ors. vs. Union of India and Ors., MANU/TL/0064/2019,*** which has also been approved by the Hon'ble Supreme Court **vide order dated 27.05.2019 passed in Special Leave Petition (Crl.) No. 4430 of 2019** and also in ***The State of Gujarat Vs. Choodamani Parmeshwaran Iyer and Ors., MANU/SC/0992/2023,*** a Division Bench of Telangana High Court repelled the similar contention raised by an accused in following words;-

"50. The contention of the petitioners is that the CGST Act, 2017 prescribes a procedure for assessment even in cases where the information furnished in the returns is found to have discrepancies and that unless a summary assessment or special audit is conducted determining the liability, no offence can be made out under the Act. Therefore, it is their contention that even a prosecution cannot be launched without an assessment and that therefore, there is no question of any arrest.

51. It is true that CGST Act, 2017 provides for (i) self assessment, under Section 59, (ii) provisional assessment, under Section 60, (iii) scrutiny of returns, under Section 61, (iv) assessment of persons who do not file returns, under Section 62, (v) assessment of unregistered persons, under Section 63, (vi) summary assessment in special cases, under Section 64 and (vii) audit under Sections 65 and 66.

52. But, to say that a prosecution can be launched only after the completion of the assessment, goes contrary to Section 132 of the CGST Act, 2017. The list of offences included in sub-Section (1) of Section 132 of CGST Act, 2017 have no co-relation to assessment. Issue of invoices or bills without supply of goods and the availing of ITC by using such invoices or bills, are made offences under clauses (b) and (c) of sub-Section (1) of Section 132 of the CGST Act. The prosecutions for these offences do not depend upon the completion of assessment. Therefore, the argument that there cannot be an arrest even before adjudication or assessment, does not appeal to us."

Thus, there appears no substance in the submissions raised by learned senior counsel appearing for the applicant that before proceeding under 74 of the Act the applicant should not have been arrested or prosecuted.

31. Chapter XIV of the CGST Act deals with inspection, search, seizure and arrest. It comprises of sections 67 to 72. Section 70 deals with power to summon persons to give evidence and produce documents. As per sub-section (1), the proper officer under the CGST Act shall have the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any enquiry in the same manner as provided in the case of a civil court under the provisions of the Civil Procedure Code, 1908. Thus what sub-section (1) of section 70 provides is the conferment of power on the proper officer to summon any person whose attendance he considers necessary to either tender evidence or to produce documents etc. in any enquiry. Exercise of such a power is akin to power exercised by a civil court under the Civil Procedure Code, 1908. Sub-section (2) clarifies that every enquiry in which summons is issued for tendering evidence or for production of documents is to be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, 1860.

The power to arrest has been provided in section 69 of the Act. As per sub-section (1), where the Commissioner has reasons to believe that the person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132, which is punishable under clause (i) or (ii) of sub-section (1) or sub-section (2) of the said section, he may by order authorize any officer of central tax to arrest such person. Therefore, what sub-section (1) provides is that Commissioner may by order authorize any officer of the department to arrest a person if he has reasons to believe that the said person has committed any offence under clauses (a) or (b) or (c) or (d) of sub-section (1) of section 132. The expression 'reasons to believe' as appearing in subsection (1) of section 69 is of crucial importance because the same is the sine qua non for exercise of power to arrest by the Commissioner. It is also to be highlighted that under sub-section (3) of section 69, arrest under sub-section (1) has been made subject to the provisions of

Cr.P.C., which would include section 41 and 41-A thereof.

Chapter XIX of the CGST Act deals with offences and penalties. Section 132 is part of Chapter XIX. It provides for punishment for committing certain offences. As per sub-section (1), whoever commits any of the twelve offences mentioned therein shall be punished in the manner provided in clauses (i) to (iv) of sub-section (1). In the instant case, we are concerned with offences under clauses (b) and (c) of sub-section (1). As per clause (c), the offence is availing input tax credit using invoice or bill without the supply of goods or services or both in violation of the CGST Act; and as per clause (b), a person who issues any invoice or bill without supply of goods or services or both in violation of the provisions of the CGST Act or the rules made thereunder leading to wrongful availment or utilization of input tax credit or refund of tax. If a person commits the above two offences as per clauses (c) and (b), he shall be punishable under clause (i) if the amount of tax evaded or the amount of input tax credit wrongly availed of or utilized or the amount of refund wrongly taken exceeds five hundred lakh rupees with imprisonment for a term which may extend to five years and with fine. All other penalties are below five years. Therefore, the maximum penalty that can be imposed for committing offences under clauses (c) and (b) of sub-section (1) of section 132 is imprisonment for a term which may extend to five years and with fine.As per sub-section (5), the offences specified in clause (a) or (b) or (c) or (d) of sub-section (1) are punishable under clause (i) of that section are cognizable and non-bailable.

32. Reverting to the facts of the present case, it appears to be not disputed that summons were issued to the petitioner under section 70 of the CGST Act and responding to the summons, applicant had appeared before the investigating officer where after his statements were recorded on 31.01.2024,01.02.2024 and on 02.02.2024. I have perused the statements of the applicant which have been produced with the counter affidavit filed by Union Of India. It may also be noticed that on 02.02.2024 the applicant was arrested and produced before the Magistrate on 03.02.2024 and no custody remand was requested by union of India and the applicant was remanded to judicial custody for 14 days. It is admitted in para no. 17 of the counter affidavit filed by the respondent that the custody remand of the applicant was not sought as the same was not required. It is also evident that thereafter permission was taken by the department for further interrogation of the applicant in jail on 23.02.2024 and the applicant was further interrogated in jail on 26.02.2024. It is not evident as to why the applicant was not interrogated prior to 26.02.2024 when his statements have already been recorded on three days when he had appeared before the department and when according to the department he was not cooperating why his custody remand was not sought. This primafacie suggests that perhaps the department was not requiring the further interrogation of the applicant as his statements have already been recorded. It is alleged by the department that On 26.02.2024 applicant has not cooperated and when his statement was recorded in Jail he stated that he will not tender his statement without consulting his counsel.

33. Recently, Hon'ble Supreme Court in order dated March 06, 2024 passed in ***Bijender Vs State Of Haryana passed in Criminal Appeal No. Nil OF 2024***,

(Arising from SLP(Crl.)No(s). 1079/2024), while considering the plea of prosecution pertaining to the non cooperation of accused applicant who was granted Anticipatory Bail subject to the condition of cooperation in the investigation, has opined as under :-

"The learned counsel for the State opposed his plea for pre-arrest bail by filing a counter affidavit. In our order passed on 05.02.2024 giving the appellant interim protection, it was directed that the said protection was subject to the appellant's cooperation with the investigating agency. It is not in dispute that the appellant has joined the investigation but the main reason for opposing the prayer of the appellant for pre-arrest bail has been disclosed in paragraph 13 of the counter affidavit, which we quote below:-

"13. That the petitioner/accused had though joined investigation on dated 10.02.2024, as per order passed by this Hon'ble Court but the petitioner did not cooperate with the police nor got recovered the amount of bribe received by him nor disclosed the other facts of this case properly. Therefore, the custodial interrogation of petitioner/accused is required in the present case for thorough investigation."

34. We cannot treat the behavior attributed to the appellant to be instances of non-cooperation justifying dismissal of his appeal for pre-arrest bail. An accused, while joining investigation as a condition for remaining enlarged on bail, is not expected to make self-incriminating statements under the threat that the State shall seek withdrawal of such interim protection."

35. Thus the cooperation in the investigation may not be taken that accused applicant while under interrogation must make statements in favour of the department or make statements which are self incriminatory.

36. In order to canvass the necessity of the further detention of the applicant in prison the Department has relied on the statements of the applicant in order to show that there is clear admission on the part of the applicant to the wrong doing and thus committing offences under section 132(1)(c) and (b) of the CGST Act and, therefore, his arrest has been justified. Though section 25 of the Indian Evidence Act, 1872 is not attracted to recording of statements by revenue officers under the CGST Act, nonetheless at this stage section 136 of the CGST Act may be recalled which , in the considered opinion of this Court may have a bearing on this aspect. Section 136 of the CGST Act says that a statement made and signed by a person on appearance in response to any summons issued under section 70 of the CGST Act shall be relevant for the purpose of proving in any prosecution, an offence under the CGST Act, the truth of the facts which it contains when a person who made the statement is examined as a witness in the case before the court and the court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Section 136 of the CGST Act will only come into play at the time where the trial commences and thus the admission made by a person before the revenue officials under the CGST Act would not be per se admissible in evidence unless it receives the approval of the Court.

37. Section 69 of the CGST Act provides that the Commissioner may authorize arrest of a person only if he has reasons to believe that such a person has committed any offence under the clauses mentioned therein. The expression 'reasons to believe' is an expression of considerable import and in the context of the CGST Act, confers jurisdiction upon the Commissioner to authorize any officer to arrest a person, thus the expression 'reasons to belief' postulates belief and the existence of reasons for that belief. The belief must be held in good faith and it cannot be merely a assumption and the same must be based on reasons. It contemplates existence of reasons on which the belief is founded and such belief must not be based on mere suspicion rather the same must be founded upon information and sound reasons. Such reasons to believe can be formed on the basis of material/evidence but not on mere suspicion or rumour. It is open for a court to examine whether the reasons for the formation of such belief have a rational connection with the arrest. There must be a direct connection or nexus or live link between the material coming to the notice of the officer and the formation of his belief.

35. In this regard the law laid down by the Supreme Court in ***Arnesh Kumar Vs. State of Bihar, MANU/SC/0559/2014 : (2014) 8 SCC 273,*** is also important where the Supreme Court having referred to section 41 Cr.P.C. held that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, with or without fine, cannot be arrested by a police officer only on his satisfaction that such person has committed the offence punishable as aforesaid. A police officer before arrest in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence or for proper investigation of the case or to prevent the accused from causing the evidence of the offence to disappear or tampering with such evidence in any manner or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or to the police officer or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. In this context, Supreme Court also referred to section 41-A Cr.P.C. particularly sub-section (3) thereof which says that where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless for reasons to be recorded, the police officer is of the opinion that he ought to be arrested. Supreme Court emphasized that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.P.C. for effecting arrest be discouraged and discontinued.Relevant portion of the judgment of the Supreme Court in ***Arnesh Kumar (supra)*** is extracted hereunder:-

"5. Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.P.C. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in

exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive."

39. Honble Supreme Court in ***The State of Gujarat Vs. Choodamani Parmeshwaran Iyer and Ors., MANU/SC/0992/2023*** observed as under:-

"18. In the aforesaid context, we may refer to a Division Bench decision of the High Court of Telangana which ultimately came to be affirmed by this Court in the ***Special Leave Petition (Crl.) No. 4430 of 2019 order dated 27.05.2019.*** *We are referring to a decision in the case of* ***P.V. Ramana Reddy v. Union of India Writ Petition Nos. 4764 of 2019 and allied petitions decided on 18th April, 2019.*** *There are few important observations made by the High Court and we are in complete agreement with the said observations. The observations of the High Court fell in the context of certain incongruities noticed in Section 69(1) and Section 132 reply of the CGST Act, 2017. We quote the relevant observations hereunder:*

39. It is important to note that Under Sub-section (4) of Section 132 of the CGST Act, 2017, all offences under the Act except those under Clauses (a) to (d) of Section 132(1), are made non-cognizable and bailable, not-withstanding anything contained in Code of Criminal Procedure In addition, Section 67(10) of the CGST Act, 2017 makes the provisions of Code of Criminal Procedure relating to search and seizure, apply to searches and seizures under this Act, subject to the modification that the word "Commissioner" shall substitute the word "Magistrate" appearing in Section 165(5) of Code of Criminal Procedure, in its application to CGST Act, 2017.

40. Therefore, (1) in the light of the fact that Section 69(1) of the CGST Act, 2017 authorizes the arrest only of persons who are believed to have committed cognizable and non-bailable offences, but Section 69(3) of the CGST Act, 2017 deals with the grant of bail and the procedure for grant of bail even to persons who are arrested in connection with non-cognizable and bailable offences and (2) in the light of the fact that the Commissioner of GST is conferred with the powers of search and seizure Under Section 67(10) of the CGST Act, 2017, in the same manner as provided in Section 165 of the Code of Criminal Procedure, 1973, the contention of the Additional Solicitor General that the Petitioners cannot take umbrage Under Sections 41 and 41A of Code of Criminal Procedure may not be correct.

41. Though for the purpose of summoning of witnesses and for summoning the production of documents, the Proper Officer holding the enquiry under the CGST Act, 2017 is treated like a Civil Court, there are four other places in the Act, where a reference is made, directly or indirectly, to the Code of Criminal Procedure They are (1) the reference to Code of Criminal Procedure in relation to search and seizure Under Section 67(10) of CGST Act, 2017, (2) the reference to Code of Criminal Procedure Under Sub-section (3) of Section 69 in relation to the grant of bail for a person arrested in connection to a non-cognizable and bailable offence, (3) the reference to Code of Criminal

Procedure in Section 132(4) while making all offences under the CGST Act, 2017 except those specified in Clauses (a) to (d) of Section 132(1) of CGST Act, 2017 as non-cognizable and bailable and (4) the reference to Sections 193 and 228 of Indian Penal Code in Section 70(2) of the CGST Act, 2017. Therefore, the contention of learned Additional Solicitor General that in view of Section 69(3) of the CGST Act, 2017, the Petitioners cannot fall back upon the limited protection against arrest, found in Sections 41 and 41A of Code of Criminal Procedure, may not be correct. As pointed out earlier, Section 41-A was inserted in Code of Criminal Procedure by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008. Under Sub-section (3) of Section 41A Code of Criminal Procedure, a person who complies with a notice for appearance and who continues to comply with the notice for appearance before the Summoning Officer, shall not be arrested. In fact, the duty imposed upon a Police Officer Under Section 41A(1) Code of Criminal Procedure, to summon a person for enquiry in relation to a cognizable offence, is what is substantially ingrained in Section 70(1) of the CGST Act. Though Section 69(1) which confers powers upon the Commissioner to order the arrest of a person does not contain the safeguards that are incorporated in Section 41 and 41A of Code of Criminal Procedure, we think Section 70(1) of the CGST Act takes care of the contingency.

42. In any case, the moment the Commissioner has reasons to believe that a person has committed a cognizable and non-bailable offence warranting his arrest, then we think that the safeguards before arresting a person, as provided in Sections 41 and 41A of Code of Criminal Procedure, may have to be kept in mind.

43. But, it may be remembered that Section 41A(3) of Code of Criminal Procedure, does not provide an absolute irrevocable guarantee against arrest. Despite the compliance with the notices of appearance, a Police Officer himself is entitled Under Section 41A(3) Code of Criminal Procedure, for reasons to be recorded, arrest a person. At this stage, we may notice the difference in language between Section 41A(3) of Code of Criminal Procedure and 69(1) of CGST Act, 2017. Under Section 41A(3) of Code of Criminal Procedure, "reasons are to be recorded", once the Police Officer is of the opinion that the persons concerned ought to be arrested. In contrast, Section 69(1) uses the phrase "reasons to believe". There is a vast difference between "reasons to be recorded" and "reasons to believe."

40. The department in its Counter Affidavit has enclosed the copy of the order of arrest passed by the Principal Additional Director General authorizing the intelligence officer to arrest the applicant the reasons recorded by the Principal Additional Director General while authorizing arrest of the applicant are placed as CA5 to the Counter Affidavit. Perusal of this order will reveal that what has weighed with the Principal Additional Director General is only and only the gravity of the offence as it has been stated that applicant is the master mind of the racket and is required to be arrested immediately. Thus the arrest of the applicant has not been done for his non cooperation in the investigation or for further investigation. Nowhere it is stated that the applicant while at liberty may hinder the smooth progress of investigation and in this order it has also not been mentioned as to why the applicant is being arrested, which was required to be stated.

41. At this stage the following observations of Hon'ble Supreme Court in **Arnesh Kumar (supra)** are also required to be recalled:-

"6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Cr.P.C.), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest.

* * * * *

7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

* * * * *

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are a ddressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 of Cr.P.C."

42. Thus the requirement under sub-section (1) of section 69 of CGST Act is reasons to believe that not only a person has committed any offence as specified but also as to why such person needs to be arrested. From a perusal of the reasons recorded by the Principal Additional Director General, it is reflected that no incident has been mentioned therein recording any act of the applicant or his conduct of threatening any witnessor even of not co-operating with the investigation or of fleeing from investigation. It is true that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail, because such offences pose serious threat to the financial health of the country, but there has to be a sound reason or belief for curtailing the liberty of a person, specially in the offences punishable with up to seven years of imprisonment.

43. In the case of ***Satender Kumar Antil versus Central Bureau of Investigation, MANU/SC/0851/2022***, the Hon'ble Supreme Court opined as under:-

"66. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in the case of ***P. Chidambaram v. Directorate of Enforcement, MANU/SC/1670/2019 : (2020) 13 SCC 791****, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:-*

Precedents

• P. Chidambaram v. Directorate of Enforcement, MANU/SC/1670/2019 : (2020) 13 SCC 791:

23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic

offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.

• ***Sanjay Chandra v. CBI, MANU/SC/1375/2011 : (2012) 1 SCC 40:***

"39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

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46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

44. Thus, keeping in view the fact that applicant has appeared before the department on 30, 31 January 2024 and on 01st February and his statements have been recorded on these days and he was arrested on 2nd February, 2024 and produced before the magistrate and no custody remand was sought by the department and it was after many days i.e. on 26.02.2024 the department has taken the permission from the Court concerned for interrogation of the applicant in jail and also that applicant has

retracted his confessional statements and in the orders of arrest no reason has been mentioned as to why after recording of the statements of the applicant for many days his arrest is required and also keeping view that applicant is in jail in this case since 02.02.2024 and investigation appears to have reached an advanced statge and nothing has been shown before this Court which mey justify the further detention of the applicant in prison and also considering that the alleged offence is punishable with up to 5 years maximum punishment and still no formal accusation in the form of FIR or complaint has been filed by the department and also keeping in view that in such circumstances continuing the detention of the petitioner may not at all be justified and it appears justified for this court to strike a fine balance between the need for further detention of the applicant when even custodial interrogation has not been claimed at all by the Department and considering the right of an accused to personal liberty, applicant may be released on bail, however subject to certain conditions.

45. In result, the instant bail application moved by the applicant is, hereby, **allowed**.

46. Let the accused/applicant-**Deepanshu Srivastava** involved in above-mentioned case, be released on bail on his furnishing a personal bond with two sureties in the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) **The applicant shall deposit his passport before the Trial Court.**

(ii) **The applicant shall not sell any property of himself or of any of the companies in which he has a substantial interest and which are under investigation.**

(iii) The applicant shall not tamper with the prosecution evidence by intimidating/pressurizing the witnesses, during the investigation or trial.

(iv) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(v) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

47. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

48. Identity, status and residence proof of the applicant and sureties be verified by the Court concerned before the bonds are accepted.

49. Observations made herein-above by this court are only for the purpose of disposal of this bail application and shall not be construed as an expression on the merits of the case.

(2024) 3 ILRA 1195
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 2447 of 2024

Pramod **...Applicant**

Versus

State of U.P. **...Opp. Party**

Counsel for the Applicant:
Sri Prashant Yadav, Sri Rajeev Kumar

Counsel for the Opp. Party:
G.A., Sri Mrityunjay Singh, Sri Kamlesh Kumar

Criminal Law -Code of Criminal Procedure, 1973 – Section 439 – Indian Penal Code, 1860 – Section 302 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 2(bd), 14 – Bail Application – Jurisdiction of Special Court – Applicability of Cr.P.C. Provisions

The applicant, Pramod, sought bail in Case Crime No. 363 of 2023 under Section 302 IPC, lodged at Police Station Raya, District Mathura, where he was in jail since 06.10.2023. The bail application was rejected by the trial court on 01.12.2023. Although the case was being tried by an Exclusive Special Court under the SC/ST Act, the applicant was not chargesheeted under the SC/ST Act, but only under Section 302 IPC. The applicant argued no direct evidence, delay in FIR lodgement, absence of incriminating recovery, and no criminal history. The prosecution could not refute these claims. Held: The court, relying on Sections 2(bd) and 14 of the SC/ST Act, clarified that the Special Court's jurisdiction is limited to offences under the SC/ST Act, and since no such charges were framed, the bail provisions of the Cr.P.C. applied. The court found the delay in FIR, lack of direct evidence, incomplete chain of circumstances, and the applicant's cooperation and clean record justified bail. The bail application was allowed with conditions to ensure trial participation and non-interference with evidence.

Case Law Cited:

1. Pramod Vs St. of U.P., (2024) 3 ILRA, Criminal Misc. Bail Application No. 2447 of 2024, decided on 01.03.2024 (All. HC)

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

1. Matter is taken up in the revised call.

2. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No. 363 of 2023 at Police Station- Raya, District- Mathura, under Section 302 IPC. The applicant is in jail since 06.10.2023.

3. The bail application of the applicant was rejected by the learned trial court on 01.12.2023.

4. The applicant was charge sheeted under Section 302 IPC. Clearly the applicant has not been charge sheeted for any offence under the SC/ST Act (hereinafter referred to as 'the Act'). The case is being tried by the exclusive special court established under the SC/ST Act.

5. The offences under the SC/ST Act are liable to be tried by the exclusive special court defined under Section 2 (bd) of the Act. The provision is extracted hereunder:

"Section 2 (bd) Exclusive Special Court means the Exclusive Special Court established under sub-section (1) of section 14 exclusively to try the offences under this Act."

6. The Special Courts are constituted under Section 14 of the Act. The provision is extracted hereunder:

"Section 14. Special Court and Exclusive Special Court.--(1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:]

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet."

7. The legislative intent to establish Exclusive Courts was to ensure that trials for offences under the SC/ST Act are expeditiously concluded and the special procedures under the said Act are duly adhered to. The protective provisions of SC/ST Act was created for safeguarding the interests of a defined section of the citizenry. Apposite to extract the statement of object and reasons which guided the legislature while framing the enactment are extracted hereunder:

"STATEMENT OF OBJECTS AND REASONS

Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc., they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Caste persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the Protection of Civil Rights Act,1955 and the normal provisions of the Indian Penal Code have been found to be inadequate to check these crimes. A special Legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

3. The term 'atrocity' has not been defined so far. It is considered necessary that not only the term 'atrocity' should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining on the States and the Union Territories to take specific preventive and punitive measures to protect the Scheduled Castes and the Scheduled Tribes from being victimised and where atrocities are committed, to provide adequate relief and assistance to rehabilitate them.

4. The Bill seeks to achieve the above objects."

8. The Act also lays down certain special procedures for protection of the victims, and for prosecution of the accused. The provisions of grant of bail for accused under the SC/ST Act are distinct from provisions of bail under the Cr.P.C. However, the SC/ST Act is a criminal enactment. The legislation has to be construed strictly, and cannot be applied to offences which do not fall within the ambit of the SC/ST Act. The Special Courts draw their jurisdiction to try offences from Section 2(bd) of the Act. Section 2(bd) of the Act clearly confines the jurisdiction of the Courts to the offences under the SC/ST Act. Since the applicant has not been charge sheeted under the SC/ST Act, the provisions pertaining to the SC/ST Act in regard to the bail shall not be applied to the case of the applicant.

9. Criminal cases in which the accused are not chargesheeted under the SC/ST Act are liable to be processed under the provisions of Cr.P.C., even if the offence is being tried by the special court established under the SC/ST Act.

10. The following arguments made by Shri Rajeev Kumar, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Kamlesh Kumar, learned counsel holding brief of Shri Mrityunjay Singh, learned counsel on behalf of the informant and Shri Paritosh Kumar Malviya, learned AGA-I from the record, entitle the applicant for grant of bail:

1. The applicant has not been chargesheeted under the SC/ST Act.

2. The incident occurred on 28.09.2023. The wife of the deceased who is the first informant was informed by one Manvendra Singh that the body of the deceased was lying at a public place/ animal fare market.

3. The inquest was conducted on 29.09.2023 at about 10.30 AM. The postmortem report was drawn up on 29.09.2023 at about 5.35 PM.

4. The FIR was got lodged on 02.10.2023 by the wife of the deceased.

5. Delay in lodgement of the FIR in the facts of this case is fatal to the prosecution case.

6. The FIR has been lodged after due deliberation and at the instigation of inimical parties in the village.

7. There is no direct evidence or eye witness of the incident.

8. The chain of incriminating circumstances against the applicant is not complete.

9. The applicant was not last seen in the company of the deceased at a time proximate to the death of the latter.

10. No incriminating article has been recovered from the applicant.

11. Prosecution evidence does not connect the applicant with the offence.

12. The applicant does not have any criminal history apart from this case.

13. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to join the trial proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

11. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

12. Let the applicant- **Pramod** be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

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

(2024) 3 ILRA 1199
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Misc. Bail Application No. 2997 of 2024

Himanshu Kanaujiya ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Vijai Prakash Yadav

Counsel for the Opp. Party:
Sri Arunesh Kumar Singh, G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 439 – Indian Penal Code, 1860 – Sections 406, 420, 467, 468 & 471 – Bail Application – Cheating and Forgery – Fake Job Scam – Societal Impact of White-Collar Crimes - The applicant, Himanshu Kanaujiya, sought bail in Case Crime No. 369 of 2023 under Sections 406, 420, 467, 468, and 471 IPC, Police Station Kotwali, District Jaunpur, for allegedly cheating the informant by promising a job, taking Rs.1,60,000 via bank transfer and Rs.4,00,000 in cash, and providing a forged appointment letter. The applicant, in jail since 01.12.2023, claimed false implication, asserting the money was a repayment to his mother and denying any job promise or forged document. The prosecution highlighted the forged appointment letter in the case diary, the Investigating Officer's findings of fraud, and an additional similar case (Case Crime No. 72 of 2024). Held: The court rejected the bail application, emphasizing the gravity of the offense, the applicant's involvement, and the societal harm caused by fake job scams exploiting unemployed youth. The court noted that such white-collar crimes, which jeopardize the future of victims, require severe punishment. Considering the evidence, the applicant's criminal history, and the risk of further offenses, no grounds for bail were found. The court directed communication of the order to the Additional Chief Secretary (Home) and Director General of Police, Uttar Pradesh, for further action.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Supplementary affidavit filed by learned counsel for the applicant today in the Court, is taken on record. Office is directed to register the same.

2. Heard Mr. Vijai Prakash Yadav, learned counsel for the applicant, Mr. Arunesh Kumar Singh, learned counsel for the informant and Mr. D.P. Singh, learned AGA for the State.

3. The instant bail application has been filed on behalf of the applicant, **Himanshu Kanaujiya** with a prayer to release him on bail in Case Crime No. 369 of 2023, under Sections 406, 420, 467, 468, 471 I.P.C., Police Station-Kotwali, District-Jaunpur, during pendency of trial.

4. As per the allegation in the FIR, the applicant, promising to provide job to the informant, has taken Rs.1,60,000/- in his account and about Rs.4,00,000/- in cash and has given an appointment letter, which was found to be forged.

5. Learned counsel for the applicant submits that the applicant is innocent and has been falsely implicated in the present case due to *mala fide* intentions. He further submits that Rs.1,60,000/-, which has received in his account, is the money which the informant had taken from the applicant's mother and returned the same. He further submits that in order to save himself from returning the money, which he had taken from the applicant's mother, the informant placing forged documents has falsely implicated the applicant in the present case. He had never promised for providing any job nor has given any forged appointment letter to the informant. He further submits that the criminal history of the applicant has been explained in para 4&5 of the supplementary affidavit. He is languishing in jail since 01.12.2023. In case he is released on bail, he will not misuse the liberty of bail and will cooperate in the trial by all means. Lastly, it is submitted that there is no chance of applicant fleeing away from judicial process or tampering with the witnesses.

6. Per contra, learned A.G.A. has opposed the bail prayer of the applicant by contending that the applicant has been cheated by taking amount of Rs.1,60,000/- in his account and Rs.4,00,000/- has been paid in cash and a forged appointment letter has been given. The forged appointment letter, which has been given by the applicant to the informant, is the part of case dairy and the Investigating Officer has found that the fraud and cheating has been done by the applicant. He further submits that apart from the cases explained by learned counsel for the applicant in para 4&5 of the supplementary affidavit, there is one more case, i.e. case crime no.72 of 2024, which is similar in nature. Therefore, there is sufficient evidence available on record against the applicant, hence the applicant is not entitled for bail at this stage.

7. I have heard learned counsel for the parties and gone through the record.

8. Perusal of the records goes to show that the applicant on the assurance of providing job, has been cheated by taking amount from the informant and a forged appointment letter has been given to him. The forged appointment letter, which has been given by the applicant to the informant, is the part of case dairy and the Investigating Officer has found that the fraud and cheating has been done by the applicant, therefore, it would be appropriate to refer to the relevant statutory provisions in this regard:-

"406. Punishment for criminal breach of trust.?

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

415. Cheating.?

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.? A dishonest concealment of facts is a deception within the meaning of this section.

417. Punishment for cheating.?

Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property.?

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

9. While analyzing the above provisions, the ingredients therein to the present case, wherein, the complaint was lodged by the complainant, alleging that the informant was cheated by the accused under the guise of providing the job, this Court is of the view that a cognizable offence is made out to proceed against the accused person.

10. It is the specific allegation of the complainant that the accused person having received the money by making a promise that he would provide job, however, later committed breach of trust and thereby, fraudulently and dishonestly induced him since he did not provide any job nor returned the money.

11. The very term "unemployment" will sound the death knell for the future of the youth of this nation. Every individual would like to stand on his own legs to avert the reverberations of the said word "unemployment". Such untiring pursuit for employment by the youth is taken advantage of by certain sections/persons.

12. It is unfortunate that, now-a-days, everywhere in the country, bogus manpower consultant agencies and fake recruitment agencies are mushrooming with the main illegal object of luring the unemployed youth with employment in government sectors as well as in foreign countries. The youth too, without knowing the hidden agenda, are falling prey to such temptations of lucrative jobs and paying huge amounts even by selling the properties held by their families or availing loans from financial institutions with high rate of interest. While in some cases, the consultancies or agencies would disappear overnight with the amount collected from the victims, in some other cases, they used to issue fake appointment letters to the victims, who would know about the fraud played on them only at the time of joining

the post. If ultimately, he is cheated, his entire future will be in peril and it is not easy to restore normalcy in life by overcoming from the situation. In my firm view, these white-collar crimes, which have drastic effects, should be dealt with iron hands and severe punishment should be awarded to the culprits.

13. Taking into account the gravity of the offense, the evidence presented, the involvement of the accused, the severity of the punishment, and the arguments put forth by the learned counsel for both parties, I discern no compelling reason to exercise my discretion in favor of the accused applicant.

14. Accordingly, the bail application stands **rejected**.

15. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

16. Let a copy of this order be communicated to the Additional Chief Secretary (Home) as well as Director General of Police, Uttar Pradesh, Lucknow.

17. Registrar Compliance shall send copy of this order to all concerned forthwith.

(2024) 3 ILRA 1202
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2024

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Misc. Bail Application No. 8409 of 2024

Chandrashekhar Prasad
...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Pradeep Kumar Singh, Shalvin, Sri Upendra Kumar Yadav

Counsel for the Opp. Party:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 439 – Indian Penal Code, 1860 – Sections 419, 420, 406, 467, 468, 471, 120-B, 504, 506 – Bail Application – Fraudulent Employment Scheme – Organized Crime – Societal Implications - The applicant, Chandrashekhar Prasad, sought bail in Case Crime No. 122 of 2022 under Sections 419, 420, 406, 467, 468, 471, 120-B, 504, and 506 IPC, Police Station Bhatni, District Deoria, for allegedly defrauding the informant and his brother-in-law by promising jobs in the FCI Department for Rs. 3,50,000 per person. The applicant sent forged appointment letters, collected Rs. 3,50,000, and took the victims' children to Chapra (Bihar), where no appointments materialized. The applicant argued false implication, delay in FIR, and transfer of funds to another's account, claiming he was also a victim. The prosecution countered that the applicant played an active role in the organized fraud, and the delay in FIR was due to false assurances of verification. Held: The court, emphasizing the gravity of the organized crime and its societal impact, particularly on vulnerable job seekers, rejected the bail application. The applicant's transfer of funds did not absolve him, and the risk of tampering with evidence or re-offending was significant. The court underscored the need for public awareness to prevent such frauds and directed the trial court to expedite proceedings.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Upendra Kumar Yadav, learned counsel for the applicant as well as Mr. Rizwan Ahmed, learned AGA for the State and perused the material on record.

2. The instant bail application has been filed on behalf of the applicant, Chandrashekhar Prasad with a prayer to release him on bail in Case Crime No.122 of 2022, under Sections 419, 420, 406, 467, 468, 471, 120-B, 504 and 506 I.P.C., Police Station ? Bhatni, District ? Deoria, during pendency of trial.

3. As per the allegations in the FIR, on 04.06.2021 when the informant went to his sister's place, he met one Sanjay. He was told by Sanjay that his nephew Chandra Shekhar Prasad is working in FCI Department and other persons are also required there in the department as employees. On the aforesaid, informant's brother-in-law namely Ram Kishan requested Sanjay to talk to Chandra Shekhar Prasad (nephew of Sanjay) to get few family members appointed in the same. On his request, when Sanjay managed a conversation of the informant with Chandra Shekhar Prasad, he was informed that Rs.3,50,000/- per person will be required for the appointment in the FCI Department. The informant's brother-in-law requested for getting his son and nephew appointed and the informant requested for appointment of his son. Appointment letters were sent on the mobile of the aforesaid persons, seeing which the informant and his brother-in-law were asked to deposit some amount in the account no.38445012703. The informant Santosh Kumar deposited Rs.1,50,000/- in the aforesaid account on 25.06.2021.

4. Afterwards, the informant came to know that the aforesaid account was in the name of one Abhishek Kumar. Coming to know about the aforesaid account being of Abhishek Kumar, he had a talk with Chandra Shekhar Prasad who gave his PNB account no.2147000100191886 and requested the informant to deposit the amount in the aforesaid PNB account, after which Rs.2,00,000/- were deposited by the informant on 02.07.2021. He was asked to take the print out of the appointment letters as sent on the mobile and come alongwith the applicant Chandra Shekhar Prasad for further steps to be taken for the appointment of the children. Chandra Shekhar Prasad came alongwith co-accused Pankaj Kumar Rajbhar and took alongwith them the son of the informant and the son and nephew of the informant's brother-in-law in a four wheeler vehicle and went to Chapra (Bihar) for their appointment in the FCI Department. Only three persons i.e. the son of the informant and the nephew and son of the informant's brother-in-law were kept in private room. They stayed in the said room till 25 days but neither they were given appointment nor were taken to any government office. On having a conversation with the applicant Chandra Shekhar Prasad, they were told to go back to their residence and as soon as verification of the appointment is done, they will be informed about the same. On the aforesaid assurance, the children came back to their house. Till date neither they have been appointed in the department nor the money has been returned, therefore, the present FIR has been lodged against the applicant and two named accused i.e. Pankaj Kumar Rajbhar and Abhishek Kumar.

5. Learned counsel for the applicant submits that the applicant is innocent and has been falsely implicated in the present case due to ulterior motive. He further

submits that there is delay in lodging the FIR without giving any plausible explanation for the same. Though, he received the amount on 02.07.2021 but the same has been deposited in the account of one Om Prakash Pandey at the instance of Pankaj Kumar Rajbhar and upon the direction of the informant. He has placed the statement of account on page no.57 of the bail application from where it is evident that on 02.07.2021, Rs.5,50,000/- have been transferred to the account of Om Prakash Pandey. He further submits that even he is a victim of the fraud as played by the other co-accused persons. No recovery of any amount has been made from the applicant. Nothing incriminating has been recovered from the possession of the applicant which could prove that the forged appointment letters have been prepared by the applicant. He further submits that informant's son was never examined during the examination.

6. Mr. Rizwan Ahmed, learned AGA for the State on the other hand submits that it is an organized crime in which applicant alongwith other co-accused persons have cheated the informant as well as his brother-in-law by accepting the money under the garb of providing job. From the version of the FIR itself, it is clear that the forged appointment letters have been sent from the mobile phone of the applicant to that of the informant's. The statement of account as placed by learned counsel for the applicant showing that the amount as received by the applicant has been transferred in the account of one Om Prakash Pandey at the insistance of informant and the co-accused Pankaj Kumar Rajbhar cannot prove the innocence of the applicant, as in the statement of account the name of Om Prakash Pandey has been written by pen, so it cannot be said as to whether the amount has actually been transferred in the account of Om Prakash Pandey or not, as usually in the present scenario, when the computerized statement of account is being given, the name of the account holder from whom the money is debited or credited to is mentioned and the account number is also mentioned in the same. He further submits that there is no delay in the FIR as the incident started from the year 2021 and as assurance was given that after verification of the appointment, the informant shall be communicated about the same. Believing the assurance given by the accused persons, the informant waited for the appointment and when no appointment letter was given nor the money was returned, the present FIR was lodged.

7. This court has meticulously examined the contentions put forth by both learned counsels and has perused the material on record. The instant bail application has been filed on behalf of the applicant, Chandrashekhar Prasad, seeking his release on bail in Case Crime No.122 of 2022, under Sections 419, 420, 406, 467, 468, 471, 120-B, 504, and 506 I.P.C., Police Station ? Bhatni, District ? Deoria, during the pendency of trial.

8. The allegations in the FIR paint a picture of calculated deception and manipulation perpetrated by the applicant along with his co-accused. It is alleged that they exploited the trust of the informant and his brother-in-law by promising employment opportunities in the FCI Department in exchange for substantial sums of money. Despite receiving significant sums, the promised appointments never materialized, leaving the victims both financially and emotionally aggrieved.

9. The learned counsel for the applicant contends that the applicant is innocent and has been falsely implicated in the case. However, the court notes that the allegations against the applicant are not unsubstantiated. The FIR alleges a well-coordinated scheme involving the applicant and his co-accused to defraud the victims. Moreover, the contention regarding the delay in lodging the FIR is unpersuasive, as the delay can be reasonably explained by the victims' belief in the false assurances given by the accused regarding the pending verification process.

10. The defense further argues that the applicant did not directly get benefit from the fraudulent transactions and that the money received was subsequently transferred to another individual. However, this assertion fails to exonerate the applicant from his alleged involvement in the scam. The mere transfer of funds does not absolve him of responsibility, especially considering the organized nature of the crime and the active role attributed to him in facilitating the deceitful transactions.

11. Additionally, the contention regarding the absence of incriminating evidence directly linking the applicant to the fabrication of appointment letters is not conclusive at this stage of the proceedings. The investigation is ongoing, and further evidence may yet come to light.

12. In addition to the foregoing considerations, it is imperative to underscore the broader societal implications inherent in cases of fraudulent promises of employment. The court wishes to emphasize the importance of sensitizing individuals, particularly students and job seekers, to the fundamental principle that legitimate employment opportunities are attained solely through merit and diligent effort. It is incumbent upon the state to uphold the integrity of the recruitment process and to take stringent measures against those who seek to exploit the aspirations of innocent individuals through fraudulent means.

13. Furthermore, it is essential to recognize that the consequences of falling prey to such fraudulent schemes extend far beyond mere financial loss. Individuals who are misled into parting with their hard-earned money in exchange for false promises of employment often endure profound emotional distress, shattered hopes, and a sense of betrayal. Moreover, the societal repercussions can be equally damaging, as victims may find themselves ostracized and stigmatized, their reputations tarnished, and their social standing compromised.

14. Therefore, it is incumbent upon all stakeholders, including educational institutions, government agencies, civil society organizations, and the media, to collaborate in disseminating accurate information and fostering a culture of integrity and resilience. Comprehensive education and awareness campaigns must be developed to empower individuals with the knowledge and critical thinking skills necessary to recognize and resist fraudulent schemes. Moreover, efforts should be made to provide alternative avenues for career development and skill enhancement, thereby reducing the vulnerability of individuals to exploitation.

15. Ultimately, the goal must be to create an environment where the pursuit of professional opportunities is guided by principles of fairness, transparency, and

ethical conduct. By instilling these values in future generations and holding accountable those who seek to subvert them, we can uphold the dignity and aspirations of all individuals and ensure the integrity of our institutions and society as a whole.

16. Upon careful consideration of the facts and circumstances of the case, this court is of the opinion that releasing the applicant on bail at this juncture would not be in the interest of justice. The gravity of the offenses, the likelihood of the applicant tampering with evidence or influencing witnesses, and the potential risk of re-offending militate against granting bail.

17. Therefore, the bail application filed on behalf of the applicant, Chandrashekhar Prasad, is hereby denied/rejected.

18. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the present bail application and must not be construed to have any reflection on the ultimate merits of the case.

19. The trial court is directed to expedite the proceedings in accordance with law.

20. Order passed accordingly.

(2024) 3 ILRA 1206
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. Anticipatory Bail Application No. 13634 of 2023
(Under Section 438 Cr.P.C.)

Smt. Vinita Mehrotra ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Bhuvnesh Kumar Singh

Counsel for the Opp. Parties:
G.A., Sri Amit Daga

Criminal Law - Code of Criminal Procedure, 1973 – Section 438 – Indian Penal Code, 1860 – Sections 420, 467, 468, 471 & 120-B – Anticipatory Bail – Property Dispute – Alleged Fraudulent Sale Deeds – Civil and Criminal Proceedings - The applicant, Smt. Vinita Mehrotra, sought anticipatory bail in Case Crime No. 894 of 2022 under Sections 420, 467, 468, 471, and 120-B IPC, Police Station Kotwali City, District Bijnor, for allegedly executing ten sale deeds of a disputed property, 'Dharm Bhawan,' without valid title. The informant, her brother Rakesh Sharma, claimed the property was his through a 1974 partition decree and a 2012 Will, alleging the applicant colluded with land mafias to fraudulently sell parts of it. The applicant argued she believed the property was her inheritance, had initiated civil suits for partition and cancellation of the 1974 decree and 2012 Will, and had no dishonest intent. Held: The court, relying on Mohd. Ibrahim Vs St. of Bihar ((2009) 8 SCC 751), Mitesh Kumar J. Sha Vs St. of Karnataka ((2021) SCC OnLine SC 976), Hira Lal Vs St. of U.P. ((2009) 11 SCC 89), Ram Biraji Devi Vs Umesh Kumar Singh ((2006) 6 SCC 669), and Sushila Aggarwal Vs St. (NCT of Delhi) ((2020) 5 SCC 1), granted anticipatory bail. The court found the dispute primarily civil, with pending suits, and noted the applicant's bona fide belief in her property rights, her lack of criminal antecedents, and her status as a 74-year-old woman. The court distinguished her case from co-accused with criminal records and emphasized that civil and criminal proceedings could coexist, as per Pratibha Vs Rameshwari Devi ((2007) 12 SCC 369), Mahesh Chaudhary Vs St. of Rajasthan ((2009) 4 SCC 439), and Priti Saraf Vs St. (NCT of Delhi) ((2021) 16 SCC 142).

Case Law Cited:

1. Mohd. Ibrahim Vs St. of Bihar, (2009) 8 SCC 751

2. Mitesh Kumar J. Sha Vs St. of Karnataka, (2021) SCC OnLine SC 976

3. Hira Lal Vs St. of U.P., (2009) 11 SCC 89

4. Ram Biraji Devi Vs Umesh Kumar Singh, (2006) 6 SCC 669

5. Sushila Aggarwal Vs St. (NCT of Delhi), (2020) 5 SCC 1

6. Pratibha Vs Rameshwari Devi, (2007) 12 SCC 369

7. Mahesh Chaudhary Vs St. of Rajasthan, (2009) 4 SCC 439

8. Priti Saraf Vs St. (NCT of Delhi), (2021) 16 SCC 142

9. CBI Vs Aryan Singh, 2023 SCC OnLine SC 379

10. Trisuns Chemical Industry Vs Rajesh Agarwal, (1999) 8 SCC 686

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

1. List has been revised.

2. Heard Sri Bhuvnesh Kumar Singh, learned counsel for the applicant, Sri Amit Daga, learned counsel for the informant and Sri Sunil Kumar, learned A.G.A. for the State as well as perused the material placed on record.

3. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No.894 of 2022 registered under Sections 420, 467, 468, 471 and 120-B IPC at Police Station-Kotwali City, District Bijnor with a prayer to enlarge her on anticipatory bail.

PROSECUTION STORY:

4. The FIR was instituted by the informant Rakesh Sharma that he and his wife have a property in Civil Lines, Bijnor which has residence, shops and open land surrounded by boundary wall which is being used by them for the last 50 years. The said property was inherited by the informant after a family partition in the year 1974 after an order was taken from the Court. The two persons namely, Mohammed Talib and Shankar Lal, are land mafias of the area and have garnered huge black money out of it. They want to illegally grab his property. The informant had sold a certain part of the said property on 14.11.2022. It is learnt that the said land mafias have got executed ten sale deeds of certain parts of the land on 25.11.2022 in the names of their siblings in collusion with Vinita Mehrotra w/o Shri PK Mehrotra. The land grabber had got the said sale deeds executed, despite knowing the fact that Smt. Vinita Mehrotra (applicant) does not have any title to the said land.

5. It is further stated in the FIR that the informant had contested several petitions up to the Supreme Court for getting certain shops vacated by filing petitions under the Rent Control Act. The said sale deed have been executed for a consideration of Rs.3,25,00,000,/- although the real value in the open market is much more than the amount shown in the sale deeds.

RIVAL CONTENTIONS:
(Arguments on behalf of applicant)

6. The instant dispute relates to the property under the name of *'Dharm Bhawan'* having an approximate area of 2400 square yards situated in the city of Bijnor, U.P.

7. The original owner of the said property was Sahdev Sharma whose wife was Smt. Kusum Rani Sharma and the couple had three siblings, namely, Vinita Mehrotra (applicant), Rakesh Sharma and

Sangeeta Narang. The said Sahdev Sharma, father of the applicant, expired on 20.06.2012 and thereafter his wife Kusum Rani Sharma expired on 20.06.2012. It is placed on record that the informant Rakesh Sharma is a practising advocate at the District Court, Bijnor and so was his father Sahdev Sharma and was even a Government Counsel (ADGC) at the District Court, Bijnor.

8. The informant is stated to have filed a collusive suit bearing O.S. No.28 of 1974 before the Civil Judge, Bijnor for partition and permanent injunction under the name of his mother and his father Sahdev Sharma was made a defendant in it during the life time of Dharmveer Sharma (father of Sahdev Sharma, who died on 1.1.1975). In the said original suit, a compromise was filed by the parties on 15.04.1974 and the same was decided on the basis of the said compromise the same day i.e. 15.04.1974 itself and a decree was passed.

9. It is pertinent to mention that the applicant- Vinita Mehrotra, who was already married off in the year 1967, was not a party in the said original suit, as such had no inkling of the said collusive suit and decree obtained by the informant. It is also stated that just 18 days before the death of Smt. Kusum Rani Sharma (mother of the applicant and the informant), a forged Will deed is stated to have been prepared in favour of first informant on 02.06.2012, which has not been signed by her. The deceased is stated to be 86 years old on 2.6.2012.

10. The instant dispute arose when the applicant sent a legal notice to the first informant for partition of the property in question and getting her one third share of the said property on 23.09.2022 and the applicant was forced to file a civil suit as O.S. No.760 of 2022 (Smt. Vinita Mehrotra vs. Rakesh Sharma and Others) on 3.10.2022 before the Civil Judge (Senior Division), Bijnor for partition of the property in question between the legal heirs of deceased Sahdev Sharma. A copy of the said civil suit has been annexed as Annexure No.4 to the anticipatory bail application.

11. The first informant filed an application Under Order VII Rule 11 of CPC on 25.11.2022 in the said original suit and only then the applicant came to know of the said collusive decree dated 15.04.1974. A copy of the said application has been annexed as Annexure No.5 to the anticipatory bail application. Subsequent to it, the applicant is stated to have filed O.S. No.967 of 2022 on 18.12.2022 for cancellation of the judgment and decree dated 15.04.1974, obtained ex-parte. The said suit is still pending and the matter is being contested before the Civil Court.

12. The applicant had also filed O.S. No.960 of 2022 before the Civil Judge (Senior Division), Bijnor for cancellation of the fake Will deed dated 2.6.2012 purported to have been executed by Late Smt. Kusum Rani Sharma, before her death on 20.06.2012. The applicant had even filed information in the local newspaper *'Chingari'* on 3.10.2022 indicating that she holds one third share in the said property.

13. The applicant had executed ten sale deeds of the parts of the said property measuring 647 square yards for a consideration of Rs.3,25,00,000/-. The instant FIR has been instituted subsequent to the said sale deed on 6.12.2022. The applicant was granted arrest stay by this

Court till the conclusion investigation vide order dated 1.2.2023 passed in Criminal Misc. Writ Petition No.1383 of 2023.

14. The informant had even forged an unregistered Will deed of his father dated 10.02.1979 and had even forged the signatures of the applicant on it. The Investigating Officer has not acted fairly and has submitted the final report (charge-sheet) mechanically in collusion with the informant, who is an advocate, and the cognizance order dated 29.03.2023 is without application of mind.

15. The application filed Under Order VII Rule 11 of CPC was allowed by the Learned Civil Judge ex-parte on 8.2.2023 without hearing the applicant that too on the date when there was a resolution of the Bar to abstain from work on account of condolence of the death of an advocate. The applicant has filed Appeal No.33 of 2023 against the said order dated 9.1.2023 of the Civil Judge before the District Judge, Bijnor, which is still pending.

16. Reliance has been placed on paragraph No.14 of the judgment of the Supreme Court passed in ***Mohammad Ibrahim and Others vs. State of Bihar and Another***1, which reads-as-under:

"14. An analysis of Section 464 of the Penal Code shows that it divides false documents into three categories:

1. The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.

2. The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person.

3. The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practised upon him, know the contents of the document or the nature of the alteration.

In short, a person is said to have made a "false document", if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practising deception, or from a person not in control of his senses."

17. The case of the applicant is squarely covered by the judgment of Mohd. Ibrahim (supra), whereby the applicant has not dishonestly or fraudulently executed the sale deed and has not altered any document or any material part in it.

18. Reliance has also been placed on paragraph Nos.35 and 37 of the judgment of Supreme Court passed in ***Mitesh Kumar J. Sha vs. The State of Karnataka and Others***2, which reads-as-under:

"35. The dispute between the parties, could at best be termed as one involving a mere breach of contract. Now, whether and what, is the difference between a mere breach of contract and an offence of cheating has been discussed in the ensuing paragraphs.

37. Applying this dictum to the instant factual matrix where the key

ingredient of having a dishonest or fraudulent intent under Sections 405, 419 and 420 is not made out, the case at hand, in our considered opinion is a suitable case necessitating intervention of this Court."

19. Reliance has also been placed on paragraph Nos.12 and 13 of the judgment of Supreme Court passed in ***Hira Lal and Other vs. State of U.P. And Others***3, which reads-as-under:

"12. The parameters of interference with a criminal proceeding by the High Court in exercise of its jurisdiction under Section 482 of the Code are well known. One of the grounds on which such interference is permissible is that the allegations contained in the complaint petition even if given face value and taken to be correct in their entirety, commission of an offence is not disclosed. The High Court may also interfere where the action on the part of the complainant is mala fide.

13. The dispute between the parties is essentially civil in nature. The will in question is a registered will. Whether it is surrounded by suspicious circumstances or not is a matter which may appropriately fall for determination in a testamentary proceeding. Prima facie, a civil court has found the said will to be genuine. A complaint petition filed by the third respondent has been rejected. A revision application filed thereagainst has also been dismissed."

20. Reliance has also been placed on paragraph Nos.10 and 11 of the judgment of Supreme Court passed in ***Ram Biraji Devi & Another vs. Umesh Kumar Singh & Another***4, which reads-as-under:

"10. The learned Magistrate in his order has categorically stated that the perusal of the complaint would make it clear that there was a dispute in respect of sale and purchase of land between the parties. In our view even if the allegations made in the complaint are accepted to be true and correct, the appellants cannot be said to have committed any offence of cheating or criminal breach of trust. Neither can any guilty intention be attributed to them nor can there possibly be any intention on their part to deceive the complainant. No criminal case is made out by the complainant against the appellants in his complaint and in the statements of the complainant and his witnesses recorded by the Magistrate before taking of the cognizance of the alleged offences. The averments of the complaint and the statements of the complainant and his witnesses recorded by the Magistrate would amount to civil liability inter se the parties and no criminal liability can be attributed to the appellants on the basis of the material on record. In Trisuns Chemical Industry case [(1999) 8 SCC 686 : 2000 SCC (Cri) 47] relied upon by the complainant, this Court held as under: (SCC p. 687)

"Quashing of FIR or a complaint in exercise of the inherent powers of the High Court should be limited to very extreme exceptions. Merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. The provision incorporated in the agreement for referring the disputes to arbitration is not an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those

are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases."

11. There cannot be any disagreement to the well-settled proposition of law that the High Court should exercise its inherent powers in extreme exceptions to quash an FIR or a complaint. The ratio as laid down in Trisuns Chemical Industry case [(1999) 8 SCC 686 : 2000 SCC (Cri) 47] is of no help and assistance to the complainant in the facts and circumstances of the present case. The complaint instituted does not disclose that an offence under Section 420 is made out. Cognizance taken by the Magistrate thereon against the appellants for offences under Sections 406/419/420 and 120-B IPC is clearly an abuse of the process of court and interference by this Court is expedient in the interest of justice. This is a case of extreme exception where the High Court ought to have exercised its inherent jurisdiction and power to set aside the unwarranted and unjustified order of the Magistrate impugned before it by the appellants."

21. The instant case is of civil in nature and the dispute is between the informant and the applicant regarding the share in the land. The said partition deed dated 15.4.1974 is under challenge before the Civil Court, Bijnor.

22. The bona-fide purchasers were granted bail by this Court vide order dated 19.7.2023 passed in Criminal Misc. Anticipatory Bail U/S 438 Cr.P.C. No.5334 of 2023. This Court was pleased to dismiss the anticipatory bail application of co-accused persons, namely, Shankar Lal and Mohd. Talib, vide order dated 19.07.2023 passed in Criminal Misc. Anticipatory Bail U/S 438 Cr.P.C. No.5822 of 2023, but the bail of co-accused Shankar Lal has been allowed by the Supreme Court while that of the co-accused person Mohd. Talib has been rejected on account of his criminal antecedents.

23. The case of the applicant is at a different footing as she is a bona-fide seller of the property she inherited from her father. The applicant has sold the property much less than her share of 800 square yards. The applicant has no criminal antecedents to her credit and being a lady of 74 years of age, is entitled for anticipatory bail. The applicant undertakes that she has co-operated in the investigation and is ready to do so in trial also failing which the State can move appropriate application for cancellation of anticipatory bail.

(Arguments on behalf of informant/State)

24. The dispute is regarding the residential land/house known as *'Dharm Bhawan'* having an area of 2400 square yards located in front of Gayatri Nursing Home, Bijnor. The informant and his parents had got the marriage of the applicant solemnized in the year 1967 to a well off family and had spent money beyond their capacity, which was more than her share in the property. The husband of the applicant is a retired IAS officer. The order and decree dated 15.4.1974 is final and has not been set-aside by any Court of Law and the said act was bona-fide act of the parents of the applicant. As a result of the said decree, the deceased parents and the applicant were accorded one third share of the said property. The deceased Sahdev

Sharma had executed an unregistered Will deed in favour of the informant. The copy of the said Will deed has been appended as Annexure No.CA-2 to the counter affidavit filed with the anticipatory bail application.

25. After the death of the father of the informant Sahdev Sharma on 31.01.1980, the informant became the owner of two third share of the property in dispute. The informant, being the allottee of one super deluxe flat being House No.602, located at Nanda Apartment, Kaushambi under Apartment Yojna Series 650, gifted the said flat alongwith the amount of the remaining instalments proposed to be deposited in Ghaziabad Development Authority to the applicant Vinita Mehrotra. The applicant had even acknowledged the factum of partition of the ancestral property between her parents and brother Rakesh Sharma in the year 1974 in it. The copy of the said receipt dated 10.03.1993 has been annexed as Annexure No.CA-3 to the counter affidavit filed with the anticipatory bail application.

26. The mother of the informant Smt. Kusum Rani Sharma had executed a registered Will in favour of the informant where she gave her entire share in property in dispute to the informant on 2.6.2012. The copy of the registered Will has been annexed as Annexure No.CA-5 to the counter affidavit filed with the anticipatory bail application. The mother of the informant and the applicant, Smt. Kusum Rani Sharma, expired on 20.06.2012, as such the informant became the sole title holder of the property in dispute. The applicant has no share in the said property and has illegally sold the said land. The applicant is a greedy lady and under ill advice, in order to extort money from the informant and his family members, had filed civil suit and the notice in the local newspaper.

27. The informant had executed two sale deeds on 17.10.2022 subsequent to the said civil suit instituted by the applicant of the land measuring 323.66 square meters. The applicant has executed the said sale deeds subsequent to the sale deed executed by the informant on 23.11.2022 and 25.11.2022. The applicant has executed the said ten sale deeds as a stress sale much below the market price. Even the applicant has executed a power of attorney in favour of land mafias namely, Mohd. Talib and Shankar Lal, on 03.12.2022 to take care of the civil proceedings pending as O.S. No.760 of 2022 subsequent to the FIR instituted by the informant on 6.12.2022. The factum of other civil suits pending between the parties is not disputed by the informant. The final report (charge-sheet) has been submitted against the applicant after thorough investigation by the Investigating Officer and cognizance was taken by the Magistrate concerned on 29.03.2023.

28. The co-accused person Shankar Lal has been granted anticipatory bail by the Supreme Court on 09.11.2023 and that of Mohd. Talib has been rejected vide order dated 14.12.2023 on account of his criminal antecedents.

29. The bail application of the co-accused person was allowed by this Court vide order dated 19.7.2023 passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.5334 of 2023, whereby the case of the applicant and other co-accused persons, namely, Mohd. Talib and Shankar Lal, was distinguished. The relevant paragraph of the said order is being reproduced below:

"10. Considering the facts and circumstances of the case, arguments advanced by learned counsel for the parties as well as the judgements referred above by them and also the law laid down by the Apex Court in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi), 2020 SCC OnLine SC 98,*** *the applicants are entitled to be granted anticipatory bail in this case. However, it is made clear that the case of the applicants is at a different footing to the case of co-accused Vineeta Mehrotra, Mohd. Talib and Shanker Lal."*

30. As such, the applicant is also not entitled for anticipatory bail on the ground of parity with the co-accused persons whose anticipatory bail application has been rejected by this Court vide order dated 19.7.2023 passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.5822 of 2023.

31. Reliance has been placed on paragraph Nos.9 to 16 of the judgment of this Court dated 16.1.2024 passed in ***Application U/S 482 Cr.P.C. No.11379 of 2023,*** which reads as under:

"9. After mentioning the aforesaid categories, the Hon'ble Supreme Court added a note of caution to the effect that: -

"the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

10. In CBI versus Aryan Singh, 2023 SCC OnLine SC 379, the Hon'ble Supreme Court held that: -

"10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr. P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr.P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not".

11. Therefore, the submission of the learned Counsel for the applicant that the allegations leveled in the FIR are false, cannot be examined by this Court while deciding an application under Section 482 Cr.P.C.

12. So far as the next submission of the earned Counsel for the applicant, that the dispute between the parties is purely civil in nature, the allegations in the FIR are that the applicant has committed the offences of criminal breach of trust and cheating against the informant.

13. In Pratibha v. Rameshwari Devi, (2007) 12 SCC 369, the Hon'ble Supreme Court held that "it is well settled that criminal and civil proceedings are separate and independent and the pendency of a civil proceeding cannot bring to an end a criminal proceeding even if they arise out of the same set of facts."

14. In Mahesh Chaudhary v. State of Rajasthan, (2009) 4 SCC 439, the Hon'ble Supreme Court held that: -

11. The principle providing for exercise of the power by a High Court under Section 482 of the Code of Criminal Procedure to quash a criminal proceeding is well known. The Court shall ordinarily exercise the said jurisdiction, inter alia, in the event the allegations contained in the FIR or the complaint petition even if on face value are taken to be correct in their entirety, does not disclose commission of an offence.

12. It is also well settled that save and except in very exceptional circumstances, the Court would not look to any document relied upon by the accused in support of his defence. Although allegations contained in the complaint petition may disclose a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue. For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or the complaint petition fulfil the ingredients of the offences alleged against the accused. (Emphasis supplied)

15. In Priti Saraf v. State (NCT of Delhi), (2021) 16 SCC 142, it was held that: -

31. In the instant case, on a careful reading of the complaint/FIR/charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482CrPC for quashing such proceedings."

16. As besides the civil dispute between the parties, the allegations in the FIR make out commission of cognizable offences of criminal breach of trust and cheating by the applicant, which allegations have been established by the material collected during investigation and, accordingly, a charge-sheet has been filed against the applicant, I am of the considered view that as per the law laid down by the Hon'ble Supreme Court in Pratibha, Mahesh Chaudhary and Priti Saraf (Supra), the charge-sheet and the criminal proceedings against the applicant cannot be quashed merely because the allegations may also disclose a civil dispute between the parties."

32. If there is civil litigation pending between the parties, there is no bar in continuing with the criminal prosecution as has been settled in the judgment of **Keshav (supra).**

33. Learned A.G.A. has reiterated the arguments tendered at bar by learned counsel for the informant and has also opposed the anticipatory bail application of the applicant, but has not disputed the facts that the applicant has no criminal antecedents to her credit and also the pendency of civil suits between the parties.

CONCLUSION:

34. The important factor to be taken into consideration is that when a person executes a document conveying a property describing it as 'his' or 'hers', there are two possibilities. The first is that he/she, as a bona-fide act, believes that the property actually belongs to him/her. The second is that he/she may be dishonestly or fraudulently claiming it to be his/her even-though he/she knows that it is not his/her property.

35. As propounded in **Mohd. Ibrahim (supra),** to fall under the first category of false documents, it is not sufficient that a document has to be made or executed dishonestly or fraudulently. In the case herein, the applicant has executed the sale deed conveying it to be her's and has not misrepresented anyone. It is also admitted fact that prior to the institution of the FIR and even the said sale deeds, there were civil suits pending before the Civil Court, Bijnor. Thus, the exception can be drawn in favour of the applicant being a lady of 74 years of age. It is to be noted at the time of arguments in the bail application of co-accused, the facts relating to the applicant were not argued or brought forward as she was not an applicant there.

36. The argument of the counsel for the informant claiming parity of rejection of bail of co-accused does not hold good as it is settled law of the Court that parity can be claimed for grant of bail and not for its rejection. It is also to be taken into account that one of the very same accused person Shankar Lal has been enlarged on anticipatory bail by the Supreme Court vide its' order dated 09.11.2023. The case of the applicant is at a better footing to Shankar Lal as she has no criminal antecedents.

37. It is very unfortunate when familial relationships are strained by greed. Open communication and understanding can be key to resolving such issues. Sorry to see that rapacity can create conflicts and damage blood relationships. The FIR and the litigations between the parties is a fallout of depleting family relations due to avidity. The litigation can further complicate the already depleting family dynamics.

38. On due consideration to the arguments advanced by learned counsel for the applicant, learned counsel for the informant as well as learned A.G.A., taking into consideration the judgment of the Supreme Court passed in **Mohd. Ibrahim (supra)** and the fact that the bail application of the co-accused person Shankar Lal has been allowed by the Supreme Court vide its' order dated 9.11.2023 coupled with the fact that the applicant has no criminal antecedents to her credit, and considering the nature of accusations, the applicant is liable to be enlarged on anticipatory bail in view of the judgment of Supreme Court in the case of ***"Sushila Aggarwal Vs. State (NCT of***

Delhi), (2020) 5 SCC 1". The future contingencies regarding the anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

39. In view of the above, the anticipatory bail application of the applicant is **allowed**. Let the accused-applicant- **Smt. Vinita Mehrotra** be released forthwith in the aforesaid case crime (supra) on anticipatory bail till the conclusion of trial on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

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

(ii). that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii). that the applicant shall not leave India without the previous permission of the court;

(iv). that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

(v). that the applicant shall not pressurize/ intimidate the prosecution witness;

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

(vii). that in case of breach of any of the above conditions the court concerned shall have the liberty to cancel the bail.

40. It is made clear that observations made hereinabove are exclusively for deciding the instant anticipatory bail application and shall not affect the trial.

(2024) 3 ILRA 1216
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Crl. Misc.IInd Bail Application No. 26925 of 2023

Yogendra Kumar Mishra ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Ms. Akanksha Tripathi, Sri Manoj Kumar Mishra, Sri Prabha Shanker Mishra, Ms. Tanisha Jahangir Monir, Sri Zia Uddin Ahmad

Counsel for the Opp. Parties:
Sri Amit Tiwari, G.A., Sri Shakti Shanker Tiwari, Sri Subhash Chandra Tiwari

Criminal Law - Code of Criminal Procedure, 1973 – Section 439 – Indian Penal Code, 1860 – Sections 376, 328 & 506 – Protection of Children from Sexual Offences Act, 2012 – Sections 3/4 – Information Technology Act, 2000 – Section 67 – Second Bail Application – Requirement of New Grounds – Judicial Discipline

The applicant, Yogendra Kumar Mishra, filed a second bail application in Case Crime No. 324 of 2021 under Sections 376, 328, 506 IPC, Sections 3/4 POCSO Act, and Section 67 IT Act, Police Station Kotwali, District Prayagraj, alleging false implication in a case involving rape, poisoning, criminal intimidation, and digital offenses against the complainant and her daughter. The applicant argued delayed FIR, lack of specific details, enmity due to a prior dispute, inconsistencies in St.ments under Sections 161 and 164 Cr.P.C., no medical evidence of rape, the complainant's daughter being a major (19 years), and no evidence of video recording or blackmail. The prosecution countered that the first bail rejection order implied consideration of all arguments, and a

second bail application required new grounds, which were absent. Held: The court, relying on Mahipal Vs Rajesh Kumar ((2020) 2 SCC 118), St. of Maharashtra Vs Buddhikota Subha Rao (1989 Supp (2) SCC 605), Satyapal Vs St. of U.P. (1998 SCC OnLine All 1224), St. of M.P. Vs Kajad ((2001) 7 SCC 673), Kalyan Chandra Sarkar Vs Rajesh Ranjan ((2005) 2 SCC 42), and Hari Singh Mann Vs Harbhajan Singh Bajwa ((2001) 1 SCC 169), rejected the second bail application. The court held that successive bail applications require substantial new grounds, and reviewing the first rejection order without new facts would amount to impermissible review under criminal law. The applicant's failure to challenge the first rejection in the Supreme Court and reliance on the same grounds rendered the application unsustainable.

Case Law Cited:

1. Mahipal Vs Rajesh Kumar, (2020) 2 SCC 118

2. St. of Maharashtra Vs Buddhikota Subha Rao, 1989 Supp (2) SCC 605

3. Satyapal Vs St. of U.P., 1998 SCC OnLine All 1224

4. St. of M.P. Vs Kajad, (2001) 7 SCC 673

5. Kalyan Chandra Sarkar Vs Rajesh Ranjan, (2005) 2 SCC 42

6. Hari Singh Mann Vs Harbhajan Singh Bajwa, (2001) 1 SCC 169

7. Vinod Kumar Vs St. of Punj., (2015) 3 SCC 220

8. Hussain Vs Union of India, (2017) 5 SCC 702

(Delivered by Hon'ble Dr. Gautam Chowdhary, J.)

1. वर्तमान दाण्डिक प्रकीर्ण द्वितीय जमानत प्रार्थना पत्र, आवेदक योगेन्द्र कुमार मिश्रा की ओर से मु०अ०स० 324/2021, अन्तर्गत धारा 376/ 328/ 506 भा०दं०वि० एवं 3/4 पॉक्सो अधिनियम एवं 67 आई.टी एक्ट, थाना कोतवाली, जिला इलाहाबाद में जमानत पर मुक्त करने हेतु प्रस्तुत किया गया है।

2. आवेदक की विद्वान अधिवक्ता तनीषा जहांगीर मुनीर, परिवादी के विद्वान अधिवक्तागण एवं श्री चंदन सिंह विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

3. आवेदक की विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि आवेदक को इस प्रकरण में झूठा फसाया गया है, उसने कथित अपराध कारित नहीं किया है, प्रथम सूचना रिपोर्ट काफी विलंब से दर्ज करायी गयी है, जिसका कोई स्पष्टीकरण वादिनी मुकदमा ने नहीं दिया है, जबकि वादिनी के घर से थाने की दूरी मात्र 2 किमी. है। प्रथम सूचना रिपोर्ट में दिन, तारीख, समय व स्थान नहीं दिखाया गया है। वादिनी ने उपरोक्त मुकदमा रंजिशन प्रार्थी व उसके परिवार को बर्बाद व बदनाम करने की नीयत से झूंठा एवं फर्जी दर्ज कराया है क्योंकि वादिनी ने अपने प्रथम सूचना रिपोर्ट में स्वयं ही यह कहा है कि उसके पति एवं आवेदक के मध्य लड़ाई के कारण मुकदमा कोर्ट में चल रहा है। वादिनी के चिकित्सीय परीक्षण आख्या तथा उसकी पुत्री के चिकित्सीय परीक्षण आख्या से दोनों पीड़िताओं के साथ बलात्कार किये जाने की पुष्टि नहीं होती है, इसीप्रकार वादिनी के बयान अन्तर्गत धारा 161 व धारा 164 द्.प्र.सं. में विरोधाभाष है तथा वादिनी की बेटी के बयान अंतर्गत धारा 161 व धारा 164 दं.प्र.सं. में भी विरोधाभाष है। मुख्य चिकित्सा अधिकारी द्वारा वादिनी की बेटी के उम्र निर्धारण हेतु किये गये चिकित्सीय परीक्षण में उसकी उम्र लगभग 19 वर्ष पायी गयी है, इसप्रकार वह बालिग थी इसलिए आवेदक के विरूद्ध पाक्सो अधिनियम का कोई अपराध नहीं बनता है, आवेदक ने वादिनी की पुत्री की कोई वीड़ियो रिकार्डिंग भी नहीं बनायी और न ही उसके द्वारा वादिनी की पुत्री को ब्लैकमेल किया गया, इसलिए आवेदक के विरूद्ध धारा 67 आई.टी. एक्ट का भी कोई अपराध नहीं बनता है। वादिनी एवं आवेदक के बीच जो भी संबंध थे वे एक ही विभाग में कार्यरत होने के कारण थे, इन समस्त तथ्यों को देखते हुए आवेदक निर्दोष है इसलिए उसे जमानत पर छोड दिया जाये। आवेदक दिनांक 18.04.2022 से कारागार में निरूद्ध है।

4. आवेदक की विद्वान अधिवक्ता का कथन है कि प्रथम जमानत आवेदन पत्र के निस्तारण के समय आवेदक के तत्कालीन विद्वान अधिवक्ता ने उपरोक्त तर्क प्रस्तुत किये थे किन्तु प्रथम जमानत आवेदन पत्र के निरस्त्रीकरण आदेश में उक्त तर्क उद्धृत नहीं किये गये हैं इसका अर्थ यह लगाया जाये की प्रथम जमानत आवेदन पत्र के आदेश में उक्त बातों पर ध्यान दिये बिना ही आवेदक का जमानत

आवेदन पत्र निरस्त किया गया है इसलिए उन्हीं तर्कों के आधार पर आवेदक को जमानत प्रदान किया जाये।

5. आवेदक की विद्वान अधिवक्ता का कथन है कि प्रथम जमानत आवेदन पत्र संख्या 24524 सन 2022, जो इस न्यायालय की अन्य न्यायपीठ के आदेश दिनांक 17.10.2022 द्वारा निरस्त कर दिया गया था। वह आदेश निम्नवत है-

"1. Heard Sri Anil Tiwri, learned Senior Counsel assisted by Sri Dharmendra Shukla, learned counsel for the applicant and Sri Subhash Chandra Tiwari, learned counsel for the complainant and Sri Sanjay Singh, learned A.G.A. for State.

2. The present bail application has been filed by the applicant with a prayer to enlarge him on bail in Case Crime No. 324 of 2021, under Sections 376, 506, 328 I.P.C. and Section 3/4 of POCSO Act and Section 67 I.T. Act, Police Station Kotwali, District Prayagraj.

3. After hearing the learned counsel for the applicant and learned counsel for the complainant and learned A.G.A., and after perusing the averments made in the present bail application as well as rejection order, this Court is of the opinion, that learned counsel for the applicant could not point out any good ground for grant of bail to the applicant.

4. Accordingly, the bail application filed on behalf of the applicant is hereby rejected.

5. However, it is directed that the trial of the aforesaid case pending before the concerned court below be concluded expeditiously, preferably within eight months in accordance with Section 309 Cr.P.C. and in view of principle as has been laid down in the recent judgment of Hon'ble Apex Court in the case of **Vinod Kumar v. State of Punjab reported in 2015 (3) SCC 220 and Hussain and Another v. Union of India; 2017 (5) SCC 702,** if there is no legal impediment."

6. उपरोक्त दलीलों के संबंध में, आवेदक की विद्वान अधिवक्ता ने आगे कहा कि प्रथम जमानत प्रार्थना पत्र खारिज करते समय, आवेदक की ओर से दी गई दलीलों को निरस्तीकरण आदेश में दर्ज किया जाना आवश्यक है, जबकि इसे दर्ज नहीं किया गया है, अपने तर्क के समर्थन में उन्होंने माननीय उच्चतम न्यायालय के निर्णय महिपाल बनाम राजेश कुमार उर्फ पोलिया और अन्य 2020 (2) एससीसी 118 में पारित न्यायदृष्टि के प्रस्तर 24, 25, 27 की ओर न्यायालय का ध्यान आकृष्ट किया, जो निम्नवत् हैं।

"24. There is another reason why the judgment of the learned Single Judge has fallen into error. It is a sound exercise of judicial discipline for an order granting or rejecting bail to record the reasons which have weighed with the court for the exercise of its discretionary power. In the present case, the assessment by the High Court is essentially contained in a single paragraph which reads:

"4. Considering the contentions put-forth by the counsel for the petitioner taking into account the facts and circumstances of the case and without expressing opinion on the merits of the case, this court deems it just and proper to enlarge the petitioner on bail.

25. Merely recording "having perused the record" and "on the facts and circumstances of the case" does not sub-serve the purpose of a reasoned judicial order. It is a fundamental premise of open justice, to which our judicial system is committed, that factors which have weighed in the mind of the judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised

on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty bound to explain the basis on which they have arrived at a conclusion.

27. Where an order refusing or granting bail does not furnish the reasons that inform the decision, there is a presumption of the non-application of mind which may require the intervention of this Court. Where an earlier application for bail has been rejected, there is a higher burden on the appellate court to furnish specific reasons as to why bail should be granted."

7. परिवादी के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता का कथन है कि यद्यपि प्रथम जमानत प्रार्थना पत्र के आदेश में भले ही आवेदक के विद्वान अधिवक्ता द्वारा प्रस्तुत किये गये तर्कों को उद्धृत न किया गया हो किन्तु यह माना जायेगा कि उन्होंने उन सभी तर्कों को सुनने के पश्चात ही जमानत आवेदन पत्र निरस्त किया है एवं द्वितीय जमानत आवेदन पत्र को नये तथ्यों के आधार पर ही प्रस्तुत किया जाना चाहिए जबकि आवेदक की ओर से ऐसा नहीं किया गया है एवं प्रथम जमानत आवेदन पत्र के तर्कों को ही पुनः प्रस्तुत किया जा रहा है इसका अर्थ यह लगाया जाये कि आवेदक को जमानत पर मुक्त किये जाने के कोई नये आधार ही नहीं है, इस संबंध में उन्होंने न्यायालय का ध्यान माननीय उच्चतम न्यायालय एवं इस न्यायालय की कुछ नजीरों की ओर आकृष्ट करते हुए अनुरोध किया कि आवेदक के इस द्वितीय जमानत आवेदन पत्र को निरस्त कर दिया जाये।

8. उभयपक्षों के विद्वान अधिवक्तागण द्वारा दी गई दलीलों पर गहनतापूर्वक विचार किया एवं माननीय उच्चतम न्यायालय एवं इस न्यायालय की नजीरों का विहंगम परिशीलन किया। उक्त नजीरे निम्नवत् हैंः-

9. **महाराष्ट्र राज्य बनाम बुद्धिकोटा सुभा राव: 1989 सप्लिमेंट (2) एससीसी 605** के मामले में माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है कि यदि एक बार कोई जमानत आवेदन खारिज कर दिया गया हो तो उन्हीं आधारों पर द्वितीय जमानत आवेदन पत्र प्रस्तुत नहीं किया जा सकता है। पूर्व में प्रस्तुत किये गये तथ्य-स्थिति में कोई बदलाव किए बिना द्वितीय जमानत आवेदन पत्र को मंजूर करना वस्तुतः पहले के फैसले को खारिज करने जैसा होगा, तथा यह एक ऐसा महत्वपूर्ण परिवर्तन है, जिसका पहले के निर्णय पर सीधा प्रभाव पड़ता है, न कि केवल औपचारिक परिवर्तन। इसे निम्नानुसार माना गया है:-

"7. Liberty occupies a place of pride in our socio-political order. And who knew the value of liberty more than the founding fathers of our Constitution whose liberty was curtailed time and again under Draconian laws by the colonial rulers. That is why they provided in Article 21 of the Constitution that no person shall be deprived of his personal liberty except according to procedure established by law. It follows therefore that the personal liberty of an individual can be curbed by procedure established by law. The Code of Criminal Procedure, 1973, is one such procedural law. That law permits curtailment of liberty of anti-social and anti-national elements. Article 22 casts certain obligations on the authorities in the event of arrest of an individual accused of the commission of a crime against society or the Nation. In cases of undertrials charged with the commission of an offence or offences the court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has to be made, mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc. In the present case the successive bail applications preferred by the respondent

were rejected on merits having regard to the gravity of the offence alleged to have been committed. One such Application No. 36 of 1989 was rejected by Suresh, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail applications were rejected by Puranik, J. by a common order on 6-6-1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995 of 1989 otherwise he would have disposed it of by the very same common order. Before the ink was dry on Puranik, J.'s order, it was upturned by the impugned order. It is not as if the court passing the impugned order was not aware of the decision of Puranik, J.; in fact there is a reference to the same in the impugned order. Could this be done in the absence of new facts and changed circumstances? What is important to realise is that in Criminal Application No. 375 of 1989, the respondent had made an identical request as is obvious from one of the prayers (extracted earlier) made therein. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline, propriety and comity demanded that the impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J., only a couple of days before, in the absence of any substantial change in the fact-situation. In such cases it is necessary to act with restraint and circumspection so that the process of the court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course, we think, is to direct that the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the court's time as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In their view that we take we are fortified by the observations of this Court in para 5 of the judgment in Shahzad Hasan Khan v. Ishtiaq Hasan Khan [(1987) 2 SCC 684]. For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact-situation. That is what prompted Shetty, J. to describe the impugned order as 'a bit out of the ordinary'. Judicial restraint demands that we say no more.

10. **सत्यपाल बनाम यूपी राज्य : 1998 एससीसी ऑनलाइन ऑल 1224 : (1998) 37 एसीसी 28**7 के मामले में इस न्यायालय की एकल न्यायपीठ द्वारा एक प्रश्न का जवाब देते हुए निर्णय किया था कि क्या एक नया तर्क जो पहले उपलब्ध था उसे दूसरे जमानत आवेदन में आगे बढ़ाने की अनुमति दी जानी चाहिए या नहीं, खण्डपीठ के समक्ष प्रश्न इस प्रकार था:-

"1. The following question has been referred by learned single Judge to be decided by this Court:--

"Whether a fresh argument in a second bail application for an accused should be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected"."

The Division Bench held that a fresh argument in a second bail application cannot be allowed to be advanced on those very facts which were available to the accused at the time of the moving and rejection of the first bail application. The answer as given to the referred question is as follows :-

xxx xxx xxx xxx xxx

"9. ..... Accordingly our answer to the question referred is that fresh arguments in a second bail application for an accused cannot be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected."

11. माननीय उच्चतम न्यायालय ने **म.प्र. राज्य बनाम काजाद: (2001) 7 एससीसी 673** के मामले में जोर देते हुए कहा कि यद्यपि क्रमिक जमानत आवेदन स्वीकार्य हैं, लेकिन बदली हुई परिस्थितियों में। इसे निम्नानुसार माना गया है:-

"8. It has further to be noted that the factum of the rejection of his earlier bail application bearing Miscellaneous Case No. 2052 of 2000 on 5-6-2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in Hari Singh Mann v. Harbhajan Singh Bajwa [(2001) 1 SCC 169 : 2001 SCC (Cri) 113] and various other judgments."

12. इसके अलावा, माननीय उच्चतम न्यायालय ने **कल्याण चंद्र सरकार बनाम राजेश रंजन : (2005) 2 एससीसी 42** के मामले में जोर देते हुए कहा कि यदि तथ्यों में परिवर्तन या कानून में कोई बदलाव होता है जो पिछले आदेश को खारिज कर देगा तो बाद में जमानत आवेदन पत्र दायर किया जा सकता है। न्यायालय ने इस तर्क को खारिज कर दिया कि लगातार जमानत याचिका ऐसे आधार पर दायर की जा सकती है जिसे पहले ही अदालतें खारिज कर चुकी हैं, इसे निम्नानुसार माना गया है:-

"8. On 23-9-2002 the accused-respondent moved the eighth bail application which came to be allowed by the High Court by its order dated 23-5-2003 solely on the ground that the accused-respondent had undergone incarceration for a period of 3 years and that there was no likelihood of the trial being concluded in the near future and an appeal filed against the said grant of bail came to be allowed [Ed.: In Kalyan Chandra Sarkar v. Rajesh Ranjan, op. cit. fn. 2, above] on the ground that the High Court could not have allowed the bail application on the sole ground of delay in the conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of prima facie case, gravity of offence, and the allegation of tampering with the witness by threat and inducement when on bail. This Court held [Ed.: In Kalyan Chandra Sarkar v. Rajesh Ranjan, op. cit. fn. above] that since the above factors go to the root of the right of the accused to seek bail, non-consideration of the same and grant of bail solely on the

ground of long incarceration vitiated the order of the High Court granting bail. This Court also observed that though an accused had a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases the court also has a duty to record what are the fresh grounds which persuaded it to take a view different from the one taken in the earlier applications. This Court in that order also found fault with the High Court for not recording any fresh grounds while granting bail and for not taking into consideration the basis on which earlier bail applications were rejected. The Court also emphasised in the said order that ignoring the earlier orders of this Court is violative of the principle of binding nature of the judgments of the superior court rendered in a lis between the same parties, and noted that such approach of the High Court in effect amounts to ignoring or overruling and thus rendering ineffective the principles enunciated in the earlier orders especially of the superior courts. On that basis, the appeal of the complainant challenging the grant of bail came to be allowed cancelling the bail granted to the respondent. This order of this Court is reported as Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977]."

**** "20. The decisions given by a superior forum, undoubtedly, are binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view of the guarantee conferred on a person under Article 21 of the Constitution, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by the courts earlier, including the Apex Court of the country."

13. जहां तक आवेदक की विद्वान अधिवक्ता द्वारा **महिपाल (सुप्रा)** के मामले में दिए गए पैराग्राफ संख्या क्रमशः 24, 25, 27 पर जोर देते हुए यह तर्क प्रस्तुत किया गया है, कि प्रथम जमानत आवेदन पत्र तय करते समय न्यायालय द्वारा आदेश में उन तर्कों को दर्ज किया जाना चाहिए, लेकिन मौजूदा मामले में, उस पर पूर्व न्यायालय द्वारा विचार नहीं किया गया है, इसलिए आवेदक प्रथम जमानत आवेदन पत्र में प्रस्तुत किये गये आधारों पर ही जमानत पाने का हकदार है। इस संबंध में इस न्यायालय का मानना है कि यह न्यायालय इस मामले पर यह गौर नहीं कर सकता है कि पहले जमानत आवेदन पर निर्णय लेते समय तत्समय प्रस्तुत तथ्यों को दर्ज किए गए हैं या नहीं, दूसरी बात यह है कि यदि यह न्यायालय इसकी जांच करता है, तो यह स्थिति यह होगी कि पहले के आदेश की समीक्षा करना, जो कि आपराधिक कानून के तहत स्वीकार्य नहीं है जैसा कि माननीय सर्वोच्च न्यायालय ने **Hari Singh Mann Vs. Harbhajhan Singh Bajwa 2001 (1) SCC 169** के साथ-साथ अन्य निर्णयों में भी निर्णय दिया है।

इसके अलावा, पहले जमानत आवेदन को खारिज करने के आदेश को उच्चतम न्यायालय के समक्ष चुनौती नहीं दी गई है और यदि आवेदक इससे व्यथित था, तो उसके द्वारा उक्त निर्णय को उच्चतम न्यायालय के समक्ष चुनौती दी जानी चाहिए थी, लेकिन आवेदक ने ऐसा करने के बजाय, द्वितीय जमानत आवेदन पत्र दाखिल किया है। इस न्यायालय के समक्ष प्रस्तुत द्वितीय जमानत आवेदन, जिस पर प्रथम जमानत आवेदन की अस्वीकृति के बाद अभियुक्त को जमानत प्रदान करने के लिए नये आधारों पर विचार

किया जाना है, क्योंकि द्वितीय जमानत के लिए नए आधारों की उपलब्धता वांछनीय है, जो आवेदक के विद्वान अधिवक्ता द्वारा प्रश्नगत प्रकरण में नहीं किया गया है, इसलिए यह द्वितीय जमानत आवेदन पत्र निरस्त किये जाने योग्य है।

14. उपरोक्त के दृष्टिगत, आवेदक का यह द्वितीय जमानत आवेदन पत्र पोषणीय नहीं है, तदनुसार यह द्वितीय जमानत आवेदन पत्र निरस्त किया जाता है।

(2024) 3 ILRA 1223
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2024

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Crl. Misc. Bail Application No. 34031 of 2023

Roshan Singh ...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Vibhu Rai, Sri Shiv Babu Dubey

Counsel for the Opp. Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 439 – Indian Penal Code, 1860 – Sections 419, 420, 467, 468 & 471 – Bail Application – Impersonation in Competitive Examination – Societal Impact – Need for Stringent Measures

The applicant, Roshan Singh, sought bail in Case Crime No. 531 of 2023 under Sections 419, 420, 467, 468, and 471 IPC, Police Station Kotwali Nagar, District Banda, for allegedly impersonating Ranjan Gupta during a Village Development Officer re-examination on 26.06.2023. The FIR, lodged by the Principal of Arya Kanya Inter College, St.d that the applicant's photograph and biometric fingerprint did not match the admit card, leading to his identification as an imposter. The applicant argued false implication, a one-day delay in FIR, discrepancy in arrest date (29.06.2023), the offense being triable by a Magistrate, and parity with others granted bail in similar cases. The prosecution countered that the applicant was caught impersonating, undermining meritorious students' rights, and the parity claim was inapplicable due to different case circumstances. Held: The court rejected the bail application, emphasizing the grave societal impact of examination fraud, which jeopardizes deserving students' futures and erodes meritocracy. The court urged the St. Government and Examination Conducting Agencies to implement stringent measures to curb such malpractices and directed communication of the order to the Principal Secretary (Law) and Advocate General for policy formulation. The applicant's involvement, the offense's severity, and the need to deter such acts justified the denial of bail.

Case Law Cited:

1. Saurabh Kumar Vs St. of U.P. and Anr., Criminal Misc. Bail Application No. 35731 of 2023, decided on 23.08.2023 (All. HC) (cited by applicant, distinguished by court)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Rejoinder affidavit filed by learned counsel for the applicant today in the Court, is taken on record.

2. Heard Mr. Shiv Babu Dubey, learned counsel for the applicant, Mr. K.P. Pathak, learned counsel for the State and perused the material on record.

3. The instant bail application has been filed on behalf of the applicant, **Roshan Singh** with a prayer to release him on bail in Case Crime No. 531 of 2023, under Sections 419, 420, 467, 468, 471 I.P.C., Police Station-Kotwali Nagar, District-Banda, during pendency of trial.

4. As per the allegations in the FIR lodged by Poonam Gupta; Principal, Arya Kanya Inter College, Kotwali Nagar, Banda, when the re-examination 2018 for the post of Village Development Officer was going on in the second meeting on 26.06.2023 at about 04:20 pm, a call was received from the Control Room, Lucknow regarding examination room number 4 informing that the bio-metric of one Ranjan Gupta was found suspicious. On the aforesaid, a team was conducted for checking, in which the person sitting in place of Ranjan Gupta was found to be Roshan Singh, whose photograph and bio-metric fingerprint did not match with the admit card of the original candidate Ranjan Gupta. Information about the same was sent to the Commission conducting the examination, on the basis of which, an FIR has been lodged.

5. Learned counsel for the applicant submits that the applicant is innocent and has been falsely implicated in the present case due to mala fide intentions. He further submits that the FIR has been lodged after a delay of one day without giving any plausible explanation for the same. The arrest memo goes to show that the applicant was arrested on 29.06.2023, so it cannot be said that he was the person, who found sitting on 26.06.2023 in the examination centre in place of Ranjan Gupta. The offence is triable by the Magistrate. In different case crime numbers, in identical matters, the number of persons have been granted bail; one such bail application no.35731 of 2023 (Saurabh Kumar vs. State of U.P. and another) passed by the Co-ordinate Bench of this Court vide order dated 23.08.2023, copy of which has been passed on to the Court today, is kept on record. Thus, the applicant is also entitled for bail. He further submits that the applicant has no criminal history. He is languishing in jail since 26.06.2023. In case he is released on bail, he will not misuse the liberty of bail and will cooperate in the trial by all means. Lastly, it is submitted that there is no chance of applicant fleeing away from judicial process or tampering with the witnesses.

6. Per contra, learned A.G.A. has opposed the bail prayer of the applicant by contending that the applicant is named in the FIR, but it has not been mentioned in the FIR that the applicant was arrested on that date. He further submits that the applicant, who was sitting in place of Ranjan Gupta, was found in the examination centre, whose photograph and bio-metric fingerprint did not match with the admit card of the original candidate; Ranjan Gupta, therefore, the information of the same was given to the Commission. On the basis of the report of Commission, the FIR has been lodge by the Principal of the College, where the examination has been conducted on 27.06.2023. He further submits that such offence has taken away the right of the meritorious students. The order as placed before the Court by which parity has been claimed, does not mention the circumstances as in the present case and the same is different case crime number. Therefore, there is sufficient evidence available on record against the applicant, hence the applicant is not entitled for bail at this stage.

7. Cases akin to the present one illustrate a troubling trend: cheating through impersonation in competitive examinations is proliferating like an epidemic, consequently exerting a detrimental impact on both society and the education system. The future of diligent and deserving students is being jeopardized

by individuals engaged in such malfeasance, necessitating a firm and decisive response. These offenders must be dealt with sternly to safeguard the integrity of the examination process and uphold the principles of fairness and meritocracy.

8. During their preparation period, a student envisions and nurtures their aspirations day and night, longing for the opportunity to achieve their dreams. However, in today's sorry state of affairs, responsible agencies fail to transmit updates in due course of time, hindering their ability to apprehend imposters who undermine the integrity of the candidates.

9. Students hailing from a wide array of socio-economic backgrounds face myriad hurdles in their journey to achieve their aspirations, and it is imperative that we ensure a transparent examination process as the bare minimum. It would be grossly unjust for this court to extend sympathy towards an imposter who has callously subverted the right of deserving candidates to a fair and equitable opportunity in a transparent examination process. Such actions not only undermine the integrity of the system but also erode trust in the meritocratic principles upon which it is founded.

10. Taking into account the gravity of the offense, the evidence presented, the involvement of the accused, the severity of the punishment, and the arguments put forth by the learned counsel for both parties, I discern no compelling reason to exercise my discretion in favor of the accused applicant.

11. Before concluding on this matter, it is pertinent for this Court to emphasize that it is imperative for the State Government, in collaboration with Examination Conducting Agencies/Commissions, to introduce robust and stringent measures aimed at eradicating such audacious malpractices. Such measures are essential not only to instill confidence in the state apparatus but also to inspire every candidate investing their most valuable years in the preparation of competitive examinations.

12. This Court fervently hopes and trusts that the State Government will expedite the formulation of robust guidelines, regulations, or policies aimed at quelling the rampant spread of such malpractices that have taken root within our society. Such guidelines, so formulated, may be circulated among all the Examination Conducting Agencies/Commissions within the jurisdiction of the Government of Uttar Pradesh.

13. Let this order be communicated to the Principal Secretary (Law), U.P. Lucknow who will place it before the Hon'ble Minister, Law & Justice, U.P., Lucknow.

14. In view of the observations as made above, the bail application stands **rejected.**

15. Registrar (Compliance) shall communicate a copy of this order to

learned Advocate General and the Principal Secretary (Law), U.P. Lucknow.

(2024) 3 ILRA 1226
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2024

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Crl. Misc. IInd Bail Cancellation Application No. 38682 of 2023

Bharat Singh ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ravikant Shukla

Counsel for the Opp. Party:
G.A., Sri Deepak Dubey

Criminal Law - Code of Criminal Procedure, 1973 – Section 439 – Indian Penal Code, 1860 – Sections 147, 148, 149, 302, 307, 506, 120-B – Second Bail Application – Criminal Conspiracy – Hardened Criminal – Exploitation of Legal Loopholes

The applicant, Bharat Singh, sought bail in Case Crime No. 344 of 2018 under Sections 147, 148, 149, 302, 307, 506, and 120-B IPC, Police Station Sector-Nawabad, District Jhansi, for allegedly conspiring to murder Sanjay Verma on 21.07.2018. The FIR, lodged by Sanchit Verma, detailed an ambush where assailants fired at Sanjay Verma's car, killing one guard and injuring others. The applicant, not named in the FIR, was implicated through witness St.ments recorded post-incident, alleging he conspired with co-accused in 2017. The applicant argued false implication, delayed witness St.ments, weak evidence, and over five years of incarceration, claiming "bail is the rule, jail is the exception." The prosecution highlighted the applicant's criminal history (27 cases, convicted in three, including a prior murder of the victim's brother), his family's criminal involvement, and the rejection of a co-accused's bail by the Supreme Court. Held: The court, citing Vinod Kumar Vs St. of Punj. ((2015) 3 SCC 220) and Hussain Vs Union of India ((2017) 5 SCC 702), rejected the bail application, emphasizing the applicant's extensive criminal history and the case falling under the "exception" to the bail principle due to the risk of tampering with evidence and repeating offenses. The court noted the societal harm caused by hardened criminals exploiting legal loopholes, undermining public trust, and directed the trial court to expedite proceedings.

Case Law Cited:

1. Vinod Kumar Vs St. of Punj., (2015) 3 SCC 220

2. Hussain Vs Union of India, (2017) 5 SCC 702

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

1. List has been revised.

2. Heard Sri Ravikant Shukla, learned counsel for the applicant, Sri Deepak Dubey, learned counsel for the informant and Sri Ashutosh Srivastava, learned A.G.A. for the State as well as perused the material placed on record.

3. This is the second bail application on behalf of the applicant. The first Criminal Misc. Bail Application No.27318 of 2020 has been dismissed by this Court as not pressed vide order dated 21.02.2023.

4. Applicant seeks bail in Case Crime No.344 of 2018, under Sections 147, 148, 149, 302, 307, 506 and 120-B, Police Station Sector- Nawabad, District Jhansi, during the pendency of trial.

PROSECUTION STORY:

5. The FIR was instituted by Sanchit Verma, son of Shri Sanjay Verma, stating therein that today on 21.7.2018 at about 11:00 A.M. he along with his father had gone to Court. His father had to attend his case in the Court of District Judge, Jhansi,

and Civil Judge (Junior Division), Jhansi. At about 1:30 P.M., his father left the Court premises by his Pajero Sports Car No. UP 93AN 6301, which was being driven by Ravi Varma. His father was accompanied by his guards Jai Goswami and Sunil Kushwaha.

6. In the meantime, after about two minutes, it was observed that the car was being followed by a motorcycle driven by Ajay Sony. Near a temple, truck No. UP 93T 8047 was found parked along with a loader No. UP 93AT 3437. Hiding behind the said vehicles, the accused persons namely, Sonu Geda, Rinku Geda, Bobi Geda, Angad Gurjar, Prahlad Gurjar, Udham Gurjar, Rajendra Gurjar, Shivam Gurjar and Pushpendra Gurjar, came out with firearm weapons and started firing indiscriminately at the passengers in the car, which hit the driver of the vehicle resulting in it colliding with the loader and truck. The father of the informant and the persons seated in the vehicle sustained life threatening gunshot wounds.

7. The assailants sped away on motorcycles firing in air. The injured persons were rushed to Medical College Jhansi, where they are being treated and doctors had declared Jai Goswami dead. The accused persons, namely, Rinku Geda, Sonu Geda, Sardar Singh and others, had earlier caused the death of the uncle of the informant Ajay Verma and were convicted in it. The said conviction was sustained by the High Court, Allahabad and even the writ petition filed by Man Singh was dismissed by the Supreme Court. The aforesaid accused persons had earlier on also failed in attempt to commit murder of the father of the informant several times.

8. The instant F.I.R. was instituted at police station at 09:57 P.M. the same night.

RIVAL CONTENTIONS:
(Arguments on behalf of applicant)

9. The applicant is not named in the FIR. The name of the applicant has come up later in the statement of two witnesses i.e. Vijay Sony and Sanjiv Gupta regarding the applicant having hatched the conspiracy to commit the murder of the father of the informant. The said statement is an afterthought and the witnesses have been roped in after legal consultation, just to get the applicant languishing in jail.

10. The Investigating Officer without conducting proper, fair investigation and in a lethargic manner, has illegally submitted the final report (charge-sheet) against the applicant also of having committed the criminal conspiracy for getting the murder of the father of the informant.

11. The said witnesses are stated to have heard the applicant and co-accused persons, namely, Sardar Singh Gurjar and Rav Raja, on 03.08.2017 at the compound of Civil Court conspiring to get Sanjay Verma eliminated. The said offence is stated to have been committed after a period of almost 1 year i.e. on 21.7.2018. The statements of the witnesses have been recorded after the offence and not during the intervening period of conspiracy and murder.

12. It is pertinent to mention here that the delay in recording the statement of the witnesses speaks volume of frivolous prosecution of the applicant. The motive of false implication is mentioned in the said statement as both the parties carried an animosity with the applicant as he is already convicted in the murder of the uncle of the informant.

13. The 'bail' is the rule and 'jail' is an exception. The applicant is in jail since

18.10.2018. The period of incarceration being more than five years is itself a valid ground for release of the applicant that too in an offence of conspiracy only.

14. Five witnesses have already been examined and there is no tangible or credible evidence against the applicant and there is no chance of him absconding or tampering with evidence. The statement of prosecution witness Sanjeev Gupta (P.W.4) does not inspire any confidence as it is full of contractions and is filled up with embellishments.

15. The prosecution witnesses have stated that the applicant was handcuffed at the time he saw and heard them hatching the said conspiracy, which stands falsified from the facts that applicant was brought without being handcuffed as is evident from the order of the Special Judge (Gangster's Act), which has been filed as Annexure No.9 to the affidavit filed with the instant bail application.

16. The applicant is an aged person of 77 years and there is no likelihood of him repeating the offence.

17. The criminal history of twenty seven (27) cases assigned to the applicant stands explained as he has been acquitted in twenty (20) of the cases and proceedings in the case under the National Security Act have been dropped. The applicant has been enlarged on bail in three (3) cases and is convicted in the other three (3) cases.

(**Arguments on behalf of State/Informant)**

18. The applicant was a convicted person in Case Crime No.1463 of 2006, under Sections 147, 148, 149, 307, 302 I.P.C. and 7 Criminal Law Amendment Act vide judgement and order dated 20.8.2009. The Criminal Appeal against the said order of conviction was dismissed by this Court vide judgment and order dated 12.9.2017. An S.L.P. filed by applicant Bharat Singh was also dismissed by the Supreme Court.

19. The Government Order No.324/2023/1442/22-2-2023-17(4999) dated 12.06.2023 was passed for premature release of applicant under Section 2 of the Provisions of U.P. Prisoners Release on Probation Act, 1938 (Act 8 of 1938), as the applicant had forged his aged to be 77 years while his actual age is about 60 years, as is evident from the voter ID card issued by the State Election Commission, Uttar Pradesh, Lucknow. The said order of remission is under challenge before the High Court and it is pertinent to add that the remission order of co-accused Man Singh Gurjar has been set-aside by this Court vide order dated 19.04.2023.

20. The applicant and his family are a bunch of hardened criminals being involved in about twenty nine (29) cases in all. The criminal history of the applicant has been filed as Annexure No.CA-7 to the Short Counter Affidavit filed with the bail application. The applicant is a previous convict in three (3) cases and in one of the cases, the conviction has been affirmed up to the Supreme Court.

21. The bail application of the co-accused Rav Raja, whose case is on the similar footing to the applicant, has been rejected by the Supreme Court vide its order dated 29.10.2021 passed in S.L.P. (Criminal) Diary No(s). 24115/2021.

22. Learned A.G.A. has also opposed the bail application and reiterated the averments of counsel for the informant.

CONCLUSION:

23. The phrase "Bail is the rule and Jail is an exception" underscores the principle that individuals are presumed innocent until proven guilty. In this context, "jail as an exception" refers to the situations where a person's pre-trial liberty is restricted due to specific circumstances. These exceptions might include concerns about flight risk, potential danger to the community, the likelihood of the accused tampering with evidence, or possibility of repeating offence. Essentially, while bail is generally favoured to ensure the presumption of innocence, exceptions exist when there are compelling reasons to detain someone before trial.

24. The criminal justice system is designed to maintain order, protect citizens, and ensure that wrongdoers face consequences for their actions. However, an alarming trend has emerged where hardened criminals exploit loopholes in legal proceedings, capitalize on ambiguities, procedural errors, or inadequacies in legislation to evade the full force of the law. Whether through technicalities, or delays, these individuals navigate a legal landscape that inadvertently provides them with opportunities to escape justice. The exploitation of legal loopholes undermines public confidence in the criminal justice system. Victims may feel betrayed, and communities may lose faith in the ability of the legal framework to protect them. Additionally, this phenomenon perpetuates a cycle of crime, as criminals observe and learn from successful manoeuvres within the legal system.

25. Striking a balance between efficiency and justice remains a challenging aspect of legal proceedings. Taking case of the issue of hardened criminals exploiting legal loopholes is crucial for upholding the principles of justice and maintaining public trust in the legal system, through proactive legal reforms, technological advancements, and ongoing professional development, we can create a more resilient framework that minimizes opportunities for criminals to escape accountability. It is imperative that society remains vigilant in its pursuit of a fair and effective criminal justice system.

26. The applicant was convicted for the murder of the brother of one of the victims of the instant incident and the same is the motive for committing the instant offence. He is a previous convict in two other cases. Here the long criminal history of the applicant is an important factor which goes against him.

27. The instant case falls in the category of "exception" as mentioned in the old saying "Bail is the rule, and Jail is an exception". Hence, the bail to the applicant is declined and is, accordingly, ***rejected.***

28. However, it is directed that the aforesaid case pending before the trial court be decided expeditiously as early as possible in view of the principle as has been laid down in the recent judgments of the Apex Court in the cases of ***Vinod Kumar vs. State of Punjab; 2015 (3) SCC 220*** and ***Hussain and Another vs. Union of India; (2017) 5 SCC 702,*** if there is no legal impediment.

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

(2024) 3 ILRA 1230
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. 2nd Bail Application No. 44594 of 2023

Kamlesh Pathak ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Vijai Prakash Yadav, Sri Saghir Ahmad (Sr. Advocate)

Counsel for the Opp. Party:
G.A., Sri Anurag Shukla, Sri Dharmendra Shukla, Sri Saurabh Pathak, Sri Anil Tiwari (Sr. Advocate)

Criminal Law - Code of Criminal Procedure, 1973 – Section 439 – U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 – Section 3(1), 19(4)(b) & 12 – Second Bail Application – Criminal History – Gang Leader – Mandatory Bail Conditions - The applicant, Kamlesh Pathak, an Ex-MLC, sought bail in Case Crime No. 462 of 2020 under Section 3(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Auraiya, District Auraiya, linked to two cases involving double murder and attempt to murder (Case Crime Nos. 189 and 196 of 2020). The FIR alleged that the applicant, as a gang leader, engaged in extortion, illegal land encroachment, assault, and firing to maintain dominance, notably in the daylight murder of an advocate and his sister to grab temple land. The applicant, with a criminal history of 37 cases since 1974 (8 acquitted, 13 closed, 7 withdrawn, 2 unnoticed, 2 preventive, 1 decided, 4 pending), argued prolonged detention since 14.07.2020, bail in other cases, and parity with a co-accused. The prosecution highlighted the applicant's influence, pending SLPs against his bail in the murder case, and the risk of witness tampering. Held: The court, citing Neeru Yadav Vs St. of U.P. ((2015) 3 SCC 527), Sudha Singh Vs St. of U.P. ((2021) 4 SCC 781), Indresh Kumar Vs St. of U.P. (2022 Live Law (SC) 610), Deepak Yadav Vs St. of U.P. ((2022) 8 SCC 559), and Dharmendra Kirthal Vs St. of U.P. ((2013) 8 SCC 368), rejected the bail application. The court emphasized the applicant's extensive criminal history, the mandatory conditions under Section 19(4)(b) of the Gangsters Act requiring reasonable grounds to believe the accused is not guilty and unlikely to reoffend, and the societal threat posed by the applicant. Parity was dismissed as the co-accused's bail ignored Section 19(4)(b). The court directed expeditious trial under Section 12 of the Act and Section 309 Cr.P.C., prioritizing the Gangsters Act case.

Case Law Cited:

1. Neeru Yadav Vs St. of U.P., (2015) 3 SCC 527

2. Sudha Singh Vs St. of U.P., (2021) 4 SCC 781

3. Indresh Kumar Vs St. of U.P., 2022 Live Law (SC) 610

4. Deepak Yadav Vs St. of U.P., (2022) 8 SCC 559

5. Dharmendra Kirthal Vs St. of U.P., (2013) 8 SCC 368

6. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22 (distinguished)

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

1- Heard Mr. Saghir Ahmad, learned Senior Advocate assisted by Mr. Raghav Arora, learned counsel for the applicant, Mr. Arbind Kumar, Mr. Deepak Mishra and Mr. Rabindra Kumar Singh, learned Additional Government Advocates appearing for the State of U.P. as well as Mr. Anil Tiwari, learned Senior Counsel assisted by Mr. Anurag Shukla, learned

counsel appearing on behalf of complainant of [double murder case (crime No. 189 of 2020) filed against the applicant and his associates].

2- Brief facts of the case which are required to be stated are that a first information report under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act was lodged on 11.07.2020 against the applicant, who is Ex-MLC and his other ten associates at Police Station Auraiya, District-Auraiya on the basis of two cases being Case Crime No. 189 of 2020, under Sections 147, 148, 149, 302, 307, 506 I.P.C. and Section 7 of Criminal Law Amendment Act and Case Crime No. 196 of 2020 under Sections 147, 148, 149, 353, 307 I.P.C. and Section 7 of Criminal Law (Amendment) Act registered against him and others on 11.06.2020 at Police Station Auraiya, District Auraiya. In the first information report of this case, it is alleged inter alia, that gang leader Kamlesh Pathak (applicant) along with his gang members carry out criminal incidents like extortion, illegal encroachment of precious government land, assault, firing etc. to maintain their dominance and terror in the society for their economic and worldly benefits. Many criminal cases are already registered against the applicant and his associates, which they got compromised due to their fear and influence. No one comes to testify against them due to their fear. They misused their position while being in government and got their cases closed. On 15.03.2020, an advocate Manjul Chaube and his sister Sudha Chaube was brutally murdered by firing in brought day light in order to grab the valuable land of "Panchmukhi Hanuman Temple" situated in Arya Nagar, Auraiya. Due to which, their fear, dread and terror has become so widespread among the public that no one from the public dares to speak and testify against them, therefore it is not in public interest for them to remain free. Hence it is necessary to take action against them under U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986.

2.2- After investigation police Report (charge-sheet) under Section 173 (2) Cr.P.C. has been submitted against the applicant and other accused persons on 11.06.2020 and they are facing trial.

2.3- The first bail application of the applicant was rejected by detail order of the coordinate Bench of this Court dated 23.02.2023 in Criminal Misc. Bail Application No. 21738 of 2022.

2.4- The above order dated 23.02.2023 was challenged by the applicant before Hon'ble the Apex Court by means of Petition(s) for Special Leave to Appeal (Crl.) No. 3438 of 2023, which was dismissed by the Hon'ble Supreme Court vide order dated 08.05.2023, leaving it open to the petitioner to renew his request of bail after completion of three months.

2.5- Thereafter second Miscellaneous Application No. 1855 of 2023 in SLP (Crl) No. 3438 of 2023 was preferred by the applicant before Hon'ble Supreme Court, but the same was dismissed as withdrawn reserving liberty to the petitioner/applicant to move High Court, if so advised, with the observation that if application for bail is filed by the applicant, the same shall be considered by the High Court as expeditiously as possible.

2.6- In view of the above, the instant second bail application under Section 439 of Cr.P.C. has been filed on behalf of the applicant with a prayer to release him on

bail in Case Crime No. 462 of 2020 (Sessions Case No. 352 of 2021-State Vs. Kamlesh Pathak and Others) under Section 3(1) of Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986, Police Station-Auraiya, District-Auraiya pending in the court of Additional District and Session Judge, Court No.-II, Auraiya.

3- Main substratum of argument of Mr. Saghir Ahmad, learned Senior Counsel for the applicant is that the applicant is Ex-MLC, who is in jail in the present case since 14.07.2020, but his trial has not yet been concluded and till date out of sixteen prosecution witnesses, only six prosecution witnesses of charge sheet have been examined before the trial court. As on date, applicant is on bail in all pending criminal cases against him except in the present case and one co-accused Avanish Pratap Singh has been granted bail, therefore applicant is entitled to be released on bail.

3.1- So far as criminal history of the applicant is concerned, it is submitted that applicant has criminal history of total 37 cases, details whereof are as under:-

S.No.	Case Crime no. & year	Under sections	Police Station and District.
1.	**82 of 1985**	u/s 186, 189, 353, 504 IPC.	Police station Kotwali, District Auraiya.
2.	**481 of 1984**	u/s 332, 353, 171-F IPC & section 132 (2) Representation of the People Act.	Police station Kotwali Auraiya, District Etawah.
3.	**480 of 1984**	u/s 332. 353, 171-F IPC & section 132 (2) Representation of the People Act.	Police station Kotwali Auraiya, District Etawah.
4.	**479 of 1984**	u/s 332. 353, 171-F IPC & section 132 (2) Representation of the People Act.	Police station Kotwali Auraiya, District Etawah.
5.	**55 of 1974**	u/s 353, 393, 307 IPC.	Police station Kotwali Auraiya, District Etawah.
6.	**402 of 1983**	u/s 147 and 353 IPC.	Police station Kotwali Auraiya, District Etawah.
7.	**273 of 2005**	u/s 147, 148, 149, 307, 325 IPC.	Police station Kotwali, District Auraiya.
8.	**383 of 1974**	u/s 302 IPC.	Police station Kotwali Auraiya, District Etawah.
9.	**469 of 2007**	u/s 395 and 397 IPC.	Police station Kotwali, District Auraiya.
10.	**43 of 1991**	u/s 395, 397, 332, 353 IPC.	Police station Kotwali,

			District Auraiya.
11.	**365 of 1989**	u/s 395, 397 converted into 147, 148, 149, 323 IPC.	Police station Kotwali, District Auraiya.
12.	**364 of 1989**	u/s 395 & 397 IPC.	Police station Kotwali, District Auraiya.
13.	**175 of 1989**	u/s 395 & 397 IPC converted into 147, 148, 149 and 323 IPC.	Police station Kotwali, District Auraiya.
14.	**24 of 1986**	u/s 395 & 397 IPC converted into 323 and 504 IPC.	Police station Kotwali, District Auraiya.
15.	**11 of 1984**	u/s 147, 148, 149, 323, 506 IPC.	Police station Auraiya, District Auraiya.
16.	**30 of 2004**	u/s 147, 148, 149, 307, 436, 323, 353, 332, 341, 435 IPC and section 7 Criminal Law Amendment Act & 3/6 of Prevention of Damages to Public Property Act.	Police station Kotwali, District Auraiya.
17.	**338 of 2003**	u/s 405, 406, 420, 109, 120-B IPC.	Police station Kotwali, District Auraiya.
18.	**337 of 2003**	u/s 405, 406, 420, 109, 120-B IPC.	Police station Kotwali, District Auraiya
19.	**336 of 2003**	u/s 405, 406, 420, 109, 120-B IPC.	Police station Kotwali, District Auraiya
20.	**8 of 2002**	u/s 147, 148, 149, 323, 504 IPC.	Police station Mangaipur, District Kanpur Dehat.
21.	**63 of 1989**	u/s 188 IPC.	Police station Kotwali, District Auraiya.
22.	**23 of 2009**	u/s 2/3 (1) of UP Gangster Act.	Police station Kotwali, District Auraiya.
23.	**487 of 2008**	u/s 147, 148, 149, 307, 436, 336, 323, 353 IPC & section 7 Criminal Law Amendment Act and section 3/6 of Prevention of Damages	Police station Kotwali, District Auraiya.

		of Public Property Act.	
24.	**487-A of 2008**	u/s 147, 148, 149, 307, 436, 336, 323, 353 IPC & section 7 Criminal Law Amendment Act and section 3/6 of Prevention of Damages of Public Property Act.	Police station Kotwali, District Auraiya.
25.	**97 of 2001**	u/s 323, 504, 506 IPC and section 7 of Criminal Law Amendment Act.	Police station Kotwali Auraiya, District Auraiya
26.	**330 of 1993**	u/s 224 and 225 IPC.	Police station Kotwali, District Etawah.
27.	**30-E of 2004**	u/s 147, 323, 504, 506, 427, 436 IPC.	Police station Kotwali, District Auraiya.
28.	**30-C of 2004**	u/s 147, 336, 504 IPC.	Police station Auraiya, District Auraiya.
29.	**52 of 1986**	121, 128 of Railway Act.	P.S. GRP Auraiya, District Etawah
30.	**621 of 1999**	u/s 25 (1) (B) of Arms Act.	P.S. Kotwali, District Auraiya
31.	**Arising out of case crime No. 25 of 2009**	3 (2) of the National Security Act.	P.S. Kotwali, District Auraiya
32.	**Arising out of case crime No. 189 of 2020**	3 (2) of the National Security Act.	P. S. Auraiya, District Auraiya.
33.	**01 of 2009**	3 UP Goondas Act	P.S. Auraiya, District Auraiya
34.	**ST No. 81 of 2021, (State vs. Kamlesh Pathak and Others) arising out with case crime no. 189 of 2020.**	147, 148, 149, 302, 307, 506 IPC and section 7 of Criminal Law Amendment Act.	P.S. Auraiya, District Auraiya
35.	**ST NO.83 OF**	25/27 Arms Act.	P.S. Auraiya, District

	2021, (State vs. Kamlesh Pathak) arising out with case crime no. 190 of 2020.		Auraiya
36.	**ST NO. 82 of 2021, (State vs. Kamlesh Pathak and Others) arising out with case crime no. 196 of 2020.**	147, 148, 149, 353, 307 IPC and section 7 Criminal Law Amendment Act.	P.S. Auraiya, District Auraiya.
37.	**Case Crime no. 462 of 2020 (present case)**	under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act	P.S. Auraiya, District Auraiya.

Explaining the above criminal history of the applicant, it is further pointed out that:-

i- In 08 criminal cases mentioned in the above chart from serial no. 01 to 08, applicant has been acquitted.

ii- In 13 criminal cases mentioned in the above chart from serial no. 09 to 21, closer reports have been submitted.

iii- Total 7 criminal cases against the applicant mentioned in the above chart from serial no. 22 to 28 have been withdrawn by the State of U.P.

iv- In 2 criminal cases mentioned in the above chart from serial no. 29 and 30, applicant did not receive any notice or summon.

v- Two cases against the applicant mentioned in the above chart at serial nos. 31 and 32 were related to preventive in nature under Section 3 (2) of the National Security Act.

vi- One case against the applicant mentioned in the above chart at serial no. 33 has been decided.

vii- In four criminal cases mentioned in the above chart from serial no. 34 to 37, applicant is facing trial.

4- On the other hand, learned Additional Government Advocate for the State as well as Mr. Anil Tiwari, learned Senior Counsel appearing on behalf of complainant in above noted double murder case vehemently opposed the prayer for bail of the applicant by contending that in Case Crime No. 189 of 2020, under Sections 147, 148, 149, 302, 307, 506 I.P.C. and Section 7 of Criminal Law Amendment Act, Police Station Kotwali Auraiya, District Auraiya, the applicant has been granted bail by the coordinate Bench of this Court vide order dated 13.04.2022 passed in Criminal Misc. Bail Application No. 46390 of 2020, against which complainant has preferred SLP (Cri.) No. 004386 of 2022 before Hon'ble the Apex Court, in which notice has been issued to

the applicant vide order dated 02.05.2022. The State of U.P. has also preferred SLP (Cri.) No. 006080 of 2022. Much emphasis has been given by contending that the influence of the applicant is evident from the record that in thirteen criminal cases closure report has been filed by the police which include heinous offences like attempt to murder, attempt to dacoity and forgery etc., therefore in case bail is granted to the applicant in the instant case, the possibility of tampering the witnesses and evidence adopting different modus operandi cannot be ruled out. Lastly it is submitted that applicant and his associates / gang members are habitual to commit crime of different nature adopting different modus operandi, hence considering the nature of crime and gravity of offence, bail application of the applicant is liable to be rejected.

5- Having heard learned counsel for the parties and examined the matter in its entirety, I find that it is not in dispute that applicant is having long criminal history as noted above. In the SLP (Cri.) No. 004386 of 2022 filed by the complainant and SLP (Cri.) No. 006080 of 2022 filed by the State against the order dated 13.04.2022 granting bail to the applicant in above noted Case Crime No. 189 of 2020, notice has been issued by the Hon'ble Supreme Court and the same are still pending before the Hon'ble Supreme Court. At present following four cases are pending against the applicant in the Court of Special Court MP/MLA, District Auraiya. Present status of the same are as under:-

(i) Session Trial No. 81 of 2021 arising out of Case Crime No. 189 of 2020, under Sections 147, 148, 149, 302, 307, 506 I.P.C. and Section 7 of Criminal Law (Amendment) Act, Police Station Auraiya, District Auraiya, in which out of 17 prosecution witnesses, statements of 12 prosecution witnesses have been recorded before the trial court.

(ii) Session Trial No. 82 of 2021 arising out of Case Crime No. 196 of 2020 under Sections 147, 148, 149, 353, 307 I.P.C. and Section 7 of Criminal Law (Amendment) Act, Police Station Auraiya, District Auraiya, in which out of 15 prosecution witnesses, statements of 09 prosecution witnesses have been recorded before the trial court.

(iiI) Session Trial No. 83 of 2021 arising out of Case Crime No. 189 of 2020, under Sections 25,30 and 27 Arms Act, Police Station Kotwali, Auraiya, District Auraiya, in which out of 16 prosecution witnesses, statements of 03 prosecution witnesses have been recorded before the trial court.

(iv) GST No. 352 of 2021(present case) arising out of Case Crime No. 462 of 2020 under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, Police Station Auraiya, District-Auraiya, in which out of 16 prosecution witnesses of charge sheet, statements of 6 prosecution witnesses have been recorded before the trial court.

6- It is well settled that criminal history of the accused is also one of the relevant factor while considering bail application. In this regard, it is relevant to refer following judgments of the Apex Court.

6.1- Hon'ble Apex Court in the case of **Neeru Yadav Vs. State of U.P. (2015)3 SCC 527**, after referring a catena of judgments of Hon'ble Supreme Court on the consideration of factors for grant of bail, held as under:

"This being the position of law, it is clear as cloudless sky that the High Court

has totally ignored the criminal antecedent of the accused. What has weighed with the High Court is the doctrine of parity. A history sheeter involved in the nature of crimes which we have reproduced herein above, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner."

6.2- The aforesaid judgement has further been followed by the Apex Court in the case of **Sudha Singh Vs. State of U.P. and another, 2021(4) SCC 781** and **Indresh Kumar Vs. State of U.P. and another, 2022 Live law (SC) 610.**

6.3- In **Sudha Singh (Supra)** the Court held as under:

We find in this case that the high court has overlooked several aspects, such as the potential threat to witnesses, forcing the trial court to grant protection. It is needless to point out that in cases of this nature, it is important that courts do not enlarge an accused on bail with a blinkered vision by just taking into account only the parties before them and the incident in question. It is necessary for courts to consider the impact that release of such persons on bail will have on the witnesses yet to be examined and the innocent members of the family of the victim who might be the next victims.

6.4- In **Indresh Kumar (Supra)** the Hon'ble Supreme Court held that "as argued on behalf of the appellant, the High Court has, **apparently ignored the criminal antecedents of the respondent-accused. The respondent-accused has the criminal history of seven cases.**

The Court further held as under:

"If the High Court had seriously considered the gravity of the offence, there would have been some indication of what was the apparently extenuating circumstance, which entitled the respondent-accused to bail. Ex facie, the allegations are grave, the punishment is severe and it cannot be said that there are no materials on record at all."

7- Here it would also be apposite to quote the provisions of Section 19 (4) and (5) of U.P. Gangster and Anti-Social Activities (Prevention) Act, because the same is an additional condition for considering bail under the above mentioned Gangster Act, 1986, which are as under:-

Section 19. Modified application of certain provisions of the code :-

(1) ……..

(2) ……..

(3)……..

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

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

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such

offence and that he is not likely to commit any offence while on bail.

(5) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code.

08- In the light of above mentioned provisions, it is clear that the provisions provided in Section 19 (4) (b) of the U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, is mandatory in nature for considering the bail application under the said Act, wherein it has been provided that an accused of an offence punishable under U.P. Gangster and Anti-Social Activities (Prevention) Act, can be released on bail if the Court hearing bail application is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

09- I also find that it is not in dispute that the applicant has a long criminal history of 37 cases behind him since 1974. The courts while releasing the accused-applicant on bail imposed one of the conditions in most of the bail orders that applicant will not further indulge in criminal activity, but it appears that in the eyes of the accused-applicant, such condition / direction is nothing but a mere formality, whereas said condition is also one of the criteria for considering bail in subsequent crime of the accused. Year wise break up of the criminal cases registered against the applicant are as follows:-

In the year 1974……. 2 cases,
In the year 1983……. 1 case,
In the year 1984…….. 4 cases,
In the year 1985……. 1 case
In the year 1986……. 2 cases
In the year 1989……. 4 cases
In the year 1991……. 1 case
In the year 1993……. 1 case
In the year 1999……. 1 case
In the year 2001……. 1 case
In the year 2002……. 1 case
In the year 2003……. 3 cases
In the year 2004……. 3 cases
In the year 2005 ……..1 case
In the year 2007……. 1 case
In the year 2008……. 2 cases
In the year 2009……. 3 cases
In the year 2020……. 4 cases

10- This Court is of the view that those who are protector of the society being MP/MLA/MLC carry a big responsibility on their shoulders towards the public and they are not expected to commit crime or indulge in criminal activities causing dent to the healthy society in any manner. The higher is the position, the grater is the responsibility towards the society at large. Taking into consideration the long criminal history of the applicant, other attending factors, surrounding circumstance of the case as well as possibility of tampering the witnesses and misuse of liberty, I do not find reasonable or good ground for believing to record my satisfaction in terms of provisions of Section 19 (4) (b) of U.P. Gangster and Anti-Social Activities (Prevention) Act, that the applicant is not guilty of offence and will not further indulge in any criminal activity while being released on bail.

11- So far as submission on behalf of the applicant that the applicant has been granted bail in all the cases mentioned in gang chart and therefore he is liable to be granted bail in this case also is concerned, the same is not acceptable, because the offence punishable under Section 3 of U.P. Gangster and Anti-Social Activities (Prevention) Act is an independent offence.

Involvement of the accused in various other offences, in fact, constitute circumstances and evidence against him which may indicate that the accused is member or leader or organiser of a group which indulges in the kind of activities set out under the Gangster Act. The gravity of an offence under Section 3 of the U.P. Gangster and Anti-Social Activities (Prevention) Act may vary from case to case, therefore no universal rule can be framed to grant bail to the accused for the offence under Gangster Act.

12- The another submission on behalf of the applicant that one co-accused has been granted bail, therefore applicant is also entitled for bail on the ground of parity is concerned, I find that bail to the co-accused-Avanish has been granted without considering the mandatory provisions contained under Section 19 (4) (b) of U.P. Gangster and Anti-Social Activities (Prevention) Act and considering the judgement in the case of ***Dataram Singh Vs. State of U.P. and another, (2018)3 SCC 22,*** which is not applicable to the fact of the present case in the light of the judgement of Hon'ble Supreme Court in the case of **Indresh Kumar Vs. The State of Uttar Pradesh, 2022 Live Law (SC) 610,** therefore the bail order dated 18.8.2022 passed in Criminal Miscellaneous Bail Application No. 35331 of 2022 of co-accused Avanish is not helpful to the applicant.

13- In **Deepak Yadav Vs State of U.P. and another, (2022) 8 SCC 559,** bail granted by the Allahabad High Court to the accused in a murder case only on the basis of parity, has been cancelled by the Hon'ble Apex Court by observing that the High Court should have considered factors such as criminal background of the accused and nature of the offence, etc. Hon'ble Supreme Court considering pleuthera of judgements on the guiding principle for adjudicating a regular bail held as under:

26. "The importance of assigning reasoning for grant or denial of bail can never be undermined. There is prima facie need to indicate reasons particularly in cases of grant or denial of bail where the accused is charged with a serious offence. The sound reasoning in a particular case is a reassurance that discretion has been exercised by the decision maker after considering all the relevant grounds and by disregarding extraneous considerations."

" xxxxxxxxxxxxxxxxxx"

"39. ***Grant of bail to the Respondent No. 2/accused only on the basis of parity shows that the impugned order passed by the High Court suffers from the vice of non-application of mind rendering it unsustainable.*** *The High Court has not taken into consideration the criminal history of the respondent No. 2/accused, nature of crime, material evidences available , involvement of respondent No. 2/accused in the said crime and recovery of weapon from his possession."*

14- This Court is also of the view that further detail discussion relating to the incident and merit of the case need not be referred to herein since the allegations and the defence thereto is still open to be urged by the parties in the trial Court.

15- Considering the criminal history of the applicant, overall facts and other attending circumstances of the case as well as keeping in view the submissions advanced on behalf of parties, gravity of offence, role assigned to applicant, severity of punishment, possibility of tampering the

evidence and stage of the trial of the applicant as noted above, I do not find any good ground to release the applicant on bail.

16- Accordingly, the bail application of applicant is rejected.

17- Section 12 of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 provides that trial under the Act of any offence by special court shall have precedence over the trial of any other case against the accused in any other court and shall be concluded in preference to the trial of such other case and accordingly trial of such other case shall remain in abeyance. The validity of the aforesaid Act was in question before the Hon'ble Supreme Court in the case of **Dharmendra Kirthal Vs. State of U.P. and another, (2013) 8 SCC 368.** The Apex Court after detail analysis, upheld the constitutional validity of Section 12 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 by holding that it does not infringe any of the facets of Articles 14 and 21 of the Constitution of India.

18- Accordingly, it goes without saying that the case against the applicant under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 shall have precedence over the trial of any other case against the accused.

19- In the matter of MPs and MLAs directions have also been issued by the Hon'ble Supreme Court for expeditious disposal of cases. Accordingly trial Court is directed to conclude the trial of the applicant expeditiously in accordance with provisions of Section 309 Cr.P.C. without granting any adjournment to either of the parties taking into consideration the provisions of Section 12 of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986.

20- It is made clear that the observations contained in the instant order is confined to the issue of bail and shall not affect the merit of the trial.

(2024) 3 ILRA 1240
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 55042 of 2023

Shahzan ...Applicant (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Ms. Shivangi Singh, Sri Mohd. Afzal

Counsel for the Opp. Party:
G.A.

Criminal Law -Code of Criminal Procedure, 1973 – Sections 226, 309, 439 – Indian Penal Code, 1860 – Sections 147, 148, 149, 302 & 506 – Criminal Law Amendment Act – Section 7 – Bail Application – Murder Case – Trial Delays – Mandatory Compliance with Section 226 Cr.P.C. and Rule 35 General Rules (Criminal)

The applicant, Shahzan, sought bail in Case Crime No. 34 of 2021 under Sections 147, 148, 149, 302, 506 IPC and Section 7 of the Criminal Law Amendment Act, Police Station Haldaur, District Bijnor, for allegedly shooting and killing the deceased, as corroborated by eyewitnesses and the postmortem report. The applicant, in jail since 06.02.2021, had his bail rejected by the trial court on 29.06.2022. The prosecution's case was supported by evidence of multiple bullet injuries. Held: The court, without delving into the merits, rejected the bail application due

to the gravity of the offense, the applicant's role as a principal offender, and the risk to a fair trial if released. The court expressed concern over the slow trial pace (only 7 of 67 witnesses examined) and the prosecution's failure to submit a witness calendar under Section 226 Cr.P.C. and Rule 35 of the General Rules (Criminal), which are mandatory for ensuring fairness and pre-trial clarity. The court directed the trial court to expedite the trial within one year, enforce witness attendance through coercive measures, and ensure compliance with statutory provisions. The Director General (Prosecution) and police authorities were instructed to adhere to these provisions and prior court directives in Bhanwar Singh @ Karamvir (Criminal Misc. Bail Application No. 16871 of 2023) and Jitendra (Criminal Misc. Bail Application No. 9126 of 2023). The trial court was mandated to monitor compliance and report progress fortnightly.

Case Law Cited:

1. St. of Har. Vs Raghubir Dayal, (1995) 1 SCC 133

2. Ram Dhani Vs St. of U.P., 1997 SCC OnLine All 407

3. Noor Alam Vs St. of U.P., Criminal Misc. Bail Application No. 53159 of 2021

4. Bhanwar Singh @ Karamvir Vs St. of U.P., Criminal Misc. Bail Application No. 16871 of 2023, decided on 24.08.2023 (All. HC)

5. Jitendra Vs St. of U.P., Criminal Misc. Bail Application No. 9126 of 2023, decided on 20.12.2023 (All. HC)

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

1. Heard Ms. Shivangi Singh, learned counsel for the applicant and Shri Paritosh Kumar Malviya, learned AGA-I for the State.

2. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No. 34 of 2021 at Police Station Haldaur District Bijnor under Sections 147, 148, 149, 302, 506 IP.C and Section 7 of Criminal Law Amendment Act. The applicant is in jail since 06.02.2021.

3. The bail application of the applicant was rejected by learned trial court on 29.06.2022.

4. The applicant has been identified as one of the principal offenders who discharged his firearm and shot dead the deceased. The deceased sustained multiple bullet injuries. Eye witnesses to the incident and the postmortem report corroborate the prosecution case. The trial is on foot. Enlarging the applicant on bail at this stage would not be conducive to a fair trial. The offence is grave. There is likelihood that the applicant committed the offence. At this stage, no case for bail is made out.

5. Without going into the merits of the case, at this stage the bail application is dismissed.

6. Before parting, some essential observations arising in the facts of this case are being made as regards the conduct of the trial.

7. This Court would like to express its dissatisfaction at the pace of the trial. The status report sent by the learned trial court records that as per the chargesheet the prosecution proposes to examine 67 witnesses to bring home the charges. Till date only 7 prosecution witnesses have been examined.

8. Earlier this Court had directed the trial court to provide all relevant details regarding the status of the trial including

the number of prosecution witnesses mentioned in the chargesheet, and the prosecution witnesses depicted in the calendar.

9. The trial court in its status report only depicts the witnesses mentioned in the chargesheet. The proposed prosecution witnesses depicted in the calendar given by the public prosecutor at the commencement of the trial has not been disclosed in the said status report. The State too has failed to furnish the calendar before this Court. Evidently the calendar has not been produced before the trial court by the prosecution.

10. The prosecution at the commencement of the trial is required to submit a calendar under Rule 35 of the General Rules (Criminal) read with Section 226 of the Criminal Procedure Code.

11. Section 226 Cr.P.C. being relevant to the discussion is extracted hereinunder:

"226. Opening case for prosecution.—When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused." (emphasis supplied)

12. The provision contains the conditions precedent required to be fulfilled by the prosecution prior to opening its case before the trial court. The public prosecutor is liable to describe the charge brought against the accused, and also the details by what evidence it proposes to prove the charges against the accused.

13. The word 'shall' has been employed by the legislature giving the provision a mandatory cast.

14. Rule 35 of the General Rules (Criminal) has a similar purpose and is extracted hereunder:

"35. Procedure on commitment :- When an order of commitment for trial has been made, the Magistrate shall at once report the fact to the court to which the commitment is made by a letter in the prescribed form (Part IX, no. 2); shall notify the Public Prosecutor of the commitment of the case to the Court of Session and shall within eight days from making the said order, submit the entire record of the case and the documents and articles, if any, which are to be produced in evidence to the Court of Session or, when the commitment is made to the High Court, to the Clerk of the State together with a calendar in the prescribed form (Part IX, no. 3). The entries under head of the calendar shall be full and accurate, so as to give the court receiving it a clear idea of the matters to which each witness will depose. The Public Prosecutor shall submit a list of witnesses whom he would not examine out of the, witnesses mentioned in the calendar." (emphasis supplied)

15. The provision mandates the public prosecutor to submit a calendar in the prescribed form before the trial court prior to commencement of the trial. The entries in the calendar depict the number of witnesses, and the matters to which each witness will depose. The witnesses who are mentioned in the chargesheet but not proposed to be examined too have to be referenced in a separate list. In Rule 35 of the General Rules (Criminal), the word "shall" precedes the said tasks which have to be performed by the prosecution.

16. The provision shall be interpreted in light of the settled canons of statutory interpretation. The word 'shall' has been employed in the statute which depicts the legislative intent of giving the provision a mandatory character [See: **State of Haryana Vs. Raghubir Dayal1,** and **Ram Dhani And Another Vs. State of U.P.**2]

17. Clearly Rule 35 of the General Rules (Criminal) read with Section 226 of the Criminal Procedure Code are mandatory in nature. Imperative statutory duty is cast on the public prosecutor to submit a calendar and other details under Rule 35 of the General Rules (Criminal) read with Section 226 of the Criminal Procedure Code before the trial court prior to commencement of the trial. The provisions have been engrafted to give advance notice to the accused of the prosecution evidence proposed to be tendered at the trial. The provisions are also consistent with the fundamental norms of fairness in criminal processual jurisprudence. Prior notice of proposed prosecution evidence alerts the accused in advance to the case he/she has to meet. The provisions enable the accused to prepare his/her defence thoroughly and refute the prosecution case, and also precludes the prosecution from springing a surprise on the accused. The rights so vested in an accused cannot be disregarded or negated by non compliance of the provision.

18. However, it needs to be clarified that failure of the public prosecutor to submit the calendar does not ipso facto vitiate the trial.

19. The scheme of the provisions have to be looked at from another perspective. At the stage of the investigations many lines of enquiries are followed which appear to connect the accused with the offence. A great number official witnesses are also associated with the investigations at different stages. In the process a large number of witnesses are nominated in the chargesheet.

20. The pre trial process under Rule 35 of General Rules (Criminal) by the prosecutor crystallizes the implicatory evidence against the accused. The proceedings under Rule 35 of the General Rules (Criminal) read with Section 226 of the Criminal Procedure Code enable the prosecution to identify the relevant witnesses and critical pieces of evidence which should be adduced in the trial, and exclude irrelevant materials and witnesses named during the course of investigations.

21. The said provision ensures that there is due application of mind by the prosecutor on various aspects of the prosecution evidence prior to commencement of the trial. Pre trial strategizing of this nature enables the prosecution to package and present its evidence in a coherent sequence and professional manner. The provisions contemplate a statutory interface between the prosecutor and the investigating agency which has submitted the chargesheet. In case deficiencies in the investigations are highlighted in the process of creation of the calendar, the investigation agency may take appropriate steps as per law.

22. Calling excessive number of witnesses for the same purpose is a repetitive and a time consuming exercise which does not enure to the benefit of the prosecution. It is the prerogative of the prosecution to decide the number of witnesses to establish its case before the trial court. However, adherence to Section

226 of the Criminal Procedure Code read with Rule 35 of the General Rules (Criminal) will curtail unnecessary delays, prevent duplication of witnesses, preserve scarce resources and ensure speedy conclusion of the trial.

23. Trial courts are also under an obligation to oversee compliance of Section 226 of the Criminal Procedure Code read with Rule 35 of the General Rules (Criminal).

24. Director General (Prosecution), State of U.P., Lucknow shall ensure that the mandatory provisions of Rule 35 of the General Rules (Criminal) read with Section 226 Cr.P.C. are duly complied with by the prosecution at the time of commencement of a trial. Appropriate action in this regard shall be taken by the Director General (Prosecution) and all other concerned State authorities in all criminal trials. The Director General (Prosecution) shall consider if it so feasible to submit the calendar at this belated stage to avoid further unnecessary delays in this trial as well.

25. Considering the gravity of the offence, interest of justice will be served by directing the learned trial court to expedite the trial within a stipulated period of time.

26. Though no specific time frame to conclude the trial has been set out in the Cr.P.C., yet the legislative intent of Section 309 Cr.P.C. is explicit. The scheme of the provision clearly shows that the legislative intent is to conclude the trial in an expeditious time frame. In the facts of this case, the learned trial court shall make all endeavours to conclude the trial preferably within a period of one year from the date of receipt of a certified copy of this order.

27. The trial court has also to be conscious of the rights of the accused persons and is under obligation of law to ensure that all expeditious, necessary and coercive measures as per law are adopted to ensure the presence of witnesses. Counsels or parties who delay or impede the proceedings should not only be discouraged from doing so but in appropriate cases exemplary costs should also be imposed on such parties/ counsel. All witnesses and counsels are directed to cooperate with the trial proceedings.

28. The learned trial court shall issue summons by regular process as per Section 62 Cr.P.C. and also by registered post as provided under Section 69 Cr.P.C. to expedite the trial.

29. The learned trial court shall promptly take out all strict coercive measures against all the witnesses in accordance with law who fail to appear in the trial proceeding. Counsels or parties who delay or impede the proceedings should not only be discouraged from doing so but in appropriate cases exemplary costs should also be imposed on such parties/ counsel.

30. The police authorities shall ensure that warrants or any coercive measures as per law taken out by the learned trial court to ensure that the attendance of the witnesses are promptly executed.

31. The Superintendent of Police, Bijnor shall file an affidavit before the trial court on the date fixed regarding status of execution of the warrants/service of summons taken out by the learned trial court.

32. In case there is a failure on part of the police authorities to execute the

warrants or other coercive measures, the Superintendent of Police, Bijnor shall state the reasons for the same in the said affidavit and also show the steps taken to execute the warrants. The Superintendent of Police, Bijnor shall simultaneously inform the Additional Director General of Police (ADG) Bareilly Zone, about the aforesaid failure of the police authorities in the first instance to execute the warrants and coercive measures issued by the learned trial court. If required, the Additional Director General of Police (ADG) Bareilly Zone, may issue an appropriate directions to ensure that the warrants issued are promptly executed by the learned trial court.

33. The delay in execution of warrants and consequent absence of witnesses is one of the principal causes of delays in criminal trials and has to be addressed effectively by all stakeholders.

34. The counsels as well as the learned trial court are directed to comply with the directions issued by this Court in **Noor Alam Vs. State of U.P.** rendered in **Criminal Misc. Bail Application No. 53159 of 2021**. In case any strike happens during the course of the trial, the learned trial court is directed to ensure full compliance of the directions issued in **Noor Alam (supra)** so that the pace of the trial does not suffer.

35. It is further directed that in case any accused person who has been enlarged on bail does not cooperate in the trial or adopts dilatory tactics, the learned trial court shall record a finding to this effect and cancel the bail without recourse to this Court.

36. The delay in the trials caused by the failure of the police authorities to serve summons or execute coercive measures to compel the appearance of witnesses at the trial despite a statutory mandate, is an issue of grave concern. The said issue had arisen for consideration before this Court in **Bhanwar Singh @ Karamvir Vs. State of U.P. (Criminal Misc. Bail Application No. 16871 of 2023) & Jitendra v. State of U.P. .(Criminal Misc. Bail Application No.9126 of 2023)** and was decided by the judgements dated 24.08.2023 & 20.12.2023 respectively. This Court in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** had issued certain directions to the police authorities regarding their statutory duty to promptly serve summons and execute coercive processes to compel the appearance of witnesses.

37. The Director General of Police, Government of U.P. as well as Principal Secretary (Home), Government of U.P. had taken out relevant orders in compliance of judgements in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** and nominated the Senior Superintendent of Police of the concerned districts as the responsible officials for implementing the said judgments.

38. In case the police authorities are failing to comply with the directions issued by this Court in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** and do not implement the said directions of the Director General of Police, Government of U.P. & the Home Secretary, Government of U.P. in regard to service of summons and execution of coercive measures to compel the appearance of witnesses, the learned trial court shall direct the concerned Senior Superintendent of Police to file an affidavit in this regard.

39. The learned trial court shall be under an obligation to examine whether the

judgements of this Court in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** as well as directions of Director General of Police, Government of U.P. & the Home Secretary, Government of U.P. issued in compliance thereof have been implemented or not and to take appropriate action as per law.

40. The learned trial court shall also take appropriate measures in law after receipt of such affidavit which may include summoning the concerned officials in person.

41. The trial judge shall submit a fortnightly report on the progress of trial and the steps taken to comply with this order to the learned District Judge.

42. A copy of this order be communicated to the learned trial judge through the learned District Judge, Bijnor as well as Superintendent of Police, Bijnor by the Registrar (Compliance) by Email.

43. Government Advocate shall also communicate a copy of this order to Director General (Prosecution), State of U.P., Lucknow for taking appropriate action to ensure compliance of the directions in regard to Section 226 of the Criminal Procedure Code read with Rule 35 of the General Rules (Criminal) by the public prosecutor in all criminal trials.

(2024) 3 ILRA 1246
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2024

BEFORE

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

Contempt Appeal Defective No. 1 of 2024

Rakesh Kumar District Inspector of School Gonda ...Appellant

Versus

Surendra Pratap Singh & Ors. ...Respondents

Counsel for the Appellant:
Jyotinjay Verma

Counsel for the Respondents:
Girish Chandra Verma

Criminal Law - Contempt of Court Act, 1971 - Section 19 - Appeal - Maintainability of - In instant Contempt Appeal, order dated 13.12.2023 records finding of guilt against appellant - contemnor, rejecting three affidavits tendering unconditional apology along with applications seeking discharge of notice - Order further ignored facts relating to approval of Competent Authority for termination of writ petitioners' services and for recovery of loss to public exchequer from then DIOS and Committees of Management - Impugned order does not merely frame charge simpliciter but records adverse finding against appellant-contemnor, leaving no scope for him to further explain his conduct in relation to alleged non-compliance of writ court's order - Supreme Court consistently held where High Court refuses to exercise jurisdiction to punish for contempt and does not initiate proceedings, no appeal shall lie, and likewise no appeal lies from interlocutory order - In Baradakanta Mishra (infra) it was held that orders or decisions wherein point is determined or finding recorded in exercise of contempt jurisdiction would be appealable - Thus, Contempt Appeal, maintainable. (Para 62 to 64)

Appeal allowed. (E-13)

List of Cases cited:

1. Midnapore People's Cooperative Bank Limited Vs Chunni Lal Nanda, 2006 (5) SCC 399, (Para 11)

2. Dr. Ashwini Kumar Singh Vs Dr. Sandeep Kumar & ors.., 2020 SCC OnLine Allahabad 211

3. Om Prakash Vs Arun Chand Pandey, 2008 (26) LCD 1467

4. Devesh Kumar Mishra & ors..Vs Sudhanshu Dhar Trivedi, Contempt Appeal No.17 of 2005

5. Baradakanta Mishra Vs Justice Gatikrushna Misra, AIR 1974 SC 2255

6. Baradkanta Mishra Vs The Registrar of Orissa High Court & anr., AIR 1976 SC 1206

7. Purshotam Dass Goel Vs Hon'ble Mr. Justice B. S. Dhillon & ors.., AIR 1978 SC 1014

8. D.N. Taneja Vs Bhajan Lal, 1988 (3) SCC 26, (Para 12)

9. St. of Maharashtra Vs Mahboob S. Allibhoy & anr., 1996 (4) SCC 411

10. R.N. Dey Vs Bhagyabati Pramanik, 2000 (4) SCC 400, (Para 10)

11. Modi Telefibres Ltd Vs Sujit Kumar Choudhary & ors.., 2005 (7) SCC 40

12. Parents Association of Students Vs M. A. Khan & anr. 2009 (2) SCC 641, (Paras 11, 12)

13. Tamilnad Mercantile Bank Shareholders Welfare Association Vs S.C. Sekar & ors.., reported in (2009) 2 SCC 784

14. ECL Finance Limited Vs Hari Kishen Shankr Ji, Gudipati & ors..reported in (2018) 13 SCC 142

15. Smt. Subhawati Devi Vs R.K. Singh & anr. 2004, Criminal Law Journal Allahabad 4817, (Paras 15, 16)

16. T. George Vs Vijai Kumar Srivastava, 2003 (5) AWC 4247, (Para 14)

17. Sanjay Kumar Vs Santosh Kumar Srivastava reported in 2023 (3) ADJ 354, (Para 15)

18. Jai Karan Lal Verma Vs Rajesh Kumar Pathak & ors..reported in 2008 (1) AWC Page 61

19. Dr. Ashwini Kumar Singh Vs Dr. Sandeep Kumar & ors.., 2020 SCC online Allahabad 211

20. Arun Kumar Gupta Vs Jyoti Prasanna Das Thakur, (1996) ILR 1 Calcutta 292

21. Manjula Chaudhary Vs Priyanka Chauhan, 2015 (4), MPLJ 704, (Paras 10, 14)

22. Amit Kumar Dubey Vs Pradeep Kumar Shukla 2017 Cr.L.J. 1315, (Paras 38, 45, 46, 74)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.

1. This Contempt Appeal has been filed against the order passed by the Contempt Judge dated 13.12.2023 framing charge against the Appellant.

2. A preliminary objection has been raised by Sri G.C. Verma, learned Counsel for the respondent that such Contempt Appeal is not maintainable against an order by the Contempt Judge, only framing charge.

3. Reliance has been placed by the counsel for the respondent on the Supreme Court observations in *Midnapore People's Cooperative Bank Limited Vs. Chunni Lal Nanda*, 2006 (5) SCC 399; where the Supreme Court had observed that a Contempt Appeal would lie only against an order imposing punishment. The counsel for the respondent has also placed reliance upon two Division Bench judgements of the Court rendered in *Dr. Ashwini Kumar Singh Vs. Dr. Sandeep Kumar and others*,

2020 SCC OnLine Allahabad 211, where the Division Bench also placed reliance upon another Division Bench judgement rendered in the case of *Om Prakash Versus Arun Chand Pandey*, 2008 (26) LCD 1467, and on a similar decision rendered in Contempt Appeal No.17 of 2005: *Devesh Kumar Mishra and others versus Sudhanshu Dhar Trivedi*.

4. The counsel for the appellant on the other hand has argued that the order impugned in this Appeal is not an order, framing charge simplicitor but the Contempt Judge has given a finding of the District Inspector of Schools being guilty and rejected the affidavits filed along with applications rendering unconditional apology by the appellant.

5. Appreciating the arguments raised by the counsel for the parties, this Court shall first consider the language of Section 19 of the Contempt of Courts Act.

6. Section 19 of the Act provides as follows: –

(1) An Appeal shall lie as of right from any order or decision of High Court in exercise of its jurisdiction to punish for contempt – (a), where the order or decision is of a Single Judge to a Bench of not less than two Judges of the Court; (b) Where the order or decision is that of a Bench, to the Supreme Court; provided that where the order or decision is that of the Court of Judicial Commissioner in any Union Territory, such Appeal shall lie to the Supreme Court.

(2) pending any Appeal, the Appellate Court may order that – (a) execution of punishment, or order remains suspended; (b) if the appellant is in confinement, he be released on bail (c) An Appeal be heard notwithstanding that the Appellant has not purged contempt.

(3) Where any person aggrieved by any order against which an Appeal may be filed satisfies the High Court that he intends to prefer an Appeal, the High Court may also exercise all or any of the powers conferred by Sub-Section (2) until an Appeal under Sub-section (1) shall be filed – (a) in the case of an Appeal to a Bench of the High Court, within 30 days; (b) in case of an Appeal to the Supreme Court, within 60 days from the date of the order, appealed against.

7. We shall now consider various judgments of the Supreme Court to understand the true import of Section 19 of the Contempt of Courts Act.

8. In ***Baradakanta Mishra Vs. Justice Gatikrushna Misra***, AIR 1974 SC 2255, the High Court had refused to take action on the motion made by the Applicant for initiating contempt proceedings. The Appellant filed a Criminal Appeal under Section 19 of the Act, a preliminary objection was raised that the Appeal was not maintainable. The Supreme Court observed that so far as Criminal Contempt is concerned, it is a matter entirely between the Court and the Contemnor. The litigant can only draw the attention of the Court to the alleged Contempt, and it will then be for the Court, if it so thinks fit, to take action to vindicate it's authority and direct the arrest of the Contemnor for contempt. There is no right in anyone to compel the Court to initiate a proceeding for contempt, even where a *prima facie* case appears to have been made out. The Court may in exercise of its discretion accept an unconditional apology from the Contemnor and drop the proceedings. Even after the Contemnor is found guilty, the Court may

having regard to the circumstances, decline to punish him. The Supreme Court further observed that it is only when the Court decides to take action and initiate a proceeding for contempt that it assumes jurisdiction to punish for contempt. Where the Court rejects the motion or reference and declines to initiate a proceeding for contempt, it refuses to assume or exercise jurisdiction to punish for contempt and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt. Such a decision would not therefore fall within the language of Section 19 of the Act.

9. In ***Baradkanta Mishra Vs. The Registrar of Orissa High Court and another***, AIR 1976 SC 1206, an order passed in contempt jurisdiction was challenged by Baradkanta Mishra before the Supreme Court. The Supreme Court observed that the appeal was not maintainable as only those orders or decisions in which some point is decided or finding is given in the exercise of jurisdiction of the High Court to punish for Contempt an appeal under Section 19 of the Contempt of Courts Act would lie. An Interlocutory order pertaining purely to the procedure of the Court, including one relating to maintainability of the proceedings, did not amount to an order passed in exercise of jurisdiction to punish for content.

10. In ***Purshotam Dass Goel Vs. Hon'ble Mr. Justice B. S. Dhillon and others***, AIR 1978 SC 1014, contempt proceedings were initiated against the appellant and he challenged the same before the Supreme Court. The Supreme Court observed that an Appeal shall lie under Section 19, as a matter of right from any order or decision of a Bench of the High Court if the order has been made in exercise of its jurisdiction to punish for contempt. There may be many interlocutory orders passed in proceedings and it could not be the intention of the Legislature to provide for an Appeal to the higher Court as a matter of right from each and every such order made by the High Court. The *'order'* or the *'decision'* must be such that it decides some of contentions raised before the High Court affecting the right of the party aggrieved. Mere initiation of proceedings for contempt and issuance of notice on satisfaction, that the case is a fit one for drawing a proceeding, does not decide any question. The Court in *Purshotam Dass Goel* (supra) made an observation to the effect that either the matter may have been decided finally or even at an interlocutory stage if an order is made which decides a contention raised by the Contemnor asking the High Court to drop the proceedings and High Court refuses to drop such proceedings; such an order may be an appealable order.

11. In ***D.N. Taneja Vs. Bhajan Lal***, 1988 (3) SCC 26. The Appellant had filed a petition before the Punjab and Haryana High Court for initiation of contempt proceedings against the then Chief Minister of the State. Initially, notice was issued but after reply was filed, the High Court dismissed the application for initiation of contempt proceedings and discharged the notices. The Appeal was filed by D.N. Taneja before the Supreme Court. An objection was raised regarding its maintainability. The Supreme Court observed that when the High Court acquits the Contemnor, the High Court does not exercise its jurisdiction for contempt. So long as no punishment is imposed by the High Court, the High Court cannot be said to be exercising its jurisdiction or power to

punish for contempt under Article 215 of the Constitution.

In paragraph-12, the Supreme Court observed:

"12 – – the aggrieved party under Section 19 (1) can only be the Contemnor who has been punished for Contempt of Court".

12. The view taken in D.N. Taneja (supra) was reiterated by the Supreme Court in the case of ***State of Maharashtra Vs. Mahboob S. Allibhoy and another***, 1996 (4) SCC 411. The Supreme Court observed that-

"the words "any order" has to be read with the expression "decision" used in the sub-section (1) of Section 19 as that which the High Court passes in exercise of its jurisdiction to punish for Contempt. 'Any order' is not independent of the expression 'decision'. They have to be put in an alternate form say as in 'order' or 'decision'. In either case, it must be in the nature of punishment for contempt. If the expression 'any order' is read independently of 'a decision', then an Appeal shall lie under sub-section (1) of Section 19, even against any interlocutory order passed in a proceeding for contempt by the High Court, which shall lead to a ridiculous result – ".

13. In all such decisions, the Supreme Court was dealing with an order of the High Court that had dropped the contempt proceeding and the party aggrieved had filed an Appeal against the dropping of the contempt proceedings.

14. In ***R.N. Dey Vs. Bhagyabati Pramanik***, 2000 (4) SCC 400; however, the Supreme Court observed in paragraph 10 as follows: –

"10. – – – When the Court, either Suo Moto or on a motion or a reference, decides to take action and initiate proceedings for contempt, it assumes jurisdiction to punish for contempt. The exercise of jurisdiction to punish for contempt, initiating a proceeding for contempt, and if the order is passed, not discharging the rule issued in contempt proceedings, it would be an order or decision in exercise of jurisdiction to punish for contempt. Against such order appeal would be maintainable." (emphasis supplied by us)

15. Thereafter, in ***Modi Telefibres Ltd Vs. Sujit Kumar Choudhary and others***, 2005 (7) SCC 40; Supreme Court held that an Appeal was maintainable against an order where the appellant had been held guilty of contempt, even though no punishment was imposed upon him, but the order had given him an opportunity to purge himself for the contempt.

16. In ***Midnapore People's Cooperative Bank Ltd. Vs. Chunilal Nanda***, 2006 (5) SCC 399, the Supreme Court after dealing with the entire law on the subject and its various decisions held as follows: –

"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarised as :

(i) an Appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

(ii) Neither an order declining to initiate proceedings for contempt, nor an order, initiating proceeding for contempt,

nor an order dropping the proceedings for contempt, nor an order aquitting or exonerating, the Contemnor, is appealable under section 19 of the Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution of India. (emphasis supplied)

17. In ***Parents Association of Students Vs. M. A. Khan and Another 2009 (2) SCC 641***, the Supreme Court in Paragraph 11 and 12 has observed as under :–

"11. The controversy as regards exercise of jurisdiction of the Appellate Court under Section 19 of the Contempt of Courts Act is a vexed one. Whereas one line of decisions beginning from Baradakanta Mishra Vs. High Court of Orissa till Midnapore Peoples Cooperative Bank Ltd (Supra) is that an Appeal would be maintainable only when an order of punishment has been made, in R. N. Dey Vs. Bhagyabati Pramanik(supra), it has been held to be maintainable if the jurisdiction is exercised by any court under the Contempt of Courts Act."

"12. The question, we may notice has been referred to a three Judge Bench in Dharam Singh Vs. Guljari Lal, SLP Civil No. 18852 of 2005 decided on 19.09.2005. *We therefore need not decide the larger question, namely, maintainability of the appeal under Section 19 of the Contempt of Courts Act, 1971 vis-a-vis maintainability of the special appeal under the Letters Patent of the High Court, since the matter has been referred to a Larger Bench."* (emphasis supplied by us)

18. In ***Tamilnad Mercantile Bank Shareholders Welfare Association Vs. S.C. Sekar and others***, reported in (2009) 2 SCC 784; Supreme Court was considering an Appeal filed against an order passed by the Division Bench entertaining Contempt Appeal under Section 19 of the Act against an order passed by the Contempt Judge. The facts of the case were that in a Suit filed by an Association of Shareholders of a Bank (which was a company) before the Madras High Court. The Court had restrained the Bank from taking up in its Annual General Meeting the agenda items relating to election of new Directors in place of those retiring by rotation. However, certain persons were elected in the AGM as Directors. The plaintiffs filed a Contempt Petition against the Managing Director of the bank for alleged disobedience of the interim order passed in the Suit. The Court in contempt petition passed an interim order restraining the Managing Director from implementing the Resolution relating to election of Directors, notwithstanding that the persons elected in the AGM as Directors were not party to the Suit. The said persons approached the Division Bench as they were prejudiced by the interim order passed in contempt proceedings. The Appeal under Section 19(1) of the Contempt of Courts Act was held by the Division Bench to be maintainable as the court while sitting in contempt proceedings had passed an interim order, which was without jurisdiction.

19. The Court observed that apart from the fact that the appellant did not approach the Court with clean hands and was, thus, not entitled to any equitable relief, the manner in which the interim order was passed by the Single Judge in contempt proceedings was not justified. There was no finding recorded that the Managing Director had *prima facie* committed contempt. Ordinarily, direction could not be issued in contempt

proceedings without arriving at a finding as to how the Managing Director of the Bank could be said to have flouted the order. Indisputably, the respondents were prejudiced by such order passed in contempt jurisdiction and a person aggrieved can move the higher Court. If an interim order was passed wholly without jurisdiction, an Appeal would lie thereagainst. In a situation where the order has been passed adverse to the interest of the Contemnor, an Appeal would be maintainable, particularly where a judgement had been passed by Court, which is beyond jurisdiction. Even assuming that an Appeal under Section 19 of the Contempt of Courts Act was technically not maintainable, having regard to the fact that the interim injunction was granted till disposal of the Contempt Application, it was a judgement within the meaning of Clause 15 of the Letters Patent of the Madras High Court. Even proceeding on assumption that the Appeal was not maintainable, an aggrieved person cannot be left without a remedy. The Supreme Court further observed that apart from the fact that the order passed by the Single Judge in contempt proceedings was illegal and without jurisdiction having been passed without any application of mind, furthermore, the same was obtained by the appellant by suppressing material facts and the proceedings between the parties, therefore it was a fit case where the Supreme Court should refuse to interfere with the impugned order of the High Court. It is well settled that the Supreme Court does not exercise its jurisdiction only because it is lawful to do so. The Supreme Court dismissed the appeal with a cost of Rs.50,000/-.

20. In ***Dharam Singh Vs. Guljari Lal(Supra)***, the Supreme Court has passed a short order, referring the matter to the Chief Justice for Constitution of a Larger Bench. It has observed as follows:–

"the question as regards to interpretation of Section 19 of the Contempt of Courts Act, 1971 arises for consideration in this Appeal. Our attention has been drawn to the decision of this Court in State of Maharashtra Vs. Mehboob S. Allibhoy and Another 1996 (4) SCC 411; wherein a two Judge Bench has taken the view that no appeal lies under Section 19 of the Contempt of Courts Act against any interlocutory order passed by the High Court stating that the words: any 'order' must be read with the expression "decision" used in the Subsection, so as to exclude any interlocutory order of the High Court from the scope of Contempt Appeal. However, in R.N. Dey and Others Vs. Bhagbati Pramanik and Others, 2000 (4) SCC 400. Another two Judge Bench of this Court has held that where, after initiation of a proceeding of Contempt, an order is passed without discharging the rule issued under the provision of Section 19, it would be an order or decision in exercise of its jurisdiction to punish for Contempt, and against such order an appeal shall be maintainable.

It appears that various High Courts have taken different views on interpretation of the judgement in Mehboob S. Allibhoy (Supra) as some of the High Courts are of the opinion that even if a direction is issued to the contemnor by way of interlocutory order, the same would attract the provisions contained in Section 19; as such an order, or a 'decision' of the High Court would be in exercise of its discretion to punish for Contempt.

We are, therefore, of the opinion that the matter being of some importance requires consideration by a Larger Bench.

Accordingly, we direct that the matter may be placed before Hon'ble the Chief Justice for necessary orders.

In the meantime, there shall be a stay of the operation of the order passed by the learned Single Judge."

21. In ***ECL Finance Limited Vs. Hari Kishen Shankr Ji, Gudipati and Others reported in (2018) 13 SCC 142,*** the Supreme Court was considering a case where the Single Judge had only admitted Contempt Petition and had issued notice to the respondents. It is at that stage, the respondents had filed an appeal under Section 19 of the Contempt of Courts Act. The Division Bench of Bombay High Court had admitted the appeal despite objections regarding maintainability, leaving the question of maintainability of the appeal to be considered at the time of final hearing. The appellant approached the Court against such order passed by the Division Bench. The respondent referred to decision of the Supreme Court in the case of R.N. Dey Vs. Bhagyawati, Pramanik (supra) and *Tamilnad Mercantile Bank* (Supra).

22. The Supreme Court distinguished R.N. Dey by observing in Paragraph-4 that R.N. Dey was a case where the High Court declined to accept unconditional apology tendered by the Contemner. It was in that context that the Supreme Court had held that the Contemner could file an appeal since he was otherwise entitled to be discharged in case, the unconditional apology had been accepted. In other words, the Supreme Court was of the view that the decision to reject the unconditional apology and proceed further was an order or decision to proceed to punish the Contemner. Hence it was held that such a decision or order was appealable.

23. Similarly, the Supreme Court also distinguished the judgement rendered in *Tamilnad Mercantile Bank* (supra) by saying that an appeal under Section 19 is maintainable if in the impugned order an issue has been decided or a direction has been issued relating to the merits of the dispute between the parties while exercising Contempt jurisdiction. It referred to Paragraph-39 of the judgement rendered in Tamilnad Mercantile Bank to say that it is a different matter if the Court while passing an order, decided some dispute raised before it by the Contemner asking it to drop the proceedings on one ground or the other. In such a situation, an appeal would be maintainable against a notice to show cause. The question of satisfying the Court by showing cause that the respondent-Contemner had not committed any contempt had not been considered by the Court. The Supreme Court rejected the argument made by the learned counsel for the respondent that before issuing notice the Single Judge had considered the merits of the case and had already made up his mind to punish the respondent and therefore an appeal would lie.

24. The Supreme Court observed that-

"....observations made by the Single Judge while issuing notice in the Contempt Petition is only for prima facie satisfaction as to whether the Contempt Petition needs to be considered on merits. Only after such a preliminary stage notice can be issued. Now, it is open to the respondent to file the reply, and after considering the defence, the learned Single Judge will have to take a call as to whether it is a case to be proceeded against for punishing the respondent. In case such a decision is taken by the High Court, it is at that stage that the respondent gets a right to file an appeal before the Division Bench in terms of section 19 (1) (a) of the Act…"

25. The question before us in this Appeal is with regard to the maintainability. Whether an Appeal under Section 19 of the Act is maintainable against an order passed by the Contempt Judge framing charges against the Contemnor in contempt jurisdiction?

26. The Supreme Court in aforecited case of Midnapore (Supra) had taken the view that Contempt Application is maintainable only against an order imposing punishment. There are a few judgements of the Allahabad High Court, which however take a different view altogether. In ***Smt. Subhawati Devi Vs. R.K. Singh and Another 2004 Criminal Law Journal Allahabad 4817***, a Division Bench of Allahabad High Court after referring to various judgements of the Supreme Court observed in paragraph 15 as under:-

"15. We have carefully examined the expression namely "execution of the punishment or order appealed against"... From careful reading of this expression, we are of the view that the expression in exercise of its jurisdiction to punish a contempt, should not be interpreted as "imposing a punishment for contempt". Accordingly, in our view, the language used is more closer to the meaning, that an Appeal shall lie from any order or decision, which is made by the Court when the jurisdiction of the High Court is used for punishing a person for contempt. It may be appreciated from the introduction of the word punishment or order in Section 19(2)(a) of the Act. This is because under Clause (a) of Subsection (2) of Section 19 there is power of the Appellate Court not only to stay the execution of punishment, but also to stay an order in respect of which an Appeal has been filed. The law is now well settled that the Court must presume that the legislature does not waste words and as such every word in the statute should be presumed to have necessity of user in the statute, and must be given effect to consistent with its meaning. Therefore, it would be difficult for us to hold that an Appeal lies only against an order of punishment."
(emphasis supplied)

27. In paragraph 16, the High Court went on to observe thus –

"16. From the discussion made here in above, it is pellucid that an Appeal under Section 19(1) of the Act shall lie not only against an order imposing punishment, but also from an order or direction made by the Court in the exercise of its contempt jurisdiction– – –". (emphasis supplied)

28. In ***T. George Vs. Vijai Kumar Srivastava, 2003 (5) AWC 4247***, a Division Bench of the High Court was dealing with the issue which is before us. That is, whether an Appeal would lie against an order framing a charge. After the charges were framed the Contemnor filed an Appeal and a preliminary objection was raised that no Appeal lies against this order. The Division Bench of this Court after referring to Purushottam Das Goel(Supra) held that an Appeal lies. The observations made by the Division Bench in Paragraph 14 are being quoted here in below:–

"14. – – – from the aforesaid observation of the Supreme Court, it is, therefore, clear, that an appeal shall lie against an order under Section 19 of the Act, even where the orders were passed at some intermediate stage in a proceeding. As we have discussed already, where some

bone of contention was raised by the applicant before the learned Contempt Judge is decided and, therefore, it cannot be said that no Appeal lies against such order. The view expressed by the Supreme Court in the decision has also taken help of the decision of the Supreme Court in the case of Baradakanta Mishra (Supra) which has also been discussed by us in the following paragraphs of this order." (emphasis supplied by us)

29. In ***Sanjay Kumar Vs. Santosh Kumar Srivastava*** reported in ***2023 (3) ADJ 354***, a Division Bench of this High Court while noticing judgement rendered in *S.M.A. Abdi Vs. Private Secretary Brotherhood, 2009 (4) UPLBEC 3106* and the decision in *Tarun Kumar Agarwal Vs. Executive Engineer, UP Awas Evam Vikas Parishad, 2013 (101) Allahabad. Law reports 46;* held Contempt Appeal to be maintainable under Section 19, if the Contempt Judge after exchange of pleadings refuses to discharge contempt notices and records a finding of the Contemnors being *prima facie* guilty of Contempt of the Writ Court's Order.

30. The Division Bench of this Court in Sanjay Kumar (Supra) summarized the legal position as per law settled by the Supreme Court, in paragraph 15 as under: –

"(i) an Appeal under Section 19 is maintainable, only against an order or decision of the High Court, passed in exercise of its jurisdiction to punish for Contempt, that is, an order imposing punishment for Contempt, (ii) neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt, nor an order dropping the proceedings for contempt, nor an order acquitting or exonerating the Contemnor, is appealable under section 19 of the Contempt of Courts Act, 1971. In special circumstances, they may be open to challenge under Article 136 of the Constitution, (iii) In a proceeding for Contempt, the High Court can decide whether any Contempt of Court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties, (iv) Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in exercise of "jurisdiction to punish for contempt" and, therefore, no Appeal under Section 19 of the Contempt of Courts Act, 1971. The only exception is if such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the Appeal under Section 19 of the Act, can also encompass incidental or inextricably connected directions. The order or decision must be such that it decides some of the contentions raised before the High Court affecting the right of the party aggrieved. (v) If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra court Appal (if the order was of learned Single Judge and there is a provision for an intra court Appeal) or seeking Special Leave to Appeal under Article 136 of the Constitution of India. (vi) In other cases, if the Court while passing an order, decided some disputes raised before it, by proceeding on one ground or the other, then, in a given situation, an appeal would be maintainable, even against notice to show

cause. (vii) There cannot be any doubt that in a situation where an order has been passed adverse to the interest of the Contemnor, an appeal would be maintainable, particularly where an order has been passed by a court which is beyond its jurisdiction. (viii) Exercise of jurisdiction to punish or contempt commences with the initiation of a proceeding for contempt, and if the order is passed, not discharging the rule issued in contempt proceedings, it would be an order or decision in exercise of its jurisdiction to punish a contempt. Against such an order appeal would be maintainable.

31. Having summarized the settled legal position on the question of maintainability of the Appeal under Section 19 of the Act of 1970, the Division Bench in *Sanjay Kumar* (supra) proceeded to examine the impugned Order dated 14.09.2022.

"We have gone through the order and find that the Court below has recorded a finding in the second paragraph of the order that the officer is totally in contempt of the order passed by the Writ Court dated 04.12.2017. In the fourth paragraph of the order, the Contempt Court has again recorded a finding that without commenting upon the decision dated 06.11.2018 by which the representation of the respondent was disposed of by the Managing Director; the Contempt Court observed such decision to be totally in the teeth of the Order passed by the Court on 04.12.2017. Thereafter, the Contempt Court issued a direction that last opportunity is granted to the opposite party to revisit its order and take a decision. Thereafter, in the last paragraph, it stated that in case no decision is taken by the Board till the next date, the Court will be compelled to proceed against the officers concerned."

32. The Division Bench in *Sanjay Kumar* (supra) further observed that:-

"Finding so recorded and directions issued and the observations made in the order dated 14.09.2022 as noted above, leaves no manner of doubt that the Contempt Court has held the officers to be totally in Contempt. Therefore, the Appeal would be maintainable in view of the law summarised in paragraph 15 (i) and (iii) above. That apart, the Managing Director had taken a decision dated 06.11.2018, which could have been challenged by the respondent/ contempt applicant before the appropriate forum. We have specifically asked learned counsel for the respondent whether the order of the Managing Director has been challenged by the respondent and he has replied that it has not been challenged as yet, and the respondent proposes to challenge it by filing a petition before the appropriate forum.

Under the circumstances, the Contempt Judge travelled beyond its power to issue directions to the authorities concerned to revisit its order and take a decision. Hence, The Appeal is maintainable in view of the settled position above.

So far as the impugned Order is concerned, it would be suffice to observe that in the impugned interlocutory order, findings have been recorded that the officers are totally in Contempt. Therefore, the impugned order is unsustainable.

33. A Division Bench of this Court in the matter of ***Jai Karan Lal Verma Vs. Rajesh Kumar Pathak and others reported***

in 2008 (1) AWC Page 61 has categorically held that appeal under Section 19 (1) against order of Contempt Judge holding the Contemner *prima facie* guilty of contempt and framing charges is not maintainable, as such, orders are not the orders imposing punishment.

34. *In* ***Dr. Ashwini Kumar Singh Vs. Dr. Sandeep Kumar and Others, 2020 SCC online Allahabad 211,*** a Division Bench of the Court was considering several Contempt Appeals filed under Section 19 of the Act against orders of the Single Judge, framing charge against the appellants and calling upon them to file the response, if any, on or before the next date. The counsel for the respondents had cited Midnapore Peoples Cooperative Bank(Supra) to argue that Contempt Appeal is not maintainable. The learned Senior Counsel appearing for the appellant had pointed out that Midnapore Peoples Cooperative Bank (Supra) had not referred to previous decision of the Supreme Court in the case of R.N. Dey Vs. Bhagyabati Pramanik, which had held that orders passed by the Court in exercise of jurisdiction to punish, even at intermediate stage maybe challenged under Section 19. He had argued that the word 'or' used between 'order' and 'decision' being disjunctive, the logical conclusion would be that even though an Order of Punishment would not have been passed, yet an Appeal under Section 19 would be maintainable in respect of orders prior to the Order of Punishment. The Senior Counsel had placed reliance upon E.C.L. Finance Limited Vs. Harikrishan Shankar Ji Gudipati and T George Joseph(Supra) in support of contention. The learned Senior Counsel also placed reliance upon Sadhna Upadhyay Vs. State of UP 2009 (65) ACC 64 (FB).

35. The Division Bench of this Court however in Dr. Ashwini Kumar Singh (Supra) has observed that order or decision may be separated by a disjunctive word but they should be read *ejusdem generis*. The word *'order'* has been used to mean orders other than final decisions, which may decide a matter of moment; for example, in the *Sadhna Upadhaya* case, the assumption of jurisdiction, which was seriously questioned by the appellant on several grounds. Such orders may not be decisions finally terminating the proceedings but may amount to a decision of moment widely affecting the contemnor. However, if the order is only an order framing a *charge simplicitor*, it cannot be said to have widely affected the rights of the Contemnor. Contempt proceedings are quasi criminal in nature. While framing a charge, it is inevitable for the Court to delve into the merits of the case which does not affect any substantive rights of the contemnor as opportunity is given to the contemnor to controvert and place its defence against the proposed charge. Thus, order framing *charge simplicitor*, is only a reflection of a prima facie opinion of the Court as to the alleged contempt. The learned Senior Counsel appearing for the appellant Dr Ashwini Kumar Singh (Supra) had pointed out paragraph 7 of *E.C.L. Finance Ltd* (Supra) which referred to the fact situation in the said case where only notice was issued in the contempt after *prima facie* satisfaction, that Contempt Petition needed to be considered on merits. In the said case, the Supreme Court had observed that it is open for the respondent to file the reply and after considering the defence, the learned Contempt Judge will have to take a call as to whether it is a case to be proceeded against for punishing the respondent, in such a case a decision is taken by the High Court, it is at that stage that the respondent

gets a right to file an Appeal before the Division Bench in terms of Section 19(1) of the Act, but the Division Bench in *Dr Ashwini Kumar Singh* (Supra) distinguished the case and observed that the order impugned is an order framing a charge, which in no way affects the substantive rights of the contemnor. The Division Bench also distinguished the judgement rendered by the Supreme Court in the case of *R.N. Dey (Supra)* and observations made by the Division Bench in *T. George Joseph (Supra)* and by Full Bench of the Chhattisgarh High Court in *Anil Kumar Dubey Vs. Pradeep Kumar Shukla(Supra)*.

36. In a Contempt Appeal filed against an order of contempt Judge finding the Contemnor *prima facie* guilty, the High Court at Calcutta in ***Arun Kumar Gupta Vs. Jyoti Prasanna Das Thakur, (1996) ILR 1 Calcutta 292*** also distinguished *D.N. Taneja's* case and held in paragraph 9 that the ratio propounded by the Supreme Court, in D.N. Taneja (Supra) was not attracted in the case which it was dealing with. The criteria laid down by the Supreme Court in the case of *Baradakanta Mishra (supra)*, in finding out the maintainability of the Appeal becomes inapplicable as there was an initiation of a proceeding by issuance of a Rule and the Contemnor was found *prima facie* guilty of the alleged contumacious act, and the Court found that they were required to purge themselves by carrying out the order violated. The direction for so carrying out comes within the purview of the term 'order', which stands in contradistinction to the word 'punishment' as used in Subsection 2(a) of Section 19 of the Contempt of Courts Act. – It further held that in the above view of the matter, the order is such as can be said to be amenable to an Appeal under Section 19(1) of the Contempt of Courts Act.

37. In ***Manjula Chaudhary Vs. Priyanka Chauhan, 2015 (4), MPLJ 704*** a Division Bench of the Madhya Pradesh High Court had held the Contempt Appeal to be maintainable under Section 19 of the Contempt of Courts Act against an order passed by the Single Judge in Contempt Petition as the Division Bench felt that the Contempt Court could only have examined whether the directions issued by the Court in the previous petitions to consider the case of the respondent for regularisation has been complied with or not, and could not have gone into the validity of the order passed by the *appellants* rejecting the respondent's case for regularisation. The Court also clarified that it had not expressed any opinion on the merits of the case and allowed the appellant to challenge the order rejecting the respondent's case for regularisation in appropriate proceedings. The Court found that the Contempt Judge had exceeded the jurisdiction vested in the Contempt Court while issuing, directions beyond and in addition to the directions issued by the Court in the original proceedings. The Court had also found that Contempt Judge had gone into the merits of the case in detail and had considered the correctness of the findings recorded by the appellant subsequently, which were neither considered nor on record of the original writ petitions. The Court held that such actions were beyond the scope of powers conferred upon the Court in Contempt Proceedings. After holding that the appellant had committed Contempt of Court, the Contempt Judge had thereafter proceeded to grant opportunity to the appellant, either to purge the contempt or to show cause as to why they should not be punished for contempt. The Contempt

Judge had failed to take into consideration the fact that in the original writ petition filed by the respondent, the Court had simply issued a direction to consider the case of the respondent for regularisation, which direction was complied with and the respondent's case for regularisation was considered by the Screening Committee.

38. The Division Bench of Madhya Pradesh High Court while referring to several judgements of the Supreme Court observed that from perusal of the aforesaid judgements of the Supreme Court, it is apparent that in some cases the Supreme Court has permitted filing of appeal under Section 19 holding that the appeals filed against the orders passed in Contempt proceedings, other than the order imposing punishment, are maintainable. In some cases the Supreme Court has held that an Appeal under Section 19 of the Act is maintainable only against an order imposing punishment. It referred to the judgement rendered by the Supreme Court in the case of *Purushottam Das Goel(Supra)*, where the Court had observed that Contempt proceedings is initiated under Section 17 by issuance of a Notice. Thereafter, there may be many interlocutory orders passed in the said proceeding by the High Court. It would not be the intention of the legislature to provide for an Appeal to this Court as a matter of right from each and every such order made by the High Court. The order or decision must be such that it decides some of contention raised before the High Court affecting the right of party aggrieved. Mere initiation of a proceeding for Contempt by the issuance of notice on the prima facie view that the case is a fit one for drawing up the proceeding, does not decide any question. In *Purushottam Das Goel (Supra)*, the Supreme Court had given an example of an interlocutory order against which an Appeal under Section 19 would be maintainable by referring to a situation where the contemnor in response to the show cause notice appears before the High Court and asked it to drop the proceeding on the ground of it being barred under Section 20 of the Act, but the High Court holds that the proceeding is not barred. From such an order, although the proceeding has remained pending in the High Court, an appeal would be maintainable under Section 19.

39. The Division Bench of the Madhya Pradesh High Court observed in paragraph 10 as follows :–

"10. It is also significant to observe that the Supreme Court in the case of Tamilnad (supra), R.N. Dey (supra) and Purushottam Das (supra) has held the appeal to be maintainable against the orders by which punishment has not been imposed even after taking note of the decision of the Supreme Court rendered in the case of D.N. Taneja (supra) and in spite of the fact that a reference in this regard is pending decision before a Larger Bench, in the case of Dharam Singh Vs. Gulzari, Lal and others."

40. The Division Bench in Manjula Chaudhary(Supra) also observed in paragraph 14:-

"In view of the aforesaid on undisputed facts, we are in agreement with the contentions of the learned counsel for the appellant that he cannot at this stage appear before the Single Judge in the contempt proceedings and contend that he is not guilty of having committed Contempt of the Court as a final opinion against him holding him guilty of having committed

Contempt has already been recorded by the Single Judge. In other words, it is apparent that the finding that the appellant is guilty of Contempt has already been recorded by the learned Single Judge in the impugned order which finding is incidental to and inextricably connected with the ultimate order that shall be passed in the exercise of power to punish a contempt. It is also undisputed and apparent that by the impugned order, the Contempt Court has finally decided the main bone of contention between the parties thereby adversely affecting the rights of the appellant. A perusal of the impugned order further indicates that the prayer of the appellant to drop the proceedings has not been accepted and the appellant has not been discharged of the Rule issued in the contempt proceedings and therefore the impugned order is an order or decision passed in exercise of jurisdiction to punish for contempt and an appeal against such an order would be maintainable in view of the decision of the Supreme Court, rendered in the case of R.N. Dey(supra), Purushottam Das (supra) and the exception stated in paragraph 11(4) in the decision of the Supreme Court in Midnapore (supra). (emphasis supplied by us)

41. A Full Bench ofthe Orissa High Court in ***Amit Kumar Dubey Vs. Pradeep Kumar Shukla 2017 Cr.L.J. 1315*** in its majority decision has observed in paragraph 38 as follows –

"it is apparent that there is some cleavage of opinion on the scope and ambit of Section 19 of the Act of 1971. Even the judgements of the Apex Court take divergent views. We may however mention that in none of the judgements before the Apex Court, the point in issue was the one specifically raised before us. That is only dealt with by the judgement of the Allahabad High Court in T George Joseph (Supra) in which it held that an order framing charge is appealable under Section 19 of the Act. We are in respectful agreement with the same."

39. On a close analysis of the law laid down by the Apex Court and the High Court as well as the provisions of Section 19 of the Act, 1971, we are clearly of the view that any order which is an interlocutory order, but by which the High Court proceeds to exercise its jurisdiction for contempt, would be appealable".

42. In paragraph 45 and 46, the Full Bench observed as follows: –

"45. Similarly, the phrase 'in exercise of the jurisdiction to punish for contempt', not only includes an order actually imposing any punishment but also any order or direction, which may be prejudicial to the contemnor , and which, if not passed, may terminate the proceedings. As held by the Bombay High Court, these may not be actually orders punishing the contemnor for Contempt, but maybe a direction prejudicial to the contemnor and passed in exercise of Contempt Jurisdiction. Supposing a contemnor files an application that the Contempt Petition itself has been initiated beyond the period of limitation, as held by the Apex Court, if order passed on this application is only that this issue shall be decided at the time of final hearing, no Appeal may lie. However, if the Court hears the application and decides, the matter against the contemnor and hold that the Contempt Petition is within limitation, that will widely affect his rights and Appeal under Section 19 of the Act, 1971 would lie against such an order as it is passed in exercise of the jurisdiction to punish a

contempt. As said by the Apex Court, it would not be appropriate to make a list of such orders. Each case will have to be decided on its own facts.

46. As far as framing of charges concerned, such an order has to be passed after hearing the parties and the Court, after hearing the parties, considers the material on record and feels that there is sufficient material to frame charge against the contemnor. While framing the charge, the Court applies its mind. It comes to the conclusion that the proceedings should not be dropped and there is sufficient material to proceed with the case. The Court can also come to the conclusion that there is no sufficient material to frame charges and the proceedings could be dropped. Therefore, an order framing charge decides that there is sufficient material to continue with the contempt proceedings. In our considered view, this would be an order passed in exercise of the jurisdiction to punish for contempt. Therefore, an Appeal would lie against such order". (emphasis supplied by us)

43. The Full Bench of the Court in Paragraph 74 had observed that:—

"…Section 19 (3)provides for an opportunity to an aggrieved person to approach the Court for protection if he intends to file an Appeal against any order. This can be in the event a person has been ordered to be taken into immediate custody. Such an order can be passed upon conviction or even at the stage of cognizance as a measure of interim custody, pending proceedings initiated under Section 14 in a matter of Ex Facie Contempt. This can be a stage even prior to punishment when an aggrieved person may require the protection as provided for in Section 19 (2), this may take the shape of stay of an order of custody pending proceedings. An appeal in such a situation would therefore be available as a matter of right under Section 19 itself. To our mind, the legislature appears to have taken care of such a situation and has therefore consciously used the word "any order" while providing for a statutory right of appeal. This right of appeal would however, be not available against a pure interlocutory order not affecting vital rights nor would it be available to a person not aggrieved."

44. Having considered the judgements rendered by the Supreme Court and reference made by it in *Dharam Singh versus Guljari Lal* as well as the judgement rendered by Division Benches of the Court and also of the Calcutta High Court and Madhya Pradesh High Court and the Orissa High Court, the law as settled by the Supreme Court can be summarized as under: –

"(i) where an order actually imposes punishment, it is clearly appealable by the Contemner under Section 19 (ii), where an order declined to impose punishment, no appeal is maintainable at the instance of third-party that is the complainant; (iii) where an order declined to impose punishment, but contains some adverse finding against the Contemner, or decides some of contentions raised before the Court affecting the right of the party aggrieved, it may be appealable by the Contemner; (iv) an order not imposing punishment and not substantively deciding anything against the Contemner no appeal shall lie."

45. Section 19 of the Contempt of Courts Act provides a right of Appeal against an order or decision passed in

exercise of jurisdiction to punish for Contempt. As far as words 'order' or 'decision' are concerned, they may have to be read *ejusdem generis*, but at the same time, it cannot be presumed that the language used by the Legislature is superfluous. The word, "or" is disjunctive, and the legislature has taken care of a situation where a person may be aggrieved by an order which may not be an actual decision, imposing punishment, or an order of the like nature, which prejudices the Contemnor, and which, if it had been not passed, may have terminated the proceedings.

46. In ***Modi Tele Fibres Limited and others Vs. Sujit Kumar Chaudhary and Others reported in (2005) 7 SCC 40***, and in the case of ***Parents Association of Students Vs. M. A. Khan and Others reported in (2009) 2 SCC 641,*** and in ***R.N. Dey Vs. Bhagyavati Pramanik reported in (2000) 4 SCC 400;*** The Supreme Court has found it fit to interfere even in orders which did not actually punish the Contemner.

47. Now we shall consider the facts of this instant Contempt Appeal.

48. The respondents Surendra Pratap Singh and another had filed a petition against order dated 26.02.2018 passed by the District Inspector of Schools, whereby the Committee of Management of the Institution in question had been directed to stop payment of salary to the petitioners pending outcome of an enquiry instituted by the Commissioner of the concerned Division, since complaint was made to the authorities with regard to the alleged irregularities in appointment and grant of financial approval to the petitioners who were appointed on the post of Assistant Teachers and attached to primary section in the institution in question. Before the Court, it was argued that without due verification of allegations made in the complaint and during pendency of the enquiry proceedings, the petitioners' salary could not be stopped as the financial approval had already been accorded by the Competent Authority. Since the matter was yet to be finally decided and the irregularity, if any, in appointment of petitioners was not yet established as fraudulent. At the time of passing of the impugned order, there was no reason for the opposite parties to have stopped salary payment to the petitioners. In the counter affidavit filed on behalf of the opposite parties, a number of discrepancies and irregularities with regard to appointment and financial approval to the petitioners had been indicated in paragraphs-6 and 7. However, in the counter affidavit, it was also stated that a three-Member Committee was constituted to enquire into the allegations and the said Committee had already submitted its report to the State Government where it was pending final decision.

49. The Court after considering the material on record observed that it is admitted to the respondent that Financial approval had been given by the Competent Authority in 2017 to the appointment of the petitioners. The report which had been submitted by the Enquiry Committee was still pending consideration before the State Government and no final decision had been taken thereupon. No orders, cancelling or withdrawing the earlier orders granting financial approval had been passed till the date of the decision in the petition and that the opposite party could have passed such an order only once they came to a conclusion on the basis of evidence that appointment of the petitioners was illegal

and *dehors* rules. The order was premature as no order terminating the services of the petitioner had been passed till date. Initially, an interim order was granted in June, 2018 staying the order impugned. Later, the writ petition was allowed. The impugned order dated 26.02.2018 was quashed. Further three directions were issued. A writ of mandamus was issued, directing the opposite parties to make payment of regular salary due to the petitioners with effect from passing of the impugned order. Such salary was to be paid within a period of six weeks from the date a copy of the order dated 11.11.2020 was produced before the opposite parties. The salary so given to the petitioners would be subject to final decision taken by the State Government.

50. After the Court order dated 11.11.2020, the petitioners submitted a copy to the D.I.O.S. on 08.12.2020 and sent reminders thereafter. The opposite parties allegedly started to harass the petitioners through the Economic Offences Wing by issuing an order on 25.01.2021. In pursuance of such order, the Senior Superintendent of Police, Economic Offences Wing issued notice and the Principal of the Institution also issued notice on 11.09.2021 to the petitioners and called for reply. Feeling aggrieved against the aforesaid action of the opposite parties, the petitioners again approached this Court in Writ Petition No.25226 (M/B) of 2021: *Surendra Pratap Singh and another Versus State of U.P. and others*, and the Court passed an interim order on 11.01.2021 staying the enquiry proceedings.

51. The opposite parties having not complied with the judgement and order dated 11.11.2020, a contempt petition was filed on 07.11.2021. Smt. Aradhna Shukla, Secretary Education, Government of U.P. Lucknow; Sri Vinay Kumar Shukla, Director of Education; and Sri Rakesh Kumar posted as District Inspector of Schools, Gonda were made the respondent nos. 1, 2 and 3 respectively.

52. After notices were issued and served upon the District Inspector of Schools, he filed an application for discharge of contempt notices along with a counter affidavit on 18.12.2021. In the said counter affidavit, mention was made of enquiry report dated 04.05.2020, which had found 37 teachers appointed illegally in nine Private Aided colleges without following due procedure. Copy of the enquiry report was annexed to the said affidavit. It was also stated that the Administrative Department i.e. the Secondary Education Department after appreciating the contents of the enquiry report had sent letters dated 13.10.2020, 24.11.2020, 03.12.2020 and 23.12.2020 addressed to the Additional Chief Secretary, Department of Home requesting for investigation of the matter by the CBCID or any other independent agency. In pursuance thereof the Economic Offences Wing of the State of U.P. asked for documents from the office of the District Inspector of Schools by its letter dated 04.03.2021. The District Inspector of Schools supplied all documents on 10.03.2021. Some other affected persons and not the petitioners approached the High Court in Writ Petition No. 16203 (M/B) of 2021: Guru Prasad Vs State of U.P. and others challenging the investigation being carried out by the Economic Offences Wing. An interim order was passed by the Court on 29.07.2021 staying further enquiry. In the meantime, the District Inspector of Schools had submitted a proposal to take action against the erring

private colleges under Section 15(D) of the Intermediate Education Act 1921 and notices were issued to the Committees of Management of such colleges under Section 16-D. The Director of Secondary Education asked the District Inspector of Schools to make calculations regarding loss caused to the public exchequer in making payment of salary to illegally appointed teachers so that it may be recovered from officers responsible for the same. The calculation sheets were sent by the District Inspector of Schools to the Director of Secondary Education. On 04.08.2021, the then District Inspector of Schools Ram Khelavan Verma, was also placed under suspension, by order dated 02.01.2018, and Departmental Proceedings were initiated against him which were pending. The State Government was considering to pass recovery orders against the District Inspector of Schools, Finance and Accounts Officer, and the concerned Committees of Management, who had allowed misappropriation of public funds in making illegal appointments. The District Inspector of Schools had also requested the Director of Secondary Education by his letter dated 02.12.2021 that he may be allowed to take a final decision in respect of illegally appointed teachers. A copy of the letter dated 02.12.2021 was also enclosed to the counter affidavit.

53. To the said counter affidavit, a rejoinder affidavit was filed by the petitioner denying that their appointments were made illegally and reiterating that the judgement had not been challenged further and it had become final, yet it had not been complied with.

54. Another application for dismissal of contempt petition and discharge of contempt notices was filed along with the supplementary counter affidavit on 17.11.2023. In the supplementary counter affidavit, the District Inspector of Schools had stated that the petitioner along with 35 other persons had been illegally appointed without following the provisions of the Government Order dated 19.04.2003. Initially, no financial approval was given. The petitioners filed Writ Petition No. 1661 (S/S) of 2012: *Surendra Pratap Singh Vs State of U.P and others* and Writ Petition No. 1662 of 2012: *Smt Anita Kumari versus State of U.P. and others*, which were disposed of in terms of judgement and order 17.04.2012 passed in Special Appeal No. 607 of 2010: *Kumari Poonam Devi Vs. State of U.P. and others*, the Division Bench taking into account the argument made by the learned Counsel for the Appellants Poonam Devi that the Government Order requires fresh sanction before making appointment against a sanctioned posts existing in a private institution which would only delay the process of selection of teachers and further, once the Government order had allotted certain number of sanctioned posts to a particular primary school, there was no rationale to ask for fresh permission every time when appointments are made against such posts; had modified the order passed by the Writ Court to the extent that primary schools concerned shall not make appointments beyond the sanction posts available with them, and further that once a sanction in respect of appointment has already been granted, in respect of existing vacancy then against that no fresh permission would be required to fill the post. The Division Bench had held that in case the appellant had been appointed against sanctioned post, it would be inappropriate on the part of the authorities to insist upon seeking a fresh permission/ sanction.

55. In the said supplementary counter affidavit it was further stated that the petitioners thereafter made representation to the District Inspector of Schools, Gonda for payment of salary. The District Inspector of Schools rejected the representation of the petitioners on 11.03.2014 by saying that the Manager of the institution had forged letters seeking prior approval for making appointment of teachers in primary section. No orders sanctioning ten posts in primary section had been made available by the Manager. Also, no prior approval had been given for making appointments on vacancies arising out of retirement. Government orders relating to reservation of posts were also not followed. The appointments were made illegally and against the directions of the Division Bench in Special Appeal No. 607 of 2010, which had given liberty to make appointments without prior approval for initiating selection only on regularly sanctioned and created post. The District Inspector of School referred to advertisement having been issued inviting applications for filling a post only in two local newspapers and being made in violation of orders relating to reservation.

56. The petitioners challenged the order passed by the District Inspector of Schools by filing Writ Petition No. 3282 (S/S) of 2015: *Surendra Pratap Singh Vs. State of U.P. and others* and Writ Petition No.3246 of 2012: *Smt. Anita Kumari versus state of U.P. and others*. Both the petitions were dismissed as withdrawn on 02.05.2017. Despite the District Inspector of Schools earlier order dated 11.03.2014 being on record, the then District Inspector of Schools, Sri Ram Khelawan Verma illegally passed an order giving financial approval but in the said order also it was stated that such approval is conditional and shall stand automatically cancelled, if there is discovery of concealment and misrepresentation of facts by the Management. The District Inspector of Schools Sri Ram Khelavan Verma was suspended on 02.01.2018 and Departmental proceedings were initiated against him and upon completion of such proceedings by an order dated 03.11.2022, a recovery of Rs.14,43,130/- had been issued against him. Later developments relating to issuance of show-cause notice and filing of writ petitions against the same in which interim orders were passed were also mentioned in the supplementary counter affidavit dated 17.11.2023. Unconditional and unqualified apology was also tendered by the District Inspector of Schools in case the court felt that any contempt had been committed by him.

57. It has also been pointed out by the counsel for the appellant that challenge was raised to the Government Order dated 25.01.2021 by which the State Government had referred the enquiry to the Economic Offences Wing and the communication received from the headquarters of Economic Offences Wing, CBCID U.P., by the petitioners in Writ Petition No. 25226 of 2021 : *Surendra Pratap Singh and another Vs. State of U.P. and others*, which was disposed of by the Division Bench on 24.08.2023 and the Division Bench noted that the petitioners had only been called to get their statements recorded in connection with an enquiry/investigation being conducted by the Economic Offences Wing regarding fraudulent appointments by Management and educational institutions and payment of salary to such appointees. The Division Bench, did not interfere in the matter saying that merely because the State Government had asked the Economic Offences Wing to conduct an enquiry in the

matter, it did not give any cause to the petitioners to approach the Court. The impugned letter had only asked the petitioners to appear before the Inspector, Economic Offences Wing to get their statements recorded, and at this stage it was not clear as to whether they were accused or just prospective witnesses in the criminal case. The Division Bench directed the petitioners to take all possible pleas on facts and law before the Inspector, Economic Offences Wing. The Court refused to entertain the petition and also refused to pass any interim order staying the enquiry/investigation.

58. On 22.11.2023, the Contempt Judge noted the submissions made by the counsel for the petitioners that they had been appointed by a Committee of Management on vacant posts after due selection by College Authorities. The judgement dated 11.11.2020 had not been complied with and the excuse taken by the Authorities in the supplementary counter affidavit filed in the contempt petition was that pursuant to the order dated 11.11.2020, the State Government directed the Director, Secondary Education to take appropriate action against the petitioners, who were said to have been appointed *dehors* the rules. A show-cause notice was issued to the petitioners on 02.09.2022 asking them to appear personally on 13.09.2022 in the office of the Director, Secondary Education. Instead of appearing before the Authorities, the petitioners had filed writ petition bearing Writ Petition No. 3034 of 2023. The Court passed an interim order on 26.04.2023, staying the operation and implementation of the show-cause notice to the petitioners. Although, a counter affidavit had been filed in the writ petition along with an application for vacation of interim order, the application remained pending and on account of the aforesaid, no final decision could be taken against the petitioners till date.

59. The Contempt judge thereafter observed in paragraph-9 onwards of the order impugned dated 22.11.2023 as follows : –

"9. Having heard learned counsel for the parties and having perused the material available on record as well as having regard the order of the writ court dated 11.11.2020, the execution thereof has been sought by the present contempt petition, I am of the opinion that despite the order of the writ court having been finalized as on today, the compliance thereof has not been done in its letter and spirit. If the authority/authorities concerned have preferred not to challenge the order of the writ court dated 11.11.2020 before the Superior Court, they had no other option except to pass appropriate order making payment of regular salary to the petitioners and it is needless to say that the benefits should provide the petitioner shall remain subject to the final outcome of the final decision so taken by the State Government.

10. Therefore, prima facie, it appears that the opposite party no.3 i.e. Rakesh Kumar, District Inspector of Schools, Gonda has committed contempt.

11. Shri Vinayak Saxena has prayed that some reasonable time may be given to the authority to pass an appropriate order making compliance of the order of the writ court.

12. It is needless to say that any appropriate order should have been passed by the opposite party no.3 by now. Therefore, for passing any appropriate order making compliance of the order of

the writ court there is no question of granting liberty.

13. List this case on 13.12.2023.

14. On or before 13.12.2023, the opposite party no.3 i.e. Rakesh Kumar, District Inspector of Schools, Gonda, shall file affidavit of compliance making compliance of the order of the writ court in its letter and spirit, failing which he shall appear in person on the next date. If it is found that the order of the writ court has not been complied with, the charges may be framed against him.

15. In the meantime, Shri Girish Chandra Verma may file reply/short rejoinder affidavit, as prayed.

60. Another application for discharge of notices and for dismissal of contempt petition, supported by a supplementary counter affidavit was filed on 13.12.2023 where subsequent developments including the direction of the State Government dated 26.08.2022 to the Director, Secondary Education to take appropriate action against teachers appointed against the rules and the decision of the Director Secondary Education taken thereafter on 24.11.2023 to terminate the services of both the petitioners were brought on record. It was also stated that the State Government had given permission to file Special Appeal against judgement and order dated 11.11.2020 by its letter dated 08.12.2023.

61. On 13.12.2023 when the matter was taken up, the Contempt Judge referred to his earlier order and then observed as follows:-

"3. In compliance of the aforesaid order, Rakesh Kumar, District Inspector of Schools, Gonda is present alongwith the supplementary counter affidavit, the same is taken on record.

4. Sri G.C. Verma, learned counsel for the petitioners has filed supplementary rejoinder affidavit, the same is also taken on record.

5. The officer, who is present in person, could not explain the plausible reasons as to why the order of the writ court has not been complied with despite the fact that neither any modification/review application has been filed before the writ court nor the aforesaid order has been assailed before the appellate court. Sri Vinayak Saxena, learned Standing Counsel has stated that the authority has sought directions/ guidelines from the State Government to make compliance of the order of the writ court inasmuch as without having any proper clarification/guidelines from the State Government, he could have not complied with the order of the Court.

6. The aforesaid explanation is not acceptable, therefore, following charge is being framed:-

"Sri Rakesh Kumar, District Inspector of Schools, Gonda/ opposite party no.3 has deliberately and willfully flouted the judgment and order dated 11.11.2020 passed by this Court in the writ petition bearing Service Single No.18502 of 2018, therefore, appropriate punishment may be awarded to him under the Contempt of Courts Act."

7. The officer is given three weeks' time to file explanation on the aforesaid charge.

8. It is made clear that on the next date, further order may be passed after considering the explanation on the aforesaid charge.

9. List on 23.01.2024.

10. On that date, the officer shall again appear in person.

11. Sri Vinayak Saxena has also stated that in the meantime, the officer shall file affidavit of compliance.

12. It is also made clear that if the affidavit of compliance is filed alongwith the explanation on the aforesaid charge, then before passing any order on the aforesaid charge, the affidavit of compliance shall be considered first."

62. It is apparent that in the instant Contempt Appeal, the Contempt Judge in his order dated 13.12.2023 has given a finding of guilt of the Appellant/ Contemnor after considering three affidavits filed by him rendering unconditional apology and applications praying for discharge of notice have been rejected. The facts of the case regarding approval of the Competent Authority for termination of service of the writ petitioners and for recovery from the then District Inspector of Schools and Committees of Management of loss caused to the public exchequer have been ignored.

63. The impugned order does not frame *charge simpliciter*. It records a finding which adversely affects the appellant/ Contemnor and no scope has been left for him to further explain his conduct regarding alleged non-compliance of the writ court's order.

64. The Supreme Court in its various judgements has clearly held that where the High Court refuses to exercise its jurisdiction to punish for contempt and does not initiate contempt proceedings, no Appeal shall lie. It has also held that where the order is interlocutory in nature, no Appeal will lie. However, in the second *Baradakanta Mishra* case, it was held that those orders or decisions in which some point is decided or a finding is given in the exercise of jurisdiction by the High Court to punish for contempt, would be appealable. In *Purushottam Das* (Supra) the Supreme Court held that if the order or decision decided some of the contention raised before the High Court affecting the rights of the parties, an Appeal would lie. The Apex Court further held that when the matter has been decided finally or even at an earlier stage, if an order is made which decides and rejects the contention raised by the contemnor asking the High Court to drop the proceedings, but they are continued, then also the Supreme Court held that even an order passed not discharging the *rule* issued in contempt proceedings, would be an order or decision in exercise of its jurisdiction to punish for contempt. Similar view was taken in *Modi Tele Fibres Limited* (Supra) where despite the fact that the contemnor had not been punished, appeal was entertained as the Contempt Court had held him *prima facie* guilty of contempt.

65. This Court is of the opinion that in the facts and circumstances of this case, this Contempt Appeal is maintainable.

66. The Office has reported a delay of seven days in filing of this appeal.

67. The appellant has filed an application for condonation of delay supported by an affidavit.

68. We have gone through the affidavit and find the reasons given therein are sufficient.

69. The application for delay in filing the Contempt Appeal, bearing C. M. Application No. 2/2024 is allowed.

70. This contempt appeal shall be treated to have been filed in time.

71. The Office is directed to assign a regular number to this Appeal.

72. **Admit.**

73. **List after exchange of pleadings on 10.04.2024.**

74. Till the next date of listing, the impugned order dated 13.12.2023 shall remain stayed.)

(2024) 3 ILRA 1269
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 46 of 2009

Pappu @ Dhani Ram ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Rajendra Kumar

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Appeal against conviction under Gangsters Act - The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2(b) - Gang, Section 2(c) - Gangster, Section 3(1) - Penalty - Onus is upon prosecution to prove the different ingredients of offence and unless it discharges that onus, it cannot succeed - suspicion howsoever strong cannot take place of proof - Falsity of defence does not establish prosecution case - Prosecution is to prove his case beyond all reasonable doubt whereas accused is to prove only till establishing preponderance of probabilities in. (Para - 17 to 20)

(B) Evidence Law - act or action of one of the accused cannot be used as evidence against another - Exception under Section 10 of Evidence Act - Court must have reasonable ground to believe that two or more persons had conspired together for committing an offence - only that the evidence of action or statement made by one of the accused could be used as evidence against the other.(Para -12)

(C) Criminal Law - The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - In order to attract the substantive offence of Section 3 of the Gangsters Act, the ingredients as provided in the definition of the word "Gang" under Section 2(b) and that of word "Gangster" under Section 2(c) are to be fulfilled. (Para -15)

Appellant convicted under Section 3(1) of Gangsters Act - Six criminal cases shown against appellant in gang chart - challenged conviction and sentence - Prosecution relied on police and official witnesses - no independent public witnesses -conviction was based on insufficient evidence - appellant not a member of any gang or involved in anti-social activities - No evidence of violence, threat, or show of violence - No recovery of property or valuable things from appellant - Sanction by District Magistrate was without application of mind. (Para - 2,3, 24 to 27)

HELD: -
Prosecution failed to prove essential ingredients of offence under Section 3(1) of the Act beyond reasonable doubt. Judgment of trial Court was not substantiated with evidence on record and prosecution was not successful to prove the fact against convict appellant. Impugned judgment and order of conviction set aside. Appellant acquitted of all the charges. (Para,30,31)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Ashok Kumar Dixit Vs St. of U.P., 1987 (24) ACC 164 (FB)

2. Saju Vs St. of Kerala, AIR 2001 SC 175

3. Ram Raheesh Vs St. of U.P. & ors., 2011 (73) ACC 559

4. Kali Ram Vs St. of H.P., AIR 1973 SC 2773

5. St. of Punj. Vs Bhajan Singh, AIR 1975 SC 258

6. Shankarlal Gyarasilal Dixit Vs St. of Maha., AIR 1981 SC 765

7. Pratap Vs St. of U.P.; AIR 1976 SC 966

8. Narbada Prasad Vs Chhaganlal & ors.; AIR 1969 SC 395

(Delivered by Hon'ble Shamim Ahmed, J)

1. This Appeal under Section 374(2) Cr.P.C. has been filed by convict appellant-Pappu @ Dhani Ram against judgment of conviction dated 08.12.2008 passed by learned Special Judge, Gangster Act, Lucknow in Case No.90 of 1998, State Vs. Birju and Others, Case Crime No.78 of 1997, Police Station Fatehpur Chaurasi, District Unnao, convicting and sentencing the appellant under Section 3(1) of The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 for two years and six months rigorous imprisonment alongwith fine of Rs.5,000/- with default stipulations.

2. Learned counsel for convict appellant argued that the appellant had been convicted and sentenced with two years' rigorous imprisonment and fine of Rs.5,000/- and in default with further imprisonment of one month, which was a severe sentence, against the evidence on record. Trial Court failed to appreciate facts and evidence placed before it, resulting this perversity. He further argued that six criminal cases were shown as criminal history against appellant in gang chart. There was no independent witness of public to prove prosecution case, except police and official witnesses, who were examined before trial Court. The convict appellant is neither member of any gang nor he had worked as gangster. There was no anti-social activities of him. No credible evidence was there. Hence, offence punishable under Section 3(1) of the Act was not made out. Even then, charge sheet was submitted and judgment of conviction with sentence, as above, was passed. Hence, this appeal with above prayer.

3. Learned A.G.A. has vehemently opposed the contentions raised by learned counsel for the appellant and submitted that the trial court has rightly appreciated facts and law, placed before it in correct perspective of law. After approval of District Magistrate, Unnao, gang chart, having six cases lodged against appellant including Case Crime No.177/1993, under Section 395/397 I.P.C., Case Crime No.377/1997, under Section 307 I.P.C., Case Crime No.422/1993, under Sections 147/148/307 I.P.C., Case Crime No.167/1995, under Sections 147/148/302 I.P.C., Case Crime No.269/1996, under Section 302 I.P.C. and Case Crime No.56/1997, under Section 307 I.P.C., was in gang chart and on the basis of above gang chart this Case Crime No. 78 of 1997, under Section 3 of the Act got registered and investigated, resulting submission of charge sheet. Accused person pleaded not guilty and claimed for trial for the charges leveled against him. Prosecution had examined its witnesses, who had proved prosecution case beyond doubt and on the basis of those cogent evidence, judgment of conviction with sentence, as above, was passed. Hence, this appeal is baseless.

4. Heard learned counsel for the parties as well as perused the impugned judgment and trial court record.

5. Before entering into merits of the case, it would be relevant to discuss Sections 2 and 3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act (hereinafter referred to as "the Act").

6. Section 2(b) of the Act provides definition of Gang:-

"'Gang' means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti- social activities, namely-

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or

....."

7. Who is gangster. This was decided by Full Bench of this Court in ***Ashok Kumar Dixit v. State of U.P., 1987 (24) ACC 164 (FB)*** that Clause (c) of Section 2 defines the word "Gangster". It means a member or leader or organizer of a group which indulges in the kind of activities set out under the various sub-clauses of clause (b) of Section 2, by use of violence or threat or show of violence or intimidation etc.

8. The term "gangster" has been defined in Section 2(c) and it means a member or leader or organizer of a gang, and includes any person who in the activities of the gang enumerated in clauses (b) whether before or after the commission of such activities or harbours any person who indulges in such activity.

9. Gangsterism is aimed at creating special organizations and groups to commit murder, use violence and take people for a ransom or other demands, forcible deprivation of freedom often involving torture, black-marketing, etc. Gangsterism could also mean the destruction of buildings, ransacking and similar acts in a cruel manner to terrorize the people.

10. Section 3 of the Act provides penalty.

"*Penalty.-(1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:*

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees."

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself of through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superiors officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to

ten years but shall not be less than three years and also with fine."

11. This Act provides special rules of evidence under Section 4. Hence the object of legislation for enactment of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (U.P. Act No. 7 of 1986 (as passed by the U.P. Legislature) was an Act to make special provisions for the prevention of, and for coping with, gangsters and anti-social activities and for matters connected therewith or incidental thereto.

12. Further, Hon'ble Apex Court in ***Saju v. State of Kerala, AIR 2001 SC 175*** has propounded at para 8 that in a criminal case the onus lies on the prosecution to prove affirmatively that the accused was directly and presently connected with the acts or omissions attributable to the crime committed by him. It is a settled position of law that act or action of one of the accused cannot be used as evidence against another. However, an exception has been carved out under Section 10 of the Evidence Act, the Court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only that the evidence of action or statement made by one of the accused could be used as evidence against the other.

13. In order to attract the provisions of Section 2/3 of the Act, the essential requirements are being enumerated below:-

(i) There should be a group of persons, who acting singly or collectively;

(ii) By violence or threat or show of violence or intimidation or coercion or otherwise;

(iii) With object of disturbing public order or of gaining any undue temporal pecuniary material or other advantage for himself or for any other person;

(iv) Indulge in anti-social activities categorized in fifteen categories of Section 2(b).

14. Meaning thereby, persons forming group may be said to be a gang if they by use of violence, threat show of violence intimidation, coercion or otherwise with the object of disturbing public order or if unlawfully gaining temporal, pecuniary material or other advantages either for himself or for any other person indulged in any of the anti-social activity enumerated under clause (1) to (XV) and those persons indulging in aforesaid activities as member, leader, organizer of the gang may be treated as gangster and may be liable for punishment under Section 3 of the Act.

15. This Court in ***Ram Raheesh v. State of U.P. and others, 2011 (73) ACC 559*** has propounded that in order to attract the substantive offence of Section 3 of the Gangsters Act, the ingredients as provided in the definition of the word "Gang" under Section 2(b) and that of word "Gangster" under Section 2(c) are to be fulfilled.

16. Full Bench of this Court in the case of ***Ashok Kumar Dixit (supra***) at paragraph 75 and 76 of judgment has held as under:-

75. While laying down so, we should not be oblivious of the avowed object of the Act. Under the ordinary criminal law, it is sometimes difficult to bring to book the overlords of crime and underworld because they seldom operate in

person or in the public gaze. They indulge in clandestine operations which threaten to tear apart the very fabric of society. It is this purpose which the Act seeks to achieve.

76. But nevertheless we must sound a note of caution. Provisions of the Act cannot be used as a weapon to wreak vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt. Then, there is a further provision for appeal. Thus, the power of judicial review of this Court has been preserved. If it is ultimately found that a person was proceeded with in sheer bad faith out of malice and by way of political vendetta the authorities do not enjoy any immunity under Section 22 of the Act. This immunity is confined only to acts done in good faith.

77. In Clause (b) of Section 2 the word used is 'indulged in anti-social activities'. We may note here that the offences for which Sections 2 and 3 of the Act can be attracted must be those which have been committed after the enforcement of the Ordinance or the Act. It is not possible to convict a person for the activities, which could be and were of the nature defined in Section 2, indulged into by him before the Ordinance or the Act. Article 20 recities two limitations upon the law making power of every legislative authority as regards retrospective criminal legislation. It prohibits.....(i) the making of ex post facto criminal law. i.e. making an act a crime for the first time and then making that law retrospective, (ii) infliction of penalty greater than which might have been inflicted under the law which was in force when the act was committed. From the language also, we find that Section 2 of the Act is prospective in nature and does not take within it the activities which were indulged into before.

17. Further, Hon'ble Apex Court in ***Kali Ram Vs. State of Himachal Pradesh; AIR 1973 SC 2773*** has propounded that in a criminal trial, the onus is upon prosecution to prove the different ingredients of offence and unless it discharges that onus, it cannot succeed.

18. Further, Hon'ble Apex Court in ***State of Punjab Vs. Bhajan Singh; AIR 1975 SC 258*** has propounded that suspicion howsoever strong cannot take place of proof.

19. Hon'ble the Apex Court in ***Shankarlal Gyarasilal Dixit Vs. State of Maharashtra; AIR 1981 SC 765*** has propounded that falsity of defence does not establish prosecution case.

20. Further in ***Pratap Vs. State of U.P.; AIR 1976 SC 966*** Hon'ble Apex Court has propounded that prosecution is to prove his case beyond all reasonable doubt whereas accused is to prove only till establishing preponderance of probabilities in.

21. In ***Narbada Prasad v. Chhaganlal & Ors.; AIR 1969 SC 395***, Hon'ble Apex Court has held that in an appeal the burden is on appellant to prove how the judgment under appeal is wrong? He must show where the assessment has gone wrong?

22. Under above perspective of law the impugned judgment and the evidence placed on record is to be appreciated.

23. Charges leveled against accused was that he was a member of an organized gang and being a member of above gang by

violence, threat of violence and show of violence, he used to commit crime, thereby disturb public peace and public order and with a view of gaining undue temporal, pecuniary, material and other advantages used to commit offence punishable under Chapter XVI, XVII or XXII of the Indian Penal Code given in gang chart. As six cases were against him, hence he committed offence punishable under Section 3 of the Act. Accused pleaded not guilty and prosecution was to prove those essential ingredients.

24. The witnesses of this case, in their statement on oath in examination-in-chief have stated that the accused is history sheeter and he is having a long criminal history. Public abstains from giving any evidence against him. This was gone through from record of police station and found to be a true information. Hence, there was no other option than to take action under this Act. Gang chart was prepared, which was approved by the then District Magistrate, Unnao. Meaning thereby, none of accused was doing any crime or was of public terror or involved in any offence provided under Chapter XVI, XVII or XXII of the I.P.C. nor they were involved in anti-social activities within the knowledge of this S.O. Rather an information by informer was given and on the basis of above information police record of police station was searched and on the basis of cases written in it gang chart was prepared and thereafter approved from the then District Magistrate, Unnao and was lodged at police station concerned i.e. no offence under knowledge of prosecution witnesses was there except on the basis of information and going through record of police station. Neither any recovered goods were produced before trial Court nor they were placed on record. Meaning thereby, all the prosecution witnesses and their testimony is not of this nature to prove the existence of essential ingredients of offence for which charges were leveled against convict appellant.

25. Hence, testimony of all the witnesses is of no assistance to prosecution for proving that there was any violence, or show of violence or use of violence for commission of any offence under Chapter XVI or Chapter XVII or Chapter XXII of the I.P.C. or doing any act for earning property or money, as above, required for offence of gangster under this Act.

26. The criminal jurisprudence has developed that the victim is being accorded proper opportunity of being heard not only at the various stages of trial and even at the stage of disposal of bail. But the story herein is a bit different. The matter in question is under Section 3(1) of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, and not under the IPC or any other Special Act and the complainant of the said case is the S.O. of the police station-Fatehpur Chaurasi, District-Unnao. So the counsel for the victim of the predicate offence i.e. Case No.90 of 1998 does not come within the category of “victim” pertaining to the present case, thus, the present prosecution has been initiated against the appellant only on the basis of gang chart, which records the criminal history of the appellant of various nature.

27. All the evidences were produced before the trial Court, but trial Court failed to appreciate essential ingredients for offence punishable under this Act and alleged proof of prosecution beyond reasonable doubt. Even rule of evidence in this said Act regarding above offence could

not be taken into consideration because no property or valuable things were recovered from the possession of convict appellant nor it was proved to be earned or procured out of above anti-social activities. Rather there was no evidence at all except a formal registration of case on the basis of formal approval given by District Magistrate concerned over gang chart which was prepared on the basis of information of hidden informer and record of police station, in which all cases ended under acquittal. Moreso, sanction given by District Magistrate is also with no application of mind by District Magistrate nor with any mention of gang chart having specific offence given under Chapter XVI or Chapter XVII or Chapter XXII of the I.P.C. or offence by way of earning property or likelihood of creating any terror in public thereby abusing public order.

28. It is further observed here that a person may be involved in more than one cases but all those cases may be of such nature which may arise out of some trivial personal dispute over some drainage problem or over some connected boundary wall dispute or over some rival competing civil claim on some piece of land and the relationship of the two parties may deteriorate to the extent that they may get involved in some squabble, quarrels or sometimes even in making criminal assaults upon each other. Such kind of crimes are somewhat of a regular kind and nature. They do not make a good ground to impose Gangster Act.

29. The definition as has been provided in the Gangster Act is very exhaustive and has very wide contours. While dealing with the issues involved in the case of Gangster Act, the court has to be cautious and should not stretch it too much or to the extent where any kind of crime committed by anybody or all kinds of offences committed by anybody would make him a "gangster". In fact it is a question of fact and the court will have to see it as per the allegations made in each individual case whether the nature of crime committed was such on the basis of which an accused can be brought under the bracket of the definition of the gangster or not. There cannot be a over generalized formula on this point and the Court has to satisfy itself on a subjective basis as well as on the objective basis as per the allegations and the circumstances as they may appear from the nature of crime said to have been committed by a particular accused and see for itself whether he can be brought within the mischief of the Act or not.

30. This judgment of trial Court was not substantiated with evidence on record and prosecution was not successful to prove the fact against convict appellant. Hence, this appeal merits its allowance.

31. Accordingly, this appeal succeeds and is allowed. The impugned judgment and order of conviction dated 08.12.2008, passed by the trial court, is hereby set aside and the appellant, Pappu @ Dhani Ram, is acquitted of all the charges. The appellant was on bail during the pendency of this appeal, thus, his

personal bond and surety bonds are canceled and sureties are discharged.

32. Let a copy of this judgment along with trial court's record be sent back to the court concerned for immediate compliance.

(2024) 3 ILRA 1276
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 95 of 1998

Smt. Madhu Tandon ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
R.B.Khare, Anil Kumar Rajvanshi, Ayodhya Prasad Mishra, H.S.Jain, Shesh Ram Verma

Counsel for the Respondent:
Govt. Advocate, Bireshwar Nath, Shiv P. Shukla

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Sections 120B, 409, 419, 420, 467, Prevention of Corruption Act, 1947 - Section 5(1)(c),5(2) - Criminal misconduct in discharge of official duty - Standard of proof required for conviction is proof beyond all reasonable doubts - Burden of proof is always on the prosecution and never shifts on to the accused person - Suspicion, however, grave cannot take place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmises or conjectures - Reliance solely on handwriting analysis and contradictory witness statements cannot suffice for a conviction.(Para - 20,22,28)

(B) Practice & Procedure - Finding given by the expert examiner is not full proof - Trial court must exercise caution when relying on expert evidence, especially handwriting analysis, which lacks the same degree of certainty as fingerprint analysis - Judges must proactively interrogate witnesses to distinguish truth from falsehood rather than leaving it entirely to the advocates - Trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.(Para -14,27)

Appellant's husband was convicted of criminal breach of trust and criminal misconduct - misappropriating funds while serving as branch manager of UCO Bank - prosecution relied on testimony of various witnesses, including bank officials and complainant - trial court convicted him - Appellant appealed against this conviction - citing insufficient evidence and unreliable witness testimony. (Para - Paras: 3, 4, 7, 10, 12)

HELD: -
Prosecution failed to establish guilt beyond a reasonable doubt. Testimony of witnesses wholly untrustworthy and unbelievable. Testimonies of other witnesses, even if taken on their face value, fall short of the requirement of proof of the charge beyond all reasonable doubt. Conviction and sentence passed by trial court set aside. Appellant's husband acquitted of all charges.(Paras: 20, 28, 29,30)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. C.S.D. Swamy Vs St., (1960) 1 SCR 461

2. Harishchandra Krishna Gadkar Vs St. of Maha., 1994 SCC (L&S) 1055

3. Fakhruddin Vs The St. of M.P., 1966 SCC OnLine SC 55

4. Paramjeet Singh Vs St. of Uttarakhand, AIR 2011 SC 200

5. Pandurang s/o Ramji Khade Vs St. of Maha., 1980 SCC OnLine Bom 201

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

1. List has been revised and the case was taken up in the revised call.

2. Heard learned Counsel for the appellant, Shri Shiv. P. Shukla, learned Counsel for C.B.I. and Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondents.

3. The instant Criminal Appeal under Section 9 of the Criminal Law Amendment Act read with Section 374 Cr.P.C. has been filed on behalf of the appellant, namely, Smt. Madhu Tandon against the judgment and order dated 10.02.1998 passed by Special Judge (Anti Corruption), U.P (West) Lucknow, in Case No.1/81 arising out of R.C. No.19/1979, convicting the husband of the appellant under Section 409 I.P.C. and Section 5(2) readwith Section 5(1)(c) of the Prevention of Corruption Act, 1947 and sentencing him to undergo two years rigorous imprisonment and a fine of Rs.18,000/- on each count, the sentences of imprisonment directed to run concurrently and in default of payment of fine to undergo further imprisonment of six months.

4. The prosecution case in brief is that P.K. Tandon i.e. accused (now deceased), who was the husband of the appellant, was appointed as a Branch Managar at Koraw Branch Allahabad in the U.C.O Bank formerly known as United Commercial Bank and one-Shri T.N. Bhalla served as the chief accountant in the same branch. On October 10, 1979, at 11:45 AM, a case was registered against P.K. Tandon and T.S. Bhalla as R.C. No. 19/79 under sections 120B , 419, 420, 409, 467 I.P.C. and under Section 5(2) read with Section 5(1)(c) of the Prevention of Corruption Act, 1947. During the period 1976-77, the accused obtained a blank cheque book of Shri Kamala Shankar Pandey, the proprietor of M/s Agro Service Center situated in Allahabad (now Prayagaraj) under false pretext. The chequebook, numbered 775830 to 775850, was subsequently used by the accused to forge the signature of the P.W.-5 on eight cheques between September 9, 1996, and February 17, 1997, the accused had fraudulently withdrawn a total sum of Rs.43,000/- using these forged cheques.

Additionally, it was alleged that the complainant had entrusted the accused with a sum of money to be deposited into a savings account. The accused, identified as P.K. Tandon, provided pay-in-slips with his signature acknowledging receipt of the money on various dates: November 29, 1976 (Rs.19,000/-), December 9, 1976 (Rs.7,000/-), January 13, 1977 (Rs.5,000/-), and January 21, 1977 (Rs.5,000/-), totaling Rs.36,000/-. However, the accused did not deposit the said amount into the bank account of the complainant, resulting in a loss to the bank.

Upon investigation, the case was handed over to C.B.I Inspector Shri K.P. Singh, who collected evidence indicating the guilt of the only accused, P.K. Tandon-accused, husband of the appellant for misappropriating the aforementioned sum of Rs.36,000/- and failing to deposit it into the bank account as instructed. Consequently, a charge-sheet was filed against the accused under Section 409 of the Indian Penal Code (IPC) and under Section 5(2) read with Section 5(1)(c) of the Prevention of Corruption Act, 1947.

5. Charges were framed by the trial court under Sections 409 I.P.C. and under Section 5(2) r/w 5(1)(c) of Prevention of Corruption Act, 1947. The accused persons denied charges and sought trial.

6. In order to substantiate their case, the prosecution examined witnesses Rajeshwar Amolak Ramshani, Assistant General manager UCO Bank, D.R Kapoor, Director of UCO Bank, N.P Khare, Officer UCO Bank, T.N Bhalla Chief accountant UCO Bank, Kamala shankar pandey i.e. P.W.5 proprietor M/s Agro Service Center, Koraw, Amar singh Deputy G.E.Q.D, State Handwriting examiner, K.P Singh Inspector C.B.I Supervising officer.

7. Learned Counsel for the appellant submitted that the prosecution banked upon three types of evidences to substantiate the charges leveled against the accused. The first evidence consists of direct testimony of witness who has entrusted the amount to the accused, who had issued pay-in-slip related to deposit of money. The second type of evidence consists of those witnesses working in the same department who acknowledged the signature and writing of the accused. The last type of evidence is the evidence of Expert who compared the handwriting of accused inasmuch as he was provided with the specimen signatures and handwriting of the accused as well as signatures in disputed pay-in-slip, and who had given his opinion that the signatures in the disputed pay-in-slip were of accused.

8. P.W-1 Rajeshwar Amolak Ramshani, who was an Assistant General Manager at UCO Bank in 1981 stated that he had granted permission to run a case against the accused after obtaining the necessary authorization from the Board of Directors of UCO Bank. Furthermore, he mentioned that the accused was served with a joining letter bearing signature of B.D Desai, the Deputy General Manager of UCO Bank. He further stated that the accused was an employee of UCO Bank at the Koraw branch, but did not made any allegation regarding embezzlement of money from the bank by the accused, thus, statement of P.W.-1 also did not support the prosecution case so far it relates to the allegation that the accused is involved in embezzlement of fund.

9. P.W. 2 stated that he has given Power of Attorney to PW 1 to proceed the case against the accused. Thus, it is clear from his statement that he had not mentioned anything in favour of the prosecution case and he just gave his permission to proceed for prosecution of the accused in accordance with law.

10. P.W-3 N.P. Khare testified that they took charge of the Koraw branch from the accused P.K Tandon and claimed familiarity with the writing and signatures of the accused because he had seen the accused writing and putting signatures on relevant papers and further stated that one current account was opened in the name of the P.W-5 on 13.02.976 and signature of the accused were put on the account opening form, and also stated that on the name of the P.W-5 accepted Term loan of Rs.91800/- and Cash Credit of Rs.62,750/- on 14.06.1976. He further stated that he was familiar with the writing and signatures of the accused and had seen the writing style of the accused. Statement of PW-3 seems ambiguous because he had seen the accused handwriting and putting signatures while he was taking the charge from the accused. The claim of P.W-3 being familiar with the handwriting of the accused is dubious as he testified this fact

after 10 years. It might be the case that P.W-3 has given statement against the accused under influence of the bank. The trial courts while examining witness to verify handwriting the trial court must adopt due care and caution. No common man could identify signature and handwriting of any person which had been signed or written 10 years ago. Therefore, the statements of PW-3 are not wholly reliable as he appears to be an interested witness. It is further observed that the accused in her statement before the trial court clearly stated that he had not worked with P.W.-3 but he was only present when the accused was joining in the U.C.O. Bank, thus, it is highly improbable that a person who has seen the accused writing or putting signature once that too ten years back could remember the writing style of the accused.

11. P.W.-4, namely-T.N. Bhalla, who was the Chief Accountant in the U.C.O Bank stated that on the date of issue of alleged pay-in-slips he was on leave, thus, he stated that he was not present on the date of issue of alleged pay-in-slips, which clearly shows that the P.W.-4 has not fully supported the prosecution and has only stated that he was well aware with the handwriting and signature of the accused, which is the subject matter of verification before coming to a conclusion that the signatures which are in dispute were put by the accused. So far as the statements of P.W-4 are concerned, it is pertinent to note here that initially P.W.-4 was also accused in the present case and later on under the influence of the Bank and its Officials turned into a prosecution witness only with the intention to save himself from the case and falsely implicate the accused in the present case, thus, it appears that P.W.-4 is also not a reliable witness.

12. P.W-5 Kamala Shankar Pandey, was not treated as a reliable witness because he had made false and frivolous complaint against the accused for forging signature on several cheques which were obtained from him under false pretext and used those cheques to misappropriate money from his bank account but this complaint appears to be false and fabricated as there is high probability that P.W.-5 has given false statements against accused for settlement of his Bank loan. Further, this allegation leveled by the P.W.5 against the accused regarding misappropriation of cheques which were obtained by the accused on false pretext and later they were misused by him, was dropped by the Investigating Officer at the initial stage of his investigation.

13. Learned Counsel for the appellant further submitted that in respect of allegation regarding pay-in-slips, the P.W.-5 further stated that he used to visit the bank to deposit money of which he used to keep record in his personal diary but at the time of investigation he could not produce his personal diary and further stated that he did not remember the exact dates on which the pay-in-slips were issued to him and regarding veracity of those pay-in-slips he stated that the pay-in-slips which were issued against the money which was allegedly deposited by him in the bank were undated, the only thing which goes against the accused is that the pay-in-slips bear the signature of the accused even though, the signatures which were put on the pay-in-slips are in dispute, thus, the P.W.-5 himself has failed to establish his case beyond reasonable doubt and the whole prosecution story is based on surmises and conjunctures.

14. P.W.-6 -Amar singh Deputy G.E.Q.D, State Handwriting Examiner has

stated that the signatures of the accused which were produced before him for examination do tally to some extent but so far as the science of examination of handwriting is concerned he stated that the science is not perfect to give its full proof finding that both the signatures are same, thus, he stated that there might be some shortcomings in his finding regarding veracity of his report given in respect of signature examination. Thus, it is evident from his statements that the finding given by the expert examiner is not full proof. The value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general it cannot be a basis for conviction unless it is corroborated by other evidence. The hazard of accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witness, the quality of credibility or incredibility being one which an expert shares with all other witnesses, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less chance of an incorrect opinion and the converse if the science is less developed and imperfect the science of identification of finger print has a ten year perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not merely so perfect and the risk is, therefore, higher. An expert deposes not decides, his duty to furnish the court with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the court to form its own independent judgment by the application of these criteria to the facts proved in evidence, thus, the statement given by the P.W.-6 is also not wholly reliable to prosecute the accused in the present case.

15. P.W-7 -Ram Chandra Pandey is an independent witness, who was also the guarantor of P.W.-5 in the bank loan amount and he used to visit the bank regularly with P.W.5 and they both know each other well, thus, it is clear that P.W.-7 is an interested witness, who gave his statements under the influence of the complainant only with the intention to help the complainant to establish its case against the accused and also help him to get some liberty in respect of loan amount, which was taken by the complainant from the said Bank. Further, there is nothing on record to demonstrate this fact that P.W.-7 used to visit the bank regularly with P.W.-5, which also create doubt in the mind of this Court.

16. P.W.-8 K.P. Singh, Inspector C.B.I. Supervising Officer, stated that after due consideration of the material available on record and after thorough investigation, he has submitted the chargesheet against the accused. He further stated that in respect of the allegations made by P.W.-5 on which the Bank initiated prosecution against the accused, P.W.-5 did not make any complaint to concerned authorities and he further stated that the alleged pay-in-slips were undated. Thus, his findings are also based on imaginary and concocted evidence which came up during the course of investigation.

17. Learned Counsel for the appellant after concluding his arguments on the factual and legal aspect finally submitted that the accused (now deceased) who was the husband of the appellant had been falsely implicated in the present case by the officials of the Bank and P.W.5, namely-Kamala Shankar Pandey in collusion with

their other associates only with the intention to get some financial aid from the Bank as the P.W.-5 took some loan amount from the concerned Bank. The investigating agencies did not appreciate the factual aspect of the case and has conducted the investigation in a hasty manner and filed the chargesheet against the accused. He further submitted that the trial court also did not go through the legal aspect of the case and has passed the order of conviction in a cursory manner, thus, the present appeal may be allowed and the order of conviction passed by the trial court may be set aside and reversed.

18. Per contra, learned A.G.A-I and learned Counsel for C.B.I. have submitted that the charges have rightly been framed by the trial court against the accused i.e. the husband of the present appellant and no interference is called for by this Court as the prosecution has proved its case beyond reasonable doubt and the trial court has rightly convicted and sentenced the accused in aforesaid case, thus, this appeal being devoid of merit and substance is liable to be dismissed.

19. I have considered the submissions made by learned counsel for the parties and gone through the record.

20. The submission of the learned counsel for the appellant is that the conviction of the accused has been held on suspicion. The suspicion, however, grave cannot take place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmises or conjectures. Thus, on the material on record when judged on the touch stone of legal principles adumbrated hereinabove, leave no manner of doubt that the prosecution, in the instant case, has failed to prove its case beyond reasonable doubt and the trial court also did not apply its judicial mind before passing the order of conviction and sentence, the accused, who made an error in issuing pay-in-slips without date for which he has no satisfactory explanation and to that extent he has committed grave irregularity. But, only on that point, it cannot be said that he committed the offences for which he was charged in the aforesaid case.

21. It is observed here that **Section 409 I.P.C**. deals with criminal breach of trust by public servant or by banker, merchant or agent. Section 405 defines criminal breach of trust. The offence like the offence of criminal misappropriation is characterized by an actual fraudulent appropriation of property. There is not originally wrongful taking or moving as in the case of theft but the offence consists in wrongful appropriation of property, consequent upon a possession which is lawful. The offence is distinguishable from criminal misappropriation because subject of it is not the property which by some casual act or otherwise, but without criminal means, comes into the offender's possession: but the property which is entrusted to the offender by the owner or by others lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust.

22. Further, Section 5(1)(c) and Section 5(2) of Prevention of Corruption Act, 1947 are quoted hereunder:-

"5. Criminal misconduct in discharge of official duty *- (1) A public servant is said to commit the offence of criminal misconduct: —*

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

5. Criminal misconduct in discharge of official duty -

(2) Any public servant, who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine."

So far as Section 5 of the Prevention of Corruption Act, 1947 is concerned, Hon'ble the Apex Court in the case of ***C.S.D. Swamy v. State [(1960) 1 SCR 461]*** *has held that that sub-section (3) of Section 5 of the Prevention of Corruption Act, 1947, does not create a new offence but only lays down a rule of evidence which empowers the Court to presume the guilt of the accused in certain circumstances, contrary to the well known principle of Criminal law that the burden of proof is always on the prosecution and never shifts on to the accused person. In Swamy case, there were charges for the offence of criminal misconduct under two heads, clause (a) and clause (d). The trial court held the accused person in that case not guilty of the offence under clause (a) but guilty of the offence under clause (d) by invoking the Rule of presumption laid down in sub-section (3) of Section 5. The distinction between that case and the case under our consideration is this : in Swamy case, there were two charges either of which could be found on the rule of presumption laid down in sub-section (3); but in our case there is only one charge of criminal misconduct of which the appellant has been acquitted; therefore, there is no other charge which can be found on the rule of presumption referred to in sub-section (3). This is the difficulty with which the respondent is faced in the present case. It appears to us that the learned Special Judge and the High Court proceeded wrongly on the footing as though sub-section (2) or sub-section (3) of Section 5 of the Act creates an offence. The offence which is punished under sub-section (2) or can be founded on the rule of presumption laid down in sub-section (3) must be the offence of criminal misconduct of one or more of the categories mentioned in clauses (a) to (d) of sub-section (1). In the case before us the only category which was alleged against the appellant was that of category (c), namely, dishonest or fraudulent misappropriation, etc. That charge having failed, there was no other charge which could be founded on the rule of presumption laid down in sub-section (3).*

23. Further, the Hon'ble Apex Court in the case of ***Harishchandra Krishna Gadkar vs. State of Maharashtra*** reported in ***1994 SCC (L&S) 1055*** has been pleased to observe as under:-

"7.We are unable to agree with the learned counsel. Apart from the evidence of handwriting expert, there is evidence of PW 6 the Assistant Commissioner of Income Tax (Mr Deshmukh) who deposed that the alterations were made by A-3. According to him, the payment of Rs 20,000 has been made by cheque received from the Office of the Income Tax Commissioner and he refused to sign the receipt as it was in the name of B.P. & Co. Thereupon, accused 3

scored off the words "B.P. & Co." on the receipt and wrote the words "Assistant Commissioner of Income Tax" and thereby made the alterations. In order to substantiate this aspect, certain specimen signatures were also secured and those were sent to handwriting expert and the evidence establishes that handwriting tallies with that of accused 3.

8.But the next question is whether that alterations could, even otherwise, in any manner, establish the guilt of the appellant. The High Court having accepted the evidence of handwriting expert as well as the evidence of PW 6, reached the conclusion that the part played by accused 3 shows that he must have been a member of the conspiracy. Having given such a finding, again, the High Court categorically held thus:"It is impossible on this evidence to hold that accused 3 must have enriched himself with this amount or a large part thereof". Having made this observation the High Court also commented that police investigation came at a much later stage and if proper investigation had been done, the truth might have come out."

24. Further, the Hon'ble Apex Court in the case of ***Fakhruddin vs. The State of Madhya Pradesh*** reported in ***1966 SCC OnLine SC 55*** has been pleased to observe paragraph No.11, which is reproduced hereunder:-

"11. Both under S. 45 and 5. 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience, In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to becorof v an handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the, opinion whether of the expert or other witness."

25. Similarly in ***Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200*** also Hon'ble Apex Court was pleased to observe as under:-

"When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the

testimony of such a witness; normally, it should look for corroboration to his testimony".

26. Further the Bombay High Court in the case of ***Pandurang s/o Ramji Khade vs. State of Maharashtra*** reported in ***1980 SCC OnLine Bom 201*** has observe paragraph No.24 and 25, which are reproduced hereunder:-

"24. From this angle, it would be advantageous to refer to the decision of the Supreme Court reported in (1976) 4 SCC 233: A.I.R. 1977 S.C. 1706 (Rabindra Kumar Dev v. State of Orissa). In the said case Fazal Ali, J., has laid down certain cardinal principles of criminal jurisprudence viz;

1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and I cannot derive any benifit from weakness or falsity of the defence version while proving its case;

2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

3) that the onus of the prosecution never shifts.

25. He further observed that;

"It is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by section 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Penal Code, 1860 on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court."

27. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile or is an interested witness, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

28. The loose ends and the suspicion raised by the learned counsel for the appellants cannot be brushed aside lightly. On a comprehensive re-appreciation of the evidence and material placed on record, this Court is of the firm opinion that the testimony of the witnesses is wholly untrustworthy and unbelievable. In criminal prosecution the standard of proof required for conviction is proof beyond all reasonable doubts. The testimonies of other

witnesses, even if taken on their face value, fall short of the requirement of proof of the charge beyond all reasonable doubt.

29. Consequently, contrary view taken by the trial Court is against the weight of the evidence on record and the exposition of law attested by the decisions of Hon'ble Supreme Court cited herein above. Thus, on perusal of material placed on record and discussions and observations made above, it appears that the prosecution has failed to establish its case beyond reasonable doubt and the learned trial court has also not applied its mind to appreciate and consider the prosecution witnesses placed by the prosecution in order to substantiate its case.

30. Thus, in view of the aforesaid discussions/observations and the judgments rendered by the Hon'ble Apex Court cited hereinabove, the appeal is allowed. the judgment and order dated 10.02.1998 passed by Special Judge (Anti Corruption), U.P (West) Lucknow, in Case No.1/81 arising out of R.C. No.19/1979, convicting the accused (now deceased) under Section 409 I.P.C. and Section 5(2) readwith Section 5(1)(c) of the Prevention of Corruption Act, 1947 and sentencing him to undergo two years rigorous imprisonment and a fine of Rs.18,000/- on each count, the sentences of imprisonment directed to run concurrently and in default of payment of fine to undergo further imprisonment of six months is set aside and reversed. The accused, namely, Late P.K. Tondon, who was the husband of the present appellant, is acquitted of charges under Section 409 I.P.C. and Section 5(2) readwith Section 5(1)(c) of the Prevention of Corruption Act, 1947 and sureties, if any, are also discharged.

31. Let record of trial Court be sent back to Court concerned along with copy of judgment and order for information.

(2024) 3 ILRA 1285
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 134 of 2004

Ram Sanehi & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
M.P. Yadav, Ajay Madhavan

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Appeal against order of forfeiture of Surety Bond - Code of Criminal Procedure, 1973 - Section 446 - Procedure where bond has been forfeited - Sureties liable for penalty if accused fails to appear - Court has discretion to reduce penalty under Section 446 Cr.P.C.. (Para 9,10,11)

Appellants were sureties for accused - Accused jumped bail - leading to forfeiture of surety bond - Appellants challenged order of forfeiture and imposition of penalty -Accused surrendered before court - Discretion of court to remit penalty. (Para 4-5,10-11)

HELD: - Penalty amount reduced to the tune of Rs. 4000/- in view of surrender of accused and deposit of part amount by sureties. Appellants directed to deposit reduced penalty within one month.(Para 11-12)

Appeal partly allowed. (E-7)

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

1. Heard Sri M.P.Yadav, learned counsel for the appellants and Sri Ashok Kumar Srivastava, learned A.G.A. for the

State and perused the material available on record.

2. This is an appeal under Section 449 Cr.P.C. against the judgment and order dated 5.6.2003 passed by Additional Session Judge, District Barabanki (FTC Court No.29) in Criminal Misc. Case No. 5/2023:State Vs. Ram Sanehi and another sentencing the appellants under Section 446 Cr.P.C. to pay Rs. 15,000/- each with default stipulation by means of which the surety bonds of the appellants have been forfeited.

3. Learned counsel for the appellants submits that in complaince the order dated 21.08.2023, the appellants have already filed the Supplementary affidavit dated 05.01.2024, which is available on record.

4. Learned counsel for appellants has submitted that the appellants were sureties of Rs. 15000/- each in S.T. No. 200/1994, under Section 394/412 I.P.C. of accused Dinesh Yadav but he jumped the bail.

5. Learned counsel for appellants has further submitted that when accused Dinesh Yadav did not appear before the court, notice was issued to appellants (sureties) Ram Sanehi and Parsu Ram under Section 446 Cr.P.C., thereafter the court below vide order dated 05.06.2003 forfeited the sureties of Rs.15,000/- and issued recovery warrant and in default of payment, the trial court also imposed six months imprisonment.

6. Learned counsel for appellants has further submitted that the appellants preferred the instant criminal appeal before this Hon'ble Court and this Hon'ble Court vide order dated 23.01.2004 while staying the operation of the impugned order dated 05.06.2003 directed the appellants to deposit Rs. 4000/- towards the bond amount in the court concerned, within fifteen days from the date of order.

7. Learned counsel for appellants has further submitted that in compliance of the order dated 23.01.2004 the appellants have deposited the amount.

8. Learned counsel for appellants has further submitted that the accused Dinesh Yadav has already surrendered before the court concerned on 05.11.2003 in another case S.T. No. 356/2002: State of U.P. Vs. Dinesh Yadav, arising out of Crime No. 244/1997,under Section 395/412 I.P.C. pending in the Court of ADJ (Fast Track Court) Court No.32 and since then he is in jail.

9. Learned counsel for the appellants has further submitted that the appellants are not the accused in this case. He stood surety and proceeding under Section 446 Cr.P.C. is as follows:

"(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. Explanation.- A condition in a bond for

appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. 1 provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

10. Learned A.G.A. for the State submits that as it was the duty of the sureties to ensure that accused was appearing in the Court on each and every date. Sureties have failed to ensure it because accused did not appear in Court, hence the court below had no option but to pass the impugned order, thus the learned court below had rightly passed the impugned order dated 05.06.2003, but did not dispute this fact that appellants were surety of accused Dinesh Yadav in S.T. No. 200/1994, under Section 394/412 I.P.C. of accused Dinesh Yadav and accused Dinesh Yadav appeared and surrendered before the court concerned on 05.11.2003 in another case S.T. No. 356/2002: State of U.P. Vs. Dinesh Yadav, arising out of Crime No. 244/1997,under Section 395/412 I.P.C. pending in the Court of ADJ (Fast Track Court) Court No.32 and since then he is in jail. He further submits that under Section 446 Cr.P.C. the Court has discretion to remit a portion of penalty imposed upon the appellants.

11. Considering the overall facts and circumstances of the case and also the argument of learned counsel for the appellants that the accused of the instant case has surrendered before the court concerned, in my view, interest of justice would be sub-served if the penalty amount imposed upon the appellants is reduced to the tune of Rs. 4,000/-, in light of the order dated 23.01.2004 of this Court in place of surety amount of Rs. 15,000/- and appeal may be allowed in part.

12. Accordingly, the appeal is **partly allowed**. The penalty amount imposed by the court below is reduced to the tune of Rs. 4000/-. If the penalty amount has not already been deposited, the same be deposited within one month from today positively. On account of failure, the penalty amount fixed in this appeal be

realized by the court below in accordance with law.

13. A certified copy of the order be also sent to the court concerned for compliance.

14. Office is directed to communicate this order to the court concerned for necessary compliance.

15. Record of trial court, if any, shall also be sent back to the district court concerned.

(2024) 3 ILRA 1288
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 414 of 2000

Mohd. Nabi @ Munna ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Murli Manohar Srivastava ,Nadeem Murtaza, Praveen Kumar Yadav, Qazi Sabihur Rahman, Rajesh Mishra

Counsel for the Respondent:
Govt Advocate

(A) Criminal Law - Appeal against Conviction - Indian Penal Code, 1860 – Section 436 – Mischief by fire or explosive substance with intent to destroy house - Burden of proof - Presumption of innocence - Evaluation of evidence – Witnesses - three distinct categories - wholly reliable, wholly unreliable, neither wholly reliable nor wholly unreliable - Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable - Same treatment required to be given to the defence witness(es) as is to be given to the prosecution witness(es) - Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact - Accused must be and not merely may be guilty before a court can convict and a mental distinction between 'may be' and 'must be' is long and divided vague conjectures from sure conclusions. (Para - 19 ,33,34 , 36)

(B) Evidence Law - Evidence Act 1872 - Section 154(1) , (2) - Question by party to his own witness - statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness – held - Trial court had overlooked the material evidence available on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and, therefore, liable to be reversed and set aside.**(Para -41)**

(C) Practice & Procedure - Judges must proactively interrogate witnesses to distinguish truth from falsehood rather than leaving it entirely to the advocates - Trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice. (Para -37)

(D) Words or Phrases - *Presumption of Innocence – "ei incumbit probatio qui dicit, non qui negat" (the burden of proof is on one who declares, not to one who denies):* an accused is considered innocent until proven guilty - It is the duty of the prosecution to prove the guilt of the accused. *Hostile Witness*: witness who contradicts their earlier statements or acts unfavorably towards the party that called them. *Falsus in Uno, Falsus in Omnibus (false in one thing, false in everything)*: A principle not applied in Indian law, emphasizing the need to separate reliable testimony from falsehoods - duty of Court to separate grain from chaff. (Paras 17, 19, 24, 27)

Appellant convicted for burning canteen in court premises - prosecution relied on testimony of several witnesses, including informant and an eyewitness - witnesses were declared hostile and their testimony was inconsistent defense, on the other hand, presented witnesses who claimed that the fire was accidental - Appeal against conviction.(Para - 1-8, 26-32)

HELD: - Trial court failed to circumspect the material on record carefully and had erred passing the impugned judgment and order. Prosecution failed to prove the guilt of the accused beyond a reasonable doubt. Conviction under Section 436 IPC set aside. Appellant acquitted. (Para - 35,42)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Khujji @ Surendra Tiwari Vs St. of M.P., AIR 1991 SC page 1853

2. Sucha Singh Vs St. of Punj., AIR 2003 SC 3617

3. Paramjeet Singh Vs St. of Uttarakhand; AIR 2011 SC 200

4. Mahendra Singh & ors. Vs St. of M.P., (2022 7 SCC 157)

5. Vadivelu Thevar Vs St. of Madras; 1957 SCR 981: AIR 1957 SC 614

6. Suresh Narain Tripathi & ors. Vs St. of U.P. & ors., 2005 Cril LJ 2479

(Delivered by Hon'ble Shamim Ahmed, J)

1. Heard Sri Nadeem Murtaza, learned counsel for the appellant and Sri Ashok Srivastava, learned A.G.A. for the State as well as perused the record.

2. By means of the instant criminal appeal, the appellant has challenged the judgment and order dated 26.04.2000 passed by learned Second Additional Sessions Judge, Lucknow in Sessions Trial No.192 of 1995, convicting and sentencing the appellant under Section 436 I.P.C. for three years rigorous imprisonment.

3. The prosecution story as narrated in the First Information Report registered as Case Crime No.27 of 1991, under Sections 436 I.P.C. at Police Station Kaiserbagh, Lucknow on 23.04.1991 by one Shiv Das alleging therein that his son has been allotted a canteen in the compound of American Library Court where the informant was present on 23.01.1991 alongwith his two workers. At about 08:30 AM, the appellant who is an employee of Civil Court, allegedly came and asked for Suraj (Son of the informant), upon which, the informant told the appellant that he will come to canteen at about 11:00 A.M., hearing this, the appellant allegedly poured kerosene oil over the canteen and set the same on fire, due to which, not only the canteen was burnt but chamber of an advocate was also burnt.

4. Pursuant to the registration of the First Information Report, the police carried out investigation and submitted chargesheet against the appellant under Section 436 I.P.C. on 17.05.1991. The matter being triable by the court of sessions, was committed to the Sessions Court for trial where charge under section 436 IPC was framed against the appellant, who pleaded not guilty to the aforesaid charge and claimed to be tried.

5. In order to bring home the charge under section 436 IPC against the appellant, the prosecution produced following four persons as prosecution witnesses:-

(i) P.W.-1 Shivdas, Informant (alleged eye witness)

(ii) P.W.-2 Constable Girdhar Singh (Proved chik FIR and General Diary entry)

(iii) P.W.-3 Vijay Kumar, Employee of the Canteen (Alleged Eye Witness)

(iv) P.W.-4 Durgesh Kumar Tiwari, Investigating Officer.

6. The appellant in his statement under section 313 CrPC denied the case of prosecution and produced following two witness in his defence;-

(i) DW-1 Ajeet Singh Yadav, Clerk of Advocate whose chamber was burnt

(ii) DW-2 Mahendra Pratap Singh, Advocate

7. After having heard the rival submissions of parties, the Trial Court found appellant-accused guilty, therefore, convicted and sentenced him under Section 436 I.P.C. for three years rigorous imprisonment.

8. Feeling aggrieved by the judgment of conviction and sentence passed by Trial Court, the appellant-accused has preferred this appeal.

9. Learned counsel for the appellant submitted that the learned trial court has convicted the accused on the testimonies of the prosecution witnesses ignoring that their testimonies are full of infirmities and contradictions. PW-1 failed to assign any motive for the alleged offence throughout the entire prosecution story. Even he fails to recall the date, time and year of the alleged incident. PW-1 also failed to explain as to why he did not try to stop and catch the appellant. Moreover, his version that an Advocate went to police station along with him belied by PW-2, namely, constable Girdhar Singh, thus, making him unreliable witness.

10. Learned counsel for the appellant further submitted that same is the case with PW-3 whose testimony inspires no confidence.

11. Learned counsel for the appellant further submitted that on the other hand the defence witnesses are more reliable and their version seems to inspire much more confidence than that of prosecution. DW-1 who happens to be the clerk of an Advocate, whose seat got burnt, clearly stated that fire accident in the instant case was the result of the carelessness of the child employee of the Canteen who was trying to fill the Air in the stove.

12. Learned counsel for the appellant further submitted that likewise DW-2 who happens to be an Advocate stated that the fire accident corroborates the version of DW-1 effectively and confirms that the fire accident was the result of the carelessness of the child employee of the Canteen who was preparing the stove in order to make tea.

13. Learned counsel for the appellant further submitted that clearly the prosecution story appears to be a wholly unreliable and the the prosecution has completely failed to prove its case beyond the realm of reasonable doubt and the learned Trial Court has erroneously neglected the entire defence version.

14. Learned counsel for the appellant further submitted that the judgment and order passed by the Trial Court is wrong both on facts and law. The learned trial court had misread and misconstrued the statements of prosecution witnesses and even other witnesses have also not supported the prosecution case.

15. Learned counsel for the appellant has further contended that the learned trial court had wrongly relied upon that when a

witness has been declared hostile, his statement could be relied upon with some extent. As such, he submits that the learned trial court has erred in law and passed the impugned order, therefore, the same is liable to be set aside and the instant appeal is liable to be allowed.

16. Opposing the contention of learned Counsel for the appellant-accused, the learned A.G.A. has contended that sufficient evidence was given by the prosecution to prove the factum of committing the crime i.e. burning of canteen wherein a chamber of an Advocate was also burnt. The F.I.R. was also immediately lodged and the prosecution witnesses have also proved the commission of offence, as such, the impugned order does not require any interference by this Court and the appeal is liable to be dismissed.

17. After hearing the argument advanced by learned counsel for the parties, this Court is of the view that through out the web of the Criminal Jurisprudence, one golden thread is always seen that it is the duty of the prosecution to prove the guilt of the accused. This burden of proof on prosecution to prove guilt is also known as presumption of innocence. The presumption of innocence, sometimes refer to by the latin expression "ei incumbit probatio qui dicit, non qui negat" (the burden of proof is on one who declares, not to one who denies) is the principle that one is considered innocence unless proven guilt. In criminal jurisprudence every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. The prosecution may obtain a criminal conviction only when the evidence proves the guilt of accused beyond reasonable doubt.

18. In the present case, almost all the prosecution witnesses have turned hostile. It is based on testimony of hostile prosecution witnesses from which guilt of accused may be inferred.

19. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. Hon'ble Apex Court in **Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC page 1853** was pleased to observe as under :-

"The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

20. The term "hostile witness" does not find place in Evidence Act 1872 (here-in-after referred as Act of 1872 for brevity). It is a term borrowed from English Law. Though in English Law to allow a party to contradict its own witness was not acceptable view. The theory of contradicting its own witness was resisted on the ground that party should be permitted to discard or contradict his own witness, which turns unfavorable to party

calling him, however, this rigidity of rule was sought to be relaxed by evolving a term "hostile" or "un-favourable witness" in common law.

21. It is relevant to quote Section 154 (1) of the Act of 1872, which reads as under:-

"the Court may, in its discretion, permit the person who calls a witness to put any question to him, which might be put in cross examination by the adverse party".

22. Sub-Section (2) of Section 154 of Act of 1872, further provides that :-

"Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of evidence of such witness".

23. Thus discretion is vested in Court to permit a person to put such question, which may be put by adverse party, if Court deems it appropriate. Thus the term "hostile witness" has been borrowed from English Law and developed in through case Laws.

24. The principle of "**falsus in uno falsus in omnibus"** (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court in the case of **Sucha Singh v. State of Punjab, AIR 2003 SC 3617** was pleased to observe as under :-

"even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."

25. Similarly in **Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200** also Hon'ble the Supreme Court of India was pleased to observe as under:-

"When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony".

26. Before proceeding further, it would be necessary to discuss all the prosecution witnesses as well as the defence witnesses alongwith their testimonies, which are being discussed as under:-

PROSECUTION WITNESSES

27. PW.1-Informant Shivdas :- A perusal of the star witness of the prosecution case namely PW-1 Shivdas shows that although in the FIR he had stated that the chamber of an Advocate was also burnt due to fire caused by the appellant, however surprisingly, in his statement recorded before the trial court, he has stated that only a portion of the takhta of one Advocate was burnt. This witnesses further stated that FIR was scribed by one clerk of the Court however surprisingly he failed to name the said scribe. According to this witness many people gathered after the canteen was set on fire but not even a single independent witness was produced by the prosecution to prove its case.

In his Cross Examination, the PW-1 has stated that he went to lodge the First Information Report with one Advocate, however, no such advocate was produced as a witness by the prosecution. This witness stated to have known the appellant from past 7 years from the alleged date of incident and he stated that the appellant was a regular customer of the canteen and he never used to keep any dues.

The entire testimony of the PW-1 is silent about any motive which the appellant might have for the commission of the alleged offence.

28. **PW-2 Girdhar Singh**:- The aforesaid witness i.e. PW-2 Girdhar Singh, although is a formal witness who has proved the Chik FIR as well as G.D. Entry regarding the registration of the First Information Report, however, the aforesaid witness has stated that PW-1 came alone for registration of FIR and no advocate accompanied him. The said fact totally contradicts the version of the PW-1 wherein he has stated that he went to the police station along with one Advocate.

29. **PW-3 Vijay Kumar:**- PW-3 Vijay Kumar is alleged to be one of the employee of the canteen and has claimed to have seen the incident, however, his testimony is also full of contradictions and, as such, the same is unworthy of any credit. PW-3 has also claimed to have accompanied the informant to the police station for registration of FIR, however, the said claim is totally contradictory to the statements of PW-1 who has stated to have visited police station along with one Advocate. Version of PW-3 is also contrary to the testimony of PW-2 Constable Girdhar Singh who has stated that the informant came alone for the registration of FIR.

This witness stated in his testimony that he has come to testify on the instructions of his Employer Suraj, thus, making his entire version infirm and unworthy of credit.

30. **PW-4 Durgesh Kumar Tiwari:**- PW-4 Durgesh Kumar Tiwari happens to be the Investigating officer of the instant case who stated that he was assigned the investigation on 23.01.1991 itself. The witness stated to have recovered burnt ashes from the alleged place of incident. This witness further stated that he submitted the chargesheet under section 436 of IPC against the appellant in the court on 3.01.1996.

In the Cross Examination this witness stated that he fails to recall that the seat of Advocate Bhola Prasad was situated near the said canteen and he also failed to recall whether the seat was burnt or not.

It is pertinent to mention here that Cross examination of the P.W.-4 reveals that he did not record the statement of the Canteen Owner, namely, Suraj. He further stated that he failed to record the statement of any Advocate and he also stated that he failed to record the statement of anyone who could have been the eye witness of the said incident. This witness also failed to recognize the location of the alleged place of incident.

DEFENCE WITNESSES

31. **DW-1 Ajit Singh Yadav**:- This witness happens to be the clerk of an Advocate whose seat got burnt. This witness stated that the appellant was neither present at the place of incident nor he committed the offence. He further stated that the fire was the result of the mistake of one child employee of the canteen, who was filling the air in the stove. He further stated that as soon as the child employee lit the matchstick to light the stove, whole canteen as well as his seat caught fire.

32. **DW-2 Mahendra Pratap Singh:-** He is an Advocate and stated that on the fateful day at about 8:20 AM, he reached the canteen and asked its owner Suraj for a cup of tea. Suraj instructed his worker to make the tea and while his worker was trying to light the stove to make the tea, the whole canteen caught fire and the whole canteen was reduced to ashes. This witness also stated that subsequently Shivdas (PW-1) who happens to be the proprietor of the Canteen started inquiring from the appellant and it ultimately led to the heated argument between the two. Thereafter, the PW-1 lodged the First Information Report against the appellant due to animosity arising out of the said scuffle.

33. Hon'ble the Supreme Court of India in the case of **Mahendra Singh and Others Versus State of Madhya Pradesh; (2022 7 SCC 157)** was pleased to observe at para 20 as under:-

"20. It is a settled law that same treatment is required to be given to the defence witness(es) as is to be given to the prosecution witness(es)."

34. Further, Hon'ble the Supreme Court of India in the case of **Vadivelu Thevar v. State of Madras; 1957 SCR 981: AIR 1957 SC 614** was pleased to observe at para 11 & 12 as under:-

"11……..it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable,

(2) Wholly unreliable

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof the court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness if it is found to be above reproach or suspicion of interestedness, incompetence, or subornation. In the second category the court equally has no difficulty to its conclusion. It is in the third category of cases that the court has to be circumspect and has to look for corroboration in the material particulars

by reliable testimony direct or circumstantial……."

35. After a careful perusal of all the testimonies of prosecution witnesses as well as defence witnesses, this Court finds that the learned trial court had failed to circumspect the material on record carefully.

36. Further, a Division Bench of this Court in the case of **Suresh Narain Tripathi and others versus State of Uttar Pradesh and Others; 2005 Cril LJ 2479**, granted acquittal for the offence under section 436 of IPC where the star witnesses were unreliable and was pleased to observe at para 13 as under:-

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

37. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

38. No proper explanation of injuries on the person of injured have been given. Mere suggestion is not sufficient. Moreover it itself indicates a false case. All the witnesses being the close to each other, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent.

39. This Court has gone through the impugned judgment and evidence on record. The trial court relying on the testimony of witnesses, even though who have not supported the prosecution case, has concluded that the accused had burnt the canteen. Looking into the totality of statement of witnesses, the conclusion drawn by the trial court cannot be said to be reasonable.

40. In the present case, the learned trial court has also failed to consider the fact that the alleged incident is said to have taken place in the court compound at 11:00 A.M. and the prosecution has failed to produce any Advocate or any other staff of court to prove its case. Further, on the other hand, the presence of D.W.-1 and D.W.-2, who were clerk and advocate respectively and their presence is quite natural in the court premises. The defence witnesses ought to have been considered by the trial court. Thus, this Court finds that the prosecution failed to establish that appellant in all probability has committed the said offence.

41. It is also an established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness. Thus, the trial court had overlooked the material evidence available

on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and, therefore, liable to be reversed and set aside.

42. Thus in view of above, after analysis of circumstances of present case in the light of aforesaid settled legal principles, I come to the conclusion that the trial court has erred passing the impugned judgment and order, therefore, this appeal succeeds and is **allowed.** The judgment and order dated 26.04.2000 passed by learned Second Additional Sessions Judge, Lucknow in Sessions Trial No.192 of 1995, convicting and sentencing the appellant under Section 436 I.P.C. for three years rigorous imprisonment, is **set aside and reversed**. The appellant, namely, Mohd.Nabi @ Munna is **acquitted** of charge under Section 436 I.P.C. His personal bond and surety bonds are canceled and sureties are discharged.

43. Let record of Trial Court be sent back to the Court concerned along with copy of judgment and order for information.

(2024) 3 ILRA 1296
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.03.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Appeal No. 465 of 1999

Surednra Prasad Misra & Anr.
...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Arun Sinha, Anurag Singh Chauhan

Counsel for the Respondents:
G.A., Abhinandan Kumar Pandey

(A) Criminal Law - Jurisdiction of High Court in issuing non-bailable warrants in appeals - role and discretionary powers of Magistrates in handling bail for accused persons in such cases - Indian Penal Code, 1860 - Section 302 r.w. 34, 82/83 , Section 390 – Arrest of accused in appeal from acquittal - The Allahabad High Court Rules, 1952 - Chapter V Rule 6 - Reference to a larger Bench.

(B) Words or Phrases -Interpretation of "non-bailable warrant" in appellate jurisdiction and "discretionary power of magistrates" for bail in appeal proceedings. (Paras 24-34)

Appellants were convicted under Section 302 IPC for murder and sentenced to life imprisonment - initially granted bail but were later directed to be taken into custody when they failed to appear before High Court for the appeal hearing – issues related to - issuance and execution of non-bailable warrants in criminal appeals, especially concerning appellants who have previously been acquitted or convicted - Jurisdiction of Magistrates in Matters of Bail Post-Issuance of Non-Bailable Warrants by Higher Courts - warrants are issued at a later stage of the appeal rather than at admission - use of Amicus Curiae when appellants fail to appear. (Paras – 1 to 3 ,18 to 62)

HELD: - High Court referred to crucial procedural issues regarding issuance and execution of non-bailable warrants and discretionary bail powers in appeals to a Larger Bench to establish a consistent approach across similar cases. (Paras 58-62)

Matter referred for consideration by a Larger Bench. (E-7)

LIST OF CASES CITED: -

1. St. of U.P. Vs Geeta Devi & anr , Govt. Appeal No. 454 of 2022

2. St. of U.P. Vs Shamshuddin Khan & ors., Govt. Appeal No. 2552 of 1981

3. St. of U.P. Vs Poosu & anr., (1976) 3 SCC 1

4. Empress of India Vs Mangu, ILR (1879) 2 All 340

5. Bana Vs Methuen; 2 Bens 228

6. Balkrishna Mahadev Lad Vs St. of Maha., 2012 SCC OnLine Bom 1490

7. Farooq Abdul Gani Surve Vs The St. of Maha., 2012 ALL MR (CRI) 271

8. Amin Khan Vs St. of Raj. & ors., (2009) 3 SCC 776

9. Krishna Kumar & ors. Vs St. of U.P. Crl. Appeal No. 3757 of 2023

10. Bani Singh & ors. Vs St. of U.P.; (1996) 4 SCC 720

11. K.S. Panduranga Vs St. of Karn., (2013) 3 SCC 721

12. Surya Baksha Singh Vs St. of U.P. (2014) 14 SCC 222

(Delivered by Hon'ble Rajan Roy, J.)

(Crl. Misc. Application No. 5 of 2023 - Second Bail Application)

1. Heard Mr. Anurag Singh Chauhan, learned counsel for the appellant no. 2 - Bablu alias Alok Kumar and learned AGA on the second bail application.

2. This Criminal Appeal arises out of the judgment and order dated 09.08.1999 passed by the Special Judge (SC/ST), Sultanpur in 97 of 1995 (State vs. Surendra Prasad and another) arising out of case Crime No. 8 of 1995, under Section 302 IPC, Police Station Amethi, District Sultanpur whereby the appellants have been convicted and sentenced to undergo life imprisonment under Section 302 read with 34 IPC.

3. Appellants - Surendra Prasad Misra and Bablu alias Alok Kumar were convicted as aforesaid vide judgment of the Court below dated 09.08.1999, but, were ordered to be enlarged on bail by this Court vide orders dated 09.07.1999 and 22.05.2000 passed in this appeal. When the matter came up before the Court on 06.05.2022 none appeared for the appellants, accordingly Chief Judicial Magistrate, Sultanpur was directed to issue non-bailable warrant against the appellants and also that they shall be taken into custody and sent to jail. The said order reads as under:

"The instant application has been filed by the victim of the present case, who is son of the deceased for early disposal of the present appeal.

Ms. Smiti Sahai, learned A.G.A. is present.

Learned A.G.A. states that both the appellants are on bail.

It transpires from the office report dated 1.10.2021 that both the appellants are alive and to this effect, Chief Judicial Magistrate, Sultanpur has sent compliance report dated 17.9.2021.

None appears on behalf of the appellants to argue the instant appeal.

Chief Judicial Magistrate, Sultanpur is directed to issue Non-bailable Warrants against the appellants nos.1 and 2 namely Surendra Prasad Mishra and Bablu @ Alok Kumar. The appellants shall be taken into custody and sent to jail. Chief Judicial Magistrate shall submit his report before this court on or before 4.7.2022.

It further transpires from the order sheet that the office was directed to prepare the paper book but the same has not yet been prepared.

Office is directed to prepare the paper book by the next date.

List this appeal for final hearing on 4.7.2022.

Since the appeal is listed for final hearing on 4.7.2022, as such the instant application bearing Crl. Misc. Application No.IA/2/ 2022 stands disposed."

In pursuance thereof both the appellants were arrested and are in jail. Appellants were arrested on 25.06.2022, as informed by the counsel for the appellant no. 2. Appellants filed an application bearing No. IA/3/2022 for release on bail but the same was rejected on 01.08.2022 in the following terms:

"This is the first bail application moved on behalf of the appellants.

It transpires from the record that the appellants were on bail and this Court vide order dated 06.05.2022 issued non-bailable warrants against the appellants and directed the matter to be listed today for final hearing. Thereafter, the appellants were arrested by the police on 25.06.2022.

In pursuance of order dated 06.05.2022, the matter is listed today for final hearing.

Heard Shri Siddhartha Sinha, Advocate holding brief of Shri Arun Sinha, learned counsel for the appellants, Shri Vishwas Shukla, learned AGA for State-respondent, Abhinandan Kumar Pandey, learned counsel for the complainant and perused the material brought on record.

Learned counsel for the appellants stated that he has not obtained the paper book and further stated the appellants are in jail since 25.06.2022. He further submitted that appellants have no criminal history, hence are entitled to be released on bail.

When the learned counsel for the appellants was asked to argue the appeal finally, he showed his reluctance and stated that the instant bail application filed on behalf of the appellants be heard and decided.

After hearing the submissions advanced by learned counsel for the parties and taking into account the fact that the appeal is listed today for final hearing; paper book is ready and the appeal is of the year 1999 and the learned counsel for appellants has showed his reluctance in not arguing the appeal finally, we find that no good ground is made out for enlarging the appellants on bail.

The bail application of the appellants- Surendra Prasad Mishra and Bablu alias Alok Kumar involved in S.T. No. 97 of 1995 under sections 302 I.P.C., police station Amethi, District Sultanpur is, accordingly, rejected.

List the matter in the next cause list peremptorily before appropriate Bench for final hearing. "

4. This second application for bail has been filed by appellant no. 2 - Bablu alias Alok Kumar alone on 05.09.2023.

5. Submission of the counsel for the appellant no. 2/applicant's counsel was that he was on bail earlier, therefore, he be enlarged on bail.

6. As regards the second bail application of the appellant no. 2 we find that his earlier bail application which was filed after his incarceration consequent to issuance of non-bailable warrant was rejected on the ground that the counsel was not ready to argue the matter. Today, the

situation is that none has appeared on behalf of the appellant no. 1 though counsel for appellant no. 2 is present. Paper book is ready and the counsel for the appellant no. 2 is ready for hearing, however, counsel for the appellant no. 1 is not present.

7. Let a report be requisitioned from the Superintendent of Jail where the appellant no. 1 is lodged as to whether he wants to engage another counsel to argue his appeal or wants that the Court may appoint an *Amicus* in the matter so that his appeal be argued. District Legal Services Authority be also informed about it.

8. As learned counsel for the appellant no. 2 is ready to argue the appeal, but, none is present for appellant no. 1 who is in jail and we have requisitioned a response in this regard as aforesaid which could take time and, as, we propose to refer certain legal issues for consideration by Larger Bench which may take some time to be answered and as appellant no. 2 was on bail earlier and his counsel assures us that he will argue the appeal whenever listed, we are of the opinion that he is entitled to be enlarged on bail.

9. Let appellant no. 2, Bablu alias Alok Kumar be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Chief Judicial Magistrate concerned.

10. As soon as personal bonds and sureties are furnished, photocopies of the same shall be transmitted to this Court forthwith by the Trial Court concerned to be kept on record of this appeal.

11. It is made clear that during bail, the applicant-accused shall not indulge himself in any criminal activity. If he is found indulging himself in any criminal activity, the prosecution will be at liberty to file an application for cancellation of bail

12. The second bail application is disposed of.

13. While hearing the bail application and reserving the orders, we noticed an order passed by a Coordinate Bench of this High Court at Allahabad on 18.01.2024 in **Government Appeal No. 454 of 2022 (State of U.P. Vs. Geeta Devi and Anr).** Noticing the same, we had passed the following order:

"Heard Mr. Anurag Singh Chauhan, learned counsel for the appellant no. 2 - Bablu alias Alok Kumar and learned AGA on the second bail application.

During course of argument, learned counsel for the appellant as also learned AGA once again referred to the order passed by a Coordinate Bench of this Court at Allahabad on 18.01.2024 in Government Appeal No. 454 of 2022 wherein certain directions have been issued empowering the Chief Judicial Magistrate to release a person on bail where non-bailable warrant has been issued against him whether it be in appeal against acquittal or conviction, by the High Court, which according to them requires reconsideration by a Larger Bench. They also referred to another order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981 issuing similar directions/order relying upon the order dated 18.01.2024. They have relied upon Full Bench decision of the Bombay High Court in the case of Balkrishna Mahadev Lad vs. State of Maharashtra; 2012 SCC OnLine Bom 1490, Constitution Bench decision of Hon'ble the Supreme Court in the case of State of U.P. vs. Poosu and

Another; (1976) 3 SCC 1 and subsequent decision of Hon'ble the Supreme Court in Amin Khan vs. State of Rajasthan and others; (2009) 3 SCC 776.

We have heard the bail application as also on the aforesaid questions.

We reserve our orders on both the issues."

14. We have perused the order dated 18.01.2024 passed by the Coordinate Bench in the aforesaid appeal. We find that there are certain observations/directions in the said order as also in the subsequent order dated 19.01.2024 passed by the Coordinate Bench in **Government Appeal No. 2552 of 1981 (State of U.P. vs. Shamshuddin Khan and others)** which require consideration by a Larger Bench as they have far reaching consequences on issues which arise while hearing criminal appeals, and also with regard to jurisdiction of Magistrate in the execution of non-bailable warrants issued by the High Court in such appeals, therefore, we proceed to consider the matter from the said stand point.

15. On a perusal of the orders passed by the Coordinate Bench on 18.01.2024 and 19.01.2024 as referred hereinabove, we find that the Coordinate Bench proceeded on the premise that in appeals arising from acquittal warrants are issued in such appeals to secure presence of the acquitted person and that enlargement of such persons who have been acquitted by the Trial Court, in an appeal against their acquittal, is a matter of right. In this context, it has referred to a Full Bench decision of the Bombay High Court though it has not mentioned the cause title and has observed that the said Full Bench while interpreting the provisions of Section 390 of the Code of Criminal Procedure Code, 1973 (hereinafter referred to as 'Code of 1973') has held that the very purpose of this Section was to ensure presence of an accused before the Court and based on this the Coordinate Bench has issued certain directions. The directions issued by the Coordinate Bench are not only with respect to non-bailable warrants issued by the High Court in appeals against acquittal but also in respect of appeals against conviction. The order dated 18.01.2024 reads as under:

"1. Heard learned AGA appearing for the State and learned counsel for the respondents.

2. The present Government Appeal has been filed by the State against the order of acquittal dated 7.6.2018 passed by the Additional Sessions Judge / FTC No. 3, Muzaffar Nagar in ST No. 299 of 2007, under Sections 302, 201, 364, 120B IPC (State Vs. Brajpal and others).

3. We have gone through the order dated 9.9.2022 of this Court which was passed on the appeal filed by the State against the judgment of acquittal dated 7.6.2018. By the order dated 9.9.2022, the respondents were directed to furnish personal bond with two sureties in the like amount to the satisfaction of the learned CJM. However, it appears that they could not be served and thereafter Non bailable warrants were issued and they were arrested.

4. Learned counsel submits that both the respondents are in custody since 27.11.2022 i.e for a period of one year and three months.

5. Though the Bench is not in agreement with the procedure followed by the Court that in a State appeal challenging the judgment of acquittal, the issuance of Non Bailable Warrants would interpretate that police authority will execute the same

and produce the concerned person before the High Court so that some effective order be passed with regard to their bail. However, in the instant case despite acquittal, the respondents are in judicial custody for more than one year and three months because bailable warrants were not executed. It is worth noticing to reproduce Section 390 of Cr.P.C. which read a under :

"Section 390: Arrest of accused in appeal from acquittal:- When an appeal is presented under section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."

6. Similarity, in order to procure the presence of accused persons, the Court has an alternative option to order for attachment of property of person absconding under Section 83 Cr.P.C.. Further, Section 80 of Cr.P.C. provides for arrest of person against whom warrant is issued and it provides for taking security under Section 71 of Cr.P.C for production before the Court, such person may be released under Section 81 Cr.P.C.

7. A perusal of Section 390 Cr.P.C. clearly gives power to the Court before whom a accused is brought, either to send him to prison or admit him to bail. It is also worth noticing that repeatedly such type of cases are coming where in appeal in pursuance of the Non Bailable Warrant issued by the High Court to the accused who were acquitted from the trial court re languishing in jail for more than one year because they were either not served with the warrant or could not engage Advocate in the High Court. It is held by a full Bench of Bombay High Court while interpretating provisions of Section 390 Cr.P.C. that the very purpose of this Section is to ensure presence of an accused before the Court. In view of the above, we deem it appropriate to issue a direction to the Director, Judicial Training and Research Institute, Lucknow to take online seminar of all the Chief Judicial Magistrates as well as Secretary, District Legal Services Authority and inform that :

(a) As and when Non Bailable Warrants are issued in appeal from acquittal and accused is brought before the CJM / Ilaka Magistrate, he will be admitted bail subject to furnishing bail bonds to their satisfaction and on undertaking that they will appear before the High Court on particular date as per the order of the Court.

(b) Even in cases where appeal against conviction is pending before the High Court and sentence is suspended and either he or his counsel could not appear before the High Court and Non Bailable Warrants are issued on and produced before the CJM, they will be released on bail to the satisfaction of the court concerned with an undertaking that they will appear before the High Court.

(c) The Director of the Judicial Training and Research Institute, Lucknow will conduct a survey in the State of UP to find out where in terms of issuance of Non Bailable Warrant either in case of bail against acquittal or in case where accused sentence is suspended, but subsequently he failed to appear, is in jail (prison) for considerable long time, they will be released on bail in same terms as mentioned in above sub para (a) and (b).

(d) Since keeping a person in judicial custody for long time without any justification violate the right of life and liberty of such person, after 30 days of this order, if still bails are not granted, this Court will impose cost of Rs. 50,000/- to be

paid by the District State Legal Services Authority concerned.

8. Be whatsoever, the Court deem it appropriate to release the respondents on bail.

9. Let the respondents namely Gita Devi and Afzal be released on bail subject to the satisfaction of the court concerned.

10. Registrar General of this Court is directed to communicate this order to the Director, Judicial Training and Research Institute, Lucknow within a week from today and submit compliance report on the next date fixed.

Order on Appeal

List the matter 30.01.2024. "

16. Similar observations/directions have been made in its order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981 relying upon the earlier decision dated 18.01.2024. The said order dated 19.01.2024 read as under:

"1. This Government Appeal was filed in the year 1981 challenging the judgment of acquittal passed in favour of the opposite parties.

2. As per earlier order dated 14.12.2022, non bailable warrants were issued against the accused-respondent no.1 and the Chief Judicial Magistrate concerned was directed to sent a compliance report.

3. An office report dated 20.01.2023 was later on submitted stating therein that the sureties of opposite party/respondent no.1 Shamshuddin are Bashir, who died on 08.04.2016 and Ram Kripal, who is about 70 years old and cannot walk, whereas all sureties of respondent nos. 2 and 5 have died.

4. Thereafter again non-bailable warrants were issued against opposite party nos. 1 and 4 and the matter remains pending for considerable long time.

5. Learned counsel for respondent no.1, namely Shamshuddin Khan submits that he is in jail and presently detained in District Jail, Banda. Even thereafter the case was listed on number of occasions but it has been noticed in the order dated 10.04.2023 that respondent no.1 namely Shamshuddin Khan is not traceable though he is already lodged in District Jail, Banda. The opposite party no.1 is in the judicial custody since 23.02.2023.

6. Learned A.G.A. could not dispute the above contention.

7. Considering the facts and circumstances of the case, issuance of non-bailable-warrants to procure the presence of respondent no.1 so that he may engage a counsel and defend his case through the counsel, has no relevance. We deem it appropriate to grant bail to the accused-respondent no.1 namely Shamshuddin Khan.

8. Let opposite party no.1-Shamshuddin Khan be released on bail subject to the satisfaction of the court concerned.

9. In a Government Appeal bearing Government Appeal No. 454 of 2022 (State of U.P. Vs. Geeta Devi & Anr.), this Court in similar situation has already directed the Director, Judicial Training and Research Institute, Lucknow that an online seminar of all the Chief Judicial Magistrates through out the Sate of Uttar Pradesh regarding the procedures to be followed in the matter of grant of bail of the accused, who are in jail since long and their appeals are pending for consideration.

10. Such procedures mentioned in the above Government Appeal give discretion to the Court of Chief Judicial

Magistrate specially the Ilaka Magistrate to grant bail in such cases where the purpose of issuance of non-bailable warrants is to procure the presence of the accused especially in the cases where an accused person has acquitted from the trial court and non-bailable warrants are issued in an appeal filed by the State.

11. The Registrar General of this Court is directed to communicate this order forthwith to the Director, Judicial Training and Research Institute, Lucknow within a week from today and submit compliance report on the next date fixed.

Order on Appeal

12. List this case on 30.01.2024. "

17. As already stated the said orders raise important issues pertaining to procedure to be followed by the High Court hearing criminal appeals, process/warrants to be issued by it, its execution and jurisdiction of Chief Judicial Magistrate in this regard and, as, there should be reasonable degree of definiteness and certitude in this regard not only in the mind of Judges of the High Court exercising such jurisdiction but also the Magistrates and as general directions have been issued by the Coordinate Bench to the Chief Judicial Magistrates throughout the State of Uttar Pradesh with penal consequences in the event of non compliance and also to Judicial Training and Research Institute, therefore, it has become necessary that legal issues in this regard be clarified/settled by a Larger Bench.

Appeal Against Acquittal

18. First and foremost, we may point out that in an appeal by the State under Section 378 of the Code of 1973 against acquittal of the accused, Section 390 of the Code of 1973 is attracted which reads as under:

"390. Arrest of accused in appeal from acquittal.- *When an appeal is presented under Section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."*

19. Prior to coming into force of the Code of 1973, the Criminal Procedure Code, 1898 (hereinafter referred as 'Code of 1898') was in operation and in the said Code of 1898 also a pari materia provisions existed in the form of Section 427 which read as under:

"427. When an appeal is presented under Section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail."

20. The aforesaid Section 427 of the Code of 1898 and Section 390 of the Code of 1973 came up for consideration before a Constitution Bench of Hon'ble the Supreme Court in the case of ***State of U.P. vs. Poosu and Another; (1976) 3 SCC 1***. The question referred to the Constitution Bench was: *"Whether the Supreme Court while granting special leave to appeal under Article 136 of the Constitution, against an order of acquittal on a capital charge, has the power to issue a non-bailable warrant for the arrest and committal to prison of the accused respondent who had been acquitted by the High Court?*

21. Hon'ble the Supreme Court had the occasion to consider the historical

perspective of the aforesaid provisions and it observed that such provision was enacted for the first time in the Code of 1882, but even before its enactment, the High Court as a matter of judicial practice, had the power, pending the appeal against an order of acquittal, to secure the attendance of the accused respondent by bailable or non-bailable warrants. It referred to a Full Bench decision of the Allahabad High Court in the case of ***Empress of India vs. Mangu; ILR (1879) 2 All 340*** wherein it was held that the High Court has the power to cause the arrest and detention of the accused in prison, pending an appeal against an order of acquittal. It referred to various other decisions which were to the same effect. It observed that this power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal conferred on the High Court by the Code. It referred to an English case i.e. ***Bana Vs. Methuen; 2 Bens 228*** decided way-back in 1824 wherein Best, J. following an older precedent, enunciated the rule that - *"when an act of Parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person charged with such offence"*. Hon'ble the Constitution Bench has observed that this was the rationale of Section 427 of the Code of 1898.

22. It further observed that as soon as the High Court on perusing a petition of appeal against an order of acquittal, considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more becomes *sub judice*. It then went on to observe that Article 136 of the Constitution of India confers on the Supreme Court the same power which was vested in the High Court under Section 427 of the Code of 1898 corresponding to the existing Section 390 of the Code of 1973. It then considered the question as to whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant and it held that it is a matter which rests entirely in the discretion of the Court. It observed as under:

"Whether in the circumstances of the case the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors such as,

"the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and State (see State v. Capt. Jagjit Singh; AIR 1962 SC 253)".

In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing in this Court. In the context, it must be remembered that this over-riding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by

the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice."

23. Most important it repelled the contention made before it that an order directing the rearrest and detention of an accused respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right guaranteed in Part III of the Constitution. It held that by no stretch of imagination could it be said that such an order deprives the accused respondent of his liberty in a manner otherwise than in accordance with procedure established by law.

24. Thus, from a reading of the said Constitution Bench decision, it is clear that even in an appeal against acquittal the the presence of the acquitted person can be secured either by issuing bailable warrant or non-bailable warrant at the discretion of the appellate Court which is to be exercised in the light of the guidelines laid down by Hon'ble the Supreme Court. The arrest of such an acquitted person consequent to the aforesaid does not violate Article 21 of the Constitution.

25. We may now refer to the Full Bench decision of the Bombay High Court details of which have not been mentioned by the Coordinate Bench, but, on our own research we find that the said Full Bench decision has been rendered in the case of ***Balkrishna Mahadev Lad vs. State of Maharashtra; 2012 SCC OnLine Bom 1490***. On a reading the said Full Bench decision, we find that two questions were referred for its consideration which are as under:

"(a) When in an appeal against acquittal an action of issuing warrant for arresting the accused is directed in accordance with section 390 of the Code of Criminal Procedure, 1973, whether the Accused is entitled to bail as a matter of right and whether the learned Sessions Judge before whom the Accused is brought has no power to direct that the Accused shall be committed to prison till disposal of the Appeal?

(b) Whether this Court has power to direct that every breach committed by Sessions Judge of the direction issued by this Court will always constitute contempt of this Court?"

26. While considering question no. 1 it found that some of the decisions by the Division Benches which led to the reference before the Larger Bench were rendered without referring to the legal position expounded by the Apex Court in the case of ***Poosu*** (supra). The said Division Benches also proceeded on the premise as if the enlargement of a person acquitted on bail by the Trial Court was a matter of right whereas the legal position in ***Poosu*** (supra) was entirely different. In this context it observed as under:

"Notably, the abovesaid observations have been made without referring to the legal position expounded by the Apex Court in the case of ***Poosu*** *(supra). Indubitably, a person who is acquitted of the criminal charges, by a Court of law, should not remain in jail even for a day after acquittal. But, that does not necessarily follow that the subordinate Court, before whom the acquitted accused is produced, in connection with the order passed by the High Court in an appeal against his acquittal, cannot commit him to prison even if the fact situation so warrants."*

27. The Full Bench of the Bombay High Court took notice of the Apex Court decision in the case of **Poosu** (supra). It also considered the provisions of Section 390 of the Code of 1973 and in this context it observed as under:

"8. A bare perusal of this provision leaves no manner of doubt that the High Court is expected to exercise its judicial discretion on case to case basis to issue a warrant (bailable or non-bailable) directing that the accused be arrested and brought before it or be produced before the subordinate Court for compliance thereof. The opening part of this Section makes it amply clear that the judicial discretion can be exercised at any stage, after the presentation of the appeal under Section 378 of the Code. Thus, presentation of such appeal is a sine qua non for exercise of this judicial discretion, in terms of Section 390 of the Code.

9. Reverting to the other facet of this provision, when an accused is acquitted by the subordinate Court, after a full-fledged trial, the High Court, while issuing direction in exercise of powers under Section 390 of the Code, may, in a given case, issue "bailable warrants" directing production of the accused before it or the subordinate Court for compliance thereof. If the accused is produced before the subordinate Court, pursuant to such "bailable warrants" issued by the High Court, the subordinate Court may release that accused on bail on terms and conditions which must be just and proper to secure the presence of the accused. Indeed, if the accused is unable to fulfill the terms and conditions for release on bail, the subordinate Court will be justified in directing committal of the accused to prison. However, he must soon thereafter intimate that fact to the High Court. Notwithstanding the power given to the subordinate Court under Section 390 of the Code, it cannot direct that the accused be committed to prison even if he is capable of and willing to abide by the terms and conditions of bail. Further, if the High Court in its order issuing "bailable warrants" has already spelt out the terms and conditions then the subordinate Court cannot add to or relax such conditions, but is expected to ensure compliance of those directions of the High Court.

10. Similarly, if the High Court were to issue "non bailable warrants" recording reasons indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no option but to commit such accused to prison.

11. The Sessions Court, however, can exercise its judicial discretion when the High Court in its order has not indicated either way to commit the accused to prison or to admit him to bail, pending the disposal of the appeal. In other words, if the High Court, in its order, merely directs initiation of action under Section 390 of the Code and if the accused is produced before the subordinate Court, it would be open to the subordinate Court, after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may be deem fit keeping in mind that the same are essential to secure the presence of the accused when required in the pending appeal or to commit him to prison. That judicial discretion has to be exercised on the basis of settled parameters and, inter alia, keeping in mind the question, as to whether releasing the accused on bail would not hamper securing his attendance pending

the disposal of the appeal against acquittal in the High Court."

Thus, there is a discretion vested in the Magistrate to be exercised judicially in cases covered by Para 11 quoted above and he is not bound to release him.

28. Thus, as per the Full Bench of Bombay High Court, if orders for issuance of bailable warrants are issued in terms of Section 390 of the Code of 1973 by the appellate Court, the subordinate Court may release the accused on bail on the terms and conditions which must be just and proper to secure the presence of the accused but if the accused is unable to fulfill the terms and conditions for release on bail, the subordinate Court will be justified in directing committal of the accused to prison. However, he must soon thereafter intimate that fact to the High Court.

29. It has further observed that if the High Court in its order issuing bailable warrants has already spelt out the terms and conditions then the subordinate Court cannot add to or relax such conditions, but is expected to ensure compliance of those directions of the High Court. Similarly, it has observed that if the High Court were to issue non-bailable warrants recording reasons indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no other option but to commit such accused to prison.

30. It has then observed that the Sessions Court, however, can exercise its judicial discretion when the High Court in its order has not indicated either way to commit the accused to prison or to admit him to bail, pending the disposal of the appeal. In other words, if the High Court, in its order, merely directs initiation of action under Section 390 of the Code of 1973 and if the accused is produced before the subordinate Court, it would be open to the subordinate Court after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may be deemed fit keeping in mind that the same are essential to secure the presence of the accused when required in the pending appeal or to commit him to prison. This judicial discretion has to be exercised on the basis of settled parameters and, *inter alia*, keeping in mind the question, as to whether releasing the accused on bail would not hamper securing his attendance pending the disposal of the appeal against acquittal in the High Court. Even as per the Bombay High Court, this is not to be done mechanically.

31. Thus, even as per the Bombay High Court in the context of an appeal against acquittal an action is taken under Section 390 of the Code of 1973 the acquitted person can either be enlarged on bail or committed to prison depending upon the facts of the case and the discretion to be exercised judicially by the concerned Court.

32. The Full Bench was of the considered opinion that - *"Section 390 of the Code of 1973 cannot be read to mean that the Sessions Judge, on production of the accused, has no option but to immediately release him on bail, instead it held the subordinate Court before whom the accused is produced pursuant to warrant issued in terms of the order of the High Court, must exercise his judicial discretion on case to case basis and in particular keeping in mind the order of the*

High Court, passed in the pending appeal against acquittal in that regard. This would presuppose that the Sessions Judge, in appropriate case, can commit the accused to prison till the disposal of the appeal. Indeed, in that case, it will be open to the accused to question that decision of the Sessions Judge, before the High Court, in which proceedings, the High Court may consider the claim of the accused for grant of bail. Thus understood, grant of bail by the subordinate Court is not a matter of right." [Para 13 of the Full Bench - ***Balkrishna Mahadev Lad*** (supra)].

33. In fact, it found that the Division Bench judgment in ***Farooq Abdul Gani Surve vs. The State of Maharashtra; 2012 ALL MR (CRI) 271*** wherein it was held that the accused is entitled to be released on bail as a matter of rule is not the correct statement of law and it is in the teeth of the exposition of law by the Constitution Bench of the Apex Court in the case of ***Poosu*** (supra) as also the purport of Section 390 of the Code of 1973.

34. The Full Bench also took note of the introduction of Section 437A in the Code of 1973 w.e.f. 31.12.2009 which is as under:

"18. As a matter of fact, after introduction of Section 437A w.e.f. 31st December, 2009, the Trial Court, at the conclusion of the trial, or the Appellate Court including the High Court before disposal of the appeal, as the case may be, is duty bound to ensure that the accused must execute bail bond to appear before the Higher Court and such bail bond must be kept in force for six months. Section 437A, as introduced by the Act 5 of 2009, reads thus:

"[437A. Bail to require accused to appear before next appellate Court.- (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months."

It then observed as under:

"19. This provision reinforces that even if the Trial Court or the Appellate Court, as the case may be, is inclined to acquit the accused, it has to ensure that the accused must execute a bail bond with surety to appear before the Higher Court and this bail bond must be kept in force for six months. The period of six months is specified in anticipation that the appeal against acquittal would be filed, either by the State or the victim/complainant, within such period and if the appeal against acquittal is filed, the accused would make himself available in the said proceedings."

It finally expressed its opinion succinctly as under:

"20) Accordingly, we hold that the accused is not entitled to bail as a matter of right merely because he has been acquitted. Further, the subordinate Court, before whom the accused is produced, has judicial discretion to direct the accused to be committed to prison or to admit him to bail keeping in mind the order of the High Court, pending disposal of the appeal. Indeed, that judicial discretion has to be exercised in consonance with the settled parameters."

35. Thus, there is a discretion vested in this regard which has to be exercised

judicially by the High Court or the Chief Judicial Magistrate as the case may be on case to case basis.

36. We may in this context also refer to another decision of Hon'ble the Supreme Court in ***Amin Khan vs. State of Rajasthan and others; (2009) 3 SCC 776*** wherein the High Court while admitting the appeal against acquittal committed the acquitted person to prison for justifiable reasons and the said order committing the acquitted person to prison during pendency of the appeal against their acquittal was upheld by Hon'ble the Supreme Court. Hon'ble the Supreme Court did not find any error in the said order, it inter alia observed as under:

"Section 390 corresponds to Section 427 of the repealed Code. In the present section the word and figure "Section 378" are substituted for the words and figures "Section 411-A, sub-section (2) of Section 417" in the old section. Except for this change, no other changes are made. Under this section the High Court has the power to rearrest the accused pending the disposal of an appeal against his acquittal."

37. The Coordinate Bench while making observations/ directions vide its order dated 18.01.2024 and 19.01.2024, it seems, has missed out on the ratio of the Full Bench decision of the Bombay High Court as also the judgment of Hon'ble the Supreme Court in ***Poosu*** (supra) and ***Amin Khan*** (supra).

38. In an appeal against acquittal in order to secure the presence of an acquitted person bailable warrants are issued in view of the provisions contained in Section 390 of the Code of 1973. Once the bailable warrants are executed and the person appears before the Court below and submits requisite undertaking along with Sureties or Personal Bonds as may have been directed by the appellate Court and, if not directed, to the satisfaction of the Chief Judicial Magistrate concerned, as the case may be, and the said person appears before the appellate Court on the date fixed, the appellate Court shall proceed with the matter accordingly. Even an acquitted person can be committed to prison for justifiable reasons as discussed by the Constitution Bench in ***Poosu*** (supra) and this would not be violative of Article 21 of the Constitution of India.

39. If at a subsequent stage of the appeal, he fails to appear either personally or through his counsel, then, the appellate Court would be justified in securing his presence by issuance of bailable warrants as is normally the practice in the Allahabad High court. Straightway non-bailable warrants are not issued in such a situation. If even this fails to secure his presence his sureties can be proceeded. Ordinarily at this stage process under Section 82/83 of the Code of 1973 is not adopted. If even after proceeding against the sureties, presence of the person concerned cannot be secured, may be because they have died or for any other reason, then, the High Court has no option but to secure his presence by issuance of non-bailable warrants. At this stage, if necessary process under Section 82/83 of the Code of 1973 can be adopted.

40. We may also point out in an appeal against acquittal ordinarily High Court does not issue non-bailable warrants at the initial stage, but, only issues bailable warrants under Section 390 of the Code of 1973 or orders for its issuance.

41. We may also point out that in an appeal against acquittal ordinarily the

presence of the acquitted person is secured initially by issuance of bailable warrants which is not to say that the appellate Court in a given circumstance can not issue a non-bailable warrants, but, ordinarily this is not done. It is only when the presence cannot be secured after issuance of bailable warrants that non-bailable warrants are issued.

42. Now, the moot point is as to whether in an appeal against acquittal where non-bailable warrants have issued especially at the subsequent stage of the appeal (not admission stage), as discussed hereinabove, the Chief Judicial Magistrate can on his own, without there being any stipulation in the order of the High court to release the accused on bail if he appears, release him, as has been directed by the Coordinate Bench in Government Appeal No. 454 of 2022; whether it amounts to vesting the Chief Judicial Magistrate with a power and jurisdiction which the Statute and the law does not vest in him and whether it will not divest and deprive the High Court of the discretion and jurisdiction it exercises in this regard as an an appellate criminal Court? Assuming the Magistrate has this jurisdiction and power, whether the general directions issued by the Coordinate Bench dated 18.01.2024 and 19.01.2024 do not deprive even the Magistrate of his discretion in this regard in view of the law discussed hereinabove by making it mandatory to release such person? Whether such general directions can be issued by the High Court making it mandatory for the Chief Judicial Magistrate to release a person in such a situation without applying his mind on case to case basis, assuming that he has power to do? These are important issues which have far reaching consequences which require consideration, in our humble opinion, by a Larger Bench, as, another view is quite possible.

43. Much depends in this regard upon the format of the order passed by the High Court in the context of Section 390 of the Code of 1973 at the time of admission of the appeal or thereafter. Ordinarily, the Allahabad High Court does not itself issue bailable warrants, but, orders the same to be issued through the Chief Judicial Magistrate or with the stipulation that the warrants be issued for its execution through the Chief Judicial Magistrate and even in such eventuality it is the latter who issues the warrants. If there is certainty and uniformity, as far as possible, in the orders for issuance of warrants containing the terms and conditions of warrants by the High Court in exercise of its appellant criminal jurisdiction, much of the confusion in this regard would be allayed, therefore, this is also an aspect which can be considered as it will bring about certainty and definiteness as to the execution of bailable warrants and who is to exercise the discretion as discussed hereinabove.

44. Now, in this context we have considered Section 437 of the Code of 1973 and find that the said provision is applicable at the initial stage of a criminal case and it does not empower the Chief Judicial Magistrate to encroach upon the powers of the appellate Court which has issued the non-bailable warrants. Section 437 of the Code of 1973 will have no play in such situation as, the High Court had issued the bailable warrants, it alone can determine the terms of its execution. Likewise, for the same reason, Section 81 of the Code of 1973 can also not be read and understood as empowering the Chief Judicial Magistrate to encroach upon the

powers of the appellate Court which has issued the non-bailable warrants and release the person on bail without there being any stipulation in the order of the High Court for such release, once the order for issuance of warrant has been issued by the appellate Court, especially in the case of non-bailable warrant in view of Section 71 of the Code of 1973. The Chief Judicial Magistrate or any other Magistrate cannot add or subtract anything to the order of bailable warrant issued by the High court in exercise of its appellate power.

45. Moreover, the second proviso to Section 81 is to be read with Section 78 (2) of the Code of 1973 which applies only in cases where warrants are forwarded outside the jurisdiction of the Court and, therefore, it has no play so far as issues involved herein is concerned.

46. The procedure under Section 82/83 of the Code of 1973 should not be adopted prior to issuance of non-bailable warrants i.e. at the stage of bailable warrants.

47. However, in the event a person is committed to prison on account of default in the sense the direction of the appellate Court is to take sureties and then release him on bail and he is unable to provide the sureties on account of which he is sent to prison and remains there, then, that would be situation which needs to be remedied at the earliest as he is not sent to jail by a conscious decision of the Court in the exercise of the judicial discretion in light of the parameters discussed in ***Poosu*** (supra) and other decisions of the Supreme Court and the High Courts, but, he has been sent to prison by default. In such a scenario in our view the Court which commits him to prison should immediately inform the High Court where the appeal against his acquittal is pending and the Administrative side of the High Court to take immediate steps to place the matter before the concerned Bench which has been assigned such matters at the earliest which should consider the matter as per law as to whether he is entitled to be released on bail or certain changes in the condition of bailable warrant are required. In addition to it in such cases the Chief Judicial Magistrate or any other Magistrate should immediately inform the District Legal Services Authority or the State Legal Services Authority or the High Court Legal Services Committee which should take immediate steps, especially in cases where for absence of proper legal advice such person remains in jail so that necessary legal advice and assistance is provided to him and his matter is considered by the High Court. This, in our view, would be the solution for meeting with such cases. There may be other solutions which can be considered by the High Court even on the Administrative Side.

48. We are also conscious of the fact that keeping acquitted person in jail for long is not justified and appropriate measures should be taken so that they are provided legal aid at the earliest and their cases for grant of bail are considered at the earliest, but, only by the competent Court. Whether the Chief Judicial Magistrate can do it, if so, under what circumstances, is the moot point which requires consideration.

Appeal Against Conviction

49. The Coordinate Bench in Government Appeal No. 2552 of 1981 not only issued directions with regard to release of an accused against whom non-bailable warrants have been issued by the

High Court in an appeal against acquittal, but similar directions have been issued for release of the appellant who has filed an appeal against his conviction.

50. Now, with great respect, we are of the opinion that an appellant challenging his conviction stands on a different footing viz-a-viz a person who has been acquitted by the Trial Court, but, his acquittal is under challenge in appeal. In an appeal against conviction such as the present one, Section 390 of the Code of 1973 does not apply and there is already a pronouncement by the Trial Court convicting such person and sentencing him to prison, therefore, the parameters for grant of bail or for committing him to prison in such appeals against conviction are very different.

51. Apparently, in such cases, the appellant is enlarged on bail in his appeal filed against his conviction and the question of issuance of non-bailable warrants arises only at a subsequent stage when for the reasons which may be similar to those already discussed hereinabove, such appellant fails to appear thereby frustrating hearing of appeal against his conviction making it necessary to secure his presence, but, the Coordinate Bench has treated both the appeals against acquittal and conviction on the same footing, which in our humble opinion, may not be correct and this aspect is also required to be considered by a Larger Bench.

52. Moreover, we have a mechanism of providing legal aid through the District Legal Aid Services Authority or the State Legal Services Authority or the High Court Legal Services Committee in cases where the convicted or acquitted person is languishing in jail consequent to execution of such non-bailable warrants. These bodies can be directed to identify such persons and do the needful.

53. There are certain practicalities also involved in this context. If even after issuance of non-bailable warrants in the circumstances discussed hereinabove i.e. at a stage subsequent to the initial stage of entertaining/admitting an appeal against acquittal or ordering releasing of the appellant in an appeal against conviction, the accused-respondent continues to avoid the proceedings and on issuance of non-bailable warrants, the Chief Judicial Magistrate releases him in compliance of the directions issued by the Coordinate Bench in *Government Appeal No. 454 of 2022*, how the appeal would be heard and how the High Court would be able to secure his presence because in such circumstances where, even after release on bail by the Chief Judicial Magistrate after issuance of non-bailable warrants by the High Court, if such accused again does not appear in spite of an undertaking given to that effect, then, the High Court will again have to again issue non-bailable warrants and the entire process will again have to be repeated which may include the process under Section 82/83 of the Code of 1973, etc., but, this cannot be an unending process and in a given case it may frustrate the hearing of an appeal. This aspect can be clarified by the Larger Bench.

54. Of course, some of the cases in recent times (for example ***Criminal Appeal No. 3757 of 2023 (Krishna Kumar and others vs. State of U.P.***) decided on 01.12.2023), Hon'ble the Supreme Court has disapproved the practice by the High Court of cancelling the bail where the appellant's counsel did not appear instead it observed that the appeal could have been heard by appointing an Amicus Curiae for

him. There are other decisions of the Supreme Court of India such as those rendered in the case of ***Bani Singh and others vs. State of U.P.; (1996) 4 SCC 720; K.S. Panduranga vs. State of Karnataka (2013) 3 SCC 721; Surya Baksha Singh vs. State of U.P. (2014) 14 SCC 222*** wherein the question of deciding appeals on merit in the absence of the appellant (convict) or respondent (acquitted person) has been considered. The question is whether in such cases where the appellant or his counsel is not appearing, though he may be traceable, instead of issuing bailable or non-bailable warrants, can the Court straightaway appoint an *Amicus Curiae* without seeking his consent, hear and decide the matter or decide it on merits without appointing any *Amicus*, necessarily so, invariably, or there is some discretion vested in this regard?

55. The legal position and the practice which should ordinarily be followed by this Court in such cases should also be determined and some guidance should be provided by a Larger Bench so that there should be certain degree of uniformity in hearing of appeals and the procedures to be followed in this regard by the different Benches of the High Court within the parameters of law.

56. The reference is also necessary as the Coordinate Bench has issued directions to the Director, Judicial Training and Research Institute, Lucknow to hold a seminar and apprise the Chief Judicial Magistrates and Magistrates of the legal position on the subject in the light of what has been held in the aforesaid orders dated 18.01.2024 and 19.01.2024. It is, therefore, all the more necessary that first of all we should be clear about the legal position before communicating it to the Courts below for compliance as otherwise it may result in confusion and chaos.

57. In our humble opinion, the observations made and the directions issued by the Coordinate Bench as referred hereinabove require a reconsideration by a Larger Bench so that the legal position in this regard is settled and there is no confusion in the minds of the Advocates and Judges, especially the Judges of the District Court. Once the position is clarified the Judicial Training and Research Institute should hold a seminar, etc. and apprise the Judicial Officers about the same.

58. We may in this context quote Rule 6 Chapter V of the Allahabad High Court Rules, 1952 which is as under:

"6. Reference to a larger Bench:- *The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein. "*

59. The aforesaid Rule permits a Bench of the High Court to refer a question of law formulated by it for consideration by a Bench of two or more Judges to be constituted by the Chief Justice. Thus, a reference is permissible under the Rules of the Court not only in the event of a conflict between two Coordinate Benches, but also in a case where important questions of law are involved, which according to a particular Bench, are required to be considered by a Larger Bench. We are also

of the opinion that important questions of law and procedure relating to hearing of criminal appeals whether against acquittal or conviction have arisen on account of the orders passed by the Coordinate Bench as also in view of the procedure being followed by different Benches of the High Court, which require certain clarity.

60. We, therefore, refer the matter for consideration by a Larger Bench to be constituted by Hon'ble the Chief Justice in exercise of his powers under Chapter V Rule 6 of the Allahabad High Court Rules, 1952.

61. We frame the following questions for consideration by the Larger Bench:

"(1) Whether the Chief Judicial Magistrate or any other Magistrate can enlarge an acquitted person or a person convicted of an offence on bail even in a case where in an appeal against acquittal or conviction, as the case may be, the High Court or any other appellate Court has issued non-bailable warrants for securing his presence without any such stipulation therein for release by the Court below, more so when such non-bailable warrant has been issued at a subsequent stage of appeal and not the admission stage?

(2) Assuming the Magistrate has jurisdiction as referred in Question No. 1, whether a general direction of a mandatory nature can be issued by the High Court to the Magistrate for such release, as has been done vide order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 and order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981, does it not deprive the Magistrate of his discretion in this regard to consider such release on case to case basis in view of the law discussed?

(3) Whether the observations and directions as contained in the order dated 18.01.2024 passed in ***Government Appeal No. 454 of 2022 (State of U.P. vs. Geeta Devi and another)*** *and the directions dated 19.01.2024 in* ***Government Appeal No. 2552 of 1981 (State of U.P. Vs. Shamshuddin Khan and others)*** *are in accordance with law?*

(4) What are the modes prescribed in law for securing the presence of acquitted person or one who has been convicted, in an appeal before the High Court and what should be the course to be ordinarily adopted by the High Court in exercise of its appellate criminal jurisdiction for securing such presence to facilitate hearing of such appeals?

(5) Whether an appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted-appellant, as the case may be, in the event he is not appearing in the appellate proceedings though his presence can be secured, without his consent and without any intimation to him, if so, under what circumstances?"

62. Let the matter be placed before Hon'ble the Chief Justice.

(2024) 3 ILRA 1314
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.03.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Criminal Appeal No. 2162 of 2015
Connected with
Criminal Appeal No. 2127 of 2015
And
Criminal Appeal No. 2161 of 2015

Lalit Kumar & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Yogesh Kumar Srivastava, Sri Noor Muhammad, Sri Sikandar B. Kochar (A.C.), Sri Diwan Saifullah Khan, Sri Abhishek Ankur Chaurasia, Sri Naveen Kumar Yadav

Counsel for the Opp. Party:
Govt. Advocate, Sri Subroto Chandra

(A) Criminal Law - Indian Penal Code, 1860 - Sections 364A, 365, 147, 148, 307, 149, Arms Act, 1959 - Section 25 – Ransom – Abduction – Detention – Encounter - Wrongful Confinement - Sections 364A – Kidnapping for ramson, Section 365 - Kidnapping or abducting with intent secretly and wrongfully to confine person – To establish an offense under Section 364A IPC - Prosecution must prove three essential elements: (i) kidnapping or abduction of a person; (ii) threat to cause death or hurt to the kidnapped person or apprehension of such threat; and (iii) demand of ransom. (Para - 34)

Appellants were accused of abducting a child and confining him secretly - Prosecution alleged that child's abduction was for ransom - During an encounter child was recovered - accused were apprehended - inconsistencies emerged regarding ransom handling - no evidence supported a threat to the child's life or safety. (Paras - 2 to 17)

HELD: - No evidence to support the claim that kidnappers threatened to cause death or harm to child. Prosecution failed to establish demand, payment, and recovery of ransom amount beyond reasonable doubt. Case does not meet all three conditions, and it cannot be concluded that accused persons committed any offense under Section 364A IPC. Appellants were acquitted of charge under section 364-A IPC but convicted for offense under section 365 IPC. Convicted for other offences under Sections 147, 148, and 307/149 IPC. Appellants are entitled to be released from jail immediately. (Paras – 35, 39 to 41)

Appeals partly allowed. (E-7)

LIST OF CASES CITED: -

1. Vinod Vs St. of Har., (2008) 2 SCC 246

2. Arvind Singh Vs St. of Maha., (2021) 11 SCC 1

3. Shaik Ahmed Vs St. of Telan., (2021) 9 SCC 59

4. Malleshi Vs St. of Karn., (2004) 8 SCC 95

5. Mulla Vs St. of U.P., (2010) 3 SCC 508: (2010) 2 SCC (Cri) 1150

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. These three appeals are arising out of the common judgement and orders dated 05.05.2015 and 07.05.2015, passed by the Additional Sessions Judge, Court No.7, Ghaziabad, in Sessions Trial No. 268 of 2012 (State of U.P. vs. Lalit Kumar and others), arising out of Case Crime No. 820 of 2011 under Section 364A I.P.C. and Sessions Trial No. 363 of 2014, arising out of Case Crime No. 820 of 2011 under Section 364A (State vs. Qayyum) and Sessions Trial No. 291 of 2012 (State vs. Lalit Kumar and Ors.) arising out of Case Crime No. 1190 of 2011 under Sections 147, 148, 307/149 I.P.C. and Sessions Trial No. 292 of 2012 (State vs. Lalit Kumar) arising out of Case Crime No. 1191 of 2011 and under Section 25 of the Arms Act, Sessions Trial No. 293 of 2012 (State of U.P. vs. Pappu) arising out of Case Crime No. 1192 of 2011 under Section 25 of Arms Act, Sessions Trial No. 292 of 2017 (State of U.P. vs. Raj Kumar) arising out of Case Crime No. 1193 of 2011 under Section 25 of the Arms Act, Sessions Trial No. 295 of 2012 (State of U.P. vs. Kanhaiya) arising out of Case Crime No.

1194 of 2011 under Section 25 of the Arms Act, Sessions Trial 296 of 2012 (State of U.P. vs. Iqbal) arising out of Case Crime No. 1195 of 2012 under Section 25 of the Arms Act and Sessions Trial No. 297 of 2012 (State vs. Shivram @ vijju) arising out of Case Crime No. 1196 of 2011 under Section 25 of the Arms Act, whereby all the appellants were convicted for the offences under Sections 364A, 147, 148, 307 I.P.C. and Section 25 of the Arms Act, and sentenced under Section 364A IPC for life imprisonment with fine of Rs. 1,00,000/-, under Section 147 I.P.C., imprisonment for two years, under Section 148 imprisonment for three years, under Section 307/149 imprisonment for ten years with fine of Rs.20,000/- and under Section 25 of the Arms Act, imprisonment for of three years with fine of Rs. 10,000/- and in default of payment of fine further imprisonment for three years as provided.

2. The brief facts of the leading case in Sessions Trial No. 268 of 2012 are that PW-1, Amit Jain, had lodged a first information report on 18.10.2011 at 8:05 A.M., stating that his son, Parshva Jain, who was studying in Class II, in Diwan Public School had been abducted. He had stated that as usual on 18.10.2011, in the morning at 7:30 A.M, the guard of the informant, namely Anand, had started from the informant's house to drop Parshva Jain, son of the informant, to the school. While the guard and his son were on their way to the school, from one Scorpio car, of white and gray colour, which was parked nearby, three persons came out while the driver was still occupying the driving seat, keeping the vehicle's engine on of the three persons one person caught hold of Anand from behind and two persons snatched Parshva Jain from him and put parshva in the Scorpio car and left towards Meerut. The guard made a hue and cry and tried to follow the car but could not succeed. He could not note the vehicle number. The said boy, Parshva Jain, was wearing a school dress of blue colour half shirt, grey colour nicker and black shoes. The guard informed the informant about the incident and thereafter he had lodged the F.I.R. After registration of the F.I.R. against the four unknown accused persons on 22.10.2011, the police had recovered the kidnapped child during an encounter wherein, out of the eight persons, six were apprehended. With regard to the encounter and recovery of the kidnapped child, another Case Crime No. 1190 of 2011 was registered against all the accused persons.

3. The facts of the Case Crime No. 1190 of 2011 were that on 22.10.2011, the Inspector- Sri Anil Kaparwan, incharge of the Special Operation Group(SOG), got an information from a reliable source and through surveillance that the accused persons of Case Crime No. 820 of 2011 were hiding themselves alongwith the kidnapped child in the Dastoi Forest and due to the fear and pressure created by the police, they had shifted near Muradnagar and now they were demanding a ransom of Rs. 2,00,00,000/- (Two Crores) from the father of the kidnapped child and that some deal was going to be finalized on 22.10.2011 at Sadarpur Duhai Road and if the deal was not finalized, they were planning to shift the child to some other State and were trying to go towards Mandawali, Delhi, in the Scorpio Car through Muradnagar. On the basis of such information, Sri Anil Kaparwan, Inspector Incharge of SOG, came to the Police Station, Kavinagar and informed about the same to the SHO, Police Station-Kavinagar. Thereupon, they formed two teams of the police to apprehend the kidnappers and to recover the child.

4. Out of these two police teams, one was led by Sri Anil Kaparwan, Incharge-SOG and another was led by Sri Avanish Gautam, SHO, Kavinagar. Neeraj Kumar (Head Constable 47), Uday Pratap (Constable 1457), Vinay Kumar (Constable 2289), Arun Kumar (Constable 1088), Dhum Singh (Constable 711), Yogesh Kumar (Constable 372) were members of the police team led by SHO Avanish Gautam. Both these teams took their positions on the two roads, one, which went towards Sadarpur and another which went towards Madhuban Bapudham. After sometime a car was seen coming from Govindpur side and after ten minutes another car came from Sadarpur side and both stopped and one person each from both the cars came out and talked to each other and from the car which came first, a person took a bag and went towards the other car. Having satisfied that the payment of ransom was being finalized the police team rushed towards the other car. Thereupon, looking at the police the accused persons began to fire and ultimately the police team despite getting some minor injuries, surrounded the accused persons and apprehended six of the accused persons while two of the accused persons escaped from the spot. The father of the kidnapped child took the child in his arms. The apprehended accused persons were identified as Lalit Kumar s/o Lalaram, Pappu s/o Munna Singh, Raj Kumar s/o Mahendra Singh, Kanhaiya s/o Laxmi Narayan, Iqbal s/o Illiyas, Shivram @ Vijju s/o Khusiram and from each of the apprehended accused persons, various arms alongwith empty and live cartridges were recovered on the spot and on query made from the apprehended accused persons they told that two of their accomplice members, namely Qayyum and Johni @ Baba had fled from the spot. On the spot itself, the bag filled with money which was recovered from the seat of the Scorpio Car, was handed over to the original informant, Amit Jain. Thereafter, the F.I.R. in Case Crime No. 1190 of 2011 under Sections 147, 148, 149, 307 I.P.C. and separate cases under Section 25 of the Arms Act were registered against the accused persons. Recovery Memo of various arms from each of the accused persons were prepared and thereupon the Case Crime No. 1191 of 2011 was registered against Lalit Kumar under Section 25 of the Arms Act; Case Crime No. 1192 of 2011 was registered against Pappu Singh s/o Munna Singh; Case Crime No. 1193 of 2011 registered against Raj Kumar s/o Mahendra Singh; Case Crime No. 1194 of 2011 registered against Kanhaiya s/o Laxmi Narayan; Case Crime No. 1195 of 2011 was registered against Iqbal s/o Iliyas; Case Crime No. 1196 of 2011 against Shivram @ Vijju, all under Section 25 of the Arms Act. After the recovery of the child, the child was also handed over to the complainant after medical examination at the police station to the informant.

5. Thereupon, the investigation was completed and the other two co-accused persons who had fled from the spot had also been apprehended during the investigation and then charge-sheets were filed against all the accused persons in both the cases, namely Case Crime No. 820 of 2011 as well as Case Crime No. 1190 of 2011 and also under the offences under the Arms Act separately.

6. After submission of the said charge-sheets, cognizance was taken and the matters were committed to the sessions court, thereupon, the sessions court framed the charges against the accused Lalit Kumar s/o Lalaram, Papu s/o Munna

Singh, Raj Kumar s/o Mahendra Singh, Kanhaiya s/o Laxmi Narayan, Iqbal s/o Illiyas, Shivram @ Vijju s/o Khusiram and Johni @ Baba jointly under Section 364A IPC and further charges under Section 364A IPC were also framed against accused Qayyum. Also charges under Sections 147, 148, 307/149 I.P.C. were framed against the accused Lalit Kumar, Pappu, Rajkumar, Kanhaiya, Shivram @ vijju, Johny @ Baba and Qayyum. Separate charges against accused Lalit Kumar, Pappu, Rajkumar, Kanhaiya, Iqbal, Shivram @ Vijju were framed under Section 25 of the Arms Act.

7. To support the case in Case Crime No. 820 of 2011 under Section 364A I.P.C., the prosecution had examined PW-1- Amit Jain (Informant), PW-2- parshva Jain, PW-3- Atul Jain, PW-4- Anand Kumar, PW-5-Constable Devendra Singh, PW-6-Sub-Inspector, Ashok Rana, PW-7 SHO Avnish Gautam, PW-8 Head Constable Vikas Kumar, PW-9 Constable Akshay Sharma, PW-10 Dr. Naveen Jain, PW-11 Head Constable- Rampal Singh, PW- 12 Constable Bijendra Singh, PW13-Raghunath Gautam. To prove the case in Case Crime No. 1190 of 2011 under Sections 147, 148, 307 I.P.C, the prosecution had examined Inspector Anil Kaparwan, PW-1-the informant of the case, PW-2 Constable- Harish Raghav, PW3 Sub-Inspector Pankaj Pant.

8. Thereupon, the statements of the accused persons were recorded under Section 313 Cr.P.C. They had denied the allegations and claimed that they had been falsely implicated in the case. After conclusion of the trial vide judgement and order dated 15.05.2015, the learned trial court had convicted the accused Lalit Kumar, Pappu, Rajkumar, Kanhaiya, Shivram @ Vijju, Iqbal for the offences under section 364A IPC and also for the offences under sections 147, 148, 307, 149 IPC and each of the accused Lalit Kumar, Pappu, Rajkumar, Kanhaiya, Shivram @ vijju, Iqbal were also convicted for the offence under section 25 of the Arms Act. The other co-accused persons Johni @ Baba, Badal @ Pawan, Qayyum were acquitted of the charges under section 364A IPC as well as for the charges under sections 147, 148, 307, 149 IPC. After the conviction, vide order dated 07.05.2015 all the six accused persons named above, were sentenced to life imprisonment alongwith a fine of Rs. 1,00,000/- for the offence under section 364A IPC, for the offence under section 147 IPC the six accused persons were sentenced to undergo two years simple imprisonment, for the offence under section 148 IPC, they were sentenced to undergo three years simple imprisonment, for the offence under sections 307/149 IPC all the accused persons were sentenced to undergo 10 years rigorous imprisonment along-with fine of Rs. 20,000/- each and for the offences under section 25 of the Arms Act all the accused persons were sentenced to undergo three years rigorous imprisonment alongwith fines of Rs. 10,000/- each. For the default in payment of fines, the accused persons were further to undergo three years additional sentence. All the sentences were directed to run concurrently.

9. Against the aforesaid judgement of conviction and sentence dated 05.05.2015 and 07.05.2015, three criminal appeals were filed by the six accused persons. The first Criminal Appeal No. 2162 of 2015 was filed by accused/convicted Lalit Kumar and Shivram @ Vijju, the Criminal Appeal No. 2127 of 2015 was filed by the

accused/convicted Pappu and accused Iqbal and the Criminal Appeal No. 2161 of 2015 had been filed by accused Kanhaiya @ Kural and accused Rajkumar. Since, all the appeals arose out of a common judgement and order, all the three appeals were heard and decided together.

10. Learned counsel for the appellants and learned Amicus Curiae appointed by this Court have jointly submitted as under:

(i) In the instant case, the accused persons have been convicted and sentenced for the offence under section 364A IPC, however, from the evidence available on record and from the statements of PW1 and PW 2, there was no evidence on record to suggest that the accused persons ever threatened to cause death or hurt to the kidnapped child. Therefore, no offence under section 364A IPC can be said to have been made out against the appellants.

(ii) Learned counsel for the appellants have further submitted that the kidnapped child himself had stated that none of the accused persons, who had been apprehended, had actually kidnapped him while he was going to school. Thus, on the basis of the statement of PW-2, learned counsel for the appellants submits that the appellants herein were not kidnappers of the child and they had been falsely implicated in the case.

(iii) Learned counsel for the appellant submits that in the instant case the demand of ransom and payment thereof had not been proved beyond reasonable doubt and the bag which was stated to be carrying the amount of ransom had never been looked into and the money was never counted by any of the police personnel nor the same was recovered and sealed nor was it made part of the case property, therefore, no offence under section 364A IPC can be said to have been made out against the appellants as the demand and payment of ransom had not been established beyond reasonable doubt by the prosecution.

11. To appreciate the submissions made by learned counsel for the appellants it will be relevant to briefly note the evidence available on record. PW-1 Amit Jain, the informant, in his statement has supported the First Information Report and from his statement it is apparent that he got the information from his guard- Anand and he was not an eye witness of the incident of kidnapping. He had stated that after the kidnappers kidnapped the child, on the same day he received a phone call and he was informed that caller had kidnapped the child and if he wanted his child back safely, then he should make arrangement of money amounting to Rs. 2,00,00,000/- (Rs. Two Crores) as ransom for the release of the child. When he requested them back that he be allowed to talk to the child they did not allow him to talk to the child, however, after one or two days they arranged talk with his wife. When he has shown his inability to pay the ransom of Rs. 2,00,00,000/-(Rs. Two Crores) only and offered Rs. 20,00,000/- (Rs. Twenty Lakhs) then they called him to Bapudham Ghaziabad alone with the money. On 22.10.2011, in the night at around 1:30 A.M. he left the house and went towards Bapudham in his car. When he reached Bapudham then the other car came from the other side and stopped near his car and he started approaching that car along with the money and was about to give the money to the accused persons, when the police reached and fired at the criminal. He, however, hid himself behind his car. During the firing, the SHO Avnish Gautam and two constables sustained fire arm injuries. The child was in possession of the

accused persons. After the encounter by the police, the child was recovered by the police and handed over to PW-1 and on the spot six accused persons were arrested. Two of them had run away from the spot. The money which he was to deliver to the accused persons was returned by the police to him and while handing over, the money supurdaginama was got signed by the police from him and he had identified his signature on Memo of Supurdaginama. After taking the custody of the child, he went to his house. In his cross examination, this witness has admitted that the guard Anand was working as a guard in the informant's residential house no. 67, New Okhla, Meerut Road, Hapur and he was working as such for the last 10 to 12 years and Anand was still living with him and was a native of Hapur. The informant, Amit Jain, was running the business of manufacturing utensils and his factory was at Meerut Road, Hapur. The Diwan Public School where his son used to study was around 200 to 250 metres away from his house. One of the accused persons namely accused Qayyum was also working in his factory. The remaining accused persons had never worked with him. The place from where the child was kidnapped, was park in front of the house of Mahesh Chandra Mittal. His wife had told him that Anand had came back to the house and has informed that somebody has kidnapped their child. He received this information at around 7:40 A.M. in the morning and this incident was firstly reported by the guard Anand to his sister-in-law, Sonu Jain (Bhabhi). The other persons, namely Rajkumar Tyagi, Ashok Sharma and various other persons had also informed him about the incident of kidnapping which was witnessed by them. When the police first reached on the spot he was not there. When he came back at 8:30 A.M. then he saw the police and the crowd at the spot. He admits that neither he was informed by the police that efforts were on to search out his child nor he had told the police that he was going alone with the ransom amount to get the child released. Though, he had informed the police that demand of ransom was being made, this information was given by him to the police on 18th itself.

12. Further, in his cross examination this witness had admitted that he was not having any torch etc. and it was a dark night and there was no source of light. When the firing started he had hid himself behind his car and could not see who had fired and after 15 to 20 minutes of the incident of encounter he came alongwith the police in his car to the police station. He had further stated that he had seen the accused persons in the police station and he cannot say with certainty that the accused persons present in court were the same who were involved in the incident. However, the two of them were of the same built as were involved in the incident and were brought to the police station by the police. He had stated that his child was handed over by the police at the police station and all the formalities about the same and the memos for the same were prepared at the Police Station. He further states that his signatures were obtained at the police station Kavi Nagar. He could not tell which police officer had taken into custody the child from the accused persons. No memo with regard to money which he had carried to give the kidnappers had been prepared nor the said bag was taken from him. He had alone gone alongwith the ransom amount.

13. The victim Parshva Jain has been examined as PW-2. He had stated that on 18.10.2011 at around 7:30 A.M., he was going towards his School alongwith the

guard Anand. The persons who were standing at the end of our lane had asked the time from us and thereupon they had kidnapped me and kept in the Scorpio car. After a long drive they had asked me to get off of the vehicle in a sugarcane field. They were 12 to 13 persons who had kidnapped me. They kept me in the sugarcane field for 5 days. Out of these persons, two persons used to stay alongwith me and none of them had ever called my family members in front of me. The person who had kidnapped him used to give food to him. After keeping the kidnapped child for 5 days, those five-six persons had brought his towards Ghaziabad and in Ghaziabad the encounter had taken place with the police and at that point of time he was in the car. After the encounter he had stated that his my father had taken him from there. In the encounter, the police had suffered fire arms injuries. The person who were carrying him were apprehended by the police. He did not know the names of those persons. Out of the accused persons who were present in court, none of them were the persons who had kidnapped him while he was going to the school nor those persons had kept him in the sugarcane field. He could not identify the person involved in the encounter. In his cross examination he had stated that the persons who had kidnapped him used to give him food and he has stated that he has informed about the incident to his father but his father had not told him that the accused persons were demanding ransom from him. Where the encounter had taken place was a forest and the encounter had taken place in the night. To his knowledge one police personnel had suffered a fire arm injury. The persons who kept him in the sugarcane field were two in number and for all five days they were with him. He had denied the suggestion that no encounter had taken place and also he was handed over by the police at the police station to his father.

14. PW-3, Sri Atul Jain, is the uncle of the victim, Parshva Jain and brother of the first informant. He witnessed the handing over of the bag filled with the ransom amount to the informant and also handing over the child to the informant. However, this witness has stated that he had no information how the victim was recovered. However, he had stated that on the information given by the informant, he had come to know that the police had recovered the victim from the clutches of the kidnappers.

15. PW-4, Anand, who is the person alongwith whom the victim was going towards the school had stated that he was working as a guard of Amit Jain (informant) and the informant's child Parshva Jain used to study in Diwan Public School in Class II. On 18.10.2011 in the morning at around 7:30, he was going to drop Parshva Jain to his school. The bag of the child was kept by him on his shoulders. When he reached near the turn of the lane, he found that one big car was parked there, the number of which could not be seen by this witness. When he went ahead of the said vehicle, then, some unknown persons caught hold of him and the other persons snatched the child from his hands and kept the child inside the vehicle and also tried to put him in the vehicle. Thereafter, they went alongwith child towards the Gurudwara. He has further stated that thereafter he made a hue and cry, however, the unknown kidnappers succeeded in fleeing away from the spot. Thereafter, he went to the house of his owner and informed him about the incident, however, he could not recognize the colour and number of the vehicle nor could he identify

the unknown kidnappers. He could not identify the accused Pawan @ Badal, Pappu, Shivram, Kanhaiya, Ramkumar and Lalit, who were present in court and he has categorically stated that the aforesaid accused persons were present in court had not kidnapped Parshva Jain on 18.10.2011. His statement was not recorded by the police. When his statement under Section 161 Cr.P.C., was shown to him, then, he said how this statement was recorded, he could not give the reasons. He deposed that it was true that on 18.10.2011, Parshva Jain was kidnapped in the morning. He denied the suggestion that he was not telling the truth before the court due to pressure. It is admitted by him that he was working as guard with Amit Jain since very long and that he used to drop the kidnapped child, Parshva Jain, in the morning to Diwan Public School. He had further stated that he didn't know when and how after the incident the said Parshva Jain was recovered. He denied the suggestion that on 18.10.2011 in the morning at about 7:30, he had identified the person who kidnapped Parshva Jain as the accused person, who were present in the Court. He further denied the suggestion that he was not telling the truth due to the settlement between the accused persons and the informant. On further cross-examination the PW-5, Anand, admitted that he had never seen the accused persons present in the Court prior to the date. He has further stated that he didn't know the names and addresses of the accused persons present in court. The accused persons who were present in court were not involved in the kidnapping of Parshva Jain. He did not know any person by the name, Johni @ Baba. No person named Johni @ Baba was ever working with his master.

16. PW-5, Devendra Singh (Constable 131), is the person who had recorded the chick F.I.R., by dictating on the computer. The said report was lodged at 8:05 A.M. on 18.10.2011 in one go. In the cross-examination, he admits that F.I.R. was recorded in his presence and the said F.I.R. was lodged on his dictation on the computer. The written report was not transcribed in his presence and on the basis of the written report he got registered the case. The persons who brought the written report did not give any photograph.

17. PW-6, Inspector Ashok Rana, is the person who was posted as SHO at Police Station- Hapur Nagar and he had conducted the investigation since 18.10.2011 to 29.10.2011. He had stated that on 18.10.2011, on the basis of the written report submitted by informant, Amit Jain, Case Crime No. 820 of 2011 was registered under Section 364A I.P.C. against unknown persons. He took over the investigation and recorded the statement of eye witness- Anand Kumar and at the indication of the said eye witness, a site plan for the place of incident was prepared and PW-6 also recorded the statements of various other persons and the same was entered in the Case Diary. On 19.10.2011, the statement of the informant- Amit Jain, was recorded and thereupon in search of the accused persons he raided the place of accused Qayyum on 22.10.2011. On receipt of information from Police Station- Kavi Nagar through the wireless set, the accused Lalit Kumar s/o Lalaram., Papu s/o Munna Singh, Raj Kumar s/o Mahendra Singh, Kanhaiya s/o Laxmi Narayan, Iqbal s/o Illiyas, Shivram @ Vijju s/o Khusiram were apprehended. During the encounter, the police alongwith kidnapped child and the vehicle and arms used in the incident arrested the accused persons while the two accused persons, namely Qayyum and Johni @ Baba had fled away from the spot.

On the information received he had visited the Police Station- Kavi Nagar and had obtained the Seizure Memo etc. from the office of the Police Station- Kavi Nagar and same were made part of the Case Diary. He had also recorded the statements of the accused persons present in the police station. At the police station, Parshva Jain and his father Amit Jain also met him. The kidnapped Parshva Jain was handed over to the father- Amit Jain in presence of the witnesses and memo was prepared and the said memo was prepared in his hand writing and signature. During the process, he also recorded the statement of the informant- Amit Jain and made it part of the Case Diary. With regard to the encounter and arrest of the accused Lalit Kumar s/o Lalaram., Pappu s/o Munna Singh, Raj Kumar s/o Mahendra Singh, Kanhaiya s/o Laxmi Narayan, Iqbal s/o Illiyas, Shivram @ Vijju s/o Khusiram and other accused persons, who fled from the spot, namely Qayyum and Johni @ Baba, and for the recovery of the kidnapped child, Parshva Jain in the encounter and with regard to the vehicle and use of illegal arms etc., on 22.10.2011, Case Crime Nos. 1190 to 1196 of 2011 under Sections 147, 148, 149, 307 I.P.C., and under Section 25 of the Arms Act, were registered at Police Station- Kavi Nagar. In the said encounter, three police personnels, namely Inspector- Avnish Gautam, Constable- Vikas, Constable- Akshay Sharma, had sustained injuries. On 23.10.2011, the proceedings for warrant under Section 364A I.P.C. were initiated in the Court of A.C.J.M.- Hapur and subsequently, during investigation name of accused Pawan @ Badal also reflected, who was arrested on 27.10.2011 and was sent to jail and during the arrest of the said accused, illegal arms were also recovered and his statement was also recorded and was made part of the Case Diary. On 29.10.2011, the warrants were got issued under Section 364A I.P.C. through the Court. Thereafter, he was transferred to District- Gautam Buddh Nagar. In his cross-examination, he has stated that he has recorded the statement of the informant and the witnesseses around 10:00 A.M. to 10:30 A.M. on 18.10.2011. He had not mentioned the time of recording of the statement of these witnesses in the Case Diary. He had recorded the statement of these witnesses in the police station. He had prepared the site plan at the indication of witnesses- Anand at 11:30 A.M. He had not recorded any statement of any employee of the Rao Palace Hotel. In supurdaginama, there is no signature of kidnapped Parshva Jain. He has denied the suggestion that no encounter with the police has taken place and that the kidnapped Parshva Jain was recovered. He has also denied the suggestion that he was not was present in the police station, that is why the signature of Parshva Jain was not obtained in the supurdaginama. He further denied the suggestion that in the supurdaginama signature of witnesses and the informant were obtained later on. In the Police Station- Kavi Nagar he had not inquired from the informant that where was the money which he had brought to be given to the kidnappers nor he had seen the said money nor he has inquired as to whether the said money was in which bag or briefcase. On 23.10.2011, he had not recorded the statement of the police personnels who were involved in the encounter, though, they were present in the Police Station- Kavi Nagar. On the said date he had not gone to the Sarvodaya Hospital nor he had recorded the statement of doctor who has examined the injured police officers in the encounter. He had not conducted any identification proceedings of the accused persons vis-a-vis the witness,

Anand Kumar. He had denied the suggestion that to disclose the incident he has conducted the proceedings in collusion with Incharge SOG- Anil Kaparwan and made out the recovery of kidnapped Parshva Jain and the arrest of the accused persons. He also denied the suggestion that he had not conducted the investigation in a transparent manner. He also denied the suggestion that during the investigation he had not recorded the statement of Parshva Jain and he had not visited the place from where Parshva Jain was recovered nor any site plan was prepared by him of the place of recovery of Parshva Jain. He had undertaken the investigation after registration of the case at the Police Station. It is true that the time of initiation of investigation was not mentioned in the Case Diary. He did not record the statement of Parshva Jain as he was not well at that time. He had mentioned this fact in the Case Diary that Parshva Jain was not well. It is true that on 22.10.2011, Parshva Jain was not well and subsequently, he continued with the investigation till 29.10.2011. He did make an attempt to record the statement of Prashva Jain and the same was mentioned in Case Diary on 27 to 29.05.2011. However, he could not meet Parshva Jain on both the dates as it was told to him that he had gone to Delhi for treatment. He had gone to the school and verified that he was studying in the school. However, no statement of any person from the school was recorded. He has recorded the statement of the persons surroundings the case of incident. He could not take the statement of police personnel who recovered the kidnapped child due to the fact that he was busy in various other proceedings. In his further cross examination, he had stated that on 22.10.2011, that he had received intimation through wireless set from Police Station-Kavi Nagar, with regard to the work place, encounter and recovery of the kidnapped child Parshva Jain and arrest of all the six accused persons. From the incident, the vehicle and the illegal weapons were also recovered which were used in the crime. The two accused- Qayyum and Johni @ Baba had fled from the spot. On 18.10 2011, in the statement of Anand itself, the name of Qayyum was reflected and thereupon, on 19.10.2011, he had raided the house of the accused Qayyum for his arrest. However, the accused- Qayyum could not be arrested on that date.

18. PW-7, Avanish Gautum, SHO, stated that on 22.10.2011 he was posted as SHO- Kavi Nagar. On that date the SHO- Anil Kaparwan, incharge of SOG, alongwith police personnels, Pankaj Pant (SI), Akshay Sharma (Constable), Tejpal Singh (Constable), Vikas Sharma (Constable), Harish Raghav (Constable), Neeraj Kumar (Constable), Uday Pratap (Constable), Vinay Kumar (Constable), Arun Kumar (Constable) came to the Police Station- Kavi Nagar and informed that the kidnappers of the kidnapped child of Case Crime No. 820 of 2011 under Section 364A IPC were hiding in the forest of Village- Dastoi and now they had come to Muradnagar alongwith their associates and the child. They had demanded a ransom of Rs.2,00,00,000/- from the family members of kidnapped child- Prashva Jain and today the deal for the release of the kidnapped child was about to take place at Sadarpur Duhai road and on such deal it had come to his knowledge that the said kidnapped child shall be released and if the deal was not finalized the accused kidnappers shall shift the child to some other State. The said persons were expected to come in a Scorpio car from Muradnagar to Duhai Sadarpur Marg and they would

proceed to Mandawali. Relying upon the said information given by the SHO- Anil Kaparwan and after discussing with him they formed two teams of the police officers and both the teams proceeded towards Sadarpur Dhulai and Bajwaha Road at 1:40 A.M. on 22.10.2011, wherefrom, one road goes towards Sadarpur and the other road goes towards Madhuban Bapudhan Colony, where both the teams were placed on both sides of the roads and they waited for the accused persons to reach there. A vehicle came from the side of Govindpur and after 10 minutes another vehicle came from the side of Duhai and the second vehicle stopped near the earlier first vehicle which came from side of the Govindpur and from both the vehicles, one person came down and started talking to each other. Thereafter, the person who came in the vehicle from Govindpur side took out a bag from his vehicle and proceeded towards the other vehicle. That is the time the police realised that in the second vehicle there were the accused persons and the kidnapped child. He further deposed that when the police parties proceeded towards the said vehicle, the accused persons looking at the police personnel opened fired at the police team in which three police personnels sustained injuries and they also fired in self-defence and subsequently surrounded the accused persons and arrested six of them at 3:30 A.M. from the spot. After the arrest of the said six persons they recovered Parshva Jain. The informant, Amit Jain, who came from the Govindpur side took the child in his arms. The kidnappers were searched and on enquiry they disclosed their name as Lalit Kumar s/o Lalaram., Pappu s/o Munna Singh, Raj Kumar s/o Mahendra Singh, Kanhaiya s/o Laxmi Narayan, Iqbal s/o Illiyas, Shivram @ Vijju s/o Khusiram and from their possession various arms with live cartridges and empty cartridges were recovered, which were used in the incident. They disclosed the names of the two persons who fhad led away as Qayyum and Johni @ Baba and they also disclosed that kidnapped child which had been recovered on that day, was Kidnapped by them for ransom from Hapur and on the finalisation of deal they had brought the child for release on receipt of the ransom. The bag in which the ransom amount was kept was brought by the informant, Amit Jain was handed over to him and the recovery memo etc., were prepared on the spot in the light of the torch and recovery memos of arms and cartridges were also prepared and the same were sealed. The injuries sustained by him as well as the other police officers were examined at Sarvodaya Hospital on 22.10.2011 and on the same date the kidnapped Parshva Jain was handed over to his father Amit Jain and memo was prepared. In his cross examination this witness has further stated that at about 1:30 A.M. in the night the Inspector- Anil Kaparwan had come to the Police Station- Kavi Nagar and thereafter at 1:50 A.M., they had left for the place of incident and they had reached there within 20 minutes. The informant- Amit Jain had come from the side of Govindpur for giving the ransom amount. After 15 minutes of the reaching of Amit Jain, another vehicle had come from the other side and stopped at a distance of 20-25 feet. Amit Jain was having a faded black bag and he had informed that he had brought Rs. 17,00,000/- in the said bag. The said Rs. 17,00,000/- were counted by the Inspector SOG- Anil Kaparwan. This witness did not remember that the notes were of which denomination. This witness stated that no supurdaginama was prepared, however, the same was not on record. He further stated that at that time of arrest of the accused and

recovery of Parshva Jain, the informant-Amit Jain and his family members had reached there on the spot and the memo was prepared in their presence. In his further cross-examination, PW-7, Avanish Kumar Gautam, categorically stated that the accused persons had come in their Scorpio vehicle which was of silver colour and the vehicle number was HR 30 F 0397. However, he was not able to describe the make and colour of the vehicle on which the informant had reached at the place of encounter. He admits the firing by the accused persons in the encounter, however how many rounds of fire were made by the accused persons, he was not able to give any details. However, subsequently he has described that around 10-12 round fires were made by them and the victim child was recovered from the Scorpio vehicle and the accused persons were apprehended by the police parties at 3:30 A.M. The accused had not surrendered. The police parties had warned the accused persons and thereafter while firing in self-defence they had surrounded the accused persons and apprehended them. The ransom amount which was carried in the bag was counted on the spot and about Rs. 17,00,000/- were found there in the black bag. He did not remember the description of the notes and who counted the said ransom amount was not disclosed by this witness and after completion of the formalities, supurdaginama was prepared and the ransom amount was returned to the informant on the spot. He has denied the suggestion with regard to the encounter and recovery of the child being fabricated and that the accused were arrested from their respective houses. He further had stated in his cross-examination that the ransom amount of Rs. 17,00,000/- was recovered on the spot from the Scorpio vehicle and the amount which was recovered was handed over to the informant on the spot itself. After the incident, he was admitted in the Sarvodaya Hospital for four days and thereafter he joined his duty.

19. PW-8, Vikas Kumar (Constable 58) has also supported the statement as stated by PW-7 with regard to the encounter, recovery of the child and recovery of the money and supurdaginama etc. However, in the cross examination he had not been able to describe how much money was there in the bag which was brought by Amit Jain and who has counted the amount is also not in the knowledge of this witness. He admits that the injury sustained by him in the incident and he was admitted in the hospital.

20. PW-9, Sub Inspector Akshay Sharma has also supported the statement of the SHO Avanish Gautam and the manner of information received from Inspector Anil Kaparwan and informing of the team of the police officers, their arrival and division in two teams and subsequently arrival of the father of the kidnapped child on the spot and then the accused persons who are subsequently apprehended and the child was recovered and six of the accused persons were arrested on spot alongwith their arms and the recovery memo and supurduginama were also prepared.

21. PW-11, Ram Pal Singh has proved the registration of the Case Crime Nos. 1190 to 1196 of 2011 at the police station on 5:40 A.M. He has identified the accused persons in court. In the cross examination this witness has confirmed that on 22.10.2011, he was on duty at Police tation- Kavi Nagar and he has registered the Case Crime Nos. 1190 to 1196 of 2011 on the instruction of SHO-Avnish Gautam.

22. PW-12, SHO Bijendra Singh is the Investigation Officer who was handed

over the investigation of the case. On 05.11.2011, he had recorded the statement of SHO- Avanish Kumar Gautam, Constable- Dhum Singh, Constable- Yogesh Kumar and also received the medical report of Incharge- Avanish Kumar Gautam, Head Constable- Akshay Sharma, Constable Vikas Kumar and same was included in the Case Diary. The injury report of the child was also received which was also made part of the Case Diary. The memo of the supurduginama of Rs. 17,00,000/- and the kidnapped child was also received in original and was made part of the Case Diary. He inspected the place of incident and the site plan of the place of incident was prepared. Subsequently, on 10.11.2011 he recorded the statement of Anil Kumar Kaparwan, Head Constable- Neeraj Kumar, Constable- Tejpal, Constable- Harish Raghav, Constable- Arun Kumar etc. On 19.11.2011, he had again recorded the statement of injured Head Constable- Akshay Sharma, Constable- Vikas Sharma, Constable- Uday Pratap, Constable- Vinay Kumar. On 20.11.2011, statement of kidnapped- Parshva Jain was also recorded and on 26.11.2011 the permission was obtained from officer for proceedings under Section 25 of the Arms Act. On 28.11.2011 the statement of accused Kayyum and accused Johni @ Baba was also recorded and all were made part of the Case Diary. On 30.11.2011, the recovered arms were sent for the examination and on 02.12.2011, the charge-sheet was filed under Sections 147, 148, 307 and Section 25 of the Arms Act and on the same date, the charge-sheet was also filed against the accused Iqbal, Pawan, Kanhaiya, Ramkumar, Pappu, Shivram and Lalit Kumar under Section 25 of the Arms Act. In the cross-examination he had stated that he was not posted at Police Station- Kavi Nagar. However, on 03.11.2011 he was handed over the task of investigation of the case through the dak and 05.11.2011. Thereafter, he met Avnish Gautam for the investigation and recorded his statement. On the date when the incident had taken place, he was not on the spot. Subsequently, he had gone to the house of the kidnapped child and recorded his statement. He had recorded the statements of Police Officers at the police station and at the SOG Office. He had not recorded the statements at the Hospital. This witness stated that he had not seen the amount of Rs. 17,00,000/-. However, he has recorded the statement of the person in whose supurdugi the said amount was given. He had also not seen the bag in which the ransom amount had been brought for giving to accused persons. He had not seen the vehicle from which the accused persons were arrested nor he had tried to verify the ownership of the said vehicle. On the spot he has not recovered any empty cartridges as he had gone to the spot after 12-13 days of the incident.

23. PW13- Raghunath Gautam is the person who had taken over the investigation after the transfer of earlier Investigation Officer, Sri Ashok Rana in the Case Crime No. 820 of 2011 under Section 364A I.P.C. He had taken over the investigation on 26.11.2011. The name of the accused Lalit Kumar, Raj Kumar, Kanhaiya, Shivram, Johni @ Baba, Badal @ Pawan, Qayyum and Amit were brought in the light by the previous Investigation Officer. He examined the Case Diary and thereafter he received the surrender application of Johni @ Baba and thereafter he had recorded the statement of kidnapped child, Parshva Jain and the statement of SHO- Avanish Kumar Gautam, Anil kumar Kaparwan, Akshay Sharma, Tejpal, Vikas Sharma, Harish Raghav, Neeraj, Uday

Pratap, Vinay Kumar, Arun Kumar, Bhup Singh, Yogesh Kumar. All the statements were made part of the Case Diary and after recording the statement of the informant and the other witnesses, the charge-sheet was prepared against accused- Lalit Kumar, Raj Kumar, Kanhaiya, Iqbal, Shivram, Johni @ Baba, Badal @ Pawan, Qayyum and Amit and the same was sent to the Magistrate concerned on 26.11.2011. In his cross examination he deposed that he has recorded the statement of the kidnapped child and also the statement of other police personnels. However, he has not gone to the hospital for recording the statement. At the time of the recovery of the child he was not present. He deposed that he has not recorded the statements of Peon, Principal and Teachers of the School since the earlier Investigating Officer has already recorded their statements.

24. PW-14, Sri Rajendra Singh Yadav, is the SHO of Police Station- Hapur, had taken over the investigation from 06.05.2012 and had submitted the charge-sheet on 25.05.2012 against accused Qayyum. Sri Anil Kapwarwan, Inspector was also examined as PW-1 in Sessions Trial No. 291 of 2012, wherein he has stated that on 22.10.2011, he was posted as Incharge, SOG, Ghaziabad and on the information received that a child who was kidnapped from Hapur is being carried by the accused persons for a deal of ransom with the father of the victim. The accused persons have demanded a ransom of Rs. 2,00,00,000/- Thereafter, he came to the Police Station- Kavi Nagar and after forming two teams with the SHO- Kavi Nagar and himself, they went to Sadarpur Duhai Marg and have apprehended the accused persons at around 3:30 A.M. and recovered the kidnapped child alongwith ransom amount. The countrymade pistols, empty cartridges and live cartridges were also recovered from the spot. The bag filled with the ransom amount of Rs. 17,00,000/- was also recovered from the spot. Six accused persons were arrested while two accused persons had fled away from the spot. The said car was sealed and brought to the police station. The bag was taken in possession of police and was handed over to the informant and the child was also handed over to the informant, after medical examination. The supurduginama of the ransom amount as well as supurduginama of handing over of the kidnapped child got prepared through SHO- Avnish Gautam and was signed by him. This witness submits that at the place of encounter, there was source of light through the mercury lights and tube lights on the poles. The informant Amit Jain had reached at the spot on his WagonR car. The accused persons were apprehended on the spot. This witness was further re-examined on 02.11.2011 and in his examination-in-chief, he has stated that after the incident they have searched the accused persons and from the possession of the Lalit Kumar, one pistol of 32 bore and four live cartridges with Magazines were recovered. From the possession Pappu, one pistol of 315 bore with five live cartridges recovered and from third, Raj Kumar, one country made pistol of 32 bore with three live cartridges of 32 bore, from the fourth, Kanhaiya, one countrymade pistol of 315 bore and three live cartridges were recovered from him. From the fifth accused Iqbal, one countrymade pistol of 315 bore and one empty cartridges and three live cartridges were recovered. From the sixth accused Shivram, one countrymade pistol of 315 bore with one empty cartridges and three live cartridges were recovered and were sealed and exhibited. In his cross-examination, this witnesses has stated that

his team has not fired on the accused persons as the other team of the police was firing on the accused persons and in the incident three police personnels were injured. The arms recovered from the accused persons were sealed by S.I. Pankaj Pant. He has denied the suggestion that no deal for ransom had taken place for the release of the child or the accused persons were arrested from their houses. The bag filled with the ransom amount was recovered from the Scorpio car and the same was recovered and was handed over to the informant. He has denied further suggestions that the other accused persons were apprehended from any other place than the place of the incident.

25. Constable 795 Harish Raghav was examined as PW- 2 in Sessions Trial No. 291 of 2012. He has supported the incident as stated by the other witnesses with regard to the information received for a deal of ransom being finalized and on such information two teams of police were formed and they have encountered the accused persons and apprehended them and the child and the ransom amount and recovery of the arms from the apprehended accused persons on the spot. In his cross-examinations, this witness has been firm with regard to the incident of encounter and the arrest of the accused persons, recovery of the ransom amount and the child from such encounter and recovery of the arms from the accused persons. He has denied the suggestions that the accused persons were not arrested on the spot or were arrested from some other place.

26. Similarly, S.I. Pankaj Pant was examined as PW-3 in Sessions Trial No. 291 of 2012. He also supported the information received through the SOG Anil Kaparwan and thereafter forming of the two police teams and they went to the place of occurrence and countered the accused persons and recovered the ransom amount and the child. In the said encounter, six persons were arrested and various arms were recovered from their possession and the ransom amount as well as the recovered child was handed over to the informant. In his cross-examination, he has denied suggestion that the accused persons were not arrested during the encounter and were arrested from their houses.

27. After conclusion of the prosecution witnesses, the statement of the accused persons were recorded under Section 313 Cr.P.C. and the accused persons have denied the allegations against them and claimed that they have been falsely implicated in the case. However, none of the accused have ever been able to demonstrate any reason as to why they were falsely implicated in the case by the police officers.

28. From the aforesaid evidence available on record, the following is proved beyond reasonable doubt that:-

(i) from the statement of PW-1, PW-2 and PW-4 (Anand Kumar), it is proved that on 18.10.2011, when the witness Anand Kumar was going to drop the kidnapped child, Parshva Jain, to his school, some unknown persons came in a Scorpio car and kidnapped the child, Parshva Jain and ran away.

(ii) From the statements of PW-1, Amit Jain, it is also proved that on 18.10. 2011 itself in the evening they had received the ransom call by the kidnappers and the same was informed by him to the police. Thereupon, police kept a surveillance and got to know that a ransom demand of Rs.. 2,00,00,000/- was made by some unknown

kidnappers and finally a deal was to be executed on 22.10.2011. On such information received by the Incharge of Special Operation Group- Anil Kaparwal, he alongwith the other police personnel came to the Police Station- Kavi Nagar and discussed the issue with the SHO Avnish Gautam and thereupon they formed two teams and went near the spot where the ransom deal was about to be executed.

(iii) It is further proved that informant- Amit Jain had reached the spot alone in his private car and after a few minutes of his arrival the accused persons had reached the spot alongwith the child. Thereupon, one of the accused persons and the informant talked to each other and the informant had taken out a bag from his car and had proceeded towards the Scorpio car in which the accused persons were present and at that very time the police officers being satisfied that the deal with regard to the ransom was being finalized, surrounded the accused persons. It was at this time that the accused persons fired on them. Thereupon, in retaliation the police personnel also fired and subsequently apprehended six accused persons on the spot and also recovered the child on the spot. It is also evident from the evidence on record that the bag was also recovered, however, from the evidence available on record, there is no definite evidence that any of the police officials have, in fact, counted the ransom amount which is alleged to be there in the bag and though it is being stated that there were Rs. 17,00,000/- in the said bag, none of the witnesses was able to describe as to who had actually counted the said amount or what was the description of the currency notes available in the bag. The witnesses had stated that the said bag was handed over on the spot to the informant-Amit Jain and supurdaginama was prepared. In supurdaginama, the brother of the informant- Atul Jain had signed as witness. However, in the statement he had denied that any handing over of the bag or child has taken place in his presence. PW-3 Atul has denied his presence on the spot and denied that any bag filled with the ransom amount was handed over to the informant in his presence. So far as the recovery of the child on the spot is concerned that has been amply proved through the evidence of PW-1, PW-2. The child was kidnapped and thereafter the said child was recovered after the encounter but with regard to any ransom being paid or demanded, there is very little evidence available on record. Therefore, undoubtedly prosecution one had failed to prove the demand, payment and recovery of ransom amount beyond reasonable doubt. The prosecution has further failed to prove that the accused persons had ever threatened or caused any hurt to the child.

29. From the aforesaid proven facts it is to be examined whether the offence under Section 364A IPC is made out against the accused persons. To determine whether the offence under section 364A IPC is made out or not, it will be relevant to note the provisions of Section 364A IPC, which reads as under:-

*"'**364-A. Kidnapping for ransom, etc.**—Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or*

abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

30. In **Vinod v. State of Haryana, (2008) 2 SCC 246**, the Apex Court has held as under:-

"8. The section refers to both 'kidnapping' and 'abduction'. Section 359 defines kidnapping. As per the said provision there are two types of kidnapping i.e. : (1) kidnapping from India; and (2) kidnapping from lawful guardianship.

9. Abduction is defined in Section 362. The provision envisages two types of abduction i.e. : (1) by force or by compulsion; and/or (2) inducement by deceitful means. The object of such compulsion or inducement must be the going of the victim from any place. The case at hand falls in the second category.

10. To 'induce' means 'to lead into'. Deceit according to its plain dictionary meaning signifies anything intended to mislead another. It is a matter of intention and even if promise held out by the accused was fulfilled by him, the question is : Whether he was acting in a bona fide manner?

11. The offence of abduction is a continuing offence. This section was amended in 1992 by Act 42 of 1993 with effect from 22-5-1993 and it was subsequently amended in 1995 by Act 24 of 1995 with effect from 26-5-1995. The section provides punishment for kidnapping, abduction or detaining for ransom."

31. In ***Arvind Singh v. State of Maharashtra, (2021) 11 SCC 1***, the Apex Court has held as under:-

"92. An argument was raised that the child was kidnapped for ransom but there was no intention to take life of the child, therefore, an offence under Section 364-A is not made out. To appreciate the arguments, Section 364-A IPC is reproduced as under:

*'**364-A. Kidnapping for ransom, etc.**—Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.'*

93. Section 364-A IPC has three ingredients relevant to the present appeals, one, the fact of kidnapping or abduction, second, threatening to cause death or hurt, and last, the conduct giving rise to reasonable apprehension that such person may be put to death or hurt.

94. The kidnapping of an 8-year-old child was unequivocally for ransom. The kidnapping of a victim of such a tender age for ransom has inherent threat to cause death as that alone will force the relatives of such victim to pay ransom. Since the act of kidnapping of a child for ransom has inherent threat to cause death, therefore, the accused have been rightly been convicted for an offence under Section 364-A read with Section 34 IPC. The threat will remain a mere threat, if the victim returns unhurt. In the present case, the victim has been done to death. The threat had become a reality. There is no reason to take different view that the view taken by the

learned Sessions Judge as well by the High Court."

32. In ***Shaik Ahmed v. State of Telangana, (2021) 9 SCC 59***, the Apex Court considering the provisions of Section 364A I.P.C. has held as under:-

"33. After noticing the statutory provision of Section 364-A and the law laid down by this Court in the abovenoted cases, we conclude that the essential ingredients to convict an accused under Section 364-A which are required to be proved by the prosecution are as follows:

(i) Kidnapping or abduction of any person or keeping a person in detention after such kidnapping or abduction; and

(ii) threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or;

(iii) causes hurt or death to such person in order to compel the Government or any foreign State or any Governmental organisation or any other person to do or abstain from doing any act or to pay a ransom.

Thus, after establishing first condition, one more condition has to be fulfilled since after first condition, word used is "and". Thus, in addition to first condition either Condition (ii) or (iii) has to be proved, failing which conviction under Section 364-A cannot be sustained.

34. The second condition which is "and threatens to cause a death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt" is relevant for consideration in this case since appellant has confined his submission only regarding non-fulfilment of this condition. We may also notice that the appellant has filed grounds of appeal before the High Court in which following was stated in Grounds 6 and 7:

"6. The learned Judge failed to see that PW 2 stated that he was treated well and as such there was no threat to cause death or hurt.

7. The learned Judge should have seen that PW 1 did not state that the accused threatened to cause death or hurt to his son."

33. In ***Malleshi v. State of Karnataka, (2004) 8 SCC 95***, the Apex Court has held as under:-

"12. To attract the provisions of Section 364-A what is required to be proved is : (1) that the accused kidnapped or abducted the person; (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom. Strong reliance was placed on a decision of the Delhi High Court in Netra Pal v. State (NCT of Delhi) [2001 Cri LJ 1669 (Del)] to contend that since the ransom demand was not conveyed to the father of PW 2, the intention to demand was not fulfilled.

13. To pay a ransom as per Black's Law Dictionary means "to pay price or demand for ransom". The word "demand" means "to claim as one's due"; "to require"; "to ask relief"; "to summon"; "to call in court"; "an imperative request preferred by one person to another, under a claim of right, requiring the latter to do or yield something or to abstain from some act"; "an asking with authority, claiming or challenging as due". The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made."

34. To make a case under section 364A IPC following ingredients are required to be fulfilled:-

(i) whoever kidnaps or abducts any person or keeps a person in determination after such kidnapping or abduction; and

(ii) threaten to cause death or hurt to such person or by its conduct gives rise to enable apprehension that such persons maybe put to death or hurt;

(iii) or causes hurt or death to such person in order to compel the Government or any foreign State or Intergovernmental organisation or any other person to do or abstain from doing any act or pay ransom;

(iv) if all the above three conditions are fulfilled, then, such persons shall be punished with death or imprisonment for life and shall also be liable to fine.

35. From the evidence available on record as noted hereinabove, there is enough evidence that the child, Parshva Jain was kidnapped by some unknown persons and the said child was recovered from the possession and detention of the accused persons and all the six accused persons were apprehended in the encounter and the child was recovered from their possession. However, from the entire evidence available on record, there is no evidence available with regard to the fact that such kidnappers had ever threatened to cause death or hurt to the kidnapped child. It was certain that none of the conduct of the accused persons had ever given any reasonable apprehension that the said child may be put to death or would be hurt, therefore, the second condition is entirely absent from the evidence brought on record by the prosecution in the instant case. With regard to the third condition, there was definitely no hurt caused or anyone was put to death. However, there is some evidence for demand of ransom san the threat of causing hurt or death to any person. Also, the prosecution has failed to establish demand, payment and recovery of ransom amount beyond reasonable doubt. From perusal of the records as well as the statement of the victim P.W. 2 parshva Jain, it is clear that there was no threat to him of being put to death or of being hurt. Nor there was any such apprehension that the victim may be put to death or would be hurt in the absence of ransom. In his statement the PW-2 has specifically stated that the kidnappers used to provide him food and he had also stated that his father had not informed him about the ransom. Another aspect of the matter so far ransom part is concerned is that the prosecution had come with a clear case that an amount of Rs. 17,00,000/- which was kept in the black bag and was brought by the informant to pay to the kidnappers had been handed over to the informant on the spot itself and superdiginama of the said Bag (Ext. Ka-7) and the superdiginama of the recovered child (Ext.Ka-2) were also prepared in which P.W. 3 Atul Jain had signed as a witness but P.W.3 Atul Jain in his deposition has clearly stated he had no personal knowledge that how his nephew had been recovered and he came to know from his brother- informant-Amit Jain that the police had got recovered the victim from the kidnappers. Therefore, the prosecution had completely failed to establish that there was any threat to cause death or hurt to the victim and there was any such apprehension that the victim may be put to death or would be hurt to pay a ransom, as provided in Section 364-A IPC. The other aspect of the matter with regard to the recovery of bag and the cash kept

therein is concerned, there is nothing on record that the cash of Rs. 17,00,000/- alleged to be carried by the informant had ever been counted by the police or had been made case property and it is alleged that the same was handed over the informant on the very same date under superdiginama (Ext. Ka-7) in the presence of Atul Jain, P.W. 3, who is a witness of superdiginama and brother of the informant but in his deposition he had shown his ignorance of any such fact. Therefore, since all the three conditions mentioned above are not fulfilled in the instant case, therefore, it cannot be concluded that the accused persons had committed any offence under Section 364A IPC. However, we have to consider as to what is the offence made out against the appellants.

36. Learned counsel for the State has vehemently submitted that though the offence under Section 364 A IPC may not be made out as the conditions with regard to the threat to cause death or hurt had not been established nor there was any definite proof with regard to the demand and payment of ransom, then, definitely the act of the accused persons would come within the purview of Section 365 IPC, which reads as under:-

"Section 365. Kidnapping or abducting with intent secretly and wrongfully to confine person- *Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

37. In ***Mulla v. State of U.P. [(2010) 3 SCC 508 : (2010) 2 SCC (Cri) 1150]*** , after considering various earlier decisions, this Court held as under:

"67. It is settled legal position that the punishment must fit the crime. It is the duty of the court to impose proper punishment depending upon the degree of criminality and desirability to impose such punishment. As a measure of social necessity and also as a means of deterring other potential offenders, the sentence should be appropriate befitting the crime."

38. In the instant case, the child was kidnapped and was kept secretly and confined wrongfully and was subsequently recovered from the possessions of the accused persons herein, who were apprehended on the spot by the police teams. However, the prosecution has failed to prove the demand payment and recovery of ransom amount. Further, no threat of causing death or hurt to the child had been established.

39. For all the reasons stated above, in our considered opinion the charge under section 364-A IPC is not made out against the appellants and since the child was abducted and kept secretly and wrongfully confined and was recovered from the possession of the appellants, therefore, at the most offence under Section 365 IPC is made out against the appellants. Accordingly, the appellants are acquitted of the charge under section 364-A IPC and instead they are convicted for the offence under section 365 IPC and sentenced to seven years imprisonment with fine of Rs.50,000/- each. With regard to the conviction of the accused persons for the offences under Sections 147, 148, 307/149 IPC we uphold their conviction and the sentence as was awarded by the Additional Sessions Judge. Since the trial court had

already directed that all the sentences would run concurrently and since it has been informed by the learned counsel for the appellants that all the appellants have already undergone sentence for more than 10 years. We hold that the appellants are entitled to be released from jail forthwith, if they are not required in any other case.

40. Therefore, it is directed that the concerned Jail Authorities shall verify the aforesaid facts that if all the appellants have completed their sentences as modified hereinabove, they shall be released forthwith, if they are not required in any other case with the aforesaid observations, these appeals are ***partly allowed***.

41. We appreciate the hard work done by learned Amicus Curiae, Sri Sikandar B. Kochar and put on record our gratitude. We further direct the Legal Services Authority to make payment of Rs. 25,000/- per appeal as Honorarium in which the learned Amicus Curiae argued.

(2024) 3 ILRA 1335
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Jail Appeal No. 4480 of 2016

Usman ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Arvind Kumar Singh

Counsel for the Opp. Party:
A.G.A.

(A) Criminal Law - Murder conviction based on circumstantial evidence - Indian Penal Code, 1860 - Section 302 - murder - Circumstantial Evidence - Child Witness - Presumption of Guilt - Homicidal Death - Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. (Para - 40,48)

(B) Indian Evidence Act, 1872 - Section 106 - Burden of proving fact especially within knowledge, Section 118 - competency of child witnesses - Presumption of guilt under Section 106 of the Indian Evidence Act when the crime occurs within the private dwelling of the accused - credibility of a child witness's testimony depends on the case's circumstances and the witness's reliability and demeanor - no rule of practice for corroboration of child witness evidence before conviction - If the witness's deposition inspires confidence and there is no embellishment, the court may rely on it.(Para - 43)

(D) Words or Phrases - *"especially" - facts that are pre-eminently or exceptionally within the knowledge of the accused* , "Especially within the knowledge of the accused" - presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts - Pertains to facts that an accused can more readily explain in certain cases, under Section 106 of the Evidence Act. (Para 40)

Appellant was accused of murdering his wife - within the confines of their home - prosecution's case was supported by deceased's son, a child witness - who witnessed crime - Appellant's presence at the time of the crime was established - no contrary evidence offered by the defense.(Para 3-13, 18-20)

HELD: - Prosecution proved beyond a reasonable doubt that appellant killed his wife in their home. Child's testimony was credible, consistent, and corroborated by medical evidence and additional circumstances. Accused's silence and failure to explain circumstances of death in his home led to a presumption of guilt under Section 106 of the Evidence Act. Conviction and sentence for murder were upheld. (Para 31, 37-50)

Appeal dismissed. (E-7)

LIST OF CASES CITED: -

1. Nagendra Sah Vs The St. of Bihar, (2021) 10 SCC 725

2. Balvir Singh Vs St. of Uttarakhand, Crl. Appeal No. 301 of 2015

3. Shambhu Nath Mehra Vs The St. of Ajmer, AIR 1956 SC 404

4. Nagendra Sah Vs St. of Bihar, (2021) 10 SCC 725

5. Tulshiram Sahadu Suryawanshi & anr. Vs St. of Maha., (2012) 10 SCC 373

6. Trimukh Maroti Kirkan Vs St. of Maha., (2006) 10 SCC 681

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Arvind Kumar Singh, learned Amicus Curiae for the appellant, Shri J.P. Tripathi, learned AGA for the State and perused the record.

2. This instant jail appeal has been filed against the judgment and order dated 30.11.2015 passed by District and Sessions Judge, Bijnor, in Sessions Trial No.221 of 2014 (State Vs. Usman), arising out of Case Crime No. 59 of 2014, under Sections 302 IPC, Police Station Syohara, District Bijnor, whereby the appellant has been convicted for the offence under Section 302 IPC and awarded the sentence of life imprisonment alongwith a fine of Rs.20,000/- with default stipulation.

3. Shorn of unnecessary details, the prosecution story, as mentioned in the FIR, is that Shahana, sister of the first informant Mohd. Hanif (P.W. 1) was married about 12 years back to the appellant Usman, resident of *mohalla* Aladinpur, Police Station Syohara. Usman used to suspect the character of his wife and very often used to hurl abuses and beat her in a drunken state. It is further stated that every effort was made to counsel him by his family members, but to no avail. Yesterday i.e. on 29.01.2014, at about 08.00 p.m. in the evening, Shahana had called him over phone and informed that her husband Usman is quarreling with her, beating her and threatening to kill her, he, however, pacified his sister and asked her not to quarrel and assured that he will reach by tomorrow to counsel Usman. It is further stated that on 30.01.2014, he along with his brother Mohd. Islam and Akbar Ali reached his sister's house in village Aladinpur and found her dead body lying on a cot having injuries on her neck and face. A rope was found lying near the cot. It is further stated that last night Shahana was done to death with the help of rope by strangulating her.

4. On the basis of a written report (Ext. Ka-1), an FIR was registered vide Case Crime No.59 of 2014, under Section 302 IPC in Police Station Syohara, District Bijnor at 08.30 a.m. Carbon copy whereof

was drawn vide G.D. Report No.19 at 08.30 a.m. on 30.01.2014.

5. The investigation of the said case was entrusted to the Station Officer, who after copying out the chik FIR and G.D. in the Case Diary, recorded the statement of Head Moharrir and thereafter, recorded the statement of the first informant Hanif, Adnan, son of the deceased and Fatima, sister of the deceased and thereafter on the pointing out of the first informant prepared the site plan, which has been proved and marked as Ext. Ka-3.

6. A plastic rope lying near the cot was also taken in possession and a recovery memo was prepared for the same, which has been proved and marked as Ext. Ka-4. Thereafter, the Investigating Officer instructed S.I. Rajendra Singh, who accompanied him to the place of incident to conduct the inquest. S.I. Rajendra Singh conducted the inquest and prepared the Inquest Memo and at the same time prepared all other relevant documents namely Form-13, photo-lash, challan-lash, letter to C.M.O., letter to R.I., sample seal, which has been proved and marked as Ext. Ka-9 to Ka-14 and thereafter sent the body of the deceased to the mortuary.

7. An autopsy was conducted by Dr. F.C. Verma on the person of the deceased Shahana in District Hopspital, Bijnor on 31.01.2014 and in the post-mortem report, the Doctor has noted two ante-mortem injuries, which are as under:-

(i) Ligature mark 30-20 around the neck below the chin, 5 cm below from both ears brown in colour.

(ii) Abrasion 12 cm x 2 cm below the mouth present on both sides of mandible.

8. In internal examination of the corps, trachea was found congested and ecchymosis was present. Both the lungs were congested. Right chamber of heart was full, whereas the left chamber was empty. Stomach was empty. Gall bladder was full. Spleen, liver and kidneys were found congested. The Doctor has noted the cause of death to be asphyxia due to ante-mortem strangulation.

9. On 31.01.2014 itself, the appellant Usman is said to have been arrested and his statement was recorded. Thereafter, the Investigating Officer has recorded the statement of relevant witnesses and obtained FSL report and after concluding the investigation submitted the charge-sheet against the appellant vide Charge-Sheet No.46 of 2014, under Section 302 IPC, proved it and marked as Ext. Ka-5.

10. On the basis of the said charge-sheet, learned Magistrate has taken cognizance. Since the case was exclusively triable by Court of Sessions, learned Magistrate made over the case to the Court of Sessions for trial. The Sessions court vide its order dated 29.05.2014 framed the charge under Section 302 IPC against the appellant, who abjured the said charge and claimed to be tried.

11. During the course of trial, the prosecution has examined as many as three witnesses of fact and three other formal witnesses. Their testimony, in brief, is enumerated hereunder.

12. P.W.1 Mohd. Hanif is the first informant and brother of the deceased and he, in his testimony, stated that about 12 years back, his sister Shahana was married to Usman, who used to suspect her character and very often used to hurl abuses

and beat her in a drunken state. On 29.01.2014 at about 08.10 p.m., Shahana informed him over phone that her husband Usman is quarreling with her, beating her and threatening to kill her. He asked his sister not to quarrel and assured her to reach there by tomorrow to counsel Usman.

13. On 30.01.2014, he along with his brother reached the house of Shahana and found her dead body lying on a cot having injuries on her face and neck. The rope lying near the cot was also found and it appeared that her husband Usman had killed her by strangulating with the help of a rope, however, Usman was not present there.

14. In respect of the said incident, he had given written report (Ext. Ka-1) at the police station, on the basis of which, the chik FIR was registered. On the basis of the said FIR, the police reached the place of incident and prepared the fard recovery memo of the rope found lying there.

15. During cross-examination, he stated that Shahana was his sister and was married to Usman. A phone call from his sister was received informing him that there was a threat to her life by her husband Usman. Pursuant to the said phone call, on the next day he reached at his sister's house, where he found mother-in-law of Shahana, her sister-in-law and brother-in-law to be present and except them no one else was present there and in the room, Shahana was lying dead.

16. On the basis of the said incident, he reached the police station and lodged the report. The written report (Ext. Ka-1) was scribed by one Tarik Jaidi and thereafter he had gone in the police station to lodge the report. He further stated that no blood was found on the rope. He further stated that Investigating Officer on the very next day had recorded his statement.

17. He denied the suggestion that some unknown person had killed his sister and, on suspicion, he lodged the report against Usman. He further denied the suggestion that no telephone call was received from Shahana and he had gone to her house at Aladinpur.

18. P.W. 2 Adnan is a child witness aged about 6-7 years, who is the son of the deceased and after putting him some formal questions, as to test his understanding, his testimony has been recorded, in which, he has stated that his father, who is present in the court, had killed his mother about one year back by pressing pillow on her mouth and strangulating her by a rope. At the time of incident, he was present in the house and his mother was killed in the night.

19. During cross-examination, he stated that on the day of incident her mother and father were sleeping on different cots and he was sleeping along with his father. He came to know about the killing of his mother in the night itself, when his father was smothering her. At the time of incident, there was some darkness in the room. He further stated that the police interrogated him and he disclosed to the police that his father alone by pillow and a rope had killed his mother but she could not raise any alarm and no one had tutored him to give such statements.

20. P.W. 3 Fatima is the another witness and sister of the deceased, who stated that Shahana was married to Usman and was having a son Adnan. Usman used to suspect the character of his wife and used to assault her. On the day of incident,

she was in her mother's place and when the information about the death of Shahana was received, she reached the place of incident and his nephew Adnan disclosed her the entire incident that his father by pressing his mother's mouth by a pillow and by strangulating had killed her.

21. During cross-examination, she stated that on getting the information about the death of her sister, she had reached the place of incident along with Islam, Washeem, Amin and Ayub. When they reached there, they met Adnan but not Usman. She denied the suggestion that Adnan had not disclosed her anything and she for the first time is deposing the said facts in the court.

22. P.W. 4, Dr. F.C. Verma is the Medical Officer at District Hospital Bijnor, who conducted autopsy on the person of the deceased and proved the autopsy report and contents thereof, which has been exhibited as Ext. Ka-2.

23. During cross-examination, he stated that the victim has not died because of smothering but due to strangulation by rope. He further stated that while strangulation by a rope, linear abrasion would not follow but ligature mark would be noted. He denied the suggestion that on account of strangulating by a rope, death is not possible and it is not necessary that at the time of strangulation an alarm would be raised.

24. P.W. 5 is the Investigating Officer, in whose presence the instant case was registered and investigation was entrusted to him. He after copying the G.D. and chik report, recorded the statement of Head Moharrir and reached the place of incident, where he recorded the statement of the first informant and Adnan, son of the deceased and Fatima. He prepared the site plan at the pointing out of the first informant, which is proved as Ext. Ka-3 as well as prepared the *fard* recovery memo of the rope, which was found lying near the cot at the place of incident.

25. On his instructions, inquest proceedings were made by S.I. Rajendra Singh and after preparing all the relevant documents, the dead body of the deceased was dispatched for autopsy. On 31.01.2004, he arrested the accused and after completing the investigation submitted the charge-sheet.

26. During cross-examination, he stated that he reached the place of incident at 09:00 a.m. and thereafter recorded the statement of the witnesses and that of Adnan, who had informed him that last night his father in a drunken state had killed his mother. He further stated that Adnan had not disclosed him that his father killed his mother by strangulating her, however, at the relevant time he was sleeping with him. He further informed him that he had seen his father near the cot of his mother. He further pointed out that on the rope there was a light spots of blood.

27. He denied the suggestion that during the course of investigation, it was disclosed to him that some other person had killed the deceased and not Usman. He further denied the suggestion that on the day of incident, the appellant was not present in his house and had gone out to ply rickshaw.

28. P.W. 6 is S.I. Rajendra Singh, who, on the instructions of the Investigating Officer, had conducted the inquest on the person of the deceased and

prepared the inquest memo and other relevant papers, which have been proved by him and exhibited as Ext. Ka-9 to Ext. Ka-13. He further stated that at the time of inquest, rope was found near the cot, on which the dead body was lying and its recovery memo was prepared by the S.O. Satish Kumar, which has been marked as material Ext. Ka-4.

29. During cross-examination, he stated that the rope was white in colour and the inquest proceedings were conducted by him at 09:00 a.m. and as per the opinion of the *Panches*, the cause of death has been mentioned in the inquest report to be strangulation. He denied the suggestion that all exercise of inquest were made in the police station and no rope was recovered from the place of incident.

30. Thereafter, the statement of the accused-appellant under Section 313 Cr.P.C. has been recorded by putting all the incriminating circumstances to him. The appellant denied all the incriminating circumstances, however, the defence has not led any evidence to show his presence at some other place.

31. The trial court after appreciating the evidence on record has held that the prosecution has successfully established its case against the appellant by relying upon the testimony of P.W.-2, being the natural witness, whose presence at the time and place of incident has been cogently and unerringly established, who has categorically pointed out the presence of the appellant in the house at the time of incident. Furthermore the appellant has failed to lead any evidence to rebut the presumption drawn against him under Section 106 of Indian Evidence Act.

32. Learned amicus curiae for the appellant has submitted that the incident has not taken place in the manner as alleged by the prosecution and some unknown person killed the deceased and the appellant has been falsely implicated by creating an eye-witness account of a child witness, who has been tutored to depose before the trial court.

33. Learned amicus curiae for the appellant has further submitted that P.W.1 and P.W. 3 are not the eye-witness of the incident but are deposing on the basis of hearsay and therefore, their testimony is liable to be discarded. He has further submitted that the recovery of rope from the place of incident has not been cogently established, therefore, it creates serious dent in the prosecution story.

34. Learned amicus curiae for the appellant has next submitted that the prosecution has failed to discharge the initial burden of establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts, which are within the special knowledge of the accused, in the absence of which, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt and the appellant is entitled to be acquitted.

35. Learned amicus curiae in support of his contention has placed reliance upon the case of ***Nagendra Sah Vs. The State of Bihar, (2021) 10 SCC 725***.

36. Per contra, learned AGA has submitted that in the instant case, the prosecution has successfully proved its case beyond reasonable doubt. He has further submitted that the time and place of

incident has been cogently established. He has further submitted that the incident in question has taken place within the four walls of the house of the appellant, in which his presence has been cogently and unerringly established, however, he has failed to offer any reasonable explanation for discharge of burden placed upon him by virtue of Section 106 of the Indian Evidence Act.

37. Learned AGA has next submitted P.W.2, even though is a child witness, yet in his statement has clearly and cogently established the fact that at the time of incident, the appellant was present in the house and had killed his mother by pressing her mouth by a pillow and further strangulating her by a rope, which factum is clearly corroborated by the post-mortem report.

38. Learned AGA has next submitted that by no stretch of imagination, the evidence tendered by P.W.2, who though is a child witness cannot be said to be tutored. In the backdrop of the said circumstances and, particularly, when the appellant has failed to offer any reasonable explanation in discharge of burden placed upon him by virtue of Section 106 of the Indian Evidence Act, failure of which provides an additional link to the prosecution story, it cannot be said that prosecution has failed to prove its case beyond reasonable doubt against the appellant.

39. Having considered the rival submissions made by learned counsel for the parties and in light of the evidence adduced, though the only question falls for our consideration is whether the trial court has committed any error in passing the impugned judgment and order.

40. The Hon'ble Apex Court in the case of ***Balvir Singh Vs. State of Uttarakhand passed in Criminal Appeal No. 301 of 2015***, dated 06.10.2023 has held as under:

34. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act. Section 101 with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are, "especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience".

35. ***In Shambhu Nath Mehra v. The State of Ajmer reported in AIR 1956 SC 404***, this Court while considering the word "especially" employed in Section 106 of the Evidence Act speaking through Vivian Bose, J., observed as under:

"11. ... The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder

case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

It is evident that that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King, 1936

PC 169 (AIR V 23) (A) and Seneviratne v. R, 1936- All ER 36 at p. 49 (B)."

36. The aforesaid decision of ***Shambhu Nath*** *(supra) has been referred to and relied upon in* ***Nagendra Sah v. State of Bihar reported in (2021) 10 SCC 725****, wherein this Court observed as under:*

"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused." (Emphasis supplied)

37. In ***Tulshiram Sahadu Suryawanshi and Another v. State of Maharashtra reported in (2012) 10 SCC 373****, this Court observed as under:*

"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516]: (SCC p. 393, para 38)

"38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional

cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus: (AIR p. 406, para 11)

'11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.'"" (Emphasis supplied)

38. In ***Trimukh Maroti Kirkan v. State of Maharashtra reported in (2006) 10 SCC 681****, this Court was considering a similar case of homicidal death in the confines of the house. The following observations are considered relevant in the facts of the present case:*

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecutions [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135].) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads: "(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

xxx xxx xxx

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. ..." (Emphasis supplied)

41. Thus, taking in view the above settled legal position and applying the said principles in the instant case, it is evident that the instant incident has taken place inside the privacy of a house where the appellant had all the opportunity to plan and commit the offence at the time and circumstance of his choice.

42. In the instant case, from the evidence adduced by P.W.2, who though is a child witness, has categorically stated in his statement recorded during the course of trial that his father was present in the house at the time of incident and committed the offence, as such, in the given circumstance, it is thus obvious that the prosecution has discharged its onus by proving all the ailments necessary to establish the evidence and now the burden has shifted upon the accused to offer a reasonable explanation to show as to how the crime was committed, which is in his special knowledge, however, in the absence of the same, the accused would be guilty of the said offence, which burden the appellant has failed to discharge.

43. The next important question to be considered in the instant case is whether the testimony of a child witness under Section 118 of the Indian Evidence Act governs competence of the persons to testify, which also includes a child witness. Evidence of a child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case, the evidence of a child witness be corroborated by other evidence before a conviction can stand. The only precaution the Court should bear in mind, while assessing the evidence of a child witness, is that the witness must be a reliable one and his demeanor must be like any other competent witness and that there exists no likelihood of being tutored, however, in case, his deposition inspires confidence of the court and there is no embellishment or improvement, the court may rely upon the evidence of a child witness.

44. Furthermore, every witness competent to depose, unless the Court considers that he is prevented from understanding the questions put to him due to tender age and only in excess, there is no evidence on record to show that the child has been tutored, can the court reject their statement partly or fully. An inference as to whether the child has been tutored or not can be drawn from the contents of his deposition.

45. In the instant case, statement of P.W. 2 has been fortified and proved by other attending circumstances of the case and medical evidence. His deposition being precise, concise and specific without any improvement or impropriety is worth relying. P.W.2, in his statement after answering the relevant questions put to him, has very precisely stated that the

appellant Usman, who is present in the court, had killed his mother by strangulating her and at the relevant time, he was at his home and that his mother was killed in the night. He has further stated that he had disclosed to the police that his father killed his mother by a pillow and a rope and her mother did not raise any alarm. He has further categorically stated that he has not been tutored at at all by any one.

46. Thus, we find that the statement of P.W. 2, even though being that of a child witness, inspires our confidence coupled with the fact that the appellant has completely failed to rebut the presumption raised against him under Section 106 of the Indian Evidence Act. Even in the statement recorded under Section 313 Cr.P.C., there is no whisper explaining his conduct regarding the death of his wife within the four corners of his house, where he was, admittedly, present in the night hours.

47. The cases cited by the learned amicus curiae for the appellant are completely distinguishable on the facts of the instant case and on the basis of the aforesaid discussions, they are of no help to the appellant.

48. Thus, as held by the Hon'ble Supreme Court that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime, they were seen together or the offence takes place in the dwelling home, where the husband also normally resides, it has been consistently held that if the accused does not dispute his presence at home at the relevant time and does not offer any explanation as to how the wife received injuries, it is a strong circumstance which indicates that he is responsible for commission of the crime.

49. Applying the aforesaid principles in the instant case, we are of the opinion that the prosecution has proved its case beyond reasonable doubt against the appellant, as such, the impugned judgment and order passed by the trial court is liable to be upheld. The appeal has no force and it is, accordingly, liable to dismissed.

50. Accordingly, the present criminal appeal is **dismissed**. The conviction and sentence against the accused-appellant vide impugned judgment and order dated 30.11.2015 is hereby confirmed. The appellant is in jail. He is directed to serve out the sentence imposed upon him by the trial court.

51. Let a copy of this order be forwarded to the trial court along with the record for information and compliance.

Case :- JAIL APPEAL No. - 4480 of 2016

Appellant :- Usman
Respondent :- State of U.P.

Counsel for Appellant :- From Jail, Arvind Kumar Singh
Counsel for Respondent :- A.G.A.

(Hon'ble Rajiv Gupta, J.)
(Hon'ble Mohd. Azhar Husain Idrisi, J.)

Mr. Arvind Kumar Singh, Advocate was appointed an Amicus Curiae in the instant case. He has rendered valuable assistance to the Court. The Court quantifies Rs.10,000/- to be paid to Mr. Arvind Kumar Singh, Advocate towards fee for the able assistance provided by him

in hearing of the instant jail appeal. The said payment shall be made to Mr. Arvind Kumar Singh, Advocate by the Registry of this Court within one month from today.

(2024) 3 ILRA 1346
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.02.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 6992 of 2019

Shobha Behel & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Pawan Singh Pundir

Counsel for the Respondent:
G.A., Sri Swetashwa Agarwal

(A) Criminal Law - Murder Conviction on Circumstantial Evidence - Indian Penal Code, 1860 - Section 302 read with Section 34 - Last Seen Evidence - Chain of Circumstances - Benefit of Doubt - Motive - Doubtful Last Seen Witness - Incomplete Chain - Delayed FIR - If two views are possible, the benefit shall always go to the accused -In a case based on circumstantial evidence, the prosecution must prove a complete chain of circumstances to establish the guilt of the accused, and failure to do so will result in acquittal.(Para - 34,36,37)

Case involved conviction of appellants for alleged murder of husband of appellant no.1 - found dead at home when his parents returned from a visit - Initially informant did not suspect anyone, but later accused appellant's due to property disputes - Prosecution relied on "last seen" evidence and an alleged motive of property inheritance. (Paras 2–28)

HELD: - Prosecution failed to prove five golden principles of proving a case based on circumstantial evidence. Prosecution did not establish motive and evidence of last-seen witnesses was unreliable due to inconsistencies and delayed report. Trial Court erred in drawing adverse presumption under Section 106 of Indian Evidence Act, 1872. Chain of circumstantial evidence was incomplete, failing to exclude other possibilities. Shoddy investigation and lack of scientific evidence weakened the case further. Conviction based solely on weak circumstantial evidence and inconsistent last-seen testimonies was reversed. impugned judgment of conviction and order of sentence are set aside. Appellants are acquitted. (Paras 29–41)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Shivaji Chintappa Patil Vs St. of Maha., 2021 0 AIR (SC) (Cri) 813

2. Dinesh Kumar Vs St. of Har., 2023 0 AIR (SC) 2795

3. Krishan Kumar & Anr. Vs St. of Har., 2023 4 Crimes (SC) 87

4. Sharad Birdhichand Sarda Vs St. of Maha., AIR 1984 SC 1622

5. Jabir & Ors. Vs St. of Uttarakhand, 2023 0 AIR (SC) (Cri) 270

6. Harbeer Singh & anr. Vs Sheespal & ors., AIR 2016 SC 4958

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Heard learned counsel for the appellants, learned AGA for the State, learned counsel for the informant and perused the record.

2. The present appeal has been filed against the judgment of conviction dated 2.11.2019 and order of sentence dated

4.11.2019 passed by Additional District & Sessions Judge, Saharanpur in S.T. No. 530 of 2012 (State Vs. Shobha and others) arising out of Case Crime No. 616 of 2011 under Section 302 IPC, Police Station – Sadar Bazar, Saharanpur by which both the appellants namely Shobha Behel and Ashish Arora (Appellants no. 1 and 2 respectively) were awarded life imprisonment along with 25000/- fine (each) and in case of default in payment of fine, they have to undergo further simple imprisonment of one year. It was directed that half of the fine will paid to the father of the deceased.

3. Paper book is complete and trial court record has been received. With the assistance of learned counsel for the appellants, learned A.G.A. for the State and learned counsel for the informant, the entire evidence is re-appreciated.

4. As per prosecution version, on 12.10.2011, the informant Surendra Mohan Behel (PW-1) gave information to the police that on 10.10.2011 at about 7:00 pm he along with his wife Aruna Behel had gone to the house of their daughter Neha Mehta at Gurugram and his son Vivek Behel stayed back at home to take care of the house. He was alone as his wife Shobha Behel had gone to her parental house at Yamuna Nagar, Haryana. His son Vivek Behel was suffering from depression. On 12.10.2011, when he returned back from his daughter's house and entered his house after opening the lock, he found that his son Vivek Behel is lying in dead condition.

5. On receiving this information, the police reached at the spot and by preparing panchayatnama, dead body of Vivek Behel was sent for postmortem. On 22.10.2011, the informant gave another complaint stating that on 10.10.2011, he alongwith his wife Aruna Behel had gone to their daughter's house at Gurugram and his son Vivek Behel was alone at home. His daughter-in-law Shobha Behel has left matrimonial home in the year 2009 and started living in her parental home at Yamuna Nagar alongwith his grandson. His daughter-in-law Shobha Bahel was putting pressure on him to transfer the property in her name. It is further stated that Shobha Behel alongwith his brother Ashish Arora, S/o Amrish Arora. R/o D-27, Barrack No. 10, R. Camp, Yamuna Nagar, Haryana finding his son is alone at home, came there as one key of the house remains with Shobha Behel and both of them by way of strangulation have committed murder of his son Vivek Behel. On 12.10.2011, at about 7:00 pm, when he returned back from his daughter's house and entered his house, after opening the lock, he found that his son was lying dead. He informed the police about the incident and the police by doing Panchayatnama got the postmortem done. It is stated that he was under shock due to the death of his young son and, therefore, on 22.10.2011, he had come for registration of FIR against Shobha Behel and her brother Ashish Arora (both the appellants). Thereafter, the police arrested the appellants and submitted report under Section 173(2) of Cr.P.C.

6. The case was committed to the Court of Session and charges under Section 302 read with 34 IPC were framed against both the appellants, which they denied and claimed trial. In prosecution evidence, the informant appeared as PW-1. He reiterated the version given in the FIR and has stated that the appellant Shobha Behel is a clever and greedy lady having suspicious character. She has already taken the dowry articles to her parental home on 25.1.2007,

as per writings which was signed by PW-1 and Shobha Behel (PW-9) and was submitted before the concerned Court. It is stated that thereafter Shobha Behel had filed a complaint for demand of dowry against him, his wife Aruna Behel and son Vivek Behel as well a case of domestic violence and a petition for maintenance against Vivek Behel. His son Vivek Behel, in his reply to complaint under Section 125 Cr.P.C has stated that her wife Shobha Behel is in contact with anti social elements and is under their influence. PW-1 further stated that on 21.5.2007, a compromise was effected between them. According to the compromise, it was agreed that half portion of the house will be given to Shobha Behel and Vivek Behel agreed to give Rs. 30,000/- to her wife Shobha Behel. Following the said compromise, PW-1 got a decree of half of the portion of the property passed in favour of Shobha Behel and a sum of Rs. 30,000/- was also paid to her on 27.7.2007 by Vivek Behel. But she did not withdraw the complaint against them. It is also stated that later on, Shobha Behel registered a complaint case under Sections 420, 367, 368 in district Saharanpur and also lodge a case of attempt to murder her against Vivek Behel. This witness further stated that in 2009, Shobha Behel had gone to her parental house at Yamuna Nagar along with his grandson, however, she remains in contact with her husband Vivek Behel.

7. It is stated that later on, PW-1 had filed an application for cancelling the decree by which half of the share of the property was transferred in favour of Shobha Behel and due to this reason she was very much upset and became inimical, and she committed murder of her husband Vivek Behel.

8. This witness further stated that both the appellants are sister and brother and having no other siblings. It is stated that marriage of son of the informant (PW-1) was performed with Shobha Behel on 28.11.2005. Ashish Arora, brother of Shobha Behal, also managed all the deals of his sister-Shobha. The witness also stated that from January, 6, 2006 onwards his deceased son Vivek Behel remain admitted in a Drug-de-Addiction Centre, Rohtak. He further stated that Vivek Behel was admitted by his wife Shobha Behel (the appellant). He has also stated that (PW-1) and his wife (PW9) had given affidavits on 17.09.2007 that in future if their son Vivek Behel commits anything wrong under the influence of liquor they will be responsible for the same. The witness further stated that Shobha Behel has registered a complaint against Vivek Behel by alleging that using a cheque of Rs. 9000/-, he had withdrawn the amount from her account. In cross examination this witness has admitted that he has stated this fact to the concerned Station House Officer that out of greed of the property, Shobha Behel was mentally harassing them, however, this fact was not recorded in the complaint. This witness has further given the details of complaint filed by Shobha Behel under Section 498-A and 406 IPC. He also stated that on 09.07.2008 his grandson was born and on 29.11.2008, a petition under Section 125 Cr.P.C. was filed, which was withdrawn by Shobha Behel, as her husband Vivek Behel was paying maintenance of Rs. 2500/- per month to his wife Shobha Behel. This witness further admitted in cross-examination that a written compromise was effected between him, deceased Vivek Behel and Shobha Behel on 10.8.2007 (Ex-Ka-3) and by way of Court decree, half share of the property was given to Shobha

Behel, 1/4th share was given to Vivek Behel and 1/4th share was retained by him. It is further stated that in a complaint given to Police (EX-Ka-1), he has stated that his son Vivek Behel was under depression. This witness admitted that on 20.9.2010, Shobha gave birth to a son. However, he left him alone and went alongwith his wife to Gurugram to meet his daughter.

9. This witness further stated that on 7.10.2011, the cremation of father of Shobha Behel took place and none of his family members attended the same. He further stated that last rite was performed by Ashish Arora, brother of Shobha Behel on 16.10.2011. He also admitted that on 17.10.2011, Shobha Behel has given a complaint to the Senior Superintendent of Police, Saharanpur through speed post alleging that PW-1 has not given information of the death of Vivek Behel to her and requested that a fair investigation be done with regard to the death of her husband Vivek Behel.

10. This witness denied the suggestion that as a counter blast to complaint filed by the Shobha, present FIR has been registered.

11. In re-examination of PW-1, he proved Ex-K-22, a complaint given by PW-1 on 12.10.2011 to police wherein he had stated that his son Vivek Behel was under depression and vide this complaint, he informed the police that his son was found dead in the house.

12. Bijendra Kumar (PW-2) is witness of last seen. However, he did not support the prosecution version. He deposed that neither he had seen Shobha Behel nor his brother Ashish Arora coming out of the house of Vivek Behel on 10.10.2011 at 9:00-9:30 pm. This witness was declared hostile and was cross examined by the Public Prosecutor and some questions were put by the Trial Court as well.

13. Surajbhan (PW-3) is also witness of the last seen. He stated that on 10.10.2011 at about 9:30 am, he was in a barber shop and was getting his shave done. In the meantime, he saw that daughter-in-law of Surendra Mohan Behel and her brother were coming out of a 'gali' leading to the house of Surendra Mohan Behel. After some days he came to know that someone has committed murder of son of Surendra Mohan Behel. Thereafter, he informed people of the vicinity that he had seen the daughter-in-law of Surendra Mohan Behal and his brother coming out of his house on 10.10.2011. When Surendra Mohan Behel came to know this fact, he took him to Police Station, Sadar Bazar where the police recorded his statement.

14. In cross examination this witness stated that he is a retired person aged 70 years and the barber shop where he was getting his shave done is situated at about half kilometer from the 'gali' leading towards the house of Surendra Mohan Behel. He had seen a lady with her brother from a distance of about 5-6 yards though it was dark. This witness stated that one of his eye is damaged and he cannot see however, he can see only from one eye. He further stated that he has not given any statement before the Station House Officer that on 10.10.2011 at about 9:00-9:30 pm, he was coming back to his house from his shop. He pleaded ignorance about last rites of Vivek Behel. He denied that he has never seen the accused persons coming out of the house of PW-1 or that he is giving false statement.

15. Ved Prakash (PW-4) has stated that he is known to Surendra Mohan Behel and is aware that his son Vivek Behel died on 10.10.2011 and police had come and Panchayatnama was done before him and only his signature was taken on Panchayatnama.

16. Ram Kumar (PW-5) is another witness of Panchayatnama, who also stated in his cross examination that he does not know about the contents of Panchayatnama and he has never signed.

17. Jitendra Pal (PW-6) is also witness of the Panchayatnama and has stated in the same line as stated by PW-5.

18. Dr. P.K. Jain (PW-7) conducted postmortem of Vivek Behel and as per his deposition, the deceased was about 34-years of age and he died 2-1/2 days ago. His dead body was emitting foul smell. By doing internal examination, 'tracheal rings' was found fractured and skin of neck was thoroughly mould and both the lungs were congested. In his opinion, cause of death was 'asphyxia' due to strangulation. He prepared the postmortem report (Ex-Ka-16). He further submitted that nine documents were produced by the police, which he had signed. In cross-examination, he has stated that congestion is caused due to 'asphyxia'. There was no outer injury on the body of the deceased and fracture of the hyoid bone was found. On opening the neck, 'tracheal rings' of the neck was also fractured and internal flesh was in horizontal mould.

19. Constable Sonraja (PW-8) stated that he recorded G.D. No. 43 on 10.10.2011 on receiving a written complaint from Surendra Mohan Behel and proved the carbon copy as Ex-K-17.

20. Smt. Aruna Behel (PW-9) mother of the deceased and wife of the informant has stated that marriage of her son Vivek Behel was performed on 28.11.2005 with Shobha Behel, D/o Amrish Arora, R/o Yamuna Nagar, Haryana After some time of their marriage, Shobha Behel, wife of her son Vivek Behel was demanding share in the property and was harassing us. She has given one set of keys of the house to her daughter-in-law Shobha Behel, and she used to meet Vivek Behel when she and her husband were not at home. Even her neighbours knew about it. She stated that she alongwith her husband Surendra Mohan Behel had gone to Gurugram at the residence of her daughter to meet her, leaving Vivek Behel at home to care of the house. Shobha Behel used to come and meet Vivek Behel in their absence. When she alongwith her husband returned to home on 12.10.2011, she found that main gate was opened, however, the internal gate was locked and they found the dead body of their son Vivek Behel was lying there. This witness stated that at that time Bijendra and Ambrish, residents of their vicinity also came. Apart from them, Surajbhan (PW-3) and Ved Prakash (PW-4) also reached there and they informed that they had seen Shobha Behel and her brother Ashish Arora going out of house on 10.10.2011 at 9:00-9:30 pm. In her cross examination, she has denied suggestion that due to drug habits of Vivek Behel they have disowned him from their property and published a public notice in the news paper 'Amar Ujala' on 14.11.2006, she also denied that they had given an affidavit to the higher officers in this regard. She admitted that a compromise was effected between them but she pleaded ignorance about the death of father of Shobha Behel. She further stated that six months prior to death of Vivek Behel she along with her

husband shifted back to their own house and thereafter Shobha Behel left the house and started living at her parental house at Yamuna Nagar. She further stated that the Investigating Officer has recorded her statement after 2-3 days and she informed that Vijendra Kumar (PW-2) and Ambrish had come on the spot along with Surajbhan (PW-3) and Ved Prakash (PW-4). However this part was not recorded by the Station House Officer in her statement. She pleaded ignorance about the death of father of Shobha Behel, which occurred few days before the death of Vivek Behel and also that his last rites were performed on 16.10.2011

21. Constable Lokendra (PW-10) stated that on 22.10.2011, he received a complaint from Surendra Mohan Behel (PW-1) on the basis of which, the FIR under Section 302 of IPC was registered and report No. 54 was entered in the Rojnamcha.

22. Veerpal Singh (PW-11), retired Inspector, stated that he was S.H.O. at the relevant time at Police Station – Sadar Bazar, Saharanpur. He gave the details of the investigation including recording of evidence after the registration of FIR and proved the copy of the FIR, G.D. Entry, Panchayatnama & Postmortem Report. He also gave the details regarding recording of the statements of witnesses under Section 161 Cr.P.C. He also prepared the site plan which was exhibited as Ka-20. In cross examination, he stated that he had no knowledge that Vijendra Kumar (PW-2) and Surajbhan (PW-3) were the witnesses as they never met him. During initial investigation, their names were not brought to his notice. In cross examination, he stated that Aruna Behel (PW-9) never informed him that Vijendra Kumar, Ambrish, Ved Prakash and Surajbhan had come at the spot and they had seen the dead body of their son, Vivek Behel.

23. SHO Narendra Sharma (PW12) who also conducted part investigation recorded the statement of Shobha Behel and Ashish Arora (the appellants) and has submitted the charge-sheet which was exhibited as Ka-21.

24. Rashid Ali (PW-13), Inspector/S.H.O, the Investigating Officer, stated that on transfer of previous Investigating Officer, he had taken over the investigation and on issuance of Non-bailable warrant by Court, the accused persons surrendered before the Court. In cross examination, this witness stated that prior to 15.3.2012, during his investigation, this fact never came on record that Surajbhan and Vijendra Kumar are the witnesses of any facts of this case. He further stated that informant of the case, Surendra Mohan Behel (PW-1) and Aruna Behel (PW-9), met him during investigation but they never told him that Surajbhan and Vijendra Kumar were the witnesses of this case. He even did not get this information from any other source. For the first time, on 15.3.2012, the informant came with these witnesses i.e. Surajbhan and Vijendra Kumar and, on that day, he recorded their statements. This witness further stated that Surajbhan told him that he had seen Shobha Behel on 10.10.2011 at night about 9.00 to 9.30 p.m. but he did not inform that at that time he was present in the shop of a hairdresser and was getting his shaving done.

25. Thereafter, the Trial Court recorded the statement of accused-persons under Section 313, Cr.P.C. and all the incriminating evidence was put to them.

Both the accused persons denied the same and stated that as matrimonial dispute was pending and accused, Shobha Behel, got registered a case for demand of dowry etc., they were falsely implicated in the present case. However, no defence witness was produced but some documents were exhibited in defence.

26. The Trial Court vide its judgment dated 2.11.2019 held the appellants guilty of offence punishable under Section 302 read with Section 34 of IPC and vide order of sentence dated 4.11.2019, sentenced them to undergo imprisonment for life with fine of Rs. 25000/- each. The appellant has challenged the said judgment by making the following arguments :

(a) It is submitted that it is an admitted case of the prosecution that appellant-Shobha Behel is the wife of the deceased-Vivek Behel and matrimonial litigation was going on between them. Prior to 2009, a compromise was effected between the parties and vide Civil Court's decree, P.W.1 had transferred half share of the house in the name of appellant-Shobha Behel, 1/4th share was given to Vivek Behel and 1/4th share was retained by P.W.1. Learned counsel argued that both P.W.1 & P.W.9, the parents of the deceased, have admitted that, in their absence, appellant-Shobha used to come and stay with Vivek Behel at Saharanpur and it has also come in the statement of P.W.9 that when both P.W.1 & P.W.9 left their rental accommodation six months prior to incident and shifted back to the same house, appellant-Shobha Behel started living at her parental home at Yamuna Nagar but she used to come to meet Vivek Behel in their absence and therefore, Shobha Behel was having good relations with her husband Vivek Behel (deceased).

(b) Learned counsel has further submitted that there was no motive on the part of the appellants to commit the murder of Vivek as despite all litigations, she was maintaining relationship with her husband, Vivek and, therefore, no adverse presumption can be drawn against her as per Section 106 of Indian Evidence Act, 1872 (hereinafter referred to as Act, 1872). Counsel for the appellant has relied upon the decision in **Shivaji Chintappa Patil vs. State of Maharashtra, 2021 0 AIR (SC) (Cri) 813** to submit that in case of circumstantial evidence, there must be a chain of evidence so complete as to leave reasonable ground for conviction consistent with innocence of the accused and must show that in all human probability, the act must have been done by the accused. Counsel submit that in this case also, the accused was facing trial for committing murder of his wife and the Court observed that the mother of the deceased stated that both the accused and the deceased stayed together for some time prior to the incident which show that the relationship between them was cordial. In view of the same, the Supreme Court has held that it is settled that Section 106 of the Act, 1872 does not directly operate against either husband or wife staying under the same roof and being last person seen with the deceased as Section 106 of Act, 1872 does not absolve the prosecution of discharging of its primary burden to prove the guilt of the accused beyond reasonable doubt. Counsel has also drawn reference on para 32 of this judgment where the following observation is made :

"32. It is more than settled principle of law that if two views are possible, the benefit shall always go to the accused. It will be apposite to refer to the

following observations of this Court in the case of Sharad Birdhichand Sarda (supra):-

"163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In Kali Ram v. State of Himachal Pradesh (1973) 2 SCC 808, this Court made the following observations : [SCC para 25, p. 820 : SCC (Cri) p. 1060]

"Another golden thread which runs through the web of the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.""

(c) Counsel has relied upon the decision in **Dinesh Kumar vs. State of Haryana, 2023 0 AIR (SC) 2795,** where the Supreme Court has held that the evidence of last seen only leads upto a point and no further. It fails to link it further to make a complete chain and it may lose under the circumstances of a particular case due to long duration of time between last seen and time of death. In concluding part, the Supreme Court has held as under :

"In a case where there is no direct eye witness to the crime, the prosecution has to build its case on the circumstantial evidence. It is a very heavy burden cast on the prosecution. The chain of circumstances collected by the prosecution must complete the chain, which should point to only one conclusion which is that it is the accused who had committed the crime, and none else. Each evidence which completes the chain of evidences must stand on firm grounds. In our considered opinion, the evidence placed by the prosecution in this case does not pass muster the standard required in a case of circumstantial evidence."

(d) Learned counsel has submitted that the conviction of the appellant is primarily based on the statement of Surajbhan (PW-3) as a witness of last seen or a witness who has seen both the accused-appellants coming out of the house of informant.

(e) Learned counsel submits that another witness, Vijendra Kumar (PW-2), has not supported the prosecution version so much so that in the cross examination conducted by public prosecutor as well as the Court itself, this witness has not stated that he had seen either Shobha or Ashish Arora coming out of the house of Vivek Behel in between 9.00 to 9.30 p.m. and did not own his statement under Section 161 of Cr.P.C. to be correct.

(f) Counsel submits that the presence of Surajbhan (PW-3) who is also a witness of last seen, is highly doubtful. This witness has stated that on 10.10.2011 at about 9.00 to 9.30 p.m. he was getting his shaving done at a barber shop and had seen the accused-persons coming out of the house of informant and after some days, he came to know that the son of the informant has been murdered. He stated that when Surendra Mohan Behel (PW-1) came to know about him, PW-1 took him to the Police Station – Sadar Bazar where he got his statement recorded. Counsel submits that statement of this witness was recorded on 15.3.2012 i.e. after about five months of the incident and it is beyond presumption that a person who had seen the appellants

coming out of the house of the deceased would keep quite for a period of about five months when in cross examination he stated that he came to know about the death of Vivek after few days as he was known to PW-1. Neither PW-1 nor PW-9 have stated in their deposition that there is a barber shop in the vicinity. In cross examination, PW-1 denied about any such barber shop. Even the Investigating Officer (PW-13) stated that PW-3 never disclosed this fact that he had seen Shobha Behel and Ashish Arora at barber's shop. Moreover, even the barber was also not examined. Further, PW-3 stated that he never attended last rites of Vivek Behel though he came to know about his death and also stated that he was known to his father (PW-1). Counsel submits that this witness is introduced later on just to cover up the lacunae.

(g) It is next argued that it has not come in the complaint given by informant forming basis of the FIR which was recorded after 12 days of the date of incident that any of the witnesses either PW-2 or PW-3 has seen the accused persons coming out of the house of the informant on the date of incident. Therefore, presence of PW-3 is doubtful.

(h) Counsel further submits that even in the statement of Aruna Behel (PW-9) it has come that when they reached their house on 12.10.2011, they found that their son was lying dead and both PW-2 & PW-3 along with two other persons Ambrish and Ved Prakash came at the spot and told them that they have seen accused-appellants, Shobha and Ashish coming out of their house on 10.10.2011 at about 9.00 to 9.30 p.m. But this fact was not reported to police immediately.

(i) Counsel submits that if this fact came to the notice of PW-1 & PW-9 on 12.10.2011 itself that four persons had seen the appellants coming out of their house, however, two persons, namely Ambrish and Ved Prakash, were not examined as witness and names of Vijendra and Surajbhan were never given in the complaint filed after ten days of the accident to the police would itself show that improvements have been made by the prosecution to create evidence.

(j) Learned counsel has further argued that it has come in the statement of the Investigating Officer, Rashid Ali (PW-13), that during investigation he never got any information prior to 15.3.2012 i.e. the intervening period of five months after registration of the FIR on 22.10.2011 that either PW-2 or PW-3 was the witness of any fact of this case. This witness stated that both PW-1 & PW-9 met him but they never informed him previously that they were the witnesses and only on 15.3.2012 when PW-1 brought them to police station, he recorded statements on 15.3.2012. Counsel submits that this fact also show that Surajbhan (PW-3) was introduced later on, after a period of five months.

(k) Counsel submits that even otherwise the cross examination of PW-3 itself shows that he had never seen the appellant coming out of the house of the informant as this witness stated that the barber's shop was about half kilometre away from the street leading to the house of informant and it was dark when he had seen the lady and his brother from a distance of 5 to 6 yards. Counsel submits that this witness is aged about 70 years and he has admitted that one of his eyes is damaged and he cannot see from that eye whereas, he has seen the incident from the other eye from which he can see properly. Learned counsel submits that all these show that this witness is introduced subsequently and his statement is not believable.

(l) Counsel for the appellants submits that as per the postmortem report, the deceased died two and a half days before the date of postmortem. Counsel submits that the postmortem report of deceased reveals that the tracheal rings was fractured and muscles of the neck was ecchymosed horizontally and the cause of death was asphyxia due to strangulation. Counsel submits that the manner in which the death has occurred suggests that it can be a case of asphyxia by way of hanging and as admitted by both PW-1 and PW-9, the parent of the deceased, deceased was under continuous depression due to his drug addiction and therefore, the possibility of committing suicide cannot be ruled out, which has been later on planted as a case of murder upon the appellants.

(m) Counsel submits that the Trial Court has wrongly relied upon the statements of PW-2 recorded under Section 161 of Cr.P.C. though he was declared hostile and never supported this statement even when cross-examined by Public Prosecutor or the Court.

(n) Counsel submits that statement under Section 161 Cr.P.C. can only be relied upon for contradicting the statement of a witness and cannot be relied upon when the witness himself has disowned the same. Even in cross examination by public prosecutor and Court itself, this witness has disowned his statement and, therefore, the Trial Court has not appreciated this legal aspect of the case.

(o) Learned counsel submits that this is a case where neither any recovery was effected from the appellant regarding manner in which the murder was committed nor there was any legal last seen witness against the appellants. Even the complaint was given after a period of ten days of the incident.

(p) Counsel submits that it is a matter of fact that the father of the appellants died on 4.10.2011, his cremation was done on 7.10.2011 & last rites were performed on 16.10.2011. During that period both the appellants were at Yamuna Nagar. Counsel submits that it is only on 17.10.2011 as admitted by PW-1 that appellant-Sobha Behel had given complaint through speed post to Senior Superintendent of Police, Saharanpur for conducting fair investigation regarding the death of her husband as PW-1 did not inform her about death of her husband.

(q) Learned counsel has next argued that no scientific evidence was collected by the Police as neither any CCTV footage of the locality was collected nor any FSL expert was called at the spot and even no call details of location of mobile phones of appellant at the spot or date and time of incident was collected to corroborate the allegation of PW-1 that the appellants have committed the murder of his son, Vivek. Counsel has then referred to the content of Ex-Ka-22 which was given at the first instance by PW1 on 12.10.2011 informing that his son, Vivek, was under depression and has died. Counsel submits that on that day, no suspicion was raised against the appellants and after 10 days, a concocted version was made that too, by producing two witnesses after five months as stated by PW13, the Investigating Officer.

(r) Counsel submits that it is admitted by both PW-1 & PW-9 that appellant-Sobha, by way of a Civil Court's decree, was given half share of the house where the incident had taken place and she was the owner and in possession of that part of property. Whereas, 1/4th share was given to deceased-Vivek and 1/4th was retained by the informant. Counsel submits that after 2009, when majority of the

litigation was over and after parting away in 2010, there was no complaint from the side of the appellant-Shobha who was visiting her husband off and on.

(s) Counsel submits that the prosecution has failed to explain the delay of ten days in registration of the FIR as well as producing the last seen witnesses after five months of the registration of the FIR.

(t) Learned counsel submits that it is a case of circumstantial evidence and chain of circumstance is not proved and even motive is not proved. Counsel has relied upon the decision in **Krishan Kumar and Another vs. State of Haryana, 2023 4 Crimes (SC) 87,** wherein the Supreme Court has held that if the Trial Court has appreciated the evidence in an utterly perverse manner, i.e. against the weight of the evidence, no conviction can be entered and the accused is entitled to be acquitted as each of the links in chain of circumstances are either individually or collectively not sufficient to connect the appellants with crime.

(u) Learned counsel has relied on the decision of the Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1984 SC 1622,*** paragraph nos. 152 & 153 are reproduced as under :

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra, 1973 2 SCC 793 where the following observations were made:

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

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

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

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

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

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

(v) Counsel has also relied upon **Jabir & Ors. vs. State of Uttarakhand, 2023 0 AIR (SC) (Cri) 270,** relying upon ***Sharad Birdhichand Case*** (Supra), the Supreme Court has observed as under :

"21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between all circumstances; such circumstances, taken cumulatively, should

form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; further, the facts so proved should unerringly point towards the guilt of the accused. The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused, and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(w) Counsel has also relied upon the decision in ***Harbeer Singh and Anr. vs. Sheespal and Ors., AIR 2016 SC 4958***, where the Supreme Court has held that if the statement of a witness appears to be highly unnatural, the same can be discarded. The Supreme Court has further held that where improvements made by prosecution create serious doubt about the truthfulness or credibility of the witness, the advantage should be given to the defence.

(x) Learned counsel has thus argued that the impugned judgment is liable to be set aside as the prosecution has failed to prove cogent and convincing evidence against the appellants.

27. In reply, learned A.G.A. for the State assisted by learned counsel for the informant has opposed the prayer and has made the following arguments :

(a) It is argued on behalf of prosecution that there was strong motive in committing the murder of deceased, Vivek, by his wife and brother-in-law. Counsel submits that since the father-in-law, PW-1, had filed an application recalling/setting aside the decree of the year 2007 vide which half of the share was given to the appellant-Sobha and 1/4th share was given to the deceased-Vivek and 1/4th share was retained by PW-1, appellant-Sobha was annoyed and she left the matrimonial home and with that motive she has committed murder of Vivek. However, it is matter of fact that no such application was filed by Vivek and it was only filed by PW-1.

(b) It is further submitted that appellant-Sobha is a lady of quarrelsome nature and even on previous occasion she had filed an F.I.R. against PW-1, PW-2 & Vivek under Section 498 A of IPC which led to conviction as well as complaint against Vivek for misusing a cheque by way of withdrawing amount from her account and even extending threat to her life.

(c) It is also submitted that the case of the prosecution does not become weak if there are certain discrepancies or delay on the part of the investigating agency.

(d) Counsel submits that PW-2 & PW-3 are the witnesses who had seen both the appellants on 10.10.2011 between 9.00 to 9.30 p.m. coming out of the house of deceased-Vivek and, therefore, there is sufficient evidence that they have committed the murder of Vivek.

(e) Counsel further submits that the conduct of the accused persons is also noticeable as after registration of the FIR, they were not arrested and only when proceedings under Section 82/83 Cr.P.C. were initiated and N.B.W. was issued against them, they surrendered before the Court.

(f) It is also argued that PW-1 and PW-9 are the old aged parents of the deceased and appellant-Sobha being daughter-in-law, had an eye on the entire property i.e. house of the informant and with that motive she along with her brother committed murder of her husband.

(g) Counsel submits that the delay in registration of the FIR has been explained as the informant was under shock and they could not register the FIR earlier and only after knowing the facts from the witnesses that the appellants had gone to the house of Vivek on 10.10.2011 at about 9.00 to 9.30 p.m., they registered the FIR promptly on 22.10.2011 and, therefore, the delay is properly explained.

(h) It is also submitted that it has come in the statement of PW-1 that the appellant-Sobha had separated from Vivek in the year 2009 and when both PW-1 & PW-9 had gone to meet her daughter at Gurugram, in their absence, the appellants committed the murder of their son, Vivek Behel.

28. After hearing the counsels for the parties, we find merits in the present appeal for the reasons mentioned herein below.

29. (i) The first and foremost part is the motive. As per the prosecution version, on 10.10.2011, the informant (PW-1) and his wife (PW-9) left their home for visiting their daughter at Gurugram. It is stated in the first complaint (Ex-Ka-22) that son of the informant, deceased-Vivek Behel, was under depression and they left him alone at home to take care of the house. On 12.10.2011, at about at about 7.00 p.m., when the informant (PW-1) along with his wife (PW-9) returned and opened the lock, they found that Vivek Behel was lying dead.

(ii) At the first instance, when this information was given, neither any motive was attributed to the accused persons nor any last seen evidence was reported to the police and even no names of last seen witnesses were given. Later, on 22.10.2011 it was stated by PW-1 & PW-9 that four persons of last seen were there on the spot as after 10 days of the incident, second complaint (Ex-Ka-1) was given (forming basis of F.I.R.), in which, it was stated that the accused had left the matrimonial home with her minor son after his birth in 2008 and started living at her parental home at Yamuna Nagar and was putting pressure on them (parents of the deceased) to transfer the house in her name and due to this motive she along with her brother committed murder of Vivek Behel by way of strangulation. It was stated in the said complaint that one set of key of the house remained with the accused-Shobha Behel.

(iii) The explanation of delay was given that the informant was under shock due to sudden death of his son and, therefore, he had given the complaint on 22.10.2011.

(iv) Neither from the first complaint (Ex. Ka-22) nor from the second complaint (Ex.Ka-1) , it is found that any specific motive was assigned to the appellants who are the wife and the brother-in-law of the deceased. It is found that it has further come in the evidence of both PW-1 & PW-9, the parents of the deceased, that previously deceased was admitted in Drug De-addiction Centre by appellant-Shobha for his treatment and later a compromise was effected between them in which by way of a civil decree, half of the share of the house was transferred in the name of appellant-Shobha, 1/4th in the name of Vivek Behel and 1/4th share was retained by the informant (PW-1). Therefore, once the settlement was arrived at between the family, there is no motive to commit murder of Vivek Behel by his wife Shobha Behel.

(v) It came for the first time, in the statement of PW-1, while deposing in Court, that he had filed an application for setting aside the compromise decree and therefore, Shobha got annoyed and again left the matrimonial home and due to that reason, she committed the murder of Vivek Behel. Though in such eventuality motive would be against her father-in-law who was seeking cancellation of decree.

(vi) PW-9, in her cross examination, admitted that one set of key of the house remained with appellant-Shobha and she used to visit Vivek Behel at Shaharanpur occasionally. It has also come in the statement of this witness that six months prior to the date of incident, they (PW-1 & PW-9) left the rented accommodation and shifted back to the same house and, thereafter, Shobha Behel again started living at her parental home at Yamuna Nagar. Therefore, the evidence on record suggests that appellant-Shobha Behel wanted to stay with her husband and not with the parents of her husband (PW-1 & PW-9) and, this cannot be a motive to commit murder of her husband.

30. (i) It has come on record that PW-1 later on moved an application for cancellation of the civil decree which show that informant himself had backed out of the settlement arrived at with her daughter-in-law (appellant-Shobha Behel).

(ii) It has come in the statement of PW-1 & PW-9 that previously there was matrimonial litigation between parties i.e. Shobha Behel on one side and her husband and his parents (PW-1 & PW-9) on the other. However, as per the cross examination of these witnesses, she was still in relation with her husband-Vivek Behel and, therefore, the Trial Court has wrongly drawn adverse presumption against the appellant-wife in terms of Section 106 of the Act, 1872. It is held by the Supreme Court in ***Shivaji Chintappa Patil Case*** (Supra) that where the mother of the deceased admitted that the accused and her deceased daughter stayed together, would show that the relationship between deceased and accused was cordial. In the instant case also, it is admitted by both PW-1 & PW-9 that accused-appellant, Shobha, was given half share of the house; she was having one set of key of the house and in the absence of PW-1 & PW-9, she used to visit Vivek Behel, which suggest that despite all litigations, she was maintaining cordial relation with her husband and, therefore, the appellants are liable to be given the benefit as there is no complete chain of circumstances in the present case.

31. (i) So far evidence of last seen is concerned, as noticed above, in the first complaint given on coming to know about the death of deceased as well as the second complaint which was given after 10 days of the death, only suspicion is raised against the appellant that on account of property dispute, she committed murder of her husband. Secondly, the evidence led by the prosecution regarding last seen of Shobha Behel and her brother-Ashish Arora on 10.10.2011 at the house where the incident had taken place falls flat. Firstly, because it has come in the statement of PW-1 that when they (parents of deceased) saw the dead body of their son, persons namely Vijendra Kumar (PW-2), Surajbhan (PW-3), Ambrish & Ved Prakash also came at the spot and informed that they had seen accused-appellants, Shobha Behel and Ashish Arora coming out of the house of informant. As a matter of fact, two persons, Ambrish and Ved Prakash, were never cited as prosecution witnesses. Secondly,

Vijendra Kumar (PW-2), a witness of last seen, also did not support the prosecution version by deposing that he had not seen either Shobha Behel or Ashish Arora coming out of the house of informant on 10.10.2011. This witness was cross examined not only by public prosecutor but certain questions were put to him by the Court itself confronting him with his statement under Section 161 of Cr.P.C. However, this witness did not support his statement under Section 161 of Cr.P.C.

(ii) The Trial Court has relied upon the statement of Vijendra Kumar (PW-2) recorded under Section 161 of Cr.P.C. who has stated that he had not seen the accused persons coming out of the house of informant (PW-1) on the date of incident. This witness was declared hostile and never supported his statement recorded under Section 161 of Cr.P.C. though he was cross examined by the Public Prosecutor and certain questions were put to him by the Court in this regard.

(iii) It is well settled principle of law that the statement under Section 161 of Cr.P.C. can be used for contradicting the statement of witness and cannot be relied upon when the witness himself has disowned the same. At the cost of repetition, it is noticed that this witness was cross examined by Public Prosecutor after he was declared hostile. Still he disowned his statement and thereafter certain questions were put to him by the Trial Court but this witness has not acknowledged his statement given under Section 161 of Cr.P.C. Therefore, the Trial Court has not appreciated this legal aspect of the case.

(iv) The presence of Surajbhan (PW-3) is highly doubtful.

(a) This witness has stated that on 10.10.2011 at about 9.00 to 9.30 p.m., he was present at a barber's shop and was getting his shave done and had seen the accused persons coming out of the house of the informant. This witness stated that he came to know about the murder of Vivek Behel after few days but he never informed this fact to the informant (PW-1) though both PW-1 & PW-9 have stated that he was present at the spot when they had seen the dead body of his son on 10.11.2011.

(b) This witness stated that only when PW-1 came to know that he (PW3) has seen the accused coming out of his house on 10.10.2011, he took him to the police station and got his statement recorded on 15.3.2012 i.e. after five months of the incident. This raises a serious suspicion on the character of this witness why he kept quite for five months despite having seen the accused persons coming out of the house of the deceased on 10.10.2011.

(c) This witness otherwise is not a natural witness for the reasons that he has stated that the barber's shop where he was getting his shave done was about one and a half kilometres away from the street leading to the house of the informant and he had seen the appellants from a distance of 5 to 6 yards though it was dark outside. This witness further stated that one of his eyes was damage and he could not see from that eye and he had seen the accused persons coming out of the house of the informent (PW-1) from his another eye. This witness further stated that he is a retired person aged about 70 years.

(d) Therefore, presence of PW-3 is doubtful as it has not come in the statements of PW-1 that there was any barber's shop in the vicinity and PW-1 has even denied the suggestion whether there is any barber's shop in the nearby area. Even

the police did not record the statement of owner of the barber's shop to find out that Surajbhan (PW-3) was getting his shave done on 10.10.2011 at about 9.00 to 9.30 p.m.

(e) The presence of Surajbhan (PW-3) at the spot become highly doubtful in the light of the statement of Investigating Officer (PW-13) who has stated in clear words that during investigation, he never got any information prior to 15.3.2012 i.e. the intervening period of five months after registration of the FIR on 22.10.2011, that Vijendra Kumar (PW-2) and Surajbhan (PW-3) were witnesses of any fact of this case. This witness has even stated that during investigation he met both informant (PW-1) and his wife (PW-9) but, they never told him on any previous occasions that there was any witness of last seen and only on 15.3.2012, PW-1 brought them to the police station the he (PW13) recorded statement of both the witnesses (PW-2 & PW-3) on 15.3.2012.

(f) All the aforesaid circumstances clearly show that Surajbhan (PW-3) is not a witness of last seen and was introduced later on, after five months of the incident.

32. (i) Perusal of the entire prosecution evidence shows that no scientific investigation of the case was done. Firstly, no F.S.L. expert was called at the spot to find out whether it was a case of murder or that there was any evidence at the spot showing that the deceased had resisted to the commission of the offence by way of strangulation. The police had also not collected any CCTV footage of the locality to find out whether the accused persons were present in the area on the date of incident and surprisingly the police did not even collect any evidence of the call details or the location of the mobile phones of the accused persons or the deceased to find out whether they were present at the spot or they had any conversation with each other prior to incident. This shows that the police has conducted a very shoddy investigation in the case and there is no corroboration to the statement of the informant that the accused persons were present at the place of incident. Therefore, the chain of circumstances is not proved.

(ii) It has come in the cross examination of both PW-1 & PW-9 that father of the accused persons had died on 4.10.2011 and his cremation was done on 7.10.2011. His last rites were performed on 16.10.2011 at Yamuna Nagar. PW-1 has even admitted that on 17.10.2011, accused-Shobha had also given a complaint through speed post to Senior Superintendent of Police, Shaharanpur for conducting fair investigation regarding death of her husband stating that her father-in-law (PW-1) did not even inform her about death of her husband and from 4.10.2011 till 17.10.2011, she was at Yamuna Nagar to attend the last rites of her father with her brother accused-Ashish Arora. Once the factum of the death of appellants' father and the fact that the appellants were at Yamuna Nagar from 4.10.2011 till 17.10.2011 to attend the last rites of their father are admitted by PW-1, the Court finds that the defence taken by the appellants that they were not present at the spot on 10.10.2011 find weight.

33. Even otherwise, appellant-Shobha as admitted by PW-1 & PW-9, is the owner of half of the share of the house by way of civil court's decree passed in the year 2007. It was also admitted that the appellant had a set of keys of the house and she used to come to meet the deceased in their absence. It has also come in the statement of the

informant that the marriage between Shobha Behel and Vivek Behel was performed on 28.11.2005 and in the year 2008 a son was born to appellant and deceased who is living in care and custody of the appellant. Though both by the prosecution and the defence it established that there was matrimonial litigation between both sides, yet nothing has come on record that at any point of of time, appellant-Shobha Behel has filed any petition seeking decree of divorce or judicial separation from her husband. Rather the evidence suggests that she was visiting him at Shaharanpur which reflects that the appellant never wanted to separate from the deceased despite the fact that he was drug addicted and remained under depression as admitted by both PW-1 & PW-9. It has also come in the statement of both the witnesses that the deceased was admitted in Drug De-addiction Centre by appellant-Shobha Behel for his treatment. It has also come in their statement that they had given an affidavit to concerned authorities stating therein that, in future, if anything wrong is done by the deceased under the influence of liquor, they would be responsible for the same. It has also come on record that by way of public notice in Amar Ujala on 14.11.2006, PW-1 & PW-9 had disowned their son. Therefore, in totality of the evidence led by the prosecution and defence set up by the accused persons, neither motive is proved nor chain of circumstances is proved to hold the appellants guilty of charges.

34. In view of the judgment in ***Sharad Birdhichand Sarda's Case*** (Supra) and subsequent judgment in ***Jabir's Case*** (Supra), the prosecution has failed to prove the five golden principles of proving a case based on circumstantial evidence laid down in ***Sharad Birdhichand Sarda's Case*** (Supra).

35. In view of the judgment in ***Shivaji Chintappa Patil's Case*** (Supra), the Trial Court has wrongly drawn adverse presumption under Section 106 of Act, 1872 against the appellant-Shobha Behel though it has come in the evidence that she was maintaining relationship with her husband by visiting him at Shaharanpur.

36. In light of the judgment in ***Dinesh Kumar's Case*** (Supra) and ***Krishan Kumar's Case*** (Supra) we conclude that there is no legal evidence led by the prosecution to build its case on circumstantial evidence as the chain of circumstances collected by the prosecution is not complete to point out that only allegation can be drawn that the accused have committed the crime. In view of this judgment, the prosecution evidence only leads up to a point and no further evidence is on record to prove motive to make it a complete chain so as to record any reasonable ground for conviction.

37. It is held in ***Shivaji Chintappa Patil's Case*** (Supra) that it is settled principle of law that if two views are possible, the benefit shall always go to the accused.

38. In view of the judgment in ***Jabir's Case*** (Supra), the prosecution has failed to prove that the circumstantial evidence is complete to sustain conviction or to hold the accused guilty.

39. On perusal of the entire evidence, judgment of the Trial Court and in view of the judgment in ***Harbeer Singh's Case*** (Supra), we hold that improvements made by prosecution are creating serious doubts

about the truthfulness and credibility of the witnesses.

40. Therefore, in the light of the judgment in ***Krishan Kumar's Case*** (Supra), we hold that the Trial Court has appreciated the evidence in an utterly perverse manner i.e. against the weight of the evidence and conviction of the appellant cannot be upheld and they are entitled to acquittal.

41. In view of the above, this appeal is allowed. The impugned judgment of conviction and order of sentence are set aside. Let the appellants, Shobha Behel and Ashish Arora, be set free forthwith and their bail bonds and sureties be discharged.

42. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 3 ILRA 1363
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 811 of 2015

Smt. Renu Singh ...Appellant
Versus
Shubhang Chauhan & Anr. ...Respondents

Counsel for the Appellant:
Mohd. Aslam Khan

Counsel for the Respondents:
Ankit Srivastava

Civil Law - Civil Procedure Code, 1908 – Order XLIII Rule 1(u) - Order XIV - Order XLI - Rules 3, 23-A, 25 – Appeal against order dated 12.08.2015 remanding suit for fresh trial – Held, trial court committed gross procedural irregularities by framing issues in judgment itself without prior framing under Order XIV and affording opportunity for evidence – First Appellate Court rightly set aside trial court's order dated 17.11.2014 and remanded matter under Order XLI Rule 23-A for fresh trial after proper issue framing and evidence – Additional issues of substitution, guardianship, and limitation not framed by trial court, necessitating remand – Appeal under Order XLIII Rule 1(u) limited to examining legality of remand order, not merits – No illegality in Appellate Court's order. (Para 17-40)

Appeal dismissed.

List of Cases Cited:

1. Syeda Rahimunnisa Vs Malan BI (Dead) by L.Rs., 2016 (119) ALR 485

2. Sree Panimoola Devi Temple Vs Bhuvanachandran Pillai, (2015) 12 SCC 698

3. Jagannathan Vs Raju Sigamani, (2012) 5 SCC 540

4. P. Purushottam Reddy Vs Pratap Steels Ltd., (2002) 2 SCC 686

5. Maya Devi (Dead) through LRs Vs Raj Kumari Batra (Dead), (2010) 9 SCC 486

6. Narayanan Vs Kumaran, (2004) 4 SCC 26

7. J. Balaji Singh Vs Diwakar Cole, (2017) 14 SCC 207

8. Nedunuri Kameswaramma Vs Sampati Subba Rao, AIR 1963 SC 884

9. Brijlal Vs St. of U.P., (2005) 13 SCC 373

10. Ashwinkumar K. Patel Vs Upendra J. Patel, (1999) 3 SCC 161

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

1. Heard Mohd. Arif Khan, learned Senior Advocate assisted by Shri Akbar Ali Khan and Mohd. Shadab Khan, Advocates,

holding brief of Mohd. Aslam Khan, learned counsel for the appellant and Shri Ankit Srivastava, learned counsel for the respondents.

2. This appeal under Order-XLIII, Rule-1(u) of the Civil Procedure Code, 1908 (here-in-after referred as C.P.C.) has been preferred by the plaintiff-appellant assailing the judgment and order dated 12.08.2015 passed by the Additional District Judge, Court No.11, Sitapur in Civil Appeal No.105 of 2014; Subhang Chauhan and Others Vs. Smt. Renu Singh, by means of which the appeal preferred by the defendant-respondents has been allowed and the judgment and order dated 17.11.2014 passed in Regular Suit No.491 of 2002; Smt. Renu Singh Vs. Bhagwan Bux Singh and Others has been set-aside and the matter has been remanded to the Trial Court to pass a fresh order in the light of the observations made in the judgment of the Appellate Court after affording sufficient opportunity of filing written statement to the defendants and framing the required issues and affording opportunity of evidence to the parties on the same and hearing.

3. Learned counsel for the appellant submitted that the Trial Court had decided the suit in accordance with law after framing the issues and affording sufficient opportunity to the parties. Even then, if the learned Appellate Court was of the view that certain issues have not been framed and decided by the Trial Court, the Appellate Court, instead of remanding the whole case for a fresh trial, could have framed the additional issues and referred to the Trial Court and directed to take the additional evidence and called the same with its findings and decided the appeal after considering the same in accordance with law. Thus the submission is that the judgment and order passed by the first Appellate Court is not sustainable in the eyes of law and liable to be set-aside. He relied on **Syeda Rahimunnisa Vs. Malan BI (Dead) by L.Rs. and Another; 2016 (119) ALR 485, Sree Panimoola Devi Temple and Others Vs. Bhuvanachandran Pillai and Others; (2015) 12 SCC 698, Jagannathan Vs. Raju Sigamani and Another; (2012) 5 SCC 540, P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.; (2002) 2 SCC 686, Narendra Vs. K. Meena; 2016 (119) ALR 494.**

4. Per contra, learned counsel for the respondents submitted that there is no error or illegality in the impugned judgment and order dated 12.08.2015 passed by the Appellate Court because the learned Trial Court had decided the suit committing several irregularities. He further submitted that after exchange of pleadings, the issues are required to be framed and the opportunity afforded to the parties to adduce the evidence on the said issues but in the present case the issues were framed in the judgment and order dated 17.11.2014 passed by the Trial Court itself and without affording any opportunity to adduce evidence on the said issues, the suit was dismissed, which could not have been done. Since the issues were not framed after exchange of pleadings, therefore the parties could not know as to what evidence is to be adduced, therefore the judgment, order and decree passed by the Trial Court has been rightly and in accordance with law set aside by the Appellate Court and the Appellate Court remanded the case to decide a fresh as per the observations and directions issued by the First Appellate Court. Thus the submission is that the instant appeal has been filed on

misconceived and baseless grounds and it is liable to be dismissed.

5. He further submitted that the first appeal under Order-XLIII, Rule-1 (u) is in the nature of appeal under Section 100, therefore it could be decided only on the legal issues. He relied on **Narayanan Vs. Kumaran and Others; (2004) 4 SCC 26** and **J. Balaji Singh Vs. Diwakar Cole and Others; (2017) 14 SCC 207.**

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

7. The appellant filed a suit for permanent injunction against late Bhagwan Bux Singh, who was her father-in-law, for restraining him from alienating movable and immovable properties on the ground that the husband of the appellant late Rajesh Kumar Singh died on 27.04.2002 on account of ailment of brain cancer. Due to death of husband of the appellant, the late father-in-law of the appellant became mentally derailed. The husband of the appellant had earned money from agricultural land/ crops etc. and raised constructions in the year 1995 and shifted alongwith his family to Ganeshpur. She further alleged that the father in law of the appellant was intending to transfer / alienate the property in dispute under the influence of some relatives and in case he is not restrained from doing so, the appellant will suffer irreparable loss and injury as she has no other source of her livelihood and the property in suit is Joint Hindu Family property and the appellant has got right and title in the same. During pendency of the suit, late Bhagwan Bux Singh died, therefore the respondent no.1 i.e. Subhang Chauhan, minor son of Raj Kamal Singh Chauhan and Smt. Usha Chauhan; mother of the respondent no.1 was substituted. Smt. Usha Chauhan also died during pendency of the suit, therefore the respondent no.2 was substituted. The suit was amended and sale deeds dated 29.08.2002, 18.09.2002 and will dated 09.04.2008 were challenged with prayer for their cancellation.

8. Late Bhagwan Bux Singh filed the written statement. After his death, the substituted parties had not appeared, therefore the case had proceeded ex-party.

9. It appears that during pendency of the suit, the respondent no.1 had become major. The suit was decided by framing the issues in the judgment and order dated 21.11.2014 itself. The judgment and order dated 21.11.2014 was assailed by the respondents by filing the first appeal under Section 96 of C.P.C. The First Appellate Court after considering the grounds raised in the appeal and the record of the Trial Court and after affording opportunity to the parties passed the impugned judgment and order dated 12.08.2015 setting aside the judgment and order dated 17.11.2014 passed by the Trial Court and remanded the matter to the Trial Court with a direction to decide the suit a fresh after sufficient opportunity of written statement to the defendants and framing the required issues and affording opportunity of evidence to the parties on the same and hearing. Being aggrieved the instant appeal has been filed under Order-XLIII, Rule-1 (u) of C.P.C assailing the judgment and order passed by the Appellate court. The ground taken and pressed before this Court is that there was no illegality or error in the order passed by the Trial Court, even then if the first Appellate court was of the view that some issues were not framed and adjudicated by the Trial Court, the Appellate Court could

have decided the appeal after framing the additional issues and calling evidence and findings on the same from the Trial Court, instead of remanding the case for a fresh decision.

10. In view of above, the issue to be decided in this case is as to whether the Trial Court had decided the suit by passing an order in accordance with law, which does not suffer from any illegality or error,if not as to whether First Appellate Court has set-aside the judgment and order of the Trial Court and remanded the matter to decide a fresh rightly and in accordance with law or the first Appellate Court could have decided the appeal, after framing the issues and referring to the Trial Court with a direction to take additional evidence on the said issues and after trying the said issues send to the Appellate Court with it's finding thereon and considering the same.

11. To consider the aforesaid issue involved in this case, this Court will first consider as to whether the judgment and order passed by the Trial Court is in accordance with law and it does not suffer from any illegality or error.

12. The rule Rule-1 of Order-XIV of C.P.C provides about framing of issues. Sub-rule (1) provides that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub-rule (5) provides that at the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend, therefore the issues are required to be framed at the first hearing of the suit on the basis of the pleadings made in the plaint and the written statement on which right decision of the case appears to depend. Rule 2 (1) of Order-XIV provides that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub rule (2) of Rule 2 provides the order in which the issues may be decided. Rule 3 of order XIV provides as to from what material, the issues may be framed. Rule 4 order XIV provides that the court may examine witnesses or documents before framing issues. Rule-5 of Order-XIV provides that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. Sub rule (2) of Rules 5 of the Order XIV provides that the Court may also, at any time before passing a decree, strike out any issues which may be wrongly framed or introduced.

13. In view of above, after filing of plaint and written statement, the Court has to frame the issues on which the parties are at variance in their pleadings, as per the procedure provided in Order-XIV of C.P.C. which are required to be decided.

14. In the instant case, the Trial Court had passed the judgement and order without framing the issues and affording opportunity to adduce the evidence on the same and framing the issues in the judgment and order itself and considering the evidence taken prior to that, which may be for the purpose of framing issues. It is to

be noticed here that it is not a case in which the parties were not at issue, therefore it could have been decided under some provision of Order-XV of C.P.C. because the issues were framed in the judgment itself by the trial court.

15. Rule -1 of Order XVI provides that on or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court. Therefore it is apparent that after framing of the issues, the evidence is required to be adduced on the said issues.

16. Rule 1 of Order XVIII C.P.C. provides about right to begin by the plaintiff unless there is any preliminary objection. Rule 2 of Order-XVIII C.P.C. provides the statement and production of evidence. High Court amendment of Allahabad has substituted the Rule 2 w.e.f. 24.07.1926. Substituted sub rule (1) of Rule 2 provides that on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case indicating the relevancy of documents produced by him and the nature of oral evidence which he proposes to adduce and call his witnesses in support of the issues which he is bound to prove. Sub-rule (2) provides that the other party shall then state his case and produce his evidence (if any). Substituted Rule 2 of Order XVIII is extracted here-in-below:-

""2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)." (w.e.f. 24-7-1926)"

17. In view of above on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and call his witnesses to adduce evidence in support of the issues which he is bound to prove. Thereafter the other party shall do the same. Thus it is crystal clear that after exchange of pleadings the issues are required to be framed first by the court so that the parties may know the issues on which they are at variance and they have to adduce the evidence in support of which issue. Then the party who has to prove any issue framed by the court, can adduce the evidence in support of that issue. Whereas in present case the issues have been framed by the Trial Court in the judgment itself and the suit has been decided without affording opportunity to the parties to adduce evidence on the said issues and on the basis of the evidence taken otherwise, which has not been adduced on the said issues and may be for framing of issues, therefore the Trial Court has decided the suit without following the due procedure of law, which is a gross illegality in the eyes of law and the judgment and order passed accordingly is not sustainable at all in the eyes of law. The said judgment and order passed by the Trial Court was challenged in the first appeal accordingly.

18. Now the question arises as to whether in view of the aforesaid gross illegality and procedural lapse in the judgement and order passed by the Trial Court, the first Appellate Court has rightly and in accordance with law has set-aside the judgment and order of the Trial Court and remanded the matter for decision a fresh in accordance with the directions and observations or the Appellate Court could have framed the issues and referred the matter to the Trial Court for taking evidence on them and after trying called with it's findings and decided the appeal.

19. The provision of remand made in Rule-23, 23-A and 25 of Order XLI of C.P.C. are relevant for considering the above issue, which are extracted here-in-below:-

*"**23. Remand of case by Appellate Court.-** Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a cop of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.*

The Following Allahabad High Court Amendment has been made in aforesaid Rule 23:

a. (i) Insert he following after the words 'and the decree is reversed in appeal", namely:

"or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it"; and

(ii) delete the words "the Appellate Court" occurring thereafter and delete also the words

"if it thinks fit", occurring after the words "may".

*\ **23.(A)- Remand in other cases-** Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.*

***25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from. -** Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time.*

20. In view of above, Rule 23 as amended by the Allahabad High Court is 'where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal or where the Appellate

Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.' The aforesaid Rule 23(A) provides in regard to the appeal, which has been preferred against the decree which has been made otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23. In both the aforesaid rules, the power of First Appellate Court is one and the same as given in Rule 23 according to which, in case of reversal of a decree in appeal the Appellate Court may remand the case for re-trial. Rule 25 provides the contingencies in which the Appellate Court can frame the issues and refer the matter to the Trial Court for taking evidence on them and trying the said issues, who shall send then to the same with it's findings thereon to the Appellate Court and the Appellate Court can decide the appeal accordingly.

21. Rule 25 of Order XLI C.P.C. provides that where the court from whose decree the appeal is preferred has omitted to frame or try any issue or to determine any question of fact, which is essential to the right decision of the suit upon merits, the Appellate Court may frame the said issues and refer to the concerned court for trial of same after taking evidence and referring to the Appellate Court with it's findings and reasons thereon and then the Appellate Court may decide the appeal. Thus this procedure can be followed only if the Trial Court has omitted to frame or try any issue or determine any question of fact whereas in the present case the Trial Court has failed to follow the due procedure of law in deciding the suit as indicated above, therefore, this Court is of the view that this procedure could not have been followed by the Trial Court and it has rightly an in accordance with law has set-aside the judgment and order passed by the Trial Court and remanded the matter for a fresh decision.

22. The Hon'ble Supreme Court, in the case of **Syeda Rahimunnisa Vs. Malan BI (Dead) by L.Rs. and Another (supra),** has held that the power of the Appellate Court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of C.P.C. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand and the Appellate Court is required to record reasons as to why it has taken recourse to any one out of three Rules of Order XLI of C.P.C. for remanding the case to the Trial Court. Relevant paragraph 35 is extracted here-in-below:-

"35. *It is a settled principle of law that in order to claim remand of the case to the Trial Court, it is necessary for the appellant to first raise such plea and then make out a case of remand on facts. The power of the Appellate Court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of CPC. It is, therefore, obligatory upon the appellant to bring the case under any of these provisions before claiming a remand.*

The Appellate Court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of CPC for remanding the case to the Trial Court. In the absence of any ground taken by the respondents (appellants before the First Appellate Court and High Court) before the First Appellate Court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of CPC and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the Trial Court. The High Court instead should have decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals."

23. The Hon'ble Supreme Court, in the case of **Sree Panimoola Devi Temple and Others Vs. Bhuvanachandran Pillai and Others (Supra),** has held that if the plaintiffs had not led sufficient evidence to establish their case, as held by the High Court, ordinarily, that should have been the end of the matter and in such circumstances, remand of the suit for de-novo consideration virtually gives to the plaintiffs a second opportunity to establish their case. This Court is of the view that this judgment relied by the learned counsel for the appellant is not applicable on the facts and circumstances of the present case because in the present case the learned Trial Court has failed to follow the due procedure of law and afford opportunity in accordance with law.

24. The Hon'ble Supreme Court, in the case of **Jagannathan Vs. Raju Sigamani and Another (Supra),** has held that where the Trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the Appellate Court considered that retrial is necessary, the Appellate Court may remand the suit to the Trial Court. The relevant paragraph-7 is extracted here-in-below:-

"(7) Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the Appellate Court may remand the suit to the Trial Court even though such suit has been disposed of on merits. It provides that where the Trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the Appellate Court considers that retrial is necessary, the Appellate Court may remand the suit to the Trial Court."

25. The Hon'ble Supreme Court, in the case of **P. Purushottam Reddy and Another Vs. Pratap Steels Ltd. (Supra),** has held that the Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 C.P.C. and an unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided. This case is not applicable in the facts and circumstances of the present case because in the present case as discussed above and also as per the findings recorded by the First Appellate Court, the First Appellate Court has rightly and in accordance with law has remanded the case.

26. The Hon'ble Supreme Court, in the case of **Maya Devi (Dead) through LRs Vs. Raj Kumari Batra (Dead) (Supra),** has held that whether or not the Appellate Court should remit the matter is discretionary with the Appellate Court and

would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. The relevant paragraph- 17 is extracted here-in-below:-

"(17). *Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An Appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the Appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An Appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an Appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the Appellate Court should remit the matter is discretionary with the Appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the Appellate Court is of the view that it will prolong the litigation."*

27. The Hon'ble Supreme Court, in the case of **Narayanan Vs. Kumaran and Others (Supra),** has held that it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. The relevant paragraph-17 of the judgment is extracted here-in-below:-

"17. *It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand where it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V.Iyer and hold that the appellant under an appeal under order 43 Rule (1) clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot convass all the findings of facts arrived at by the Lower Appellate Court."*

28. The Hon'ble Supreme Court, in the case of **J. Balaji Singh Vs. Diwakar Cole and Others (Supra),** has considered the provisions of Order- XLIII, Rule-23, 23(A) and 25 of C.P.C. and under what circumstances remand could have been made and the power of this court under Order- XLIII, Rule-1 (u) of C.P.C., on being challenged an order of remand. The

relevant paragraphs 13 to 21 are extracted here-in-below:-

13. The main question, which fell for consideration before the High Court, was whether the first Appellate Court was right in remanding the case to the Trial Court for fresh trial on merits?

14. There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.

14.1. So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct the Trial Court to decide all the issues on evidence on record.

14.2. So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.

14.3. So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself.

15. Now coming to the facts of the case, we are of the considered opinion that once the first Appellate Court allowed the application under Order 41 Rule 27 of Code and took on record the additional evidence, it rightly set aside the judgment/decree of the Trial Court giving liberty to the parties to lead additional evidence in support of their case which, in turn, enabled the Trial Court to decide the civil suit afresh on merits in the light of entire evidence. The first Appellate Court was, therefore, justified in taking recourse to powers conferred on the Appellate Court under Order 41 Rule 23-A for remanding the case to the Trial Court. We find no fault in exercise of such power by the first Appellate Court.

16. In our considered view, the only error which the first Appellate Court committed was that it went on to record the findings on merits. In our view, it was not necessary to do so while passing the order of remand. The reason is that once the first Appellate Court formed an opinion to remand the case, it was required to give reasons in support of the remand order as to why the remand is called for in the case. Indeed, the remand was made only to enable the Trial Court to decide the case on merits. Therefore, there was no need to discuss much less record findings on several issues on merits. It was totally uncalled for.

17. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first Appellate Court and restored the judgment of the Trial Court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43 Rule 1(u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law then it could only remand the case to the first Appellate Court with a

direction to decide the first appeal on merits.

18. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule 1(u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43 Rule 1(u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43 Rule 1(u) which reads thus:-

"1(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court"

19. It is well settled law that the jurisdiction to decide the appeal on merits can be exercised by the Appellate Court only when the appeal is filed under Section 96 or 100 of the Code against the decree. Such was not the case here.

20. In the light of abovementioned discussion, we are of the opinion that the High Court had no jurisdiction to consider much less deciding the entire case of the parties on merits in such appeal.

21. We are also unable to agree with the High Court when it held that the first Appellate Court instead of remanding the case to the Trial Court should have heard the appeal on merits. This finding, in our view, is bad in law for the reason that firstly, it was not possible for the first Appellate Court to have recorded the evidence at the appellate stage.

29. In view of above, in the appeal under Order- XLIII, Rule-1 (u) C.P.C., the appellant is not entitled to agitate the questions of facts and this Court has to confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and the said rule confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. Therefore now the conclusions for remand by the first appellate court will be considered.

30. The first Appellate Court had made five points of determination, which are extracted here-in-below:-

"1. क्या प्रतिवादिनी सं०-3 श्रीमती उषा चौहान की मृत्यु के बाद उनके पति राज कमल सिंह को वाद में प्रतिस्थापित न किये जाने से मूल वाद की कार्यवाही दूषित है?

2. क्या प्रतिवादी सं०-2 शुभांग चौहान को किसी संरक्षक के जरिये पक्षकार न बनाने से मूल वाद की कार्यवाही दूषित है?

3. क्या प्रतिवादी सं०-3/1 असित चौहान को प्रतिस्थापित किये जाने के वाद उसे जबाबदेही के लिए सम्मन न भेजे जाने के कारण मूल वाद की कार्यवाही दूषित हुई है?

4. क्या वाद प्रस्तुत करने की वादिनी की अधिकारिता के संबंध में व वाद सुनवाई की दीवानी न्यायालय की अधिकारिता के संबंध में व याचित अनुतोष के कालवाधित होने के संबंध में विशिष्ट वाद बिन्दु विरचित न किये जाने से अवर न्यायालय की वाद कार्यवाही दूषित हुई?

5. क्या निर्णय के पूर्व दीवानी प्रकिया संहिता के आदेश 14 नियम 5 के तहत अवर न्यायालय द्वारा वाद बिन्दु विरचित न किये जाने से और निर्णय में ही वाद बिन्दु विरचित कर उस

पर पक्षकारों को साक्ष्य का अवसर न दिये जाने से अवर न्यायालय की वाद दूषित हुई है?"

31. While considering the 1st point of determination, learned First Appellate Court found that after death of Smt. Usha Chauhan, the defendant no.3 in the suit, her husband Ram Kamal Singh Chauhan was also required to be substituted in view Section 15 of the Hindu Succession Act and afforded opportunity to defend, according to which in pursuance of the will in favour of Smt. Usha Chauhan, after her death, her husband had also right in the said property. The will was not set-aside till the time of death of Smt. Usha Chauhan, therefore the Trial Court had passed the judgment and order without affording opportunity to Raj Kamal Singh Chauhan, who had right and title in the property in dispute after death of Smt. Usha Chauhan and before setting aside the will and the same could not have been set aside without affording the opportunity to him.

32. Section 15 of the Hindu Succession Act- 1956 provides general rules of succession in the case of female Hindus. Sub section (1) (a) of Section 15 provides that the property of a female Hindu dying intestate shall devolve upon the sons and daughters and the husband, which is extracted here-in-below:-

"15. General rules of succession in the case of female Hindus.—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

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33. In view of above, the suit could not have been decided without impleadment of husband of Smt. Usha Chauhan, the defendant no.3 and affording opportunity to him. This Court is of the view that the finding recorded by the first Appellate Court does not suffer from any illegality or error.

34. In regard to the 2nd point of determination, learned Appellate Court has found that while amending the suit for claiming the relief of cancellation of sale deed, the respondent no.1 was impleaded as defendant no.2. At the time of his impleadment he was minor, therefore he should have been impleaded through guardian. If he was not impleaded through guardian then court should have appointed some guardian but it was not done. Even after his attaining the age of majority during pendency of the suit he was not afforded opportunity to file the written statement and evidence, therefore the judgment and decree passed by the Trial Court against him is void.

35. The appellant before this Court, in the synopsis of this appeal, has stated that the respondent no.1 was substituted through his father as his guardian because he was minor, therefore, admittedly the respondent no.1 was minor at the time of his impleadment but he was not impleaded through guardian, which is apparent from the categorical finding recorded by the First Appellate Court which has not been assailed by the appellant, therefore by mentioning the aforesaid facts in the synopsis of this appeal the appellant has given the wrong fact before this Court and tried to mislead the court. This Court does not find any illegality or error in the findings recorded by the First Appellate Court in regard to

2nd point of determination because the guardian of a minor defendant is required to be appointed under Rule 3 of Order XXXII on an application moved on behalf of minor or plaintiff.

36. In regard to 3rd point of determination, learned First Appellate Court found that the respondent no.2 i.e. the defendant no.3/1 was substituted after death of Smt. Usha Chauhan and the substitution was allowed on 16.04.2014 holding the notice sufficient on the ground of passing of 30 days after sending of notice but after his substitution no notice was sent for filing the written statement and the case had proceeded ex-parte against him on 26.05.2014, which could not have been done.

37. In regard to the 4th point of determination, learned First Appellate Court found that the appellant had filed a suit for permanent injunction and amended the relief by adding a prayer for cancellation of sale deed and also the will deed after the death of defendant but no issue was framed in regard to the suit being time barred for the reliefs claimed, whereas the sale deed could not have been set aside without framing issue in this regard and deciding the same.

38. In regard to the 5th point of determination, the First Appellate Court has found that the Trial Court has decided the suit without framing the issues in accordance with Order-XIV, Rule-5 before the judgement and affording the opportunity to the parties, and the Trial Court had framed the issues while deciding the suit in the judgment itself. This issue has been discussed in detail by this Court above in this judgement and it has rightly and in accordance with law has been decided by the First Appellate Court.

39. The First Appellate Court has also held that the Trial Court has failed to record any finding while setting aside the sale deed as to whether it could have been set-aside or not, if the ex-parte injunction dated 13.09.2002 was not served on late Bhagwan Bux Singh before execution of sale deed on 18.09.2002 because it was served on 14.08.2003. It has further recorded that no finding has been recorded in regard to the mental condition of late Bhagwan Bux Singh, without which the suit could not have been decided.

40. In view of the aforesaid discussion and considering the over all facts and circumstances of the case, this Court is of the view that there is no illegality or error in the impugned judgement and order dated 12.08.2015 passed by the First Appellate Court in Civil Appeal No.105 of 2014; Subhang Chauhan and Others Vs. Smt. Renu Singh, which has been passed after considering the pleadings, hearing and recording findings and reasons for remand which does not suffer from any illegality or error and call for any interference by this Court. The grounds taken in this appeal are misconceived and not sustainable in the eyes of law. The appeal is misconceived and liable to be dismissed.

41. The appeal is, accordingly **dismissed**. No order as to costs.

42. Before parting with the case, this Court deems it appropriate, since the matter is old one, to provide that the Trial Court shall make it's earnest endeavour to decide the suit expeditiously and preferably within a period of one year in accordance with law

and as observed and directed by the First Appellate Court and the observations made in this order. The parties shall appear before the Trial Court on 04th April, 2024.

(2024) 3 ILRA 1376
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.03.2024

BEFORE

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

Government Appeal No. 1000325 of 2007
With other connected cases

State of U.P. ...Appellant
Versus
Jagdamba Prasad & Ors. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Ghulam Mohammad Kamil, Anil Kumar Maurya

Indian Penal Code,1860 – Sections 302, 34 & 201 – homicide – Government appeal against acquittal – criminal appeal against conviction – criminal revision by informant – alleged forcible carrying away of deceased from grove – alleged murder inside house of accused – body recovered near chak road – delay in lodging F.I.R. – unexplained delay gives room for deliberation and consultation – inconsistencies and contradictions in testimonies of P.W.1, P.W.2 and P.W.3 – unnatural conduct of witnesses – no witness to commission of murder – place of occurrence not proved – no forensic report linking blood stained weapon, clothes or soil – ocular evidence unreliable – suspicion howsoever strong cannot take the place of evidence – prosecution failed to prove case beyond reasonable doubt – view taken by trial court a possible view – no interference with acquittal – conviction based on conjectures and surmises – trial court imagined a story not suggested by prosecution – conviction perverse – conviction set aside – accused acquitted – Government appeal dismissed .

Criminal appeal allowed .

Criminal revision dismissed. (E-9)

Cases Cited:

1. State of Karnataka v. Gopalkrishna, (2005) 9 SCC 291.

2. Sudershan Kumar v. State of Himachal Pradesh, (2014) 15 SCC 666.

3. Dilawar Singh v. State of Haryana, (2015) 1 SCC 737.

4. Bindeshwari Prasad Singh v. State of Bihar, (2002) 6 SCC 650.

5. D. Stephens v. Nosibolla, AIR 1951 SC 196.

6. K. Chinnaswamy Reddy v. State of A.P., AIR 1962 SC 1788.

7. Akalu Ahir v. Ramdeo Ram, (1973) 2 SCC 583.

8. Pakalapati Narayana Gajapathi Raju v. Bonapalli Peda Appadu, (1975) 4 SCC 477.

9. Mahendra Pratap Singh v. Sarju Singh, AIR 1968 SC 707

(Delivered by Hon'ble Rajan Roy, J.)

(1) Heard Ms. Meera Tripathi, learned A.G.A. for the State and Mr. Anil Kumar Maurya, learned counsel for respondents no. 2 and 4 in Government Appeal No. 1000325 of 2007. Mr. G.M. Kamil, learned counsel for the appellant and Ms. Meera Tripathi, learned A.G.A. for the State have been heard in Criminal Appeal No. 1462 of 2007. Mr. Sanjay Kumar Yadav, learned counsel for the revisionist and Ms. Meera Tripathi, learned A.G.A. for the State have

been heard in Criminal Revision No. 398 of 2007.

(2) Respondent no. 3-Sant Ram has died in Government Appeal No.1000325 of 2007 and the appeal has abated as regards him so has Revision No.398 of 2007 in so far as it relates to him.

(3) At the very outset, it needs to be mentioned that out of the four accused, three, namely, Santram, Ramdev and Ramdas have been acquitted of the charge of murdering the deceased-Rajendra Kumar Verma and trying to destroy evidence punishable under Section 302, 34 I.P.C. and Section 201 I.P.C. whereas the fourth accused, namely, Jagdamba Prasad has been convicted and sentenced to life imprisonment.

(4) The State of U.P. has filed Government Appeal No.1000325 of 2007 against acquittal of the aforesaid three persons. Jagdamba Prasad has filed Criminal Appeal No.1462 of 2007 challenging his conviction vide impugned judgment and order dated 22.06.2007 passed by Addl. District & Sessions Judge, Ambedkar Nagar in Session Trial No.102 of 2004 arising out of Case Crime No.29 of 2004, P.S.-Haswar, District-Ambedkar Nagar holding him guilty for the offence punishable under Section 302 I.P.C. and sentencing him rigorous life imprisonment and a fine of Rs.10,000/- and in default thereof, to undergo further three months' simple imprisonment. The informant-Jais Ram Verma who is brother of the deceased has filed Criminal Revision No.398 of 2007 for setting aside acquittal of the earlier mentioned three accused and for punishing them with which they were charged.

(5) The prosecution case in nutshell is that in the night intervening 18/19.05.2004, deceased- Rajendra Kumar Verma was taken away forcibly by the accused while he was on a charpai in the grove and, by his side, his grand-father i.e. P.W.2-Ram Lakhan aged eighty years was sleeping. He was taken to the house of Jagdamba Prasad and was done to death, thereafter the body was thrown about 200 meters away near the Chak road. P.W.2 i.e. Ram Lakhan had seen the accused taking away the deceased from the grove and P.W.3 saw them throwing the body near the Chak road and running away.

(6) The distance of the police station from the scene of crime is about 10 Kms. The incident of carrying away Rajendra Kumar Verma from the grove is said to have taken place at about 10:00-10:30 P.M. The body is said to have been recovered at about 02:00-02:30 A.M. the same night and F.I.R. (Ex.Ka12) has been lodged in the morning i.e. on 19.05.2004 at 07:30 A.M. on the written tehrir of P.W.1 i.e. Jaisram Verma.

(7) Inquest was conducted between 07:30-09:00 A.M. on 19.05.2004. Post-mortem (Ex.Ka.10) was conducted on 19.05.2004 at 01:00 P.M.

(8) As per the post-mortem report, there were fifteen ante-mortem injuries on the body of the deceased and cause of death was shock and hemorrhage as a result of ante-mortem injuries.

(9) The weapon used to commit the crime i.e. two lathis and two sticks which were blood-stained were recovered from the house of Jagdamba Prasad allegedly on his pointing while he was on police custody on 19.05.2004 at 06:10 P.M. The accused-

Jagdamba Prasad and Sant Ram were arrested on 19.05.2004 itself. The other accused were arrested on subsequent date.

(10) The blood stained clothes worn by the accused-Jagdamba Prasad and Santram were also recovered on 19.05.2004 itself at the same time i.e. at 06:10 P.M. The plain and blood stained soil were collected from the scene of crime on 19.05.2004. Recovery memos in this regard are Ex.Ka.7, Ex.Ka.8 and Ex.Ka.9.

(11) Chargesheet was filed against all the four accused for the aforesaid offence. The case was committed by the Magistrate to the Sessions Court and the Sessions Court framed charges against the accused persons under Section 302, 34 I.P.C. and Section 201 I.P.C. on 20.01.2005.

(12) The prosecution produced as many as eight witnesses before the trial court. P.W.1-Jaisram Verma as already stated is brother of the deceased and is the informant. P.W.2-Ram Lakhan is grandfather aged eighty years who claims to have seen the accused carrying away the deceased while he was sleeping, from the grove. P.W.3-Bisai is said to have reached the grove on hearing the shouts of P.W.1 & P.W.2 and is said to have seen the accused throwing away the body from where it was ultimately recovered. He is a neighbour of the informant. P.W.4-Yogesh Shah, P.W.6-Nandlal and P.W.7-Rajveer Singh are the three Investigating Officers of the criminal case. P.W.5-Dr. Vivek Gupta is the Autopsy Surgeon. P.W.8-Ashok Kumar Singh is the Head Constable who made the entries in police records i.e. General Diary and lodged the F.I.R.

(13) As already stated, the trial court on a consideration of evidence before it acquitted three of the accused but convicted Jagdama Prasad and sentenced him to life imprisonment. Jagdamba Prasad is on bail.

(14) The contention of Ms. Meera Tripathi, learned A.G.A. was that Jagdamba Prasad has rightly been convicted by the trial court but it has erred in acquitting the other three accused P.W.2-Ram Lakhan has proved the factum of Rajendra Kumar being carried away by all the four accused from the grove where he was sleeping along with P.W.2 about 10:00 - 10:30 P.M. on 18.05.2004. P.W.2 had seen him being carried away and taken to the house of Jagdamba Pradad. Thereafter, the body was recovered near the Chak road from the field of Ramchander at about 02:00-02:30 A.M. the same night. Accordingly, the F.I.R. was lodged in the morning at about 07:30 A.M. P.W.3 has clearly testified having seen all the four accused throwing away the body and running away. The body of the deceased as is evident from the post-mortem report bore fifteen ante-mortem injuries and the cause of death was shock and hemorrhage as a result thereof. The Autopsy Surgeon has proved the post-mortem report and the injuries as also cause of death mentioned therein. The lodging of the F.I.R. considering the fact that the incident took place in the night and the police station was about 10 Kms. away was prompt. The motive for the murder was the illicit relation between the deceased and daughter of Jagdamba Prasad as has been testified by P.W.1. Therefore, the prosecution has proved its case against the accused beyond reasonable doubt but on minor discrepancies in the testimony of witnesses and purely on conjectures and surmises, trial court has acquitted the three accused while at the same time convicting Jagdama Prasad. Therefore, the judgment of

acquittal is liable to be set aside and the remaining three accused are also liable to be convicted and punished for the offence with which they have been charged.

(15) Sri Anil Kumar Maurya, learned counsel for the acquitted persons submitted that the testimony of P.W.1 to P.W.3 are unreliable in view of the inconsistencies in the same as also contradictions in their own testimonies. There are grave contradictions and inconsistencies in the prosecution case. The case has been improved from the stage of filing of F.I.R. to the recording of statement under Section 161 Cr.P.C. and even thereafter before the trial court. The F.I.R. was delayed and has been lodged after deliberation and consultation so as to falsely implicate the accused with ulterior motive and on account of prior rivalry and merely because, some of the accused were relatives or neighbours of the main accused- Jagdamba Prasad. There is no recovery of the lantern or torch which may have provided visibility for P.W.2 to see the incident in the grove. P.W.2 is an eighty years old person and as per oral testimony of the witnesses, he was unable to stand for long, therefore, it is highly unlikely that in the dark night when the incident took place, he could have seen any such incident. None of the witnesses are reliable. The accused were roped in merely on suspicion. The trial court has rightly acquitted Santram, Ramdev and Ramdas and the said judgment of acquittal does not require any interference especially in view of the law with regard to appeal against acquittal.

(16) Learned counsel for convicted Jagdama Prasad, Sri Kamil submitted that trial court has committed a grave error in convicting Jagdama Prasad by making out a new case different from the case of the prosecution which is absolutely impermissible in law. The trial court has convicted Jagdama Prasad purely on conjectures and on an imaginary story which was not even the case of prosecution. When three persons have been acquitted on the same evidence, there is no way that the fourth i.e. Jagdamba Prasad could have been convicted based on the same evidence. His conviction is based on conjectures or suspicion. Nobody has seen commission of the crime in the house of Jagdama Prasad. There are no independent witnesses of recovery of the weapon allegedly used in commission of the crime nor of recovery of the alleged blood stained clothes from Jagdamba Prasad. Moreover, there were similar recovery from Santram but he has been acquitted while Jagdama Prasad has been convicted. Motive has also not been proved. There are grave inconsistencies and contradictions in the prosecution case and testimonies of the witnesses, all of which have been ignored while convicting Jagdama Prasad. There is no forensic report to establish that the blood allegedly found on the lathis and dandas recovered or the blood stained clothes recovered from the accused-Jagdamba Prasad and Santram were of the deceased. There is no evidence to prove the guilt of Jagdamba Prasad yet he has been convicted. Therefore, the judgment of conviction is liable to be set aside.

(17) Sri Sanjay Kumar Yadav, learned counsel for the informant arguing in the revision for setting aside the acquittal of three other accused argued on the same lines as learned A.G.A. and for the same reasons he submitted that the acquitted persons are also liable to be convicted.

(18) As per the post-mortem report which has been proved by the Autopsy Surgeon (P.W.4), it is a case of homicide.

The question is whether the accused committed the offence of murder and destruction of evidence or not.

(19) There is no memo regarding recovery of the body on record and none has been prepared by either of the three Investigating Officers.

(20) The bloodstained and plain soil allegedly collected from the scene of crime which is the house of Jagdampa Prasad, even if they were sent for forensic examination, there is no such report to prove that the said samples matched.

(21) In fact, nobody has seen the commission of murder inside the house of Jagdamba Prasad. No blood has been found in the house of Jagdamba Prasad. Investigating Officer- P.W.4 has stated that the blood had been washed off but there is no such mention in the siteplan prepared. In fact, the siteplan does not even mention the grove where the initial crime of carrying of Rajendra Kumar while he was asleep had taken place which is a grave lapse on the part of the Investigating Officer.

(22) There is no forensic report with regard to blood stained weapon recovered from the accused-Jagdamba Prasad and Santram nor is there any such report with regard to blood stained clothes recovered from the said accused. There is also no report with regard to plain and blood stained soil allegedly collected by the Investigating Officer from the scene of crime. The siteplan has been prepared by the Investigating Officer (P.W.4) on the statement of P.W.1. In the siteplan, there is no mention of grove where the initial incident, where it is said that the deceased-Rajendra Kumar was carried away by the accused while he was sleeping on a charpai and P.W.2 was sleeping by his side, took place. This is a serious lapse on the part of the Investigating Officer.

(23) The distance of the police station from the scene of crime is 10-12 Kms. The initial incident in the grove is said to have taken place at about 10:00-10:30 P.M. on 18.05.2004. The body is said to have been recovered at about 02:00-02:30 A.M. the same night but the F.I.R. has been lodged at 07:30 A.M. in the morning. In the month of May, sun rises early. There is no explanation for this delay in lodging of the F.I.R. The unexplained delay in lodging of the F.I.R. gave room for deliberation and consultation and possible false implication may be on suspicion or for other reasons. This, of course, is apart from the fact that there are inconsistencies in the prosecution evidence with regard to the police reaching the scene of crime which will be dealt with hereinafter.

(24) P.W.1-Jaisram Verma has neither seen the first incident which occurred at about 10:00-10:30 A.M. when it is alleged that the accused carried away Rajendra Kumar from the grove towards the house of Jagdamba prasad nor has he seen commission of the crime in the house of Jagdamba Prasad nor has he seen the accused throwing away the body of the deceased near the chak road in the fields of Ramchander. His testimony is relevant only to the extent he says, on hearing the shouts of his grandfather (P.W.2) who was sleeping by the side of Rajendra Kumar (deceased) in the grove, he woke up and ran towards the grove which is situated about 200-250 meters and thereafter, he has testified that he raised an alarm whereupon other villagers woke up and they all went to the house of Jagdamba Prasad which was found to be locked and the women and

children of Jagdamba Prasad family were found standing outside the house. He has stated that house of Jagdamba Prasad is about 10-15 steps from the grove. It is about 20-25 steps away from the place where the grand-father was lying on a charpai in the grove. He has stated that they reached the house of Jadgamba Prasad within two-four minutes after running from the house i.e. after running from the house to the grove and to the house of Jagdamba Prasad. Considering the distance of house of P.W.1 from the grove which is 200-250 meters, even after taking into consideration that there may be open spaces in between, considering the age of P.W.2 who is said to be eighty years at the time of commission of the crime, it is highly unlikely that the voice of P.W.2 could have reached such a distance and P.W.1 could have reached the scene of crime immediate especially as he has stated that he was asleep in his house when he heard the voice of his grand-father and on hearing such shouts he rant towards the grove.

(25) In any case, the testimony of P.W.1 is relevant only to the extent aforesaid and it does not help the prosecution's case much as he is not a witness to either of the three important incidents which took place in the said night as already referred hereinabove.

(26) As regards seeing the accused while they were running away after throwing the body P.W.1 has stated that he did not see them running away but has stated that other witnesses had seen them. He has stated that when other witnesses were shouting and telling that the accused were running away, inspite of it, he did not see them running away. P.W.1 is aged about thirty years and must have had a good eye-sight presuming that there was visibility in the night at about 02:00-02:30 A.M. In this context, we have to keep in mind that P.W.3 who claims to have seen the accused was aged about 60-61 years on the date of the incident. Apart from it, no other witness has been produced who may have seen the accused running away after throwing the body of the deceased.

(27) P.W.1 has mentioned about his suspicion on seeing the door of Jagdamba Prasad's house locked that, his brother was being kept inside. He has admitted that southern wall of Jagdamba Prasad's house did not have any roof etc yet he did not try to find out from that side as to whether his brother was being kept inside or not. He has also not spoken about hearing any voice from inside the house. This is important as according to post-mortem report there were about fifteen ante-mortem injuries and if such injuries have been inflicted upon the deceased inside the house of Jagdamba Prasad and P.W.1 along with other witnesses had reached the house of Jagdamba Prasad within two or four minutes as claimed, then, obviously, they would have noticed something amiss.

(28) He has also not explained as to why in these circumstances, the police was not informed immediately and why the F.I.R. was lodged in the morning at 07:30 A.M. though as stated earlier, in the month of May, dawn would break early. P.W.1 has stated that the Daroga reached the village at 08:00 A.M. whereas P.W.2 says that Circle Officer reached the scene of crime in the night itself.

(29) In this context, it is relevant to mention that as per P.W.2, the police had reached the scene of crime in the night itself. He has clearly stated in his cross-examination that Circle Officer had reached

the scene of crime in the night when his lantern was still lit. He has also stated that Daroga had reached 02:30 A.M. in the night of the incident. P.W.3 has also testified that Daroga had reached the scene of crime at 02:30-03:00 A.M. the same night yet the F.I.R. has been lodged at 07:30 A.M. in the morning. In this context, we may also consider the statement of P.W.8-the Head Constable who had made the requisite entries in the police records and lodged the F.I.R. in the morning that the Chowkidar-Prabhu Dayal of the village had orally intimated the police in the night itself but Inspector was out in the area. This creates a doubt on the prosecution case especially in view of the delay in lodging of the F.I.R. as already discussed, about which no explanation has been offered by the informant who submitted the written tehrir on which the F.I.R. was lodged.

(30) P.W.1 has also not given any acceptable explanation as to why if the incidents happened in such a short time and he reached the house of Jagdamba Prasad within 2-4 minutes of hearing the shouts of his grandfather from the grove and he suspected that his brother was being held inside the house of Jagdamba and especially as he was accompanied by several other villagers 10 to 25 in numbers, no attempt was made in such an emergent situation to break the lock and enter the house or for that matter enter it from southern wall which did not have any roof, especially when, according to him, there was a motive on the part of Jadgamba Prasad on account of the alleged illicit relationship of the deceased with his daughter. No such attempt was made. Instead, he has stated that he along with the villagers tried to find out the whereabouts of his brother.

(31) There is no explanation as to why in these circumstances, he did not immediately reach to police station especially as he has stated that villagers owned motorcycle and jeep and one of them i.e. Raghunath also had a telephone and he has accepted the fact that in summers dawn breaks at about 04:00 A.M. Instead, he has stated that he went to the police station on a bicycle in the morning.

(32) P.W.1 has accepted the fact that he has not mentioned about the illicit relation between the deceased and daughter of Jagdamba in his written tehrir. He has accepted the fact that the he had not mentioned in the written tehrir / F.I.R. that the accused had carried his brother-Rajendra Kumar to the house of Jagdamba Prasad nor that this incident had been seen by his grandfather in torch light.

(33) In cross-examination, he has also stated that the distance between the house of Jagdamba where the crime of murder is said to have been committed and the place from where the body has been recovered is 200 meters. Now, considering the sequence of events mentioned hereinabove, if the villagers and P.W.1 and P.W.3 had reached the grove within two to four minutes as claimed by P.W.1 and four to six minutes as claimed by P.W.3 and they were searching for Rajendra Kumar in various groups then one fails to understand as to when the crime was committed and when the accused had the time to throw the body 200 meters away from the scene of commission of crime and why they were not seen by anybody taking the body out from the house of Jagdamba Prasad especially as it has come in the testimony of P.W.1 and P.W.3 that when they found the house of Jagdamba Prasad locked they immediately went towards the fields where

ultimately the body of the deceased was recovered. This creates a doubt on the entire prosecution case. In cross-examination, he has clearly stated that nobody had seen the accused carrying the body of the deceased and throwing it. When the witnesses shouted that the accused were running away even then he could not see where the accused were and what was the distance from where he was standing. As already stated, he is not a witness to the factum of body being carried away from the grove to Jagdamba Prasad's house nor of commission of crime at Jagdamba Prasad's house nor has he witnessed the accused throwing the body and running away near the Char road. His testimony is therefore of no significance for proving the prosecution case.

(34) P.W.2-Ram Lakhan is the grandfather who was sleeping by the side of Rajendra Kumar in the grove. He has stated that they were sleeping at the center of the grove. The measurement of the grove has been mentioned by him as sixteen lathas from north to south. He has also stated that the grove was a *kalmi bag* and the height of the mango trees was about 10 hands. The branches were about three hands above the ground. The initial incident happened at about 10:30 P.M., according to P.W.2. In this situation with the height of trees and the branches being only three hands above the ground considering that, he is an eighty years old person whose visibility would not be very good, he claims to have seen the accused carrying away Rajendra Kumar in the night.

(35) P.W.3 who is a neighbour of P.W.2 has clearly stated that P.W.2 did not have such strength so as to chase the accused-Jadgamba. This is inconsistent with the testimony of P.W.2 that he ran a few paces after the accused although he i.e. P.W.2 has himself stated that he cannot keep standing for long which also makes his testimony suspect. Moreover, P.W.3 has stated that when he reached the grove on hearing the shouts of P.W.1, he found P.W.2- Ram Lakhan standing near the charpai in the grove whereas P.W.2 has stated that he ran a few paces towards the house of Jagdamba and was only a few paces away from it which is inconsistent especially as the said charpai was at the centre of the grove which as stated by P.W.2 measured sixteen lathas from north to south. It has come in the testimony that it was a dark night.

(36) P.W.2 though initially he has stated that he was sitting on a charpai at a short distance from Rajendra Kumar when the latter shouted but, in his cross-examination, he has stated that he was feeling sleepy and was about to sleep and it is incorrect to say that he was sitting at the time of the incident, but immediately thereafter, he has stated that he has rightly testified in examination-in-chief that when his grandson was being carried away he was sitting. He has also stated that whatever has been stated by him today in the cross-examination i.e. 24.04.2006 was also correct, that is, he was sleeping and was also sitting. He has, however, stated that he did not see as to who was holding his grandson by the leg and who was holding his hands while carrying him away. None of them were carrying wooden sticks. Considering the age of this witness, the time of the offence and the testimony of P.W.3 and the contradiction in his own statement as to whether he was awake or sleep, it creates a reasonable doubt as to whether, in fact, he saw his grandson being carried away.

(37) In this context, he has spoken about a lantern being lit in the grove and also that he saw the said incident in torch light. However, there is no recovery of any torch.

(38) P.W.2 has further stated that he had seen the accused taking his grandson in the house of Jagdamba Prsad and also that they had not masked their faces. The accused belonged to the same village and in fact, they live nearby and if they were committing the crime in the dead of night in the grove when the grand-father was awake or was in such a position where he could be awakened, it is unlikely that they would not mask their faces and even if they did not, it is highly unlikely that they would allow the crime to be seen by the grandfather and they would in his presence while he was witnessing the incident take the body to the house of Jagdamba Prasad to commit the crime especially as house of Jadgamba Prasad is situated barely two lathas from the place where Rajendra Kumar (deceased) and P.W.2 were on the charpai in the grove.

(39) Moreover, if P.W.2 had seen them taking Rajendra Kumar inside the house of Jagdamba Prasad from the northern door then there was all the more reason for the villagers to have broke open the lock on the house of Jagdamba Prasad to enter it, so as to prevent any crime being committed or for that matter to immediately raise an alarm and awaken other villagers especially the Pradhan or to have informed the police immediately as at least one of the villagers i.e. Raghunath had a telephone and there were others who owned motorcycles and one of them Ramu Yadav even owned a jeep as has come in the testimony of P.W.1 himself. None of this was done and the villagers including the witnesses kept looking for Rajendra Kumar in and around the village till his body was recovered at 02:00-02:30 A.M. The crime, in fact, was committed during three to four hours of the time when the villagers and the witnesses came to know about the incident and during which they were looking for Rajendra Kumar. This appears to be highly unlikely.

(40) P.W.2 has stated that it took about half an hour for the villagers to reach the grove till then he and P.W.1 did not have the courage to approach the house of Jagdamba Prasad. Now, this is not consistent with the testimony of P.W.1 who says that they reached the house of Jagdamba Prasad after first going to the grove and talking to P.W.2 within two to three minutes and P.W.3 has stated that this happened within four to six minutes. P.W. 2 has stated that about 25 villagers had reached the scene. If it was so then they could have easily broken the lock of house of Jadgamba Prasad considering the sequence of events narrated by the witnesses. But this was not done. He has spoken about a suspicion that Rajendra must have been detained inside the house and murdered there but, this is a mere suspicion as nobody has seen this happening. Most important, in cross-examination, he has stated at one place that his grandson could not scream, therefore, there is no question of any scream being heard and they were strongly of the belief that his grandson was being held up in the house. Now, if the grandson did not scream then how P.W.2 has stated initially that he heard the shout of his grandson inside the grove, woke up and even ran a few paces behind the accused while they were carrying him away. This again is a contradiction in the testimony of P.W.2

himself. Suspicion howsoever strong cannot take the place of evidence.

(41) P.W.2 has stated that though the villagers went to the house of Jadgamba but they did not go to the house of any other accused. Now, this is inconsistent with the testimony of P.W.1.

(42) P.W.2 has stated that when all of them were looking for Rajendra they had not seen the accused-Jagdamba nor had anybody told him of having seen him. This is not consistent with the testimony of P.W.3 who has stated that the accused were running away after throwing the body and P.W.1 has stated that other witnesses had seen this though he had not.

(43) In view of the above discussion, we are of the opinion of P.W.2 is not reliable. His testimony does not inspire confidence in view of the inconsistencies and contradictions and especially in view of his age.

(44) At this stage, we take note of the fact that testimony of P.W.2 himself, who in fact was a witness to the alleged incident of Rajendra being carried away by the accused, was recorded on 04.06.2004. Being an eighty year old person, there is no evidence to the effect that he was not available at his house from the time of commission of crime till recording of his statement, as such, the statement of the Investigating Officer P.W.4 that he was not available at his house is also not acceptable. There is no explanation as to why the statement of this important witness has been recorded with such delay. This also creates a doubt on the prosecution case as it leaves scope for deliberation, consultation and false implication may be on suspicion or because of the motive being alleged.

(45) Prosecution case is not believable in view of unnatural conduct of the witnesses and other villagers in not entering the house of Jadgamba Prasad to find out whether Rajendra was being kept there or not. It appears that crime was detected only later and thereafter a story has been cooked up and that is why the F.I.R. has been lodged belatedly and the time lapse has been used to deliberate, consult and lodge the F.I.R. may be on suspicion or on account of the alleged motive of illicit relationship between the deceased and daughter of Jadgamba Prasad.

(46) P.W.3 is a neighbour of P.W.1 and P.W.2. He is a witness of body of the deceased being found and claims to have seen the accused running away after throwing it. This aspect has been dealt with earlier. There is no other witness who has spoken about having seen the accused throwing away the deceased's body and running away. P.W.1 who was present with P.W.3 did not see it. P.W.3 has stated that house of P.W.1 is near his house but the grove is far away. He has then stated that he reached the grove on hearing the shouts of P.W.1 and not P.W.2 which is inconsistent with the testimony of P.W.1 but, even if this is ignored, the fact is that an eighty year person (P.W.2) raised an alarm in the grove situated about 200-250 meters which was heard by P.W.1 and P.W.3, who claim to have reached the grove and the house of Jadgamba Prasad within two-four or four-six minutes which in the circumstances considering that it was a night appears to be unbelievable.

(47) He has stated in his cross-examination that they i.e. the witnesses and the villagers came to know that body of Rajendra has been taken out of the house of Jagdhamba whereupon P.W.1 stated that it was useless to stand outside his house. Accordingly, they went towards the field of Ramchander using the Kharanja. They did not go anywhere else to look for Rajendra. Now, this testimony of P.W.3 is not reliable. If the time lapse between the shouts of P.W.2 and the villagers and P.W.1 and P.W.3 reaching the house of Jagdamba Prasad is only four to six minutes then how and under what circumstance they came to know that the body had already been taken out of the house has not been proved. P.W.2, on the other hand, says that though P.W.1 reached there immediately, the villagers reached the grove after half an hour. There is no explanation for these inconsistencies in the prosecution case.

(48) The testimony of P.W.3 is also intriguing that they straightaway went from the house of Jadgamba to the field of Ramchander where ultimately the body was found and did not look anywhere else whereas the testimony of P.W.1 is something else. He has also supported the testimony of P.W.2 that they did not go to the house of other accused -Santram etc. but only went to the house of Jadgamba whereas P.W.1 has testified otherwise. It is also intriguing as to why they did not go to the house of other accused if P.W.2 had seen all the accused carrying away Rajendra from the grove.

(49) P.W.3 has stated that they were about eight to ten people looking for Rajendra and then they saw the accused running away after throwing the body of Rajendra in the field of Ramchander and that they had seen this incident from a distance of one bigha which is not far off, yet, even after an attempt to chase them, they could not catch them. As already stated, P.W.1 has denied seeing the accused at this time. There is no other witness who may have testified on the same lines. In fact, P.W.2 has also stated that nobody had told him about having seen the accused running away.

(50) Most important, the testimony of P.W.3 was recorded by the Investigating Officer on 04.06.2006 i.e. about fifteen days after the incident. In cross-examination, P.W.3 has stated that during this period, he was at his house and had not gone anywhere to attend any marriage etc. whereas the Investigating Officer has stated that he did not find P.W.3 at his house which is not acceptable in view of the testimony of P.W.3 himself. Thus, there is no explanation for delay in recording of statement of P.W.3 and it gives reasonable basis for opining that his statement was recorded subsequently after due deliberation and consultation and that he is a tutored witness, not at all reliable.

(51) P.W.3 has feigned ignorance as to why his statement about having seen the accused while running away has not been recorded by the Investigating Officer under Section 161 Cr.P.C.

(52) Most important, P.W.3 has also spoken/ testified about the Daroga reaching the scene of crime at 02:30-03:00 A.M. in the night when the crime was committed but the F.I.R. has been lodged at 07:30 A.M. in the morning. He has accepted the fact that his testimony was recorded by the Daroga 10-15 days after the incident.

(53) Prosecution has failed to prove that murder was committed inside the house of Jagdamba Prasad. Place of occurrence has not been proved. As already stated, there is no independent witness of recovery of the weapon allegedly used in commission of the crime nor of the blood stained clothes worn by the accused. There is no forensic report to link the blood found on the aforesaid with that of the deceased. There is no forensic report regarding blood soaked soil and plain soil collected from the alleged scene of crime having matched. Ocular evidence is unreliable. Rajendra Kumar is said to have been murdered in the house of Jagdamba Prasad but there is no evidence in this regard. P.W.2 is said to have seen the accused carrying away Rajendra Kumar while he was alive from the grove towards the house of Jagdamba Prasad but in view of the discussion made hereinabove his testimony is not reliable. P.W.1 has not seen any of the three incidents which constitute the crime. P.W.3 claims to have seen the accused throwing away the body of the deceased and running away but P.W.1 who was also present on the spot and is younger in age did not see the said incident. There is no other witness of this fact though several persons are said to have been present at that time.

(54) Moreover, at this stage, we may refer to the inquest report which was prepared in the morning and on a reading of it, we find that though there is no such requirement in law to mention the incidents which took place while committing the crime, the witnesses to the inquest, none of whom are witness of any of the incidents constituting the crime have opined that Jagdamba Prasad along with other accused had murdered the deceased inside his house at about 10:30 P.M. which is surprising as they could not have any such information.

(55) Considering the facts and evidence before us though it is a case of homicide, we are of the opinion that the prosecution has miserably failed to prove beyond reasonable doubt that the crime of murder was committed by the four accused. The trial court has rightly acquitted Santram, Ramdev and Ramdas and we see no infirmity in the judgment of the trial court acquitting these persons. The view taken by the trial court is a possible view, therefore, in view of decision of Hon'ble the Supreme Court in the case of **'State of Karnataka vs. Gopalkrishna'** (2005) 9 SCC 291; **'Sudershan Kumar vs. State of Himachal'** (2014) 15 SCC 666 & **'Dilawar Singh vs. State of Haryana'** (2015) 1 SCC 737, we see no reason to interfere with the judgment of acquittal.

(56) So far as Criminal Revision No.398 of 2007, preferred by the first informant to assail acquittal of respondents, namely, Santram, Ramdev and Ramdas is concerned, we find it relevant to refer Section 401(3) of Cr.P.C., which deals with the power of High Court while dealing with criminal revision which challenges the acquittal of respondents and seeks conviction thereof. For ready reference it is quoted hereinbelow:-

"401. High Court's powers of revision.

(1).....

(2).....

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction."

(57) In this regard Hon'ble the Supreme Court in the case of **'Bindeshwari**

Prasad Singh v. State of Bihar', (2002) 6 SCC 650 in para no.12 has held as under :-

"12. We have carefully considered the material on record and we are satisfied that the High Court was not justified in reappreciating the evidence on record and coming to a different conclusion in a revision preferred by the informant under Section 401 of the Code of Criminal Procedure. Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. The aforesaid sub-section, which places a limitation on the powers of the revisional court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party. (See D. Stephens v. Nosibolla [1951 SCC 184 : AIR 1951 SC 196 : 1951 Cri LJ 510] , K. Chinnaswamy Reddy v. State of A.P. [AIR 1962 SC 1788 : (1963) 1 Cri LJ 8] , Akalu Ahir v. Ramdeo Ram [(1973) 2 SCC 583 : 1973 SCC (Cri) 903] , Pakalapati Narayana Gajapathi Raju v. Bonapalli Peda Appadu [(1975) 4 SCC 477 : 1975 SCC (Cri) 543 : AIR 1975 SC 1854] and Mahendra Pratap Singh v. Sarju Singh [AIR 1968 SC 707 : 1968 Cri LJ 665] .)"

(58) Having regard to the provision contained in Section 401(3) Cr.P.C. and law laid down by Hon'ble the Supreme Court in **Bindeshwari Prasad Singh (supra)** coupled with the fact that in the preceding paragraphs we have held that the finding of acquittal of respondents by means of impugned judgment and order dated 22.06.2007 is based on proper appreciation of evidence which does not suffer from any infirmity or illegality. Therefore, we are of the considered opinion that the criminal revision also lacks merits, which deserves to be dismissed.

(59) As regards conviction of Jagdamba Prasad, on a reading of judgment of the trial court we find that a cryptic discussion is there in this regard towards the end. After having discarded every evidence, the trial court for the reasons best known to it has all of a sudden opined that on account of prior illicit relation between the deceased and the daughter of Jagdamba Prasad, as he was sleeping in the grove situated nearby the house of Jagdamba Prasad, the deceased-Rajendra entered the house of Jagdamba Prasad to meet his daughter but his entry and presence was detected and Jagdamba Prasad caught him.

Being infuriated, Jadgamba Prasad struck Rajendra Kumar with lathis and wooden sticks and injured him. Jagdamba Prasad throttled the deceased with the use of wooden stick resulting in his death sometime in the night and threw the body in the field of Ramchander. It has then opined that it is a case of circumstantial evidence. We can only say that the trial court has imagined a story which was not even suggested by the prosecution much less proved. This was never the case of the prosecution. Not much discussion is required to demonstrate the apparent error committed by the trial court while convicting Jagdamba Prasad. His conviction is based purely on conjecture and surmises which cannot take the place of evidence. Such conjectural findings cannot be the basis for his conviction.

(60) We are thus of the opinion that conviction of Jagdamba Prasad is perverse and is liable to be set aside. The judgment of the trial court so far as it convicts appellant-Jagdamba Prasad and sentences him to life imprisonment and imposes other sentence is liable to be set aside. It is accordingly set aside. The remaining part of the judgment, that is, so far as it acquits the other accused, is sustained.

(61) Jagdamba Prasad-the appellant is also acquitted of the charge framed against him. The appellant- Jagdamba Prasad is on bail. Bail bonds submitted earlier are cancelled and sureties are discharged. The appellant-Jagdamba Prasad is directed to file personal bond and two sureties in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure within six weeks.

(62) In view of the above discussion, the appeal of the State bearing Government Appeal No.1000325 of 2007 is dismissed. The appeal of the appellant-Jagdamba Prasad bearing Criminal Appeal No.1462 of 2007 is allowed. The revision of the informant bearing Criminal Revision No.398 of 2007 is dismissed.

(63) Let lower court record along with a copy of this judgment be sent to learned trial court for its information and necessary compliance.

(2024) 3 ILRA 1389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Habeas Corpus Writ Petition No. 47 of 2024

Kamalveer Singh ...Petitioner
Versus
Adhikshak Janpad Karagar, Moradabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar Mishra, Sri Chandrakesh Mishra, Sri Daya Shankar Mishra (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., G.A.

Civil Law -National Security Act, 1980 – Sections 3(2), 3(4), 10 & 11(4) – Constitution of India,1950 – Articles 14, 21, 22(3)(b) & 300A – Habeas Corpus – Preventive Detention – Public Order vs. Law and Order – Staleness of Grounds – Denial of Legal Assistance – Delay in Representation Disposal

The petitioner, Kamalveer Singh, sought a writ of habeas corpus challenging his preventive

detention under Section 3(2) of the National Security Act, 1980 (NSA), vide order dated 03.12.2023, confirmed on 03.01.2024, stemming from his alleged conspiratorial role in Case Crime No. 598 of 2023 (Sections 302, 307, 120B IPC), Case Crime No. 818 of 2023 (Section 7/25 Arms Act), and Case Crime No. 861 of 2023 (Section 3(1) U.P. Gangsters Act). The detention was based on a murder incident on 10.08.2023, which the St. claimed disturbed public order. The petitioner argued: (i) the incident was a law and order issue, not public order; (ii) no likelihood of bail existed, as his bail application in the IPC case was rejected and none were pending in other cases; (iii) he was denied legal assistance before the Advisory Board while the St. had legal aid; (iv) the detention was based on a stale incident (four-month gap); and (v) the U.O.I. delayed disposing his representation. Held: The court, relying on Icchu Devi Choraria Vs U.O.I. (AIR 1980 SC 1983), Mohinuddin Vs District Magistrate, Beed (AIR 1987 SC 1977), and other precedents, held that habeas corpus petitions require minimal pleading, and the burden lies on the St. to justify detention. The grounds of detention were vague, failing to establish a public order disturbance as per Dr. Ram Manohar Lohia Vs St. of Bihar (AIR 1966 SC 740) and Mrs. T. Devaki Vs Govt. of Tamil Nadu ((1990) 2 SCC 456). No likelihood of bail existed (Kamarunnissa Vs U.O.I. ((1991) 1 SCC 128)), as the petitioner's bail was rejected, and no applications were pending under the Arms or Gangsters Acts. Denial of legal assistance, despite the St.'s use of law officers, violated Article 14 and A.K. Roy Vs U.O.I. ((1982) 1 SCC 271). The four-month gap between the incident and detention order rendered the grounds stale (Alijan Mian Vs District Magistrate, Dhanbad ((1983) 4 SCC 301)). The Union's 10-day delay in disposing the representation (Rajammal Vs St. of Tamil Nadu ((1999) 1 SCC 417)) further vitiated the detention. The court quashed the detention order, allowing the petition and ordering the petitioner's release unless required in other cases.

Case Law Cited:

1. Icchu Devi Choraria Vs U.O.I., AIR 1980 SC 1983

2. Mohinuddin Vs District Magistrate, Beed, AIR 1987 SC 1977

3. Dr. Ram Manohar Lohia Vs St. of Bihar, AIR 1966 SC 740

4. Mrs. T. Devaki Vs Govt. of Tamil Nadu, (1990) 2 SCC 456

5. Kamarunnissa Vs U.O.I., (1991) 1 SCC 128

6. Baby Devassy Chully @ Bobby Vs U.O.I., (2013) 4 SCC 531

7. Abhayraj Gupta Vs Superintendent, Central Jail, Bareilly, 2022 (1) ADJ 451

8. Rekha Vs St. of Tamil Nadu, (2011) 5 SCC 244

9. A.K. Roy Vs U.O.I., (1982) 1 SCC 271

10. Choith Nanikram Harchandani Vs St. of Maharashtra, (2018) 2 SCC (Cri) 403

11. Najar Quraishi Vs Superintendent & Ors., Habeas Corpus Petition No. 3293 of 2018

12. Alijan Mian Vs District Magistrate, Dhanbad, (1983) 4 SCC 301

13. Mohd. Sahabuddin Vs District Magistrate, 24 Parganas, (1975) 4 SCC 114

14. Rajammal Vs St. of Tamil Nadu, (1999) 1 SCC 417

15. Shalini Soni Vs U.O.I., (1980) 4 SCC 544

16. Sheshdhar Misra Vs Superintendent, Central Jail, Naini, 1985 All LJ 1222

17. Arun Ghosh Vs St. of W.B., (1970) 1 SCC 98

18. Yusuf Malik Vs U.O.I., 2023 LiveLaw (SC)

19*. Ameena Begum Vs St. of Telangana, 2023 0 Supreme (SC) 825

20. Dipak Bose Vs St. of W.B., (1972) 2 SC 2686
21. Niyaz Ansari Vs Adhikshak, Janapad Karagar, Chitrakoot, Habeas Corpus Petition No. 622 of 2023

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Ram Manohar Narayan Mishra, J.)

1. This writ petition has been filed for the release of the petitioner – Kamalveer Singh, by issuing a writ of habeas corpus.

2. Brief background of the case is that on 10.8.2023 an incident took place whereby one Anuj Chaudhary was killed and a First Information Report was lodged on the same day which gave rise to Case Crime No. 598 of 2023 registered under Sections 302 and 307 IPC. There were four named accused in the case being Amit Kumar, Pushpendra, Aniket and Prabhakar and it was also alleged that there were some other persons who were not known to the First Informant. The First Information Report was got lodged by one Sandeep Singh.

3. Thereafter on 01.11.2023 on the basis of an added Section, namely, section 120B IPC, the petitioner was also implicated in the Case Crime No.598 of 2023 in a conspiratorial role. Further on 07.11.2023 in Case Crime No.818 of 2023, under Section 7/25 of the Arms Act, the petitioner was named in the crime. Still further, on 28.11.2023, the petitioner was implicated in Case Crime No.861 of 2023, under Section 3(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986. He was thereafter in jail.

4. Thereafter, on a report / proposal of the Police dated 30.11.2023, an order under Section 3(2) of the National Security Act, 1980, was passed wherein an order of detention was passed on 3.12.2023 by the District Magistrate for preventive detention of the petitioner.

5. Learned counsel for the petitioner has drawn the attention of the Court to the fact that the petitioner was not named in the First Information Report and only when there was a communication of the brother-in-law of the deceased, namely, Neeraj Khatri the name of the petitioner had surfaced. Thereafter in pursuance of the provisions under Section 3(4) of the National Security Act, 1980, on 12.12.2023 the order of approval was passed by the State Government. The order of preventive detention dated 3.12.2023 was also accompanied by the grounds of detention which were of the same date and they gave reasons on the basis of which detention had been made. In the order dated 3.12.2023 it was also provided that the petitioner could represent before the Advisory Board as is provided under Section 10 of the National Security Act, 1980. Simultaneously the petitioner was also given the opportunity to represent to the Union of India under Section 3(4) of the National Security Act. The petitioner thereafter on the order dated 3.12.2023 being approved under Section 3(4) of the National Security Act, 1980, represented to the Advisory Board by a representation dated 13.12.2023 and also sent his representation to the Union of India through the State Government on the very same date.

6. Thereafter on 16.12.2023 an alleged hearing was undergone and on 3.1.2024 the order of the State Government was passed by which the petitioner's detention order dated 3.12.2023 was confirmed in view of the report of the Advisory Board. The order dated 3.1.2024 provided the preventive detention of the

detenue for a period of 3 months, tentatively, from the date of detention.

7. The representation which was sent to the Union of India on 13.12.2023 was received by the Union of India on 22.12.2023 and, thereafter, it was rejected on 23.12.2023 and the communication of the rejection order was sent to the petitioner on 26.12.2023.

8. Learned counsel for the petitioner has submitted that the mere submission of the petitioner that the preventive detention was illegal was sufficient enough for the petitioner to approach this Court and that the State ought to have justified its stand in passing orders. It was sufficient for him to state that the detention order dated 3.12.2023 which was confirmed by the order dated 3.1.2024 was illegally passed and be set aside.

9. In this regard learned counsel for the petitioner relied upon the decisions of the Supreme Court in **Icchu Devi Choraria vs. Union of India** reported in **AIR 1980 SC 1983 and Mohinuddin @ Moin Master vs. District Magistrate, Beed and others** reported in **AIR 1987 SC 1977.**

10. In both the decisions learned counsel for the petitioner specifically relied upon paragraph no. 4. The paragraph no. 4 of **Icchu Devi Choraria vs. Union of India** reported in **AIR 1980 SC 1983** is being reproduced here as under:-

"4. It is also necessary to point out that in case of an application for a writ of habeas corpus, the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activise this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up before this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. This Court has on many occasions pointed out that when a rule is issued, it is incumbent on the detaining authority to satisfy the court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the law authorising such detention: Vide Naranjan Singh v. State of Madhya Pradesh; Sheikh Hanif, Gudma Majhi & Kamal Saha v. State of West Bengal, and Dulal Roy v. The District Magistrate, Burdwan & Ors. It has also been insisted by this Court that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with the provisions of the Act. It would be no argument on the part of the detaining authority to say that a particular ground is not taken in the petition. Vide Nazamuddin v. The State of West Bengal. Once the rule is issued it is the bounden duty of the Court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law. Vide Mohd. Alam v. State of West Bengal and Khudiram Das v. State of West Bengal & Ors.

11. Similarly the paragraph no. 4 of Mohinuddin @ Moin Master vs. District

Magistrate, Beed and others reported in AIR 1987 SC 1977 is being reproduced here as under:-

4. It was an improper exercise of power on the part of the High Court in disallowing the writ petition on the ground of imperfect pleadings. Normally, writ petitions are decided on the basis of affidavits and the petitioner cannot be permitted to raise grounds not taken in the petition at the hearing. The same rule cannot be applied to a petition for grant of a writ of habeas corpus. It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5). In return to a rule nisi issued by this Court or the High Court in a habeas corpus petition, the proper person to file the same is the District Magistrate who had passed the impugned order of detention and he must explain his subjective satisfaction and the grounds therefore; and if for some good reason the District Magistrate is not available, the affidavit must be sworn by some responsible officer like the Secretary or the Deputy Secretary to the Government in the Home Department who personally dealt with or processed the case in the Secretariat or submitted it to the Minister or other Officer duly authorised under the Rules of Business framed by the Governor under Art. 166 of the Constitution to pass orders on behalf of the Government in such matters: Niranjan Singh v. State of Madhya Pradesh, [1973] 1 SCR 691; Habibullah Khan v. State of West Bengal, [1974] 4 SCC 275; Jagdish Prasad v. State of Bihar & Anr., [1974] 4 SCC 455 and Mohd. Alam v. State of West Bengal, [1974] 4 SCC 463. "

12. Learned counsel for the petitioner has however argued on the merits of the case and has submitted that the provisions of National Security Act had been illegally invoked and that the petitioner was thus under the illegal detention.

13. Learned counsel for the petitioner submitted that:-

(i) The Central Government or the State Government could have detained the petitioner for the maintenance of public order and he has submitted that there was a difference between Public Order and a problem of law and order. Learned counsel for the petitioner has explained the difference between a law and order problem and the difficulty in maintaining public order and has submitted that, if there was a disturbance to public order, then the tempo of life of the community as a whole was disturbed. He has submitted that every assault in a public place like a public road which culminates in the death of any particular victim is definitely likely to cause horror and create panic and terror to those who are spectators, but it does not mean that all such incident necessarily cause disturbance or dislocation of the community life of the localities in which they are committed to such an extent that the State has to work towards maintenance of public order. He further submits that an act which is so grave or intense which would jeopardize the maintenance of public

order only then would the State invoke the provisions of the National Security Act, 1980 and would prevent a person from acting in a manner which would be prejudicial to maintenance of public order. In the instant case he has submitted that Anuj Chaudhary, as per the allegations made in the FIR and as per the letter written by his brother-in-law was having some money transactions between the parties and because of that the murder had taken place.

Learned counsel for the petitioner, therefore relying upon **1985 ALJ 1222 (Sheshdhar Misra v. Superintendent, Central Jail, Naini and others); 1966 1 SCR 709 (Dr. Ram Manohar Lohia v. State of Bihar); 1970 1 SCC 98 (Arun Ghosh v. State of West Bengal); 2023 LiveLaw (SC) (Yusuf Malik vs. Union of India & Ors.); 2023 0 Supreme (SC) 825 (Ameena Begum vs. The State of Telangana and others); 1972 2 SC 2686 (Dipak Bose v. State of West Bengal) and (1990) 2 SCC 456 (Mrs. T. Devaki vs. Government Of Tamil Nadu and Ors.)** has submitted that just because of any disorderly behaviour of a person in the public or just because of the commission of a certain criminal offence which would affect the law and order, lead a Government to take such actions which would result in the preventive detention of any individual, who according to the Government was indulging in acts which were prejudicial to maintenance of public order. He submits that not all law and order problems would affect the maintenance of public order.

Learned counsel for the petitioner has since heavily relied upon paragraph No. 18 of the Judgment in **Mrs. T. Devaki vs Government Of Tamil Nadu And Ors (supra)** the same is being reproduced as under:-

"18. The question which falls for consideration is whether single incident of murderous assault by the detenu and his associates on the Minister at the Seminar held at Dry Chilly Merchants Association Kalai Arangam Hall was prejudicial to the maintenance of public order. Any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality and it may also affect law and order problem but the same need not affect maintenance of public order. There is basic difference between law and order and public order, this aspect has been considered by this Court in a number of decisions, see: Dr. Ram Manohar Lohia v. State of Bihar (1966) 1 SCR 709: (AIR 1966 SC 740); Pushkar Mukherjee v. State of West Bengal (1969) 2 SCR 635 : (AIR 1970 SC 852) and Shymal Chakraborty v. Commr. of Police Calcutta, (1970) 1 SCR 762: (AIR 1970 SC 269). ***In these cases it was emphasised that an act disturbing public order is directed against individuals which does not disturb the society to the extent of causing a general disturbance of public peace and tranquility. It is the degree of disturbance and its effect upon the life of the community in the locality which determines the nature and character of breach of public order.*** *In Arun Ghosh v. State of West Bengal (1970) 3 SCR 288 : (AIR 1970 SC 1228), the Court held that the question whether a man has only committed a breach of law and order, or has acted in a manner likely to cause disturbance of the public order, is a question of degree and the extent of the reach of the act upon the society. This view was reiterated in Nagendra Nath Mondal v. State of West Bengal (1972) 1 SCC 498 : (AIR 1972 SC 665); Sudhir Kumar Saha v. Commr. of Police, Calcutta (1970) 3 SCR*

360 : (AIR 1970 SC 814); S. K. Kadar v. State of West Bengal (1972) 3 SCC 816 : AIR 1972 SC 1647; Kanu Biswas v. State of West Bengal (1972) 3 SCC 831 : (AIR 1972 SC 1656); Kishori Mohan v. State of West Bengal (1972) 3 SCC 845 : (AIR 1972 SC 1749) and Amiya Kumar Karmakar v. State of West Bengal (1972) 2 SCC 672 (AIR 1972 SC 2259)."

Learned counsel for the petitioner has also relied upon paragraphs no. 54 and 55 of the judgment in the case of **Dr. Ram Manohar Lohiya Vs. State of Bihar** reported in **AIR 1966 SC 740** and the same are being reproduced as under:-

*"54..... **Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder.** When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are.*

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

Learned counsel for the petitioner has, therefore, submitted that simply by saying that the murder of Anuj Chaudhary had caused disturbance of law and order and, therefore, public order was prejudiced was not the correct stand of the State Government. A comprehensive examination of the event and all the chain reactions that event had would have to be looked into.

(ii) Learned counsel for the petitioner has thereafter submitted that action under the National Security Act could have been taken only if there was a possibility of the petitioner being released on bail. In this regard learned counsel for the petitioner has relied upon the decisions of the Supreme Court in **Kamarunnissa vs. Union of India & Anr. : (1991) 1 SCC 128; Baby Devassy Chully @ Bobby vs. Union of India & Ors. : (2013) 4 SCC 531** and on the decisions this Court in **Abhayraj Gupta vs. Superintendent, Central Jail, Bareilly : 2022 (1) ADJ 451.**

Learned counsel for the petitioner has relied upon the averments made in the writ petition and has stated that it was very categorically stated in paragraph No. 28 of the writ petition that the petitioner's bail in Case Crime No. 598 of 2023, which was registered under Sections 302, 307 and 120B IPC was rejected and that there was yet no bail application moved in the Arms Act and in the Gangsters Act. These allegations, in the counter affidavit have not been successfully rebutted.

Learned counsel for the petitioner, therefore, submits that when there was absolutely no reason for the respondents to believe that petitioner would be moving out of the imprisonment then the provisions of the National Security Act ought not to have been invoked. While relying upon a decision of this court reported in **2022 (1) ADJ 451 : Abhayraj Gupta v. Superintendent, Central Jail, Bareilly,** learned counsel for the petitioner has stated that under the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986, a bail order was not granted as is granted for just any other offence under the IPC. Section 19 of the aforesaid act provides that public prosecutor shall be given an opportunity to oppose the bail application for such release and also when the public prosecutor opposes the bail application, the Court shall have to be satisfied that there were reasonable grounds for believing that the applicant was not guilty of the offence and that he was not likely to commit any offence while he was on bail. Learned counsel for the petitioner therefore submits that when there was absolutely no reason for the State to believe that the petitioner would be bailed out from jail in any of the three crimes he was involved in there, the invocations of the provisions of National Security Act was done without any application of mind.

Leaned counsel for the petitioner here has relied upon a judgment of the Supreme Court reported in **2011 (5) SCC 244 : Rekha v. State of T. Nadu TR. SEC.TO.GOVT. & Anr.** and has submitted that preventive detention is by nature repugnant to democratic ideas and an anathema to the rule of law. He submits that when by the ordinary law of the land the petitioner was already under a punitive detention then was not at all required.

Learned counsel for the petitioner has relied upon paragraphs No. 27, 29 and 30 of the above noted judgment reported in **2011 (5) SCC 244 : Rekha v. State of T. Nadu TR. SEC.TO.GOVT. & Anr** and the same are being reproduced here as under:-

" 27. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

……..

29. Prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can

deal with a situation, recourse to a preventive detention law will be illegal.

30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is : Was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal."

Concluding this argument learned counsel for the petitioner submitted that when there was absolutely no chance of the petitioner being bailed out in the cases where he was punitively detained then there was no doubt about the fact that the petitioner should not have been preventively detained.

(iii). Learned counsel for the petitioner, thereafter has submitted that when the petitioner had been served with the order dated 03.12.2023 and when he was asked by that order to represent before the Advisory Board, then the petitioner had through the jail authorities represented on 13.12.2023. The hearing was fixed for 16.12.2023. On that date, learned counsel for the petitioner has stated that even though the State Authorities were given the assistance of lawyers, the petitioners were deprived of any legal assistance. This statement has been made in paragraph 43 of the writ petition. This paragraph has been replied to in paragraph no. 30 the counter affidavit filed by the District Magistrate wherein he has stated that the contents of paragraph No. 43 of the writ petition do not pertain to the answering respondent. Further it is submitted that State has not given any parawise reply to the contents of the writ petition. This, learned counsel for the petitioner states would mean that though the State had the privilege of legal assistance, the petitioner was deprived of the same.

Learned counsel for the petitioner therefore, submits that the petitioner's interest was greatly prejudiced. He submits that as per the law laid down in the judgment of **Najar Quraishi Vs. Superintendent and three others passed on 19.09.2018 in Habeas Corpus Petition No.3293 of 2018,** assistance of legal advisors when had been extended in the form of Government Officials to the State, then the petitioner also ought to have been given the assistance of lawyers/Amicus Curiae etc. The judgment in Najar Quraishi has relied upon the judgment of the Supreme Court in **A.K. Roy Vs. Union of India and another**, reported in **(1982) 1 SCC 271** and on the judgement of **Choith Nanikram Harchandani v. State of Maharashtra and Others** reported in **(2018) 2 SCC (Cri) 403**. Since learned counsel for the petitioner has specifically relied upon paragraph No.93 of the judgment of **A.K. Roy Vs. Union of India and another**, the same is being reproduced herein as under:-

"93. We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or

the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not 'legal practitioners' or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them. Serving or retired Judges of the High Court will have no difficulty in understanding this position. Those who are merely 'qualified to be appointed' as High Court Judges may have to do a little homework in order to appreciate it."

Similarly the Apex Court in the case of **Choith Nanikram Harchandani (supra)** in paragraph 15 as held as hereunder :-

"15. In our considered opinion, since the detaining authority was represented by the officers at the time of hearing of the petitioner's case before the Advisory Board, the petitioner too was entitled to be represented through legal practitioner. Since no such opportunity was afforded to the petitioner though claimed by him, he was denied an opportunity of a fair hearing before the Advisory Board, which eventually resulted in passing an adverse order."

Therefore learned counsel submitted that when the petitioner was not granted any opportunity to have legal assistance and the State had then as per the law laid down by the Supreme Court, the detention becomes illegal.

(iv). Learned counsel for the petitioner has thereafter submitted that when the event which was taken into account for the invocation of the provisions of National Security Act had occurred on 10.08.2023 and the preventive detention order under Section 3(2) of the National Security Act was passed on 03.12.2023, the cause of action which formed the basis of the action taken under the NSA had become absolutely stale and, therefore, the provisions of National Security Act could not be evoked. For this purpose the learned counsel for the petitioner has relied upon the judgments of the Supreme Court in **Alijan Mian vs. District Magistrate, Dhanbad and others : 1983 (4) SCC 301; Md. Sahabuddin vs. District Magistrate, 24 Parganas and others : 1975 (4) SCC 114.** When the Division Bench of this Court in the case of **Abhayraj Gupta Vs. Superintendent, Central Jail, Bareilly** reported in **2022 (1) ADJ 451** had passed

the judgment on the basis of the fact that staleness could be a ground for releasing of detenu detained under the National Security Act, the judgments of the Supreme Court cited above had been dealt with in extenso. Paragraphs No. 36, 37, 38, 39, 40 and 41 of that judgment are relevant for the purposes of this case and these were the paragraphs which were relied upon by the learned counsel for the petitioner Sri Daya Shankar Mishra and they are being reproduced as under:-

"36. Now we proceed to examine the second ground of challenge, i.e. that the incident which took place on 02-12-2019 is a stale incident which is not proximate to the time when the detention order was passed on 23-01-2021 and there was no live link between the alleged prejudicial activity and the purpose of detention and for this reason, the invocation of the provisions of the NSA, 1980 after a long delay of about 14 months was neither warranted nor justified.

37. Sri D. S. Misra, learned Senior Advocate appearing for the petitioner has placed reliance on the following dictum of the Hon'ble Supreme Court in the case Ali Jaan Miyan Vs. District Magistrate, Dhanbad, (1983) 4 SCC 301:-

".....when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily explained such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the court has to investigate whether the casual connection has been broken in the circumstances of each case.

39. In the instant case, the last offence was committed on 3-6-1993 and the detention order was passed on 4-5-1994. No explanation is forthcoming in the return. It is argued that the S.P.'s report states that the detenu was absconding and case was filed under S. 299, Cr.P.C. The period during which he was allegedly absconding is not disclosed. In these circumstances, we are of the opinion that the live link between the alleged incident or the series of incidence and the detention order is snapped and there is no proximity between the crime committed and the order of detention."

38. In Jagan Nath Biswas v. State of W.B., (1975) 4 SCC 115, the Hon'ble Supreme Court quashed the detention order holding that

"2. The incidents themselves look rather serious but also stale, having regard to the long gap between the occurrences and the order of detention. One should have expected some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at."

39. In Mohd. Sahabuddin v. Distt. Magistrate, 24 Parganas, (1975) 4 SCC 114, the Hon'ble Supreme Court quashed the order of preventive detention on the sole ground that the order of preventive detention was passed nearly seven months after
the criminal incident.

40. In Shalini Soni v. Union of India, (1980) 4 SCC 544, the Hon'ble Supreme Court while examining the validity of a détention order held as follow:-

".....It is an unwritten rule of the law, constitutional and administrative, that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the

irrelevant and the remote...." (emphasis supplied)

41. In the present case, the incident in question took place on 02-12-2019, the petitioner was arrested on 22-12-2021, he was lodged in jail on 23-12-2021 and he was continuing to be in custody till 23-01-2021 - the date on which the impugned order of prevention was passed. The incident which occurred on 02-12-2019, i.e. about 14 months prior to passing of the detention order, is certainly a stale incident which is not proximate to the time when the detention order dated 23-01-2021 was passed and there was no live link between the alleged prejudicial activity and the purpose of detention and the invocation of the provisions of the NSA, 1980 against the petitioner after a long delay of about fourteen months was neither warranted nor justified."

(v). Learned counsel for the petitioner while relying upon the judgment of the Supreme Court in **2011 (5) SCC 244 : Smt. Rekha Vs. State of Tamil Nadu and another** has submitted that preventive detention was an extreme action which a State takes. This preventive detention is done in addition to the punitive detention which is done in the actual case which gives rise to the preventive detention and therefore, the State should be circumspect in taking action under the National Security Act, 1980. He therefore, submits that when the representation is made to the Advisory Board, simultaneously representation is also provided for being made to the Central Government (as an added handle to the detenue to place his/her case before the Central Government).

Learned counsel for the petitioner, therefore, has submitted that when the petitioner had represented to the Central Government on 13.12.2023 from Moradabad Jail, then the representation ought to have reached the Central Government in Delhi within a few hours, but in the instant case, as has been stated in the counter affidavit filed by the Union of India, the representation which started from its initial place of origin on 13.12.2023 reached the Ministry of Home Affairs on 22.12.2023 and after the matter was looked into by the Central Government, the Joint Secretary of the Central Government, rejected the same on 23.12.2023 and the information of the rejection reached the petitioner on 26.12.2023.

Learned counsel for the petitioner relying upon **1999 (1) SCC 417 : Rajammal vs. State Of Tamil Nadu And Another** has submitted the very fact that the representation was looked into in a most tardy manner and the decision was taken after almost 10 days renders the preventive detention illegal as has been held in the case of **Rajammal Vs. State of Tamil Nadu and another (supra).** The delay in that case was of 5 days and the Supreme Court on that basis had released the detenu considering the preventive detention as illegal. Paragraph No.11 of the judgment Rajammal Vs. State of Tamil Nadu and another (supra) is being reproduced herein as under:-

"11. We are, therefore, of the opinion that the delay from 9.2.1998 to 14.2.1998 remains unexplained and such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed. We therefore allow this appeal and set aside the impugned judgment. We direct the appellant-detenu to be set at large forthwith."

Apart from the above, arguments learned counsel for the petitioner has submitted that petitioner was given only a conspiratorial role. He was not present at

the spot when the actual event had taken place and he has submitted that the provisions of the National Security Act had not been invoked against the named assailants in the first information report.

14. Sri P.C. Srivastava, learned Additional Advocate General, assisted by Sri Amit Sinha, however, has opposed the writ petition and has submitted that if the grounds of detention are seen then it becomes evident that the incident which had occurred on 10.08.2023 was such an incident which had disturbed public order of the area. It was not just a law and order problem. He further submits that the chronology of events becomes important. On 10.08.2023 the incident had occurred and thereafter when the petitioner was jailed on 1.11.2023 in pursuance of the addition of Section 120B IPC in Case Crime No.598 of 2023 and thereafter on 04.11.2023 itself a bail application was moved for the release of the petitioner in Case Crime No.598 of 2023.

15. Learned counsel for the State has further stated that as per Section 11(4) of the NSA, there was absolutely no entitlement for the petitioner to be represented through any legal practitioner.

16. Sri Arvind Singh, learned counsel appearing on behalf of the Union of India submitted that there was no delay in the decision taken by the Union of India.

17. Having heard Sri Daya Shankar Mishra, learned Senior Advocate assisted by Sri Chandrakesh Mishra and Sri Abhishek Kumar Mishra, learned counsel for the petitioner; Sri P.C. Srivastava, learned Additional Advocate General assisted by Sri Amit Sinha, learned A.G.A. for the State and Sri Arvind Singh learned counsel for the Union of India, we are of the view that the writ petition deserves to be allowed and the petitioner be released from preventive detention.

18. From the arguments, which have been placed before us, we find that the grounds of detention were absolutely vague. No specific grounds had been taken as to how public order was being disturbed and only bald statements have been given out in the grounds of detention that when the incident had taken place, the locality had got disturbed. If the law as has been laid down by our Courts is perused, it becomes clear that a distinction has to be drawn between what is a law and order problem and what exactly is a disturbance of public order.

19. In **1985 All LJ 1222 : Sheshdhar Misra vs. Superintendent, Central Jail Naini and Ors.**, which is a Full Bench decision of this Court, the High Court has said that the order of detention could not be passed in a mechanical manner without any application of mind. The Authority concerned had to compulsorily look into the fact as to whether the disorder created by the event was a temporary disorder or whether it was such a disorder which would absolutely put the society out of gear and there would be difficulty in maintaining of public order.

20. The Judgment of the Supreme Court in **Dr. Ram Manohar Lohia vs. State of Bihar** reported in **AIR 1966 SC 740** has held that public order was set to embrace more of the community than just the law and order of the area. Public order is an even tempo of the life of a community taking the country as a whole or even a specific locality. Disturbance of public order is to be distinguished from the acts

directed against the individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. In that judgment, it has been stated that degree of disturbance and its effect upon the life of the community in a locality determines whether the disturbance amounts only to a breach of law and order or whether there was a problem of maintenance of public order. In the instant case, we find that the event of murdering of **Anuj Chaudhary** had happened on 10.08.2023; the case was registered as Case Crime No. 598 of 2023 under Section 302/307 of IPC and only **Amit Kumar, Pushpendra, Aniket and Prabhaker** were the named assailants. The F.I.R. had further mentioned about certain unknown assailants. The petitioner, however, was involved only when the brother-in-law of the deceased had mentioned the name of the petitioner in a letter written to the Superintendent of Police on 29.08.2023 and thereafter the petitioner was arrested on 01.11.2023 and that too in a conspiratorial role. Further we find that under the Arms Act, the crime of which was numbered as Case Crime No. 818 of 2023, the petitioner was jailed on **07.11.2023** and with regard to the Gangster's Act, the petitioner's arrest took place on 28.11.2023. The grounds of detention have only mentioned that the petitioner's relatives, after the arrest of the petitioner in Case Crime No. 598 of 2023 on 01.11.2023, had moved a bail application on 04.11.2023. No ground in the "Grounds of Detention" has been mentioned that any bail was moved with regard to the Arms Act and the Gangsters Act. It may be mentioned over here that the bail in the Gangsters Act cannot be obtained without a service of notice on the Public Prosecutor and without the Court being satisfied that the accused would be on the culmination of trial, acquitted.

21. We are, therefore, of the view that the grounds taken in the "Grounds of Detention" which accompanied the detention order dated 03.12.2023 were absolutely vague and that there was no definite conclusion that maintenance of public order was being endangered. Still further, we are of the view that when there was absolutely no chance of the petitioner being released on bail, the provisions of National Security Act, 1980 ought not to have been invoked. The petitioner was jailed on 01.11.2023 in Case Crime No. 598 of 2023 and the bail application as was moved in Case Crime No. 598 of 2023 only after the inclusion of Section 120-B of IPC. This application was rejected on 17.11.2023 by the Sessions Court. There was, on that particular date, no further bail application pending with regard to the Case Crime No. 818 of 2023 under the Arms Act and in the Case Crime No. 861 of 2023 under the Gangsters Act.

22. We are thus of the view that when there was no possibility of the petitioner being released on bail and the petitioner was continuing under punitive detention, then as per the judgments of the Supreme Court passed in **Kamarunnissa vs. Union of India & Anr. : (1991) 1 SCC 128; Baby Devassy Chully @ Bobby vs. Union of India & Ors. : (2013) 4 SCC 531** and of this Court in **Abhayraj Gupta vs. Superintendent, Central Jail, Bareilly : 2022 (1) ADJ 451** the petitioner could not be detained under the preventive detention laws.

23. Still further, we are of the view that when the State had taken the legal help of Law Officers then as per the case of **Najar Quraishi vs. Superintendent & Ors. (Habeas Corpus Writ Petition No.3293 of 2018 decided on 19.9.2018)**

which relied upon the decision of the Supreme Court in **A.K. Roy vs. Union of India : (1982) 1 SCC 271** and **Choith Nanikram Harchandani vs. State of Maharashtra & Ors. : 2018 2 SCC (Crl.) 403,** the petitioner ought to have compulsorily been given the legal assistance, specially when the petitioner in his representation had asked for one. This having not been done, we are of the view that the detention order becomes unsustainable in the eyes of law. This is what has also been held by this Court in **Niyaz Ansari vs. Adhikshak, Janapad Karagar, Chitrakoot & Ors.; Habeas Corpus Petition No.622 of 2023 decided on 19.1.2024**

24. The next argument, which the petitioner's counsel had made was that action which was taken under the National Security Act was stale one. Learned counsel for the petitioner had relied upon a judgment of this Court in **Abhayraj Gupta vs. Superintendent, Central Jail, Bareilly : 2022 (1) ADJ 451** and has submitted that there was absolutely no live link between the event which occurred on 10.08.2023 and the detention order which was passed on 03.12.2023. As has been argued by learned counsel for the petitioner, the judgments of **Ali Jaan Miyan vs. District Magistrate, Dhanbad : (1983) 4 SCC 301 ; Jagan Nath Biswas vs. State of West Bengal : (1975) 4 SCC 115 ; Mohd. Sahabuddin vs. District Magistrate, 24 Parganas : (1975) 4 SCC 114** and **Shalini Soni vs. Union of India : (1980) 4 SCC Page 544** become relevant for the decision of this issue.

25. We definitely find that after 10.08.2023, when the incident took place, there was some ruffle in the society but subsequently everything had quietened down. The order under the National Security Act for detaining the petitioner under preventive detention was passed 03.12.2023. By that time, definitely the upheaval in the society, if there was any, had quietened down and, therefore, a stale event ought not to, definitely, have been used for the purposes of the invocation of the National Security Act.

26. We also find that the representation which was sent by the petitioner on 13.12.2013 to the Union of India had for reasons best known to the Authorities concerned reached the Authority of the Central Government on 22.12.2023 and it was subsequently rejected thereafter on 23.12.2023 and the rejection order was communicated to the petitioner only as late as on 26.12.2023. In view of the decision of the Supreme Court in **Rajammal vs. State of Tamil Nadu & Anr. : (1999) 1 SCC 417** also the detention order therefore becomes bad in the eyes of law.

27. Having considered all the arguments of the learned counsel for the parties, we are definitely of the view that the petitioner ought to be released after having found that the order dated 03.12.2023 could not be sustained in the eyes of law.

28. Before parting with the case, we may mention that the law of habeas corpus is dealt with in a most technical manner. The writ of habeas corpus could have been issued upon finding :-

(i) the authorities had invoked National Security Act despite the fact that there was no requirement of preventively detaining the detenue for the maintenance of public order;

(ii) there was no chance of the petitioner/detenue being released on bail in the cases in which he was punitively detained;

(iii) the petitioner was not given the assistance of lawyers/amicus curiae when the State was given the assistance of law officers;

(iv) a stale event was taken into consideration for the invocation of the provisions of National Security Act; and

(v) the Union of India had delayed the decision on the representation sent by the petitioner.

29. However, we have dealt with all the issues raised in the case as were argued at length by learned counsel for the petitioner and also we felt that a decision on all the points had to be given.

30. We may reiterate that a finding on just any of the above issues in favour of the detenue would have resulted in the issuing of a writ of habeas corpus and thereafter the release of the detenue.

31. The writ petition is, accordingly, allowed. The order dated 03.12.2023 which was confirmed on 03.01.2024, for the reasons stated above is, therefore, set aside. The petitioner-Kamalveer Singh (detenue) be set at liberty unless he is required in any other case.

(2024) 3 ILRA 1404
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 810 of 2023

Abdia Arif (Minor) D/O Mohd. Shan Arif ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohammad Sadab Khan

Counsel for the Respondents:
G.A., Sri Suresh Kumar Gupta

Habeas Corpus - Guardians and Wards Act, 1890 - Sections 7, 17, 25 - Family Courts Act, 1984 - Section 7 - Muslim Personal Law - Petition filed on behalf of a 7-year-old minor girl seeking release from custody of her grandmother and uncle (respondent nos. 4 and 5) after father's death (16.07.2020) and mother's remarriage (11.09.2022). Mother, who left the child with respondents, filed a custody case (Case No. 92/2023) under Guardians and Wards Act, 1890, pending before Family Court, which granted interim visitation rights. Under Muslim Personal Law (Mulla, Principles of Mahomedan Law, Sections 352, 354), mother is entitled to custody (hizanat) of a female child until puberty, but loses this right upon remarriage to a stranger, with right reviving upon dissolution of such marriage. Habeas corpus not entertainable as custody with respondents not prima facie illegal, and welfare of the child is paramount. Court declined to exercise extraordinary jurisdiction due to disputed facts and pending custody proceedings, directing parties to agitate claims before Family Court. Petition dismissed without prejudice to pending guardianship proceedings. (Paras 7-24)

Petition Dismissed.

Case Law Cited:

1. Ujaif @ Noor Alam Vs St. of U.P., (not specified in detail) (Para 20)

2. Master Mahib Sajjad Masood Vs St. of U.P., (not specified in detail) (Para 20)

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

1. Heard Sri Mohammad Sadab Khan, learned counsel for the petitioner, Sri Pankaj Saxena, learned AGA-I appearing for the State-respondents and Sri Suresh Kumar Gupta, learned counsel appearing for the respondent nos.4 and 5.

2. The present petition seeking a writ of habeas corpus has been filed on behalf of the petitioner, a minor of age about seven years.

3. The facts of the case as pleaded in the petition are that the father of the *corpus*, Mohammad Shan, died in a road accident on 16.07.2020 and thereafter, on 11.09.2022, the mother, Zubairiya Shan, solemnized a second marriage with one Mohammad Siraj. The petitioner-*corpus*, at the relevant point of time, was in custody of the respondent nos.4 and 5 (mother and brother of the deceased father of the *corpus*, respectively).

4. It is sought to be contended that mother had been assured by the respondent nos.4 and 5 that the custody of the petitioner-*corpus* would be handed over to her in due course.

5. It has been pleaded in the petition that Case No.92 of 2023 (Smt. Zubairiya Shan Vs. Smt. Akhtari Begum and others), under Sections 25 of the Guardians and Wards Act, 18901 and Section 7 of the Family Courts Act, 1984, was instituted by the mother of the *corpus*, seeking her custody, and the same is pending.

6. A counter affidavit has been filed on behalf of the respondent nos.4 and 5 wherein it is asserted that the proceeding under Section 7/10 of the GWA, bearing Case No.250 of 2022 (Smt. Akhtari Begum Vs. Smt. Zubairiya Shan), is pending wherein upon an application by the mother, the Family Court has granted visitation rights as an interim measure.

7. It is not a case of the mother, Smt. Zubairiya Shan, that the custody of the petitioner-*corpus*, at any point of time, was forcibly taken away from her by the respondent nos.4 and 5. Rather, it is her own case that when her second marriage was solemnized, she on her own, left the petitioner-*corpus* in the custody of the respondent nos.4 and 5.

8. The law relating to guardians and wards is governed in terms of the GWA and an order with regard to guardianship upon an application filed by a person claiming entitlement may be passed under the aforesaid enactment.

9. Section 17 of the GWA relates to matter to be considered by the Court in appointing guardian and in terms thereof it is provided that the Court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of the minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA.

10. It is common ground between the parties that insofar as the question of custody is concerned, their rights are to be governed by the personal law.

11. The matters relating to "Guardianship of Person and Property" are provided under Chapter XVIII of Mulla, Principles of Mahomedan Law2 and Part-A thereof pertains to "Appointment of Guardians". In terms of Section 349, all applications for the appointment of a

guardian of the person or property or both of a minor are to be made under the GWA. Further, Section 351 of Mulla, Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the Court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

12. The subject matter relating to "Guardianship of a Person of a Minor" is dealt with under Part-B of Chapter XVIII of Mulla, Principles of Mahomedan Law, and the right of mother to the custody of infant children is governed under Sections 352 and 354 thereof, which are extracted below:-

"**352. Right of mother to custody of infant children.**—The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.

354. Females when disqualified for custody.—A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody—

(1) if she marries a person not related to the child within the prohibited degrees (260-261), e.g., a stranger, but the right revives on the dissolution of marriage by death or divorce; or,

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take proper care of the child."

13. The aforesaid provision indicates that the mother is entitled to the custody (*hizanat*) of her female child until she has attained puberty. This right continues though she is divorced by father of the child, unless she marries a second husband in which case the custody belongs to the father.

14. The disqualifications effecting females are contained under Section 352 which, *inter alia*, provides that a female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody, if she marries a person not related to the child within the prohibited degrees, e.g. the stranger, and the right revives on the dissolution of marriage by death or divorce.

15. The claim with regard to the custody of the petitioner-*corpus*, by her mother, if any, would accordingly, have to be examined in the light of the facts of the case and on the basis of the aforestated legal propositions, in proceedings instituted before the appropriate forum.

16. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown.

17. The principal duty of the Court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

The principle is well settled that in such matters the welfare of the child is of paramount consideration.

18. In child custody matters, habeas corpus proceedings may not be utilized to justify or examine the legality of the custody. The power of the Court in granting the writ is qualified only in cases where detention of a minor is by a person not entitled to his/her legal custody. For the exigence of a writ, it would be required to be proved that the detention of the minor child is illegal and without any authority of law, and that the welfare of the child requires that the present custody should be changed.

19. In a case where facts are disputed and a detailed inquiry is required, the Court may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate legal forum.

20. The legal position in this regard has been considered by this Court in recent judgments in **Ujaif @ Noor Alam and others Vs. State of UP and others3** and **Master Mahib Sajjad Masood and another Vs. State of UP and others**4.

21. In the present case, the material on record, *prima facie*, does not suggest that the petitioner-*corpus* has been illegally detained by the respondent nos.4 and 5.

22. Having regard to the aforesaid, the present petition for a writ of habeas corpus would not be entertainable.

23. The petition stands dismissed accordingly.

24. The dismissal of the petition would not preclude the parties from agitating their rights with regard to guardianship and custody before the court concerned where the matters are stated to be pending.

(2024) 3 ILRA 1407
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 983 of 2023

Hasan Raza @ Taiyab through its Mother Shahnaj (Corpus) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Brijesh Kumar Pandey

Counsel for the Respondents:
G.A.

Habeas Corpus - Child Custody - Parents Patriae Jurisdiction - Welfare of Minor - Petition filed by mother (petitioner No. 2) on behalf of minor son (petitioner No. 1, corpus) alleging illegal custody by father (respondent No. 3) since 28.04.2023. Mother, living separately at her maternal home due to strained marital relations, lodged FIRs against father (Crime No. 185/2019 under Sections 498-A, 323, 506 IPC, 3/4 D.P. Act, 4/3 Muslim Women Act; Crime No. 103/2023 under Sections 420, 34 IPC). Father, a labourer, claimed willingness to reconcile, but mother refused to return to matrimonial home. Corpus, attached to father, was in his custody. Court, exercising parens patriae jurisdiction, held that habeas corpus is entertainable only if custody is illegal and against the minor's welfare. No evidence

of illegal detention found, and welfare of the child, paramount under parens patriae, did not necessitate change in custody. Due to disputed facts and pending criminal cases indicating acrimony, court declined extraordinary jurisdiction, directing parties to agitate guardianship claims before appropriate forum. Petition dismissed, corpus allowed to remain with father, with police ensuring safe return. Observations prima facie, not affecting rights in other proceedings. (Paras 7-19)

Petition Dismissed.

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

1. Heard Sri Brijesh Kumar Pandey, learned counsel for the petitioners and Ms. Divya Ojha, learned A.G.A.-I appearing for the State respondents.

2. Sri Rajesh Kumar Mishra, learned counsel, who has filed his Vakalatnama on behalf of the respondent No. 3, has also been heard.

3. Pursuant to the rule nisi issued earlier, the petitioner No. 1-corpus, has been produced in Court by the respondent No. 3. They have been accompanied by Jitendra Kumar, S.I., P.N.O. No. 152533151, Police Station Kajuriya, District Rampur.

4. The petitioner No. 1 (corpus) and the respondent No. 3, have been identified by their counsel, Sri Rajesh Kumar Mishra.

5. The police officer has been identified by Ms. Divya Ojha, learned A.G.A.-I.

6. The petitioner No. 2, Shahnaj is also present in Court and has been identified by her counsel, Sri Brijesh Kumar Pandey.

7. Learned A.G.A.-I, on the basis of inquiry made from the petitioner No. 2, in Court, has submitted that she has submitted the she is living at her maternal home in district Rampur and that the petitioner No. 1 (corpus) is presently with respondent No. 3. She has submitted that the custody of the petitioner No. 1 (corpus) was taken away from her, on 28.04.2023, and a complaint in this regard has also been lodged with the police. On a pointed query, as to whether she is willing to go to her matrimonial home, she has replied in negative.

8. Learned A.G.A.-I has also made an inquiry from the respondent Nos 3, in Court, and submits that he has stated that he is working as a labourer in district Rampur and the petitioner No. 1 (corpus) is his son and is under his care and custody. He has stated that the petitioner No. 2 (his wife) is living separately due to strained relationship. He has also stated that he is willing to take back the petitioner No. 2 (his wife), but she is unwilling.

9. Learned A.G.A.-I states that she has also interacted with the petitioner No. 1 (corpus) and submits that he has shown an attachment to his father and does not apparently seem to respond to the petitioner No. 2.

10. An F.I.R. dated 4.09.2019, is stated to have been lodged by the petitioner No. 2, registered as Crime No. 185 of 2019, under Sections 498-A, 323, 506 I.P.C., 3/4 of the D.P. Act and Section 4/3 of the Muslim Women (Protection of Rights on Marriage) Act, 2019, Police Station Khajuriya, District Rampur, in which the charge sheet has been submitted. Another

F.I.R. dated 03.11.2023 is also stated to have been lodged by the respondent No. 2, registered as Case Crime No. 103 of 2023, under Sections 420 and 34 I.P.C., Police Station Khajuriya, District Rampur, in which the respondent No. 3 has been named as an accused.

11. The pendency of the aforesaid criminal cases is indicative of the acrimony and the strained relationship between the parties.

12. In an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether his welfare requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody he presently is.

13. The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle of parens patriae jurisdiction and the paramount consideration would be the welfare of the child. In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.

14. In a child custody matter, a writ of habeas corpus would be entertainable only where it is established that the detention of the minor child is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum.

15. Having regard to the entirety of the facts, the rule nisi issued earlier is discharged.

16. The habeas corpus petition is dismissed.

17. The petitioner No. 1 (corpus) would be at liberty to go along with the respondent No. 3 (his father) to the place from where he has been brought.

18. They shall be accompanied by the police officer, in safety, but free.

19. It is made clear that the observations made, hereinabove, are prima facie in nature and would not preclude the parties from agitating their claims for guardianship and custody before the appropriate forum.

(2024) 3 ILRA 1409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Habeas Corpus Writ Petition No. 1059 of 2023

Anil Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Grijesh Kumar Shukla

Counsel for the Respondents:
G.A.

Criminal Law -Habeas Corpus - Code of Criminal Procedure, 1973 - Section 427(1) - Concurrent Sentences - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 20(B)(II)(C) - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 3(1) - Petitioner, convicted under NDPS Act (Sessions Trial No. 19/2013, 12 years imprisonment, 22.07.2015) and subsequently under Gangsters Act (Sessions Trial No. 28/2013, 5 years imprisonment, 29.02.2016) based on the same NDPS offence, sought release via habeas corpus, alleging illegal detention despite bail granted in NDPS appeal (Criminal Appeal No. 4024/2015, 09.08.2023). Trial court failed to apply discretion under Section 427(1) Cr.P.C. to direct concurrent running of sentences. Relying on Iqram Vs St. of U.P. (2023) 3 SCC 184, Benson Vs St. of Kerala (2016) 10 SCC 307, Anil Kumar Vs St. of Punj. (2017) 5 SCC 53, Vicky Vs St. (NCT of Delhi) (2020) 11 SCC 540, and VSK. Bansal Vs St. of Har. (2013) 7 SCC 211, the court held that High Court, under Article 226, can exercise discretion under Section 427(1) Cr.P.C. to direct concurrent sentences when subsequent conviction arises from the same transaction without further overt act. Sentences ordered to run concurrently, entitling petitioner to release per bail order, as he has been in custody since 05.08.2013. Distinguished Mohd. Zahid Vs St. (2022) 12 SCC 426, where concurrent sentences were denied for distinct NDPS offences. St. directed to recalculate sentence period and release petitioner forthwith if not required in other cases. Petition allowed. (Paras 2-15)

Petition Allowed.

Case Law Cited:

1. Anil Kumar Vs St. of Punj., (2017) 5 SCC 53 (Paras 4, 9, 14)

2. Benson Vs St. of Kerala, (2016) 10 SCC 307 (Paras 4, 8, 14)

3. Vicky Vs St. (NCT of Delhi), (2020) 11 SCC 540 (Paras 4, 10, 14)

4. Iqram Vs St. of U.P., (2023) 3 SCC 184 (Paras 4, 11, 14)

5. Mohd. Zahid Vs St., (2022) 12 SCC 426 (Paras 5, 12)

6. VSK. Bansal Vs St. of Har., (2013) 7 SCC 211 (Paras 8, 9, 10, 14)

7. Mohd. Akhtar Hussain Vs Collector of Customs, (1988) 4 SCC 183 (Para 10)

8. St. of Punj. Vs Madan Lal, (2009) 5 SCC 238 (Para 10)

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Grijesh Kumar Shukla, learned counsel for the applicant and Sri Rahul Asthana, learned A.G.A. for the State.

2. The petitioner, before this Court, has filed the instant Habeas Corpus Writ Petition through his father, Prakash. In this writ petition, the petitioner has submitted that he was implicated in Case Crime No. 47 of 2013 under Section 18/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as *'the NDPS Act'*), P.S.- Sikandra, District-Kanpur Nagar Dehat and he is in jail since 05.08.2013. The said Case Crime No. 47 of 2013 had resulted in Sessions Trial No. 19 of 2013 and the petitioner herein was convicted vide judgement and order dated 22.07.2015 under Section 20(B)(II)(C) of the NDPS Act and the petitioner was sentenced to undergo 12 years rigorous imprisonment with a fine of Rs. 1,00,000/-. Against the said judgement and order dated 22.07.2015, the petitioner herein had filed an appeal being Criminal Appeal No. 4024

of 2015 (Anil Kumar Vs. State of U.P.), wherein during the pendency of the appeal, vide order dated 09.08.2023, the petitioner herein has been directed to be released on bail. It is further submitted on the basis of the aforesaid Case Crime No. 47 of 2013, on 31.07.2013, another Case Crime No. 200 of 2013 was also registered against the petitioner herein under Section 3(1) of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred as *'the Gangsters Act'*). In the said case, the said Case Crime No. 200 of 2013 had resulted in Sessions Trial No. 28 of 2013 wherein he was convicted and sentenced for a five years rigorous imprisonment and fine of Rs. 5,000/- vide judgement and order dated 29.02.2016. Learned counsel for the petitioner submits that since in the subsequent conviction and sentence vide judgement and order dated 29.02.2016, learned trial court has failed to take note of his previous conviction and sentence awarded in Case Crime No. 47 of 2013, therefore, learned trial court has failed to apply its discretion as provided under Section 427 (1) of Cr.P.C. Therefore, the petitioner is not being released from jail despite the bail order granted by this Court in Criminal Appeal No. 4024 of 2015 as the Jail Authorities consider that both the sentences awarded to the petitioner herein shall run consecutively.

3. Learned counsel for the petitioner submits that in view of the subsequent conviction under the provisions of the Gangsters Act, wherein he had been awarded and sentenced for five years rigorous imprisonment as the provisions of the Gangsters Act have been imposed only on the basis of the base case under the NDPS Act, he was entitled for the benefit under Section 427 of Cr.P.C., whereby his sentence under the provisions of the Gangsters Act ought to have been directed to run concurrently.

4. Learned counsel for the petitioner has argued that when the petitioner had been released on bail in the NDPS Act, the base case on the basis of which the Gangsters Act was imposed and tried, the petitioner be released as it would be deemed that the sentence which was imposed in Sessions Trial No. 28 of 2013, would run concurrently. Relying upon the judgement of the Supreme Court in ***Anil Kumar v. State of Punjab, (2017) 5 SCC 53,*** he has submitted that a person who is already undergoing sentence of imprisonment, when he is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would though normally commence at the expiration of imprisonment to which he was previously sentenced, as per law of the Supreme Court, the petitioner would get the benefit of Section 427(1) Cr.P.C. Learned counsel for the petitioner relying upon a judgement of the Supreme Court in ***Benson v. State of Kerala, (2016) 10 SCC 307***, has submitted that in cases of similar nature, if conviction had taken place, then, it would be prudent to make the sentences to run concurrently. Learned counsel for the petitioner still further relying upon the judgement of the Supreme Court in ***Vicky v. State (NCT of Delhi), (2020) 11 SCC 540,*** has argued that the sentences of two cases of similar nature ought to run concurrently. Learned counsel for the petitioner further relying upon the case of ***Iqram v. State of U.P., (2023) 3 SCC 184*** has argued that the benefit of Section 427 (1) Cr.P.C., if had not been prayed for in the court below, and had not been granted by the court below, the same can be prayed for before the High Court in a writ under Article 226 of the Constitution of India.

Relying upon law as had been laid down in the judgement of ***Iqram (supra)*** he submits that the High Court under its jurisdiction under Article 226 of the Constitution of India, while dealing with the writ of Habeas Corpus, can also extend the benefit of Section 427 (1) of Cr.P.C.

5. Sri Rahul Asthana, learned A.G.A. for the State, has relied upon a judgement of the Supreme Court in **Mohd. Zahid v. State, (2022) 12 SCC 426** and has submitted while relying upon paragraphs '*10*' and '*11*' that if there were two cases under the NDPS Act and if two different sentences have been awarded by the court below, then, the benefit of Section 427(1) of Cr.P.C., could not be extended to such a person.

6. To appreciate the submissions made by learned counsels for the parties, it will be appropriate to reproduce the provisions of Section 427 Cr.P.C., which reads as under:

"Section 427. Sentence on offender already sentenced for another offence.

(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence;

Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

7. From the plain reading of the provisions of Section 427 Cr.P.C., it is apparent that in view of Section 427 (1) Cr.P.C., when a person is already undergoing sentence of imprisonment and on his subsequent conviction is sentenced to further imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence after the expiry of the previous sentence of imprisonment. However, the Court which is subsequently sentencing such a person, who is already undergoing a sentence of imprisonment, has a discretion under Section 427(1) Cr.P.C., to direct that such subsequent sentence, which is being, awarded shall run concurrently with the previous sentence.

8. In the instant case, the petitioner herein was convicted under Section 20(B)(II)(C) of the NDPS Act and was imprisoned for a period of 12 years on 22.07.2015. However, subsequently he was convicted and sentenced on 29.02.2016 under the provisions of Section 3(1) of the Gangsters Act and was sentenced for a period of five years rigorous imprisonment. The court subsequently convicting and sentencing the petitioner had not taken into consideration the previous conviction and sentence of the petitioner and had not applied its discretion as is provided under Section 427 (1) Cr.P.C., in directing the

subsequent sentence to run concurrently with the previous sentence of imprisonment for 12 years awarded under the provisions of the NDPS Act. Ordinarily, in the absence of an application claiming benefit under Section 427 (1) of Cr.P.C., and non-application of such discretion by the subsequent Court, the subsequent sentence shall start after the completion of the earlier sentence granted under the provisions of the NDPS Act. However, in the case of ***Benson(supra)***, the Apex Court while considering the scope of Sub-section (1) of Section 427 Cr.P.C., had relied upon another judgement of the Apex Court in ***V.K Bansal v. State of Haryana, (2013) 7 SCC 211***, and had directed the sentence awarded in various cases to run concurrently in view of the provisions of Section 427 (1) Cr.P.C. Relevant portion of the Apex Court judgement in ***Benson (supra)*** reads as under:-

"6. In terms of sub-section (1) of Section 427, if a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would normally commence at the expiration of the imprisonment to which he was previously sentenced. Going by this normal principle, the sentence chart indicated in the communication dated 27-5-2016 is quite correct. However this normal rule is subject to a qualification and it is within the powers of the Court to direct that the subsequent sentence shall run concurrently with the previous sentence.

7. In V.K. Bansal v. State of Haryana [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] it was stated by this Court: (SCC p. 216, para 10)

"10. ... It is manifest from Section 427(1) that the Court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the Court the discretionary power shall have to be exercised along the judicial lines and not in a mechanical, wooden or pedantic manner. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. There is no cut and dried formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section 427(1). Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence or offences committed, and the fact situation in which the question of concurrent running of the sentences arises."

This Court then went on to club various crimes in respect of which sentences were imposed upon the appellant therein in three groups: (i) the first having 12 cases, (ii) the second having 2 cases, and (iii) the third having a single case. This Court directed that substantive sentences within first two groups would run inter se concurrently and the substantive sentences in first two groups and that in respect of the case in the third group would run consecutively. The benefit was confined only in respect of substantive sentences and not qua sentences in default.

8. We have gone through the record and considered the rival submissions. We do not find anything incorrect in the assessment made by the courts below and in our view the orders of conviction recorded against the appellant in the present cases are quite correct. We also do not find anything wrong in the quantum of sentence imposed in respect of the respective crimes. However going by the sentence calculation, the sentence imposed in respect of the first crime started with effect from 20-11-2003 and the last

sentence would be over by 19-8-2022, which would effectively mean that the total length of sentences in aggregate would be around 19 years. We are not concerned with first eight matters and sentences imposed in respect of those crimes. The sentence in respect of 8th crime is presently running against the appellant and would be over on 30-8-2017.

9. The maximum sentence in respect of the present crimes is two years' rigorous imprisonment. As per the record, these crimes were committed on the same day. Having considered the matters, we deem it appropriate to direct that the sentences imposed in each of the cases i.e. (i) CC No. 158 of 2004, (ii) CC No. 1039 of 2003, (iii) CC No. 390 of 2004, and (iv) CC No. 1168 of 2006, namely, those at Sl. Nos. 9 to 12 respectively as indicated in the sentence chart in the communication dated 27-5-2016 shall run concurrently with the sentence imposed in Crime No. 8 which is currently operative. We grant this benefit in respect of substantive sentences to the appellant but maintain the sentences of fine and the default sentences. If the fine as imposed is not deposited, the default sentence or sentences will run consecutively and not concurrently."

9. Likewise, in ***Anil Kumar (supra)***, the Apex Court relying upon ***V.K. Bansal (supra)*** and ***Benson (supra)***, had applied the discretion under Seciton 427 (1) Cr.P.C., and directed the sentences of two cases to run concurrently in the following terms:

"7. After referring to V.K. Bansal case [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , in Benson v. State of Kerala [Benson v. State of Kerala, (2016) 10 SCC 307 : (2017) 1 SCC (Cri) 108 : (2016) 9 Scale 670] , this Court directed the substantive sentences imposed on the appellant Benson to run concurrently. The appellant therein was convicted for the offences punishable under Section 379 and Section 414 read with Section 34 IPC in at least eleven cases. By a separate judgment, the appellant was convicted and sentenced in each of the aforesaid cases and total length of sentences in aggregate was around nineteen years.

8. In the present case, the appellant was earlier convicted under Section 22, NDPS Act and subsequently convicted under Section 27(b)(ii) and Section 28 of the Drugs and Cosmetics Act, 1940. Considering the nature of the offences for which the appellant was convicted and the facts and circumstances of the case, we deem it appropriate to direct that the sentences imposed on the appellant in FIR No. 37 and Complaint No. 638 shall run concurrently. However, the fine amount and the default sentence or sentences are maintained. If the fine amount is not paid, the default sentence will run consecutively and not concurrently."

10. Similarly, in ***Vicky (supra)***, the Apex Court relying upon various judgements such as ***Mohd. Akhtar Hussain vs. Collector of Customs, (1988) SCC 183, V.K. Bansal (supra)*** and ***Anil Kumar (supra)*****,** considering the condition and the family background of the petitioner therein, had directed the sentences of five cases to run concurrently in following terms.

10. We may refer to the decision of the Supreme Court in Mohd. Akhtar Hussain v. Collector of Customs [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] ,

wherein the Supreme Court recognised the basic rule of convictions arising out of a single transaction justifying concurrent running of the sentences. In Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] , it was held as under: (SCC p. 187, paras 10 & 12)

"10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.

***

12. The submission, in our opinion, appears to be misconceived. The material produced by the State unmistakably indicates that the two offences for which the appellant was prosecuted are quite distinct and different. The case under the Customs Act may, to some extent, overlap the case under the Gold (Control) Act, but it is evidently on different transactions. The complaint under the Gold (Control) Act relates to possession of 7000 tolas of primary gold prohibited under Section 8 of the said Act. The complaint under the Customs Act is with regard to smuggling of gold worth Rs 12.5 crores and export of silver worth Rs 11.5 crores. On these facts, the courts are not unjustified in directing that the sentences should be consecutive and not concurrent."

11. After referring to Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and other cases, in V.K. Bansal v. State of Haryana [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , the Supreme Court held that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints may have been filed. In V.K. Bansal [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , it was held as under: (V.K. Bansal case [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , SCC p. 217, paras 14-16)

"14. We may at this stage refer to the decision of this Court in Mohd. Akhtar Hussain v. Collector of Customs [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] in which this Court recognised the basic rule of convictions arising out of a single transaction justifying concurrent running of the sentences. ...

15. In Madan Lal case [State of Punjab v. Madan Lal, (2009) 5 SCC 238 : (2009) 2 SCC (Cri) 650] this Court relied upon the decision in Akhtar Hussain case [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and affirmed the direction of the High Court for the sentences to run concurrently. That too was a case under Section 138 of the Negotiable Instruments Act. The State was aggrieved of the direction that the sentences shall run concurrently and had appealed to this Court against the same. This Court, however, declined interference with the order passed by the High Court and upheld the direction issued by the High Court.

16. In conclusion, we may say that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a

single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor."

12. In V.K. Bansal [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , the appellant-accused was facing fifteen cases and the Supreme Court has grouped fifteen cases into three different groups:

(i) the first having twelve cases relating to advancement of loan/banking facility to M/s Arawali Tubes Ltd. acting through the appellant thereon as Director;

(ii) the second having two cases relating to advancement of loan to the appellant M/s Arawali Alloys Ltd. acting through the appellant as its Director; and

(iii) the third having a single case qua the criminal complaint by State Bank of Patiala.

The Court directed that the substantive sentences within first two groups would run inter se concurrently. The Supreme Court directed that the substantive sentences in first two groups and that in respect of the case in the third group would run consecutively.

13. Following the decision in V.K. Bansal [V.K. Bansal v. State of Haryana, (2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , in Benson v. State of Kerala [Benson v. State of Kerala, (2016) 10 SCC 307 : (2017) 1 SCC (Cri) 108] , the Supreme Court directed that the sentences imposed in each of the cases shall run concurrently with the sentence imposed in Crime No. 8 which was then currently operative. However, the Court held that the benefit of "concurrent running of sentences" is granted only with respect of substantive sentences; but the sentences of fine and default sentences shall not be affected by the direction. The Supreme Court observed that the provisions of Section 427 CrPC do not permit a direction for the concurrent running of the default sentence for non-payment of fine.

14. Further, in Anil Kumar v. State of Punjab [Anil Kumar v. State of Punjab, (2017) 5 SCC 53 : (2017) 2 SCC (Cri) 502] , it was held by this Court that: (SCC p. 55, para 5)

"5. In terms of sub-section (1) of Section 427, if a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would normally commence at the expiration of the imprisonment to which he was previously sentenced. Only in appropriate cases, considering the facts of the case, the court can make the sentence run concurrently with an earlier sentence imposed. The investiture of such discretion, presupposes that such discretion be exercised by the court on sound judicial principles and not in a mechanical manner. Whether or not the discretion is to be exercised in directing sentences to run concurrently would depend upon the nature of the offence/offences and the facts and circumstances of each case."

15. The point falling for consideration is whether the case of the appellant is a fit case for exercising the discretion in directing the sentence of imprisonment to run concurrently with the sentence of imprisonment imposed in the earlier case in FIR No. 64/2011. Of course, FIR No. 64/2011, FIR No. 67/2011 and FIR No. 263/2009 relate to different transactions. Since the appellant was already undergoing imprisonment in FIR No. 64/2011, in terms of Section 427 CrPC, subsequent sentences shall run

consecutively until and unless the court specifically directs that they shall run concurrently.

11. The Apex Court in ***Iqram (supra)*** has held that if the lower court which had passed the order of the subsequent sentence had failed to exercise its discretion under Section 427 (1) Cr.P.C., while awarding the sentence in the subsequent case, then, on a petition under Section 226 of the Constitution of India, the High Court has powers to exercise such discretion under Section 427 (1) Cr.P.C., and can direct such subsequent sentences to run concurrently to the previously awarded sentence in a previous case. The relevant paragraphs of the judgement in ***Iqram (supra)*** reads as under:-

"11. In Mohd. Zahid v. State [Mohd. Zahid v. State, (2022) 12 SCC 426] , this Court interpreted the provisions of Section 427CrPC after duly considering the precedents in the following terms :

"33. Thus from the aforesaid decisions of this Court, the principles of law that emerge are as under:

(i) If a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would normally commence at the expiration of the imprisonment to which he was previously sentenced.

(ii) Ordinarily the subsequent sentence would commence at the expiration of the first term of imprisonment unless the court directs the subsequent sentence to run concurrently with the previous sentence.

(iii) The general rule is that where there are different transactions, different crime numbers and cases have been decided by the different judgments, concurrent sentence cannot be awarded under Section 427CrPC.

(iv) Under Section 427(1)CrPC the court has the power and discretion to issue a direction that all the subsequent sentences run concurrently with the previous sentence, however discretion has to be exercised judiciously depending upon the nature of the offence or the offences committed and the facts in situation. However, there must be a specific direction or order by the court that the subsequent sentence to run concurrently with the previous sentence."

12. The trial Judge, in the present case, granted a set-off within the ambit of Section 428/Section 31 CrPC. No specific direction was issued by the trial court within the ambit of Section 427(1) so as to allow the subsequent sentences to run concurrently. All the convictions took place on the same day.

13. Once the petitioner espoused the remedy of moving a writ petition under Article 226 of the Constitution, the High Court ought to have noticed the serious miscarriage of justice which would occur consequent upon the trial court not having exercised specifically its discretion within the ambit of Section 427(1). When the appellant moved the High Court, he was aggrieved by the conduct of the jail authorities in construing the direction of the trial court to mean that each of the sentences would run consecutively at the end of the term of previous sentence and conviction. The High Court ought to have intervened in the exercise of its jurisdiction by setting right the miscarriage of justice which would occur in the above manner, leaving the appellant to remain incarcerated for a period of 18 years in respect of his conviction and sentence in the nine Sessions trials for offences essentially under the Electricity Act.

14. In view of the above discussion, we allow the appeal and set aside the impugned judgment of the High Court dated 24-3-2022 [Iqram v. State of U.P., 2022 SCC OnLine All 875] . We order and direct that the sentences which have been imposed on the appellant in the nine Sessions trials noticed in the earlier part of this judgment shall run concurrently."

12. In ***Mohd. Zahid (supra)***, the Apex Court while dealing with the subsequent conviction of the petitioner for the offences under the provisions of the NDPS Act had refused to extend the benefits of Section 427(1) of the Cr.P.C., as in that case the said person previously also was convicted for the provisions of the NDPS Act in two different cases. In such circumstances, the Apex Court had refused to exercise the discretion under Section 427(1) of Cr.P.C. The relevant portion of the said judgement reads as under:-

"18. Applying the law laid down by this Court in the aforesaid decisions and the principles of law enumerated hereinabove to the facts of the case on hand, the submissions on behalf of the appellant-accused that his subsequent sentence to run concurrently with the previous sentence is to be rejected outright. In the present case the appellant has been convicted with respect to two different transactions, there are different crime numbers and the cases have been decided by the different judgments. Therefore, the appellant is not entitled to any benefit of concurrent sentence under Section 427CrPC. As observed hereinabove, there is no specific order or direction issued by the court while imposing the subsequent sentence that the subsequent sentence to run concurrently with the previous sentence.

19. Even otherwise as observed hereinabove under Section 427(1)CrPC, the Court has the power and discretion to issue a direction that the subsequent sentence to run concurrently with the previous sentence in that case also, the discretion has to be exercised judiciously depending upon the nature of offence or the offences committed.

20. In the present case the appellant-accused has been convicted for the offences under the NDPS Act. He has been convicted in one case for recovery of 4 kg heroin and sentenced to undergo 12 years' RI and in another case there is a recovery of 750 grams of heroin and considering Section 31(ii) of the NDPS Act, he has been sentenced to undergo 15 years' RI.

21. No leniency should be shown to an accused who is found to be guilty for the offence under the NDPS Act. Those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death-blow to a number of innocent young victims who are vulnerable. Such accused causes deleterious effects and deadly impact on the society. They are hazard to the society. Such organised activities of clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have a deadly impact on the society as a whole. Therefore, while awarding the sentence or punishment in case of the NDPS Act, the interest of the society as a whole is required to be taken into consideration. Therefore, even while applying discretion under Section 427CrPC, the discretion shall not be in favour of the accused who is found to be

indulging in illegal trafficking in narcotic drugs and psychotropic substances.

22. As observed hereinabove, even while exercising discretion under Section 427CrPC to run subsequent sentence concurrently with the previous sentence, the discretion is to be exercised judiciously and depending upon the offence/offences committed. Therefore, considering the offences under the NDPS Act which are very serious in nature and against the society at large, no discretion shall be exercised in favour of such accused who is indulging into the offence under the NDPS Act."

13. Thus, from the aforesaid analysis, it is apparently clear that if the trial court in subsequent conviction fails to take note of the previous conviction and sentences such person and thereby fails to apply its discretion as provided under Section 427 Cr.P.C., then, on a petition under Article 226 of the Constitution of India, this Court undoubtedly has the power to entertain such a petition and may, in appropriate cases, apply the discretion as provided under Section 427 of Cr.P.C. However, the mandate of law is that such discretion should be applied judiciously and not mechanically depending upon the facts and circumstances of each case.

14. In the instant case, the petitioner herein was tried and convicted for an offence under Section 20(B)(II)(C) of the NDPS Act in Sessions Trial No. 19 of 2023 and vide order dated 22.07.2015, he was convicted for sentence of rigorous imprisonment for a period of 12 years. On the basis of the same case, another case was lodged under Section 3(1) of the Gangsters Act and he was tried and convicted under the provisions of the Gangsters Act in Sessions Trial No. 28 of 2013 on 29.02.2016 and was awarded sentence of five years of rigorous imprisonment without applying the discretion under Section 427 of Cr.P.C. Therefore, we find that the subsequent conviction of the petitioner herein was not for any further and overt act but for the same act for which he had already been convicted under the provisions of the NDPS Act. Therefore, the subsequent conviction of the petitioner was for the offence of a similar nature without any further overt act. Therefore, in view of the judgement of the Supreme Court in ***Iqram (supra)***, we are of the view that this Court while dealing with the case under Habeas Corpus writ petition can extend the benefit of Section 427 of Cr.P.C. to the petitioner herein in view of the judgements of Apex Court as in **V.K. Bansal (supra), Anil kumar (supra), Benson (supra), Vicky (supra).** Having found that both the cases were arising out of the same offence and were absolutely of similar nature, we extend the benefit under Section 427 (1) Cr.P.C., to the petitioner and we direct that the said sentence of the petitioner awarded under the subsequent case under the Gangsters Act vide judgement and order dated 29.02.2016, shall run concurrently to the sentence already awarded vide judgement and order dated 22.07.2015 under Section 20(B)(II)(C) of the NDPS Act. Since, the petitioner herein has been granted bail in Criminal Appeal No. 4024 of 2015 (Anil Kumar Vs. State of U.P.), vide order dated 09.08.2023, by this Court in the previous case under the provisions of the NDPS Act and since the petitioner herein is in jail since 05.08.2013, as submitted by the learned counsel for the petitioner, therefore, in view of the aforesaid direction that the subsequent sentence of the petitioner shall run concurrently to the previously awarded sentence in NDPS Act, the petitioner herein

is entitled to be released in terms of the bail order dated 09.08.2023, passed by this Court in Criminal Appeal No. 4024 of 2015. Accordingly, we direct State Authorities i.e., Respondent nos. 1 and 2, to calculate the period of sentence as if both the sentences had run concurrently and release the petitioner forthwith in terms of bail order dated 09.08.2023 if he is not required in any other case.

15. With these observations the instant Habeas Corpus writ petition is ***allowed***.

(2024) 3 ILRA 1420
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matter Under Article 227 No. 90 of 2024

Meera Awasthi & Anr. ...Petitioners
Versus
Ajeet Awasthi & Anr. ...Respondents

Counsel for the Petitioners:
Sri Anand Kumar Srivastava, Sri Anand Kumar Srivastava, Dr. Shiv Bahadur Singh

Counsel for the Respondents:--

Civil Law - Civil Procedure Code, 1908 – Order 39 Rules 1 & 2 – Specific Relief Act, 1963 – Section 9 – Constitution of India,1950 -Article 227 - Permanent Injunction – Settled Possession – Title Dispute – Maintainability of Suit for Injunction without Declaration of Title

The petitioners challenged the order dated 31.10.2023 by the Additional District Judge, Kanpur Nagar, allowing Misc. Civil Appeal No. 81 of 2023, which set aside the trial court's order dated 21.08.2023 rejecting a temporary injunction in Original Suit No. 816 of 2020. The suit, filed by respondent No. 1 (Ajeet Awasthi), sought a permanent injunction to restrain the petitioners (his parents, Meera Awasthi and another) from interfering with his possession of House No. N 638, S Block, Yashoda Nagar, Kanpur Nagar. The respondent claimed he purchased the land and constructed the house with his own funds, though registered in his mother's name, while the petitioners asserted ownership, alleging the respondent's possession was permissive as their son. The trial court rejected the injunction, finding no prima facie case, balance of convenience, or irreparable loss, and held possession alone insufficient for an injunction. The appellate court reversed this, directing both parties to maintain status quo. Held: The court, under Article 227, upheld the appellate court's order, emphasizing that Indian law protects settled possession even without title, as per Midnapur Zamindary Co. Ltd. Vs Kumar Naresh Narayan Roy (1924 PC 144), Yar Mohammad Vs Lakshmi Das (AIR 1959 All 1), and Rame Gowda Vs M. Varadappa Naidu ((2004) 1 SCC 769). A person in settled possession, even if permissive, cannot be dispossessed except through legal process. The respondent's admitted possession, though claimed permissive by the petitioners, warranted protection pending trial. The court distinguished Padhiyar Prahladji Chenaji Vs Maniben Jagmalbhai (Civil Appeal No. 1382 of 2022), as title was not yet adjudicated here, unlike in that case where the plaintiff lost on title. Relying on Anathula Sudhakar Vs P. Buchi Reddy ((2008) 4 SCC 594), the court held that a suit for injunction simpliciter based on possession is maintainable when title is disputed but not complex, and title issues can be examined in such suits if pleaded. The respondent's possession, not being that of a trespasser, entitled him to interim protection. The petition was dismissed, affirming the appellate court's status quo order.

Case Law Cited:

1. Midnapur Zamindary Co. Ltd. Vs Kumar Naresh Narayan Roy, 1924 PC 144

2. Yar Mohammad Vs Lakshmi Das, AIR 1959 All 1

3. Lallu Yeshwant Singh Vs Rao Jagdish Singh, AIR 1968 SC 620

4. Ram Rattan Vs St. of U.P., AIR 1977 SC 619

5. Puran Singh Vs St. of Punj., AIR 1975 SC 1674

6. St. of U.P. Vs Maharaja Dharmander Prasad Singh, AIR 1989 SC 997

7. Krishna Ram Mahale Vs Mrs. Shobha Venkat Rao, 1989 SC 2907

8. Samir Sobhan Sanyal Vs Tracks Trade Private Ltd., (1996) 4 SCC 144

9. Rame Gowda Vs M. Varadappa Naidu, (2004) 1 SCC 769

10. Subramaniaswamy Temple, Ratnagiri Vs VS Kanna Gounder, 2009 (106) RD 77

11. Ranjit Kaur Vs Harmohinder Singh, 2012 (1) AWC 14 (SC)

12. Anathula Sudhakar Vs P. Buchi Reddy, (2008) 4 SCC 594

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

1. Heard Sri Anand Kumar Srivastava, learned counsel for the petitioners and perused the record.

2. Present petition has been filed challenging the order dated 31.10.2023 passed by the Additional District Judge, Court No. 8, Kanpur Nagar allowing the Misc. Civil Appeal No. 81 of 2023 (Ajeet Awasthi v. Meera Awasti and others).

3. The facts of the case in brief are that the plaintiff/respondent no. 1 Ajeet instituted Original Suit No. 816 of 2020 (Ajeet Awasthi v. Meera Awasthi and others) in the court of Civil Judge (Senior Division), Kanpur Nagar for the relief of permanent injunction restraining the defendants, their servants, agents, employees, representatives, family members from interfering in the peaceful possession and enjoyment of the plaintiff over the house in dispute (House No. N 638, S Block, Yashoda Nagar, Kanpur Nagar). The case set up by the plaintiff/respondent no. 1 in the plaint in brief is that the plaintiff purchased the land out of his own income in the name of his mother namely Meera Awasthi and thereafter constructed a house from his own funds being House No. N 638, S Block, Yashoda Nagar, Kanpur Nagar and is living along with all his family members in the aforesaid house. It is further pleaded that subsequently, the defendant nos. 1 & 2 (parents of the plaintiff/respondent no. 1) under the influence of their other children started asking the plaintiff to vacate the accommodation and has also given threat to the plaintiff in case the plaintiff/respondent do not vacate the house in question, he will be thrown out from the premises in question and therefore, the present suit is instituted. The plaintiff/respondent no. 1 also filed an application under Order 39 Rule 1 & 2 C.P.C. for grant of temporary injunction. The trial court i.e. Judge Small Causes, Kanpur Nagar by an ex-parte order dated 27.10.2020 restrained the defendants from interfering with the possession of plaintiff over house in dispute and further directed them to maintain status quo. On an application filed by the plaintiff/respondent, paper no. 30Ga, the trial court appointed commissioner vide order dated 07.05.2022. Commissioner has submitted its report on 01.09.2022.

4. After service of notice, the petitioners/defendants appeared before the court below and filed their objections on 13.04.2022 being paper no. 26/27ga to the

application for temporary injunction filed by the petitioner. The case set up by the defendants/petitioners is that the land in question is not purchased by the plaintiff out of his own funds and the house constructed thereupon is also not constructed by the plaintiff out of his own funds rather the same is constructed by defendant nos. 1 & 2 out of their own funds. However, in their objections, the defendant/petitioners have admitted that the plaintiff/respondent is residing in the house in question and has thrown out the defendant/petitioner from the property in question, other pleas were also taken.

5. The trial court by order dated 21.08.2023, rejected the application for temporary injunction filed by the defendant/respondent no. 1 holding that there is no prima-facie case, balance of convenience, irreparable loss to the plaintiff. The trial court has also held that an injunction cannot be granted merely on the basis of possession. Against the order dated 21.08.2023, defendant/respondent no. 1 preferred Misc. Civil Appeal No. 81/2023 which has been allowed by the Additional District Judge, Court No. 8, Kanpur Nagar by order dated 31.10.2023. The order dated 21.08.2023, passed by the trial court was set-aside by appellate court and appellate court also directed that both the parties will maintain status quo with respect to the house in question. Being aggrieved with the order dated 31.10.2023, the present petition has been filed under Article 227 of Constitution of India by the defendants/petitioners.

6. Contention of the learned counsel for the petitioners is that the land in question was purchased vide sale deed dated 16.02.2004, paper no. 28ga from its earlier owner by Meera Awasthi defendant/petitioner no. 1. Learned counsel for the petitioner relied upon the bank statement paper no. 28Ga/27 and 28Ga/28 to demonstrate that the aforesaid bank account is in the name defendants/petitioners and the money has been paid from the aforesaid account for the purchase of the land. The house tax of the House No. N 638, S Block, Yashoda Nagar, Kanpur Nagar is being paid by Smt. Meera Awasthi and has contended that on the basis of aforesaid documents that Meera Awasthi is the actual owner of the property in dispute. It is further contended by the learned counsel for the petitioners that the plaintiff has failed to prove even prima-facie that the land is purchased by the plaintiff out of his own funds and house is constructed thereupon by the plaintiff out of his own funds. It has also been contended by the learned counsel for the petitioners that the plaintiff is in possession because being son of the defendants and is residing therein with their consent and has no right to reside therein without their consent. The plaintiff has failed to prove that the plaintiff has any legal right to remain in possession over the house in question. It is also contended by the learned counsel for the petitioners that the appellate court has erred in law in granting injunction merely on the basis of possession that to against the true owner. In this regard, the learned counsel for the petitioner relied upon the judgment of the Apex Court in case of **Premji Ratan v. Union of India** reported in **(1994) 5 SCC 574**, and Hanumanthappa v. Muniappa reported in **1997 (29) ALR 392 SC**.

7. Next, it is contended by learned counsel for the petitioners that the suit filed by the the defendant/respondent was based on his title. The suit itself was defective in as much as declaration of title has not been

sought for though the title of plaintiffs was in dispute. It is further submitted that if the suit is based on title and unless the plaintiff proves his prima-facie title, an injunction cannot be granted merely on the basis of possession over the property in dispute. It has been also contended by learned counsel for the petitioners that the suit simpliciter for permanent injunction without claiming declaration of the title, fled by the plaintiff, is not maintainable. In this connection, the learned counsel for the petitioners relied upon the judgment of Apex Court in case of **T. V. Ramakrishna Reddy v. M. Mallappa & Anr**. In Civil Appeal No. 5577 of 2021 decided on 07.09.2021 and also upon the judgment of the Apex Court in case of **Padhiyar Prahladji Chenaji (deceased) through L.R.s v. Maniben Jagmalbhai (Deceased) Through L.R.s and Ors.** in Civil Appeal No. 1382 of 2022 decided on 03.03.2022. It is also contended by learned counsel for the petitioners that the plaintiff has been residing in the house in dispute with the consent of the defendant no. 1 and 2 who are the actual owner of the property in dispute and at the best it could be said that the plaintiff has been in possession because of an implied license by the parents which has come to an end and therefore, the plaintiff has no right to remain in possession over the house in dispute and at the best, the plaintiff can ask for damages for unlawful dispossession and no injunction can be issue in favour of the plaintiff who has no legal right to remain in possession over the land in dispute.

8. I do not find any merit in the submissions so made by learned counsel for the petitioner and with force.

5. Salmond states in Jurisprudence (12th Edn.)

"few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. . . . . Law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder." (at pp. 265-66)

"In English Law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law." (Salmond, ibid, pp. 294-95)

"Legal remedies thus appointed for the protection of possession even against ownership are called

possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)." (Salmond, ibid, p.295)

6. The law in India, as it has developed, accords with the jurisprudential thought as propounded by Salmond. In Midnapur Zamindary Co. Ltd. Vs. Kumar Naresh Narayan Roy and Ors. 1924 PC 144, Sir John Edge summed up the Indian law by stating that in India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court.

9. Full Bench of Allahabad High Court in case of case of **Yar Mohammad and another v. Lakshmi Das and others** reported in **AIR 1959 All 1**, it has been held by this Court that law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess the person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause. As observed by Edge, C.J. in Wali Ahmad Khan v. Ayodhya Kundv (ILR XIII Alld, 537 at 558)

"The object of the Section was to drive the person who wanted to eject a person into the proper court and to prevent them from going with high hands and ejecting such person."

10. In case of **Lallu Yeshwant Singh v. Rao Jagdish Singh and others** reported in **AIR 1968 SC 620**, it has been held by the Apex Court that even when the land lord forcibly enters on the land in possession of the tenant whose tenancy has expired would amount to a trespass. Para no. 8 of the Lallu Yeshwant Singh (Supra) is quoted as under:

"Some stress was laid on the words "in case of proof of trespass" in s. 326 by the learned counsel for the respondent. According to him, a landlord does not commit trespass when he forcibly enters on land in the possession of a tenant whose tenancy has expired. In our view, in the context, the word "trespass" here would include forcible entry and dispossession by the landlord. Reference was made to a number of English authorities in this behalf but it is not necessary to deal with them because the law in India on this subject is different. Under s. 9 of the Specific Relief Act it is well-settled that question of title is irrelevant in a suit under that section. As the structure of s. 326 of Qanoon Mal, read with s. 163 of Qanoon Ryotwari, is similar to s. 9 of the Specific Relief Act, there is no. reason why s. 326 should be interpreted differently."

11. In **K. K. Verma v. Naraindas C. Malkani** reported in **ILR (1954) Bombay 950** at page 957, Chagla, C.J. stated that the law in India was initially different from the law in England, he observed:

"Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under s. 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession

otherwise than in due course of law, but a trespasser who has 'been thrown out of possession cannot go to Court under s. 9 and claim possession against the true Owner."

12. In case of **Ram Rattan and others v. State of U.P.** reported in **AIR 1977 SC 619**, it has been held by the Apex Court that person in settled possession can only be dispossessed even by the true owner by taking recourse to the remedies available to him under law. Relevant portion of para no. 4 of Rama Rattan (Supra) is quoted as under:

"It is well settled that a true owner has every right to dispossess or throw out a trespasser, while the trespasser is in the act or process of trespassing and has not accomplished his possession, but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law. In view of the clear finding of the High Court that the complainant Ram Khelawan even after encroachment had established his possession over the land in dispute for two to three weeks before the occurrence, for the purpose of criminal law, the complainant must be treated to be in actual physical possession of the land so as to have a right of private defence to defend his possession even against the true-owner."

While it may not be possible to lay down a rule of universal application as to when the possession of a trespasser become complete and accomplish.

13. In case of **Puran Singh and another v. State of Punjab** reported in **AIR 1975 SC 1674**, in para no. 11 of the aforesaid judgment, the Apex Court has held as under:

"11. In this case there was a concurrent finding of fact that Jamuna was in effective possession of the field on the date of occurrence and the prosecution had alleged that P.Ws 17 and I had taken possession of the property but the finding of the Court was that P.Ws 17 and 19 had not been put in possession by virtue of the delivery of possession given by the Court. It was against this context that the observations referred to above were made. This Court clearly pointed out that where a trespasser was in settled possession of the land he is not entitled to be evicted except in due course of law and be is further entitled to resist or defend his possession even against the rightful owner who tries to dispossess him. The only condition laid down by this Court was that the possession of the trespasser must be settled possession. The Court explained that the settled possession must be extended over a sufficiently long period and acquiesced in by the true owner. This particular expression has persuaded the High Court to hold that since the possession of the appellants party in this case was only a month old, it cannot be deemed to be a settled possession. We, however, think that this is not what this Court meant in defining the nature of the settled possession. It is indeed difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into a settled possession. But what this Court really meant was that the possession of a trespasser must be effective, undisturbed and to the knowledge of the owner or

without any attempt at concealment. For instance a stray or a casual act of possession would not amount to settled possession. There is no special charm or magic in the word 'settled possession' nor is it a ritualistic formula which can be confined in a strait jacket but it has been used to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to &fend his property against attack even by the true owner. Similarly an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession. Thus in our opinion the nature of possession in such cases which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes:

(I) that the trespasser must be in actual physical possession of property over a sufficiently long period;

(ii) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of animus prossendie. The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case ;

(iv)that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence. These principles logically flow from a long catena of cases decided by this Court as well as other High Courts some of which have been referred to in the judgment of this Court in Munshi Ram's case, AIR 1968 SC 706= (1968 Cri LJ 806) (supra).”

14. In case of **State of U.P. and another v. Maharaja Dharmander Prasad Singh etc.** reported in **AIR 1989 SC 997**, the Apex Court has held as under:

“A lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression 're- entry' in the lease-deed does not authorise extrajudicial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibit- ed; a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a 'legal pedigree'. In Bishandas v. State of Punjab, (1962) 2 SCR 69: (AIR 1961 SC 1570), this Court said (at pp. 1574 and 1573 of AIR):

"We must, therefore, repel the argument based on the contention that the petitioners were trespassers and could be removed by an executive order. The argument is not only specious but highly dangerous by reason of its implications and impact on law and order."

"Before we part with this case, we feel it our duty to say that the executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law."

Therefore, there is no question in the present case of the Government thinking of appropriating to itself an extra-judicial right of re-entry. Possession can be resumed by Government only in a manner known to or recognised by law. It cannot resume possession otherwise than in accord- ance with law. Government is, accordingly, prohibited from taking possession otherwise than in due course of law."

15. In case of **Krishna Ram Mahale (dead) by his L.R.s, v. Mrs. Shobha Venkat Rao** reported in **1989 SC 2907**, in para no. 8 of the judgment, the Apex Court has held as under:

"8. Mr. Tarkunde, learned Counsel for defendant No. 3, the appellant herein, rightly did not go into the appreciation of the evidence either by the Trial Court or the High Court or the factual conclusions drawn by them. It was, however, strongly urged by him that the period of licence had expired long back and the plaintiff was not entitled to the renewal of licence. It was submitted by him that in view of the licence having come to an end, the plaintiff had no right to remain in charge of the business or the premises where it was conducted and all that the plaintiff could ask for was damages for unlawful dispossess ion even on the footing of facts as found by the High Court. We find ourselves totally unable to accept the submission of Mr. Tarkunde. ***It is a well-settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law.***

16. In case of **Krishna Ram Mahale (Supra)**, the Apex Court held that the respondents as she filed suit for recovery of possession of premises upon which she had entered as licensee to conduct the business of restaurant, she was subsequently dispossessed by the licenser unlawfully and behind her back, she was entitled with decree for recovery of possession. Since she was unlawfully dispossessed, it could not be said that the license having expired long back and the plaintiff not being entitled to renewal of license could only ask for damages for unlawful possession.

17. In case of **Samir Sobhan Sanyal v. Tracks Trade Private Ltd. and others** reported in **(1996) 4 SCC 144**. The Apex Court has held as under in paragraph no. 6 of the aforesaid judgment:

"6. It would thus be clear that without any decree or order of eviction of the appellant from the demised premises, he has been unlawfully dispossessed from the premises without any due process of law. The question, therefore, is: whether he should be allowed to remain in possession till his application under Order 21, Rules 98 and 99 is adjudicated upon and an order made. Though the learned counsel for the 1st respondent and also for the 3rd respondent, who is one of the transferees from the 6th respondent, sought to contend that the appellant has no right to remain in possession after the lessee, M/s. India Foils Ltd. had admitted by a resolution that the appellant has no right to remain in possession, we are not impressed with the arguments. At this state, we are only concerned with his admitted possession of the demised premises. What rights would flow from a contract between him and him employer is a matter to be adjudicated in his application filed under Order 21, Rules

98 3nd 99, CPC. At this stage, it is premature to go into and record any finding in that behalf. The learned counsel for the 1st respondent also repeatedly sought to bring to our notice that on account of the orders of the Court Officer passed by the High Court the maintenance cost has been mounting up due to the delay in disposal of the proceedings in various courts. Even with regard to that, we are not impressed with the same. Since the letter of the law should strictly be adhered to, we find that high-handed action taken by the respondent Nos. 1, 3 and 6 in having the appellant dispossessed without due process of Haw, cannot be overlooked nor condoned. The Court cannot blink at their unlawful conduct to dispossess the appellant from demised property and would say that the status quo be maintained. If the Court gives acceptance to such high-handed action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law for ransom and it would be a field day for anarchy. Due process of law should be put to ridicule in the estimate of the law-abiding citizens and rule of law would remain a mortuary."

18. In case of **Rame Gowda (Dead) by Lrs. v. M. Varadappa Naidu (Dead) by Lrs. and another** reported in **(2004) 1 SCC 769**, the Apex Court considering the law on subject has held as under:

"In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court. The person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force.

In the present case the Court has found the plaintiff as having failed in proving his title. Nevertheless, he has been found to be in settled possession of the property. Even the defendant failed in proving his title over the disputed land so as to substantiate his entitlement to evict the plaintiff. The Trial Court therefore left the question of title open and proceeded to determine the suit on the basis of possession, protecting the established possession and restraining the attempted interference therewith. The Trial Court and the High Court have rightly decided the suit. It is still open to the defendant-appellant to file a suit based on his title against the plaintiff-respondent and evict the latter on the former establishing his better right to possess the property

Where the suit for declaration of title and injunction is filed and the title is not clear, the question of title will have to be kept open without denying the plaintiff's claim for injunction in view of the fact that the plaintiff has been in possession and

there is nothing to show that the plaintiff has gained possession by any unfair means just prior to the suit. It would suffice if he proves that he was in lawful possession of the same and that his possession was invaded or threatened to be invaded by a person who has no title thereof.

(Paras 7, 8, 11 & 12)"

19. Again in case of **Subramaniaswamy Temple, Ratnagiri Vs. V. Kanna Gounder (Dead) by Lrs.** reported in **2009 (106) RD 77**, the Apex Court has held in para no. 11 & 13 as under:

"11. It is now well settled that in India, nobody can take possession of an immoveable property except in accordance with law. Respondent was a licensee under the appellant. He was evicted from the shop which was allotted in his favour. If he had encroached upon a portion of the Poramboke land, he could have been evicted by the temple on the basis of its possessory title.

12. If, thus, the temple was in prior possession of the land which would be evident from the classification made by the State Government and recognition of its right thereover, it also had right to initiate proceedings in a civil court for eviction of a rank trespasser. In a case of this nature, the court was required to consider as to who was in prior possession. Only in the event the respondent was in a position to show that he had a better title, he could continue with the possession. The only defence taken by him was that the suit land pertains to Survey No.144 and not Survey No.370/1. Such a contention has been negatived by the trial court as also by the first appellate court. A finding of fact had been arrived at. Having regard to the concurrent finding of fact as regards the possession of the parties, vis-a-vis, their respective title in and over the suit land. The High Court, while exercising its jurisdiction under Section 100 of the Code of Civil Procedure, was required to formulate a substantial question of law which might have arisen for its consideration. No question of law was framed far less any substantial question of law relating to identification of the property. The High Court, therefore, in our opinion completely misdirected itself in passing the impugned judgment.

13. The law operating in this connection having been noticed by this Court in Rame Gowda (D) by Lrs. v. M. Varadappa Naidu (D) by Lrs. and Anr. [(2004) 1 SCC 769], we need not enter into a deeper probe. Therein it was held :

"8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the

possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions."

20. In case of Ranjit Kaur v. Harmohinder Singh (Major) and others reported in 2012 (1) AWC 14 (SC), the Apex Court in para no. 11 has held as under:

"11. However, we find merit in the arguments of learned senior counsel for the appellant that the High Court was not justified in vacating the restraint order passed by the trial Court against the dispossession of his client. Learned counsel is right in his submission that even though in the decree of divorce, the appellant has not been given a right of residence and her occupation of the suit property can be treated as unauthorized, respondent No. 1 cannot evict her except after following the procedure established by law. The material placed on record shows that the appellant had entered into the property as the wife of respondent No. 1. Therefore, even though, after passing of the decree of the divorce she may not have a legal right to continue to remain in possession of the suit property, respondent No. 1 cannot be given liberty to forcibly evict her."

21. In case of Hanumanthappa v. Muninarayanappa (Supra), relied upon by the learned counsel for the petitioner, is not applicable to the facts of the present case as in Hanumanthappa v. Muninarayanappa (Supra), the appellant was in possession over the property in dispute pursuant to a compromise decree. The Apex Court held that appellant being in lawful possession of the property as an owner and the respondents being not party to the compromise decree, no injunction can be issued against the appellant lawful owner.

22. In case of Padhiyar Prahladji Chenaji (Supra), the Apex Court was considering the question whether in a case where plaintiff has lost so far as the title is concerned and the defendant against whom permanent injunction is sought, is the true owner of the land, whether the plaintiff is entitled to a relief of permanent injunction against the true owner, more particularly, when the plaintiff has lost so far as his title is concerned and can thereafter, the plaintiff be permitted to content that despite the fact that the plaintiff has lost so far as title is concerned, her possession be protected by way of injunction and that the true owner has to file a substantive suit claiming possession. Para no. 9 of the judgment is quoted as under:

"Even otherwise on merits also, the Courts below have erred in passing the decree of permanent injunction restraining the defendant No.1 from disturbing the alleged possession of the plaintiff. Assuming for the sake of argument that the plaintiff is found to be in possession, in that case also, once the plaintiff has lost so far as the relief of declaration and title is concerned and the defendant No.1 is held to be the true and absolute owner of the property in question,

pursuant to the execution of the sale deed dated 17.06.1975 in his favour, the true owner cannot be restrained by way of an injunction against him. In a given case, the plaintiff may succeed in getting the injunction even by filing a simple suit for permanent injunction in a case where there is a cloud on the title. However, once the dispute with respect to title is settled and it is held against the plaintiff, in that case, the suit by the plaintiff for permanent injunction shall not be maintainable against the true owner. In such a situation, it will not be open for the plaintiff to contend that though he/she has lost the case so far as the title dispute is concerned, the defendant – the true owner still be restrained from disturbing his/her possession and his/her possession be protected. In the present case, as observed hereinabove and it is not in dispute that the suit filed by the plaintiff for cancellation of the registered sale deed and declaration has been dismissed and the registered sale deed in favour of the defendant No.1 has been believed and thereby defendant No.1 is held to be the true and absolute owner of the suit land in question. The judgment and decree passed by the trial court in so far as refusing to grant the relief for cancellation of the registered sale deed and declaration has attained finality. Despite the fact that the plaintiff has lost so far as the title is concerned, still the Courts below have granted relief of permanent injunction against the defendant No.1 – the absolute owner of the land in question, which is unsustainable, both, on law as well as on facts. An injunction cannot be issued against a true owner or title holder and in favour of a trespasser or a person in unlawful possession."

23. In the present case, the question of title is yet to be adjudicated in the trial and the possession of plaintiff is admitted over the property in dispute. The law laid down by Apex Court in Padhiyar Prahladji (Supra) will not apply to the facts of the present case as in Padhiyar Prahladji (Supra) the plaintiff has lost so far as the title is concerned.

24. In the present case the possession of the plaintiff/respondent is admitted. Stand taken by defendants/petitioners is that plaintiff/respondent is residing in the house being son of defendants/petitioners. The possession of plaintiff/respondent cannot be held to be unauthorised, possession of plaintiff/respondent is permissive and plaintiff/respondent cannot be held to be trespasser.

25. The contention of the learned counsel for the petitioner is that the suit itself is not maintainable as no declaration of title has been sought by the plaintiff is misconceived. The law does not prohibit for filing a suit merely for injunction based on possession.

26. In case of T. V. Ramakrishna Reddy (Supra), relied upon by learned counsel for the petitioner while considering the question whether the learned Single Judge of the High Court was right in holding that the suit simpliciter for permanent injunction without claiming declaration of title as filed by the plaintiff was maintainable. The Apex Court relied upon the judgment in case of Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs and others reported in 1 (2008) 4 SCC 594 has held that where there are necessary pleadings regarding title and appropriate issue relating to title on which the parties lead evidence if the matter involved is simple and straight forward, the court may decide upon the issue regarding title. Even in suit for injunction, however, such cases are exception to the normal rule that the question of title will not be decided in suit for injunction.

In case of T. V. Ramakrishna Reddy (Supra), the Apex Court quoted in para no. 21 of Anathula Sudhakar (Supra) which is quoted as under:

"To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction.

27. Law relied upon by the defendants/petitioners does not lay down that under any circumstances suit bases on possession cannot be filed without seeking declaration of title. Question of title can be looked into in a suit for injunction unless the same is very complicated.

28. In case of Premji Ratan se Saha (Supra) relied upon by the learned counsel for the petitioner, the Apex Court held that injunction would not be issued against the true owner even assuming that the plaintiff has any possession, their possession wholly is unlawful possession of a trespasser and an injunction would not be issued in favour of a trespasser or a person who gained unlawful possession as against the person who is the true owner. This case is not applicable to the facts of the present case as the possession of the plaintiff/respondent is permissive though as per the case of the petitioners plaintiff is in possession being the son of the defendants/petitioners and the plaintiff/respondent cannot be said to a trespasser or a person who gained possession unlawfully against the true owner. Thus, in view of the law laid down by the Apex Court, it is clear that a person who is in settled possession cannot be dispossessed except in accordance with

law.

29. In case of S. R. Ezaz v. The Tamil Nadu Handloom Weavers Co-operative Society Ltd. reported in 2002 (48) ALR 73, the Apex Court has held as under: "In our view, if such actions by the mighty or powerful are condoned in a democratic country, nobody would be safe nor the citizens can protect their properties. Law frowns upon such conduct. The Court accords legitimacy and legality only to possession taken in due course of law. If such actions are condoned, the fundamental rights guaranteed under the Constitution of India or the legal rights would be given go bye either by the authority or by rich and influential persons or by musclemen. Law of jungle will prevail and 'might would be right' instead of 'right being might'. This Court in State of U.P. and others vs. Maharaja Dharmander Prasad Singh and others [(1989) 2 SCC 505] dealt with the provisions of Transfer of Property Act and observed that a lessor, with the best of title, has no right to resume possession extra-judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited. The Court also held that there is no question of Government withdrawing or appropriating to it an extra judicial right of re-entry and the possession of the property can be resumed by the Government only in a manner known to or recognized by law."

30. In the present case, the plaintiff has asked for a decree of injunction restraining the defendants from interfering in the peaceful possession and enjoyment of the plaintiff in respect of House No. N 638, S Block, Yashoda Nagar, Kanpur Nagar. In the plaint, the plaintiff has also claimed himself to be the owner of the property. So far as the possession of the plaintiff is concerned, the same is not denied by the defendants/petitioners as it is admitted that the plaintiff is residing in the house with the consent of the defendants being their son, however, the defendant in suit have claimed ownership in the property in dispute. The question of ownership will be decided only after framing of issues in this regard and considering the evidence of the parties at the time of trial of the suit. Since, the possession of the plaintiff is admitted, the lower appellate court has committed no illegality in protecting possession of the plaintiff.

31. Consequently, the writ petition fails and is accordingly dismissed.

(2024) 3 ILRA 1433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Matter Under Article 227 No. 96 of 2024
alongwith other connected cases

Narmal Prasad Mishra & Anr.
...Petitioners
Versus
Mukut Bihari & Ors. ...Respondents

Counsel for the Petitioners:
Rajeiu Kumar Tripathi

Counsel for the Respondents:
Sushil Kumar Pathak, Pawan Kumar Mishra, Piyush Asthana

Civil Law - Civil Procedure Code, 1908 - Order 9 Rule 13 - Limitation Act, 1963 - Section 5 - Petitioners filed suit seeking decree of cancellation of sale deed executed in favour of private respondents,

and for injunction, contending that Ram Pyare, their maternal grandfather, already bequeathed property to them under will - Petitioners came to know of alleged sale deed when defendants sought mutation of their names in revenue records - Suit filed, proceeded ex parte and finally decreed ex parte - Defendants assailed ex parte judgment and decree by filing applications under O.9 R.13 in two separate sets - Notices issued to petitioners in both cases - Trial Court held applications within limitation under Article 123 Limitation Act, ,rejected applications - Petitioners moved applications in both cases seeking dismissal of defendants' petitions on ground that, since applications under Section 5 Limitation Act rejected, petitions liable to be dismissed - Trial Court rejected petitioners' applications and defendants' applications allowed - Petitioners filed Civil Revision, dismissed - Impugned order - Held, service on defendant by registered post failed as cover returned with endorsement that she resided in Surkhet, Nepal - Trial Court effected service through publication in a daily with no circulation in Surkhet, Nepal - Urged that newspaper had circulation in Nepalganj, but no evidence showed circulation in Surkhet, Nepal - Trial and Revisional Courts held defendant not duly served - Treating publication as invalid service, as limitation computed from date of knowledge, rendering applications within time - Both Courts found sufficient cause preventing defendants from contesting suit, and since ex parte decree was joint and several, its setting aside for one defendant extended to all - No error in both orders. (Para 7 to 14, 62, 63)

Writ petitions dismissed. (E-13)

List of Cases cited:

1. S. Sundaram Pillai & ors..Vs V.R. Pattabariman & ors..; 1985 (1) SCC 591

2. Ajeet Seeds Limited Vs K. Gopala Krishnaiah; (2014) 12 SCC 685, (Paras 9, 10)

3. Sunil Poddar Vs U.O.I.; (2008) 2 SCC 326, (Para 23)

4. Basant Singh & anr. Vs Roman Roman Catholic Mission; (2002) 7 SCC 531, (Paras 6 to 9)

5. Parimal Vs Veena @ Bharti; (2011) 3 SCC 545, (Paras 12, 13, 15 to 19)

6. Ram Bharose Vs Ganga Singh 1931 SCC Online All. 133

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

1. This is a batch of four petitions preferred under Article 227 of the Constitution of India assailing the order dated 20.12.2023 passed by the District Judge, Bahraich and order dated 07.11.2023 passed by the Additional Civil Judge (Junior Division)/F.T.C. Bahraich whereby the application preferred by the private respondents under Order 9 Rule 13 C.P.C. has been allowed and also holding that the said application was within time and was not barred by limitation.

2. Since the issue involved in all the four petitions are common and the matter is in between the same parties, consequently, all the four petitions are being decided by this common judgment.

3. The Court has heard Sri Rajeiu Kumar Tripathi, learned counsel appearing for the petitioner. Sri S.C. Sitapuri, learned counsel who has filed his vakalatnama on behalf of the private respondent nos. 2 and 4 in the petition bearing No. 96 (A-227) of 2024 which is taken on record. Sri Piyush Asthana, learned counsel appearing for respondent no. 1 and 3, Sri Pawan Kumar Mishra, learned counsel for the respondent nos. 5 and 6.

4. The learned counsel for the private respondents submitted that they do not wish to file any counter affidavit as only a question of law is involved, hence, with the consent of learned counsel for the parties, the Court has heard the matter and it is being decided at the admission stage itself.

5. For the sake of convenience, the Court has lifted the facts from the Petition No. 96 (A-227) of 2024 and shall refer to the parties as impleaded in the instant petitions.

6. In order to appreciate the controversy involved in the instant four petitions, it will be appropriate to delineate the facts giving rise to the instant petitions.

7. That the petitioners before this Court, were the plaintiffs in Regular Suit No. 1146 of 2018 while the private respondents were the defendants. The petitioners filed a suit as aforesaid, seeking a decree of cancellation of sale deed dated 16.09.1982 and injunction. The sale deed was executed by Ram Pyare in favour of the private respondents and it was impugned on the ground that Ram Pyare was the grand-father (maternal) of the petitioners who bequeathed the property to the petitioners by means of his will dated 10.09.1982.

8. It is only at a later stage that when the defendants of the suit attempted to get their names mutated in the revenue records on the basis of the alleged sale deed dated 06.09.1982 that the petitioners became aware of the sale deed and thus filed the said suit. The suit proceeded ex-parte against the defendants and it was finally decided ex-parte on 13.09.1982.

9. The ex-parte judgment an decree dated 13.09.1982 was assailed by the defendants of the suit by filing application under Order 9 Rule 13 C.P.C.in two sets; (i) one set of the defendants namely Mukut Bihar, Arvind Kumar Tripathi, Anand Prakash Tripathi and Akhilesh Tripathi filed an application under Order 9 Rule 13 C.P.C. along with an application under Section 5 of the Limitation Act. This was registered as miscellaneous Case no. 289 of 2023. The other set of defendants namely Asha Devi and Anita Devi filed a separate application under Order 9 Rule 13 C.P.C. along with an application under Section 5 of the Limitation Act which was registered as Misc. Case No. 305 of 2023.

10. In both the aforesaid two cases, notices were issued to the plaintiffs (the petitioners herein). Both the Misc. Cases namely Case No. 289 of 2023 and 305 of 2023 were heard together and the Trial court by means of order dated 26.10.2023 found that the application filed by the defendants in two sets were within time in terms of Article 123 of the Schedule appended with the Limitation Act of 1963 and consequently it rejected the application under Section 5 of the Limitation Act for the aforesaid reasons.

11. The petitioners herein moved an application in both the misc. cases as aforesaid and sought the dismissal of the application under Order 9 Rule 13 C.P.C. on the ground that as Section 5 of the Limitation Act, 1963 applications have been rejected so also the petitions under Order 9 Rule 13 C.P.C. ought to have been rejected consequently.

12. These two applications were rejected by the Trial Court on 31.10.2023 and the Trial Court thereafter fixed

07.11.2023 for orders on the application under Order 9 Rule 13 and accordingly on 07.11.2023, the applications under Order 9 Rule 13 C.P.C. were allowed holding that the defendants of the suit did not have adequate notice and they were prevented by sufficient cause from contesting the proceedings and since the nature of the ex-parte decree dated 13.09.2022 was joint and several, hence, setting aside of the decree in respect of one set of defendants would entail the setting aside of the decree as a whole enuring to the benefit of the other set of defendants, too.

13. The petitioners being aggrieved preferred four Civil Revisions before the District Judge, Bahraich assailing the order dated 31.10.2023 and the order dated 07.11.2023. Both orders were challenged in both the sets of cases and as such this resulted in four civil revisions bearing No. 66 of 2023, 67 of 2023 which arose from Misc. Case No. 289 of 2023 whereas the Civil Revision No. 68 of 2023 and 69 of 2023 are the cases arising out of Misc. Case No. 305 of 2023.

14. The Revisional Court did not find favour with the submissions advanced by the revisionist and consequently all four revisions as aforesaid were dismissed upholding the order passed by the Trial Court. As a consequence, the petitioners have preferred these four petitions under Article 227 of the Constitution of India and the order dated 31.10.2023 and 07.11.2023 arising out of Civil Revision Nos.66 of 2023 and 67 of 2023 have given rise to the two petitions bearing Nos. 96 (A-227) of 2024 and 347 (A-227) of 2024. Similarly, the order dated 31.10.2023 and 07.11.2023 passed in Civil Revision No. 68 of 2023 and 69 of 2023 relating to Misc. Case no. 305 of 2023 has given rise to a petition under Article 227 of the Constitution of India bearing No. 91 (A-227) of 2024 and 342 (A-227) of 2024.

15. It is in the aforesaid backdrop that all the four petitions were connected and heard together. In the aforesaid four petitions, the order dated 31.10.2023 and 07.11.2023 has been challenged on common grounds.

16. Sri Rajeiu Tripathi, learned counsel for the petitioners while assailing the orders in all the petitions has primarily raised two questions for consideration of this Court:-

(I) It is urged that once an application under Section 5 of the Limitation Act of 1963 was rejected by the Trial Court on 26.10.2023, it was only obvious that the petition under Order 9 Rule 13 C.P.C. ought to have been rejected consequently.

17. It is urged that the petitioners have moved an application on 31.10.2023 requiring the Trial Court to consider this aspect and since the application under Section 5 of the Limitation Act already stood rejected, the petitions under Order 9 Rule 13 C.P.C. ought to have been dismissed but the Trial Court without affording any opportunity of hearing on the same date itself i.e. 31.10.2023 rejected the said applications moved by the petitioners and thereafter the order dated 07.11.2023 allowing the petitions under Order 9 Rule 13 was passed and the petitioners were not even aware of the order dated 31.10.2023 which came to the notice of the petitioners only when the order dated 07.11.2023 was passed.

18. In the aforesaid circumstances, the petitioners have been prevented from agitating their cause appropriately before the Trial Court and this aspect of the matter has also not been appropriately dealt with by the Revisional Court resulting in sheer miscarriage of justice;

(II) The other limb of submission of learned counsel for the petitioners is that the two courts have not considered the provisions of law applicable to the instant case in the correct perspective.

19. The contention is that in terms of Section 27 C.P.C. summons have to be issued to the defendants in a suit and in the instant case, the service report indicated that despite the summons having been sent to the correct address of the defendant, they evaded the service. In the aforesaid backdrop, the Trial Court had also sent summons by registered post which also did not return, as a result, a presumption in terms of Order 5 Rule 19-A C.P.C. was available to the court. The Trial Court being cautious also permitted the petitioners (the plaintiffs before the Trial Court) to get the defendants served through substituted service in terms of Order 5 Rule 20 C.P.C.

20. It is submitted that Order 5 Rule 20 C.P.C. was amended by the amending Act No. 104 of 1976 which came into effect from 01.02.1977. It is further submitted that sub Rule 2 of Order 5 Rule 20 C.P.C. clearly provides that substituted service shall be as effectual as if it had been made on the defendant personally and in this view of the matter the service upon the defendants would be effectual as personal service, consequently, while moving an application under Order 9 Rule 13 C.P.C., it was incumbent upon the defendants to have moved the application under Section 5 of the Limitation Act (which was actually done by the defendants) but the Trial Court as well as the Revisional Court failed to appreciate the provisions of Article 123 appended to the Limitation Act, 1963and by wrongly applying the principle as provided in the Explanation appended to Article 123 in the schedule appended to the Limitation Act, the Trial Court and the Revisional Court treated the application under Order 9 Rule 13 C.P.C. to be within time from the date of knowledge.

21. Taking his submissions forward, Sri Tripathi urged that Article 123 clearly provides a period of limitation of 30 days for moving an application under Order 9 Rule 13 C.P.C. and it has been emphasized that the time from which the period begins to run is to be reckoned from the date of the decree as in the instant case the summons were duly served on the defendants.

22. It is urged that only when the summons are not duly served then the period of limitation of 30 days is to be reckoned from the date when the person moving the application under Order 9 Rule 13 C.P.C. gets knowledge of the decree.

23. It is further urged that there is an apparent discrepancy in Order 5 Rule 20 (2) C.P.C. and the explanation appended to Article 123 in the scheduled appended with the Limitation Act, 1963.

24. Sri Tripathi has urged that the explanation appended to Article 123 states that substituted service in terms of Order 5 Rule 20 C.P.C. shall not be deemed to be due service. It is stated that the Trial Court and the Revisional Court has granted the benefit of this explanation to the defendants and has treated the application under Order

9 Rule 13 C.P.C. to be within the period of 30 days granting the benefits to the defendants of the time for commencement of limitation from the date of knowledge of the decree.

25. It is urged that once it is provided in Order 5 Rule 20 (2) C.P.C. that the service through substituted mode shall be as effectual as having been made personally then the summons served through publication would amount to sufficient personal service and in the aforesaid circumstances, the time period will have to be reckoned from the date of the decree and not from the date of the knowledge and in the aforesaid circumstances where admittedly the application under Order 9 Rule 13 C.P.C. was filed in the month of July, 2023 whereas the ex-parte decree was dated 13.09.2022, hence, the two courts ought to have considered the ground shown in the said application and Section 5 of the Limitation Act, 1963 whether it constituted sufficient cause but the two courts have grossly erred in holding that the application under Order 9 Rule 13 C.P.C. was within time and for the said reason, the application under Section 5 of the Limitation Act, 1963 filed by the private respondents in two separate miscellaneous cases were incorrectly decided vide order dated 26.10.2023 which was patently erroneous.

26. It is urged that for the very same reason, the application dated 31.10.2023 by which the petitioners prayed that the application under 9 Rule 13 C.P.C. be rejected was erroneously dismissed and as a consequence the order dated 07.11.2023 by which the Trial Court allowed the application under Order 9 Rule 13 C.P.C. is also bad, thus, the petitions deserve to be allowed.

27. The learned counsel for the petitioners in support of his submissions has relied upon the decision of the Apex Court in ***S. Sundaram Pillai and Others Vs. V.R. Pattabariman and Others; 1985 (1) SCC 591*** to explain that what is the ambit of an explanation or a proviso which is appended to a statutory provision.

28. Relying upon the aforesaid decision, it is urged that the proviso is meant to be an exception to something within the main enactment or it is to qualify something enacted therein, however, as far as an explanation is concerned, it is intended to explain the meaning of the provision and when there is obscurity or vagueness in the provision, the explanation is meant to clarify the same to make it consistent with the dominant object which it seems to subserve and it is meant to provide additional support to the dominant object of the provision.

29. It is further urged that the explanation is to be interpreted in a manner that it should support the main provision but nevertheless it cannot have a purpose of taking away a statutory right with which any person under the Statute has been provided with some benefit nor it can set to naught the working of the provision by becoming a hindrance.

30. It is further submitted by Sri Tripathi that the manner in which the Trial Court and the Revisional Court have passed the order dated 26.10.2023 rejecting the application under Section 5 of the Limitation Act, 1963 holding that the application under Order 9 Rule 13 was within time from the date of knowledge of the decree, it has incorrectly applied the explanation to Article 123 and by doing so it has rendered the provisions of Order 5

Rule-20 (2) C.P.C. redundant which could not have been done. Accordingly, the petition deserves to be allowed after setting aside the impugned orders.

31. On behalf of the private respondents, Sri Piyush Asthana and Sri Pawan Mishra, learned counsel have responded to the submissions of the learned counsel for the petitioners and it has been pointed out that the instant petitions are bad, inasmuch as, the petitioners have not assailed the order dated 26.10.2023 by which the application under Section 5 of the Limitation Act, 1963, though rejected, but in effect the Trial Court had held that the application under Order 9 Rule 13 C.P.C. was within time and therefore there was no requirement to move the application under Section 5 of the Limitation Act, 1963. It is urged that without assailing the order dated 26.10.2023, the arguments of the petitioners pales into insignificance as the primary order has not been assailed.

32. It is further urged by the learned counsel for the private respondents that admittedly in so far as Smt. Asha Devi and Anita Devi are concerned, there was a clear averment that they were not residing at the given address since the daughter of Asha Devi was residing in Surkhet, Nepal and Asha Devi was also residing with her daughter, hence, neither the summons sent through registered post were served nor the publication made in the Hindi Daily Jan Morcha could be treated as due service as it had no circulation worth its name in Surkhet, Nepal.

33. It is further urged that once there was ample material available on record of the Trial Court especially the endorsement on the registered cover that Asha Devi was residing in Surkhet, Nepal, it was incumbent upon the plaintiffs (the petitioners herein) to have got the summons served to the petitioners at their address in Surkhet, Nepal. In the aforesaid circumstances, without doing so, the application for getting the defendants served through publication was also improper but nevertheless even the newspaper summons could not be treated to be duly served as the newspaper namely Jan Morcha was not having adequate circulation and this was contrary to Order 5 Rule 20-A C.P.C.

34. It is submitted that in the aforesaid circumstances, where the petitioners have not assailed the order dated 26.10.2023 and the Trial Court by the said order had categorically held that for the purposes of the disposal of the application under Section 5 of the Limitation Act, there was no due service on the defendants of the second set namely Asha Devi and Anita Devi, hence, the application under Order 9 Rule 13 C.P.C. was within time as it has been moved within 30 days from the date of knowledge of the decree.

35. It is submitted that the reasoning given by the Trial Court is based on sound principles of law and requires no interference. The petitioners have erred in moving the application which came to be rejected on 31.10.2023 as once it was held by the Trial Court that the application under Order 9 Rule 13 C.P.C. was within time. However, merely because the Trial Court held in its order that the application under Section 5 of the Limitation Act is rejected, it did not mean that the application under Order 9 Rule 13 C.P.C. would be rejected automatically as the reason was that the application under Section 5 of the Limitation Act, 1963 was actually not required since the Application

under Order 9 Rule 13 C.P.C. was within time.

36. It would have been a different scenario altogether if the application under Section 5 of the Limitation Act moved by the defendants would have been rejected on the merits holding that the defendants were unable to justify the delay and could not establish a sufficient cause then perhaps the contention of the learned counsel for the petitioner could be appreciated that as a consequence the application under Order 9 Rule 13 C.P.C. be dismissed.

37. It is urged that in the instant case, the Trial Court found that since the application under Order 9 Rule 13 C.P.C. was within time from the date of knowledge, hence, there was no requirement to move an application under Section 5 of the Limitation Act, hence, it was rejected. The necessary consequence was that the application under Order 9 Rule 13 C.P.C. was to be heard and decided substantively and this was done by the Trial Court and it allowed the application under Order 9 Rule 13 C.P.C. holding that the defendants were prevented by sufficient cause from contesting the suit and thus the order dated 07.11.2023 does not suffer from any error which may require any interference by this Court.

38. It is further urged that the Revisional Court also noticed the aforesaid aspect and consequently the revision filed by the petitioners were dismissed, hence, the instant petition is bad and does not deserve admission rather is to be dismissed outright especially when the matter is yet to be decided on merits and once the courts have exercised their discretion in a positive manner, it would not be expedient for the Revisional Court or this Court to interfere in such kind of orders especially when the parties have been given an opportunity to contest the proceedings on merits and the Constitutional Courts also lean in favour of such orders by which the parties are granted the benefit of hearing rather the shutting out hearing on the ground of technicalities such as raised by the petitioners in the instant case. For the aforesaid reasons, the petitions deserve to be dismissed.

39. Sri S.C. Sitapuri, learned counsel has also adopted the aforesaid submissions advanced by Sri Piyush Asthana and Sri Pawan Mishra, learned counsel for the private respondents.

40. The Court has heard the learned counsel for the parties and also perused the material on record.

41. In so far as the facts involved in the instant petitions are concerned, there is not much dispute between the parties. It is also not disputed by the learned counsel for the petitioners that they have not assailed the order dated 26.10.2023 in the instant batch of four petitions.

42. The record would further indicate that even though the issue regarding no challenge to the order dated 26.10.2023 was raised by the private respondents on the first date itself but no effort was made by the petitioner to raise any challenge to the said order by moving an application or to amend the relief clause.

43. It is in the aforesaid backdrop that the courts has considered the submissions made by the parties.

44. At the outset, it will be relevant to notice the relevant provisions of law which

have an interplay and impact on the instant petitions and for better appreciation, this Court reproduces Section 27 C.P.C. Order 5 Rule-17, Rule, Rule 20 C.P.C. and Article 123 of the schedule appended to the Limitation Act, 1963.

***"27. Summons to defendants.**—Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed[on such day not beyond thirty days from the date of the institution of the suit].*

******_____*****_____****

Order 5 Rule 17-

***Procedure when defendant refuses to accept service, or cannot be found.**—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant[who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixe*d.

******_____*****_____****

***20. Substituted service**.—(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.*

[(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper,

the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service.—Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.—Where service is substituted by

order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require."

******_____*****_____****

Article 123 Limitation Act, 1963

123.To set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte. *Thirty days*	*The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.*

Explanation.—For the purpose of this article, substituted service under Rule 20 of Order V of theCode of Civil Procedure, 1908 (5 of 1908)shall not be deemed to be due service.	

45. From the perusal of the aforesaid provisions of law, it would be clear that whenever a suit is filed in a court of law which is governed by the Code of Civil Procedure, 1908, summons have to be issued to the defendants. The summons are served through the process server and as far as possible the summons are to be served on to parties to the suit, in case if the person upon whom the service is to be affected is not available then there is an option of affixation of the summons as provided under Order 5 Rule 17 C.P.C. Similarly, where the court finds expedient, it can also get the summons served on the defendants through registered post.

46. In terms of Section 27 of the General Clauses Act, if a registered cover is sent to the person at his correct address and the requisite time having elapsed and the registered cover does not return back to the court or returns to the court with the endorsement such as refusal then in such circumstances, the service shall be deemed to have been affected. In this regard, the decision of the Apex Court in ***Ajeet Seeds Limited Vs. K. Gopala Krishnaiah; (2014) 12 SCC 685*** is relevant and the relevant portion of the said report is being reproduced hereinafter:-

"9.This Court then explained the nature of presumptions under Section 114 of the Evidence Act and under Section 27 of the GC Act and pointed out how these two presumptions are to be employed while considering the question of service of notice under Section 138 of the NI Act. The relevant paragraphs read as under: (C.C. Alavi Haji case[C.C. Alavi Hajiv.Palapetty Muhammed, (2007) 6 SCC 555 : (2007) 3 SCC (Cri) 236] , SCC pp. 563-64, paras 13-14)

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the court that the common course of business renders it probable that a thing would happen, the court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:

***'27.Meaning of service by post.**—Where any Central Act or Regulation made after the commencement*

of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. (VideJagdish Singhv.Natthu Singh[(1992) 1 SCC 647] ,State of M.P.v.Hiralal[(1996) 7 SCC 523] andV. Raja Kumariv.P. Subbarama Naidu[(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved."

10.It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

Similarly, the Apex Court in Vishwabandhu Vs. Sri Krishna And Another; (2021) SCC 549 in paragraph 15 has observed as under:-

"15.The summons issued by registered post were received back with postal endorsement of refusal, as would be clear from the order dated 19-2-1997. Sub-rule (5) of Order 5 Rule 9 of the Code states inter alia that if the defendant or his agent had refused to take delivery of the postal article containing the summons, the court issuing the summons shall declare that the summons had been duly served on the defendant. The order dated 19-2-1997 was thus completely in conformity with the legal requirements. In a slightly different context, while considering the effect of Section 27 of the General Clauses Act, 1897, a Bench of three Judges of this Court inC.C. Alavi Hajiv.Palapetty Muhammed[C.C. Alavi Hajiv.Palapetty Muhammed, (2007) 6 SCC 555 : (2007) 3

SCC (Cri) 236] made the following observations : (SCC p. 564, para 14)

"14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (VideJagdish Singhv.Natthu Singh[Jagdish Singhv.Natthu Singh, (1992) 1 SCC 647] ;State of M.P.v.Hiralal[State of M.P.v.Hiralal, (1996) 7 SCC 523] andV. Raja Kumariv.P. Subbarama Naidu[V. Raja Kumariv.P. Subbarama Naidu, (2004) 8 SCC 774 : 2005 SCC (Cri) 393] .)"

47. There may be cases where for certain reasons, the defendant cannot be served and in such circumstances the court may take recourse to get the defendants served by substituted service i.e. through publication for which the court has to take recourse to Order 5 Rule 20 C.P.C.

48. In order to permit the service through substituted mode, the court is required to form a subjective satisfaction and it has reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that the summons cannot be served in the ordinary course then the court can order the summons to be affixed in some conspicuous place in the court house or upon some conspicuous place where the defendant is known to have last resided or carried on business or personally worked for gains.

49. Rule 1-A was inserted in Order 5 Rule -20 C.P.C. by the amending Act which came into effect from 01.02.1977 which permitted the courts to get the summoned served through an advertisement in a newspaper provided the newspaper must be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided or carried on business or personally worked for gains.

50. It is in the aforesaid circumstance that a publication can be made and Sub Rule 2 of Order 5 Rule 20 C.P.C. saves such service and it would be treated as effectual as if the defendant was personally served.

51. At this stage, it will be relevant to notice the observations of the Apex Court in ***Sunil Poddar Vs. Union Bank of India; (2008) 2 SCC 326*** wherein it has been held that once a summon is published in the newspaper having wide circulation in the locality, it is immaterial whether the defendants were subscriber to the said newspapers or whether they read it. The relevant paragraphs of the said report read as under:-

"23.It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually

served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code. Since the said provision applies to the Debts Recovery Tribunals and the Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before DRT, they had no sufficient time to appear and answer the claim of the plaintiff Bank and on that ground, ex parte order deserves to be set aside."

52. Proceeding further, if Article 123 of the Schedule appended with the Limitation Act is seen, it clearly provides that the limitation for moving an application under Order 9 Rule 13 C.P.C. is 30 days, however, it further states that this period of 30 days is to be reckoned from the date of the decree in case if the summons are duly served. In case if the summons are not duly served then the period of 30 days is reckoned from the date of knowledge of the decree. The said Article also contains an explanation that the service made by publication shall not be deemed to be due service.

53. In the aforesaid backdrop, if the submissions of learned counsel for the petitioners is examined, it would be clear that the explanation which has been appended in Article 123 is only applicable to the said provision alone.

54. It is not quite correct to state that Sub Rule 2 of Order 5 Rule 20 C.P.C. was incorporated by the amendment in 1977. Rather, the correct position is that by the amending Act of 1977 Rule-1 was inserted, it only permitted the court to get the summons served through advertisement in a newspaper and in order to do it, the requirement is that the newspaper must be a daily newspaper having wide circulation in the area where the defendant sought to be served through publication was last known to have resided or worked for gains. In this regard, the observations of the Apex Court in ***Basant Singh and Another Vs. Roman Roman Catholic Mission; (2002) 7 SCC 531*** and the relevant paras thereof read as under:-

"6. Regarding the contention of the counsel for the appellants that the summons were not duly served, as the substituted service has been published in the local daily Aacharan instead of Dainik Bhaskar, we may point out that it is in the evidence on record that both Aacharan and Dainik Bhaskar are local dailies and are widely circulated in the area. In ordinary circumstances, if both the local dailies are widely circulated in the area the change of the name of the local daily from Dainik Bhaskar to Aacharan would not materially affect the service of notice by way of substituted service, deemed to have been served, and would not invalidate the effect

of substituted service just because the notice for substituted service has been published in the local daily which is not ordered by the court. It is the specific contention of the plaintiff-respondent that the notice has been published in the local daily Aacharan on 9-8-1986 and the said local daily is widely circulated in the area and the substituted service would construe as sufficient notice upon the defendants. We are also of the view that it is inherently probable that publication in the local daily Aacharan which is widely circulated in the area would have constituted a sufficient notice to the defendants.

7. Before the trial court the stand taken by the plaintiff was that the defendants had knowledge about the suit filed by the plaintiff and they had sufficient time to appear and answer the plaintiff's claim but they did not appear and the application had been filed with the intention to cause delay. Be that as it may, we are of the view that the publication of the substituted service in the local daily Aacharan instead of Dainik Bhaskar is a mere irregularity in service of summons.

8. Second proviso to Order 9 Rule 13 casts an embargo on the court that a decree passed ex parte shall not be set aside merely on the ground that there has been an irregularity in the service of summons."

9. Order 5, proviso to sub-rule (2) of Rule 19-A CPC provides that where the summons are properly addressed, prepaid and duly sent by registered post with acknowledgement due, notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the court within thirty days from the date of the issue of the summons, the court shall presume that notice is duly served. Further, Section 27 of the General Clauses Act, 1897 (in short "the Act") provides similar provision. The presumptions are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence."

55. The impact of the substituted service through publication was noticed by the Apex Court in a subsequent decision in ***Parimal vs. Veena Alias Bharti; (2011) 3 SCC 545*** and the relevant paragraphs thereof read as under:-

"12.It is evident from the above that an ex parte decree against a defendant has to be set aside if the party satisfies the court thatsummons had not been duly servedor hewas preventedbysufficient causefrom appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

13."Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that

the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (VideRamlalv.Rewa Coalfields Ltd.[AIR 1962 SC 361] ,Lonand Grampanchayatv.Ramgiri Gosavi[AIR 1968 SC 222] ,Surinder Singh Sibiav.Vijay Kumar Sood[(1992) 1 SCC 70 : AIR 1992 SC 1540] andOriental Aroma Chemical Industries Ltd.v.Gujarat Industrial Development Corpn. [(2010) 5 SCC 459 : (2010) 2 SCC (L&S) 50 : (2010) 2 SCC (Cri) 1291 : (2010) 2 SCC (Civ) 448])

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...15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doingsubstantial justice to all the parties concernedand that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (VideState of Biharv.Kameshwar Prasad Singh[(2000) 9 SCC 94 : 2000 SCC (L&S) 845 : AIR 2000 SC 2306] ,Madanlalv.Shyamlal[(2002) 1 SCC 535 : AIR 2002 SC 100] ,Davinder Pal Sehgalv.Partap Steel Rolling Mills (P) Ltd.[(2002) 3 SCC 156 : AIR 2002 SC 451] ,Ram Nath Saov.Gobardhan Sao[(2002) 3 SCC 195 : AIR 2002 SC 1201] ,Kaushalya Deviv.Prem Chand[(2005) 10 SCC 127] ,Srei International Finance Ltd.v.Fairgrowth Financial Services Ltd.[(2005) 13 SCC 95] andReena Sadhv.Anjana Enterprises[(2008) 12 SCC 589 : AIR 2008 SC 2054] .)

16.In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application.

Presumption of service by registered post and burden of proof

17.This Court after considering a large number of its earlier judgments inGreater Mohali Area Development Authorityv.Manju Jain[(2010) 9 SCC 157 : (2010) 3 SCC (Civ) 639 : AIR 2010 SC 3817] held that in view of the provisions of Section 114 Illustration (f) of the Evidence Act, 1872 and Section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post. However, the presumption is rebuttable on a consideration of evidence of impeccable character. A similar view has been reiterated by this Court inSunil Kumar Sambhudayal Gupta (Dr.)v.State of Maharashtra[(2010) 13 SCC 657 : JT (2010) 12 SC 287] .

18.InGujarat Electricity Boardv.Atmaram Sungomal Poshani[(1989) 2 SCC 602 : 1989 SCC (L&S) 393 : (1989) 10 ATC 396 : AIR 1989 SC 1433] this Court held as under : (SCC pp. 611-12, para 8)

"8. There is presumption of service of a letter sent under registered

cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same.The burden to rebut the presumption lies on the party, challenging the factum of service."

(emphasis added)

19.The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue."

56. Having noticed the relevant provisions and the pronouncement of the Apex Court, it would be clear as to how the service through publication is to be made and how it impacts the service on the parties.

57. At this stage, it will also be relevant to notice that apparently, there is no inconsistency between Order 5 Rule 20 (2) C.P.C. and the explanation appended to Article 123 in the schedule appended to the Limitation Act, 1963. Both the provisions operate in different spheres. As far as the provisions of Order 5 Rule 20 C.P.C. is concerned, it permits the court to take recourse through substituted service (through publication) in a newspaper and sub rule 2 states that the service through publication will be as effectual as due service made on the defendant personally and the purpose and intent of Sub rule -2 is to enable the court dealing with the matter to proceed further. Meaning thereby that upon filing of a suit before a court of law, the court is required to issue notice to the defendants. Before proceeding, the court has to record its subjective satisfaction that the defendants of the suit are properly served and once it arrives at the said satisfaction and yet the defendants do not appear in the suit then it would enable the court to proceed further and pass appropriate orders including setting the defendants ex-parte so that the matter can be tried and decided. If this provision is not invoked then perhaps in certain cases where the defendant is not served and even after publication where the service is not treated effectual service then the suit will not proceed and it cannot be left in limbo indefinitely. In order to avoid this uncertainty sub rule (2) of Order V Rule 20 is to be interpreted and it is in this context it is held that the provisions of Order V Rule 20 (2) is for the Court to enable it to prove further.

58. On the other hand, the explanation in Article 123 of the Limitation Act, 1963 is for the purpose of that article alone. Where the defendant moves an application under 9 Rule 13 C.P.C. for setting aside the ex-parte judgment and in such a case, the limitation as provided in the said Article 123 can be seen which is in two parts; (I) there can be a situation where the defendant

may have put in appearance in the suit and later for some reason may not participate and the decree is passed ex-parte, in such situation, the limitation would be reckoned from the date of the decree. (II) There may be a situation that the defendants for some reason could never be served either personally or through affixation or through substituted service and later if an application for setting aside the ex-parte decree is moved then it can be filed within 30 days from the date of knowledge.

59. It is for only such defendants against whom the suit has proceeded ex-parte and the service was through publication that the limitation would be from 30 days of the knowledge and to protect such litigants the explanation has been appended, however, it is not correct to say that the explanation would run counter to Order 5 Rule 20 (2) C.P.C. Primarily, Order 5 rule 20 (2) C.P.C. is for the benefit of the court to enable it to proceed further whereas the explanation appended in Article 123 is for the benefit of such defendants against whom an ex-parte decree has been passed and what will be the period of limitation to move an application under Order 9 Rule 13 C.P.C. has been mentioned and what will be the starting point of limitation has been explained. Thus, it cannot be said there is any contradiction or inconsistency in the provisions of Order 5 Rule 20 (2) C.P.C. and Article 123 of the Limitation Act, 1963.as projected by the learned counsel for the petitioners.

60. It is now well settled that the courts endevour to construe the provisions of law harmoniously so that each provision is given its complete extant within which they operate and any inconsistency may be avoided. In case if the argument of the learned counsel for the petitioner is accepted, it may give rise to anomalous situation and the endevour of the court is always to avoid inconsistency and to harmonies the provisions, hence, the contention of the learned counsel for the petitioners is fallacious and misconceived.

61. The court is fortified in its view and draws strength from a Full Bench decision of this Court in ***Ram Bharose v. Ganga Singh 1931 SCC Online All. 133*** and the relevant portion reads as under:-

"I am unable to accept this argument. The object of issuing a summons is to inform the party, against whom a suit has been instituted, of the fact that there is a suit against him, and if he so chooses, he may come and defend it. If that be the object of a summons, and if, for no fault of his own, a defendant was never put in a position to know that a suit had been instituted against him, whatever steps may have been taken for serving the summons on him, these steps can never be accepted as amounting to "due service". When an order for substituted service is made by a court, on the representation of a plaintiff, only one side is present before the court and it acts on the representation of one party. Obviously it should be open to the defendant when he appears, to show that the method employed was not calculated to effect the purpose which the court had in view, namely, informing the defendant of the institution of the suit. If this is so, the court has to consider, in view of all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him, where and how the summons was served, and so on, in order to see whether there was due service. For example, if a man has gone to Burma to earn a living and he has relations at

home with whom he is in constant touch, and the summons is served on the defendant by affixation of a copy of it on the outer door of his house, it may be open to the court to infer that the service was good, it being expected that the defendant's close relations, living jointly with him in the same house, would inform him of the case. Again, where it is found that the defendant knew that a suit was likely to come and, in order that a summons may not be served on him, he leaves the place, it may be open to the court to hold that there was due service by substitution. On the other hand, if the defendant went, say, to Burma to earn a living and left no one at home, which remained vacant, and at the instance of the plaintiff a substituted service was ordered by publication of the fact of the institution of the suit in a paper published, say, at Aligarh, where the suit was instituted, the court would be in a position to hold that there was no due service.

The rule that substituted service is to be taken as effectual as personal service only means that the court hearing the case may proceed with the suit as if the summons had been personally served on the defendant.

The result is that, in my opinion, whether there has been 'due service' or not is to be considered by the court to which an application has been made for setting aside anex partedecree, having regard to all the circumstances of the case as described above. If the conclusion is that there was due service, then, if the application has not come within thirty days of the decree, he is barred by time. If the conclusion is that there was no due service, the limitation would be computed from the date of the applicant's knowledge of the decree. The mere fact that a substituted service had been ordered is immaterial, by itself."

62. Applying the principles as noticed hereinabove to the facts of the instant case, it would be seen that Smt. Asha could not be served through registered cover as the registered cover had returned with an endorsement that she was not residing at the given address but was in Surkhet, Nepal. Even though, the Trial Court went ahead in getting the summons served through publication but it could not be disputed that Jan Morcha, the daily newspaper wherein the summons were published had any circulation in Surkhet, Nepal.

63. Even though, it has been urged that the said newspaper was even circulated in Nepalganj but there is nothing to state that the said newspaper had circulation in Surkhet, Nepal. Needless to say that Surkhet is a different district whereas Nepalganj is in a different district in a foreign country i.e. Nepal. The Trial Court as well as the Revisional Court has taken note of the aforesaid and has recorded findings regarding the fact that the defendant Smt. Asha Devi was not personally served nor the registered cover was served, hence, treating the publication as not due service for the purposes of computing the limitation for moving the application under Order 9 Rule 13 C.P.C, it held that the applications were within 30 days for the date of knowledge, hence, within time and thereafter the Trial Court went on to consider the application under Order 9 Rule 13 C.P.C. and found that there was sufficient cause for the defendants, by which they were prevented to contest the proceedings and since the decree was joint and several and indivisible, hence, if it is was set aside for one defendant, it would have to be set aside for all. There is no error in the findings

recorded by the Trial Court and the Revisional Court.

64. Moreover, there is another flaw in the arguments of the learned counsel and that is the application under Section 5 of the Limitation Act, 1963 was rejected by the Trial Court by holding that the application under Order 9 Rule 13 C.P.C. were within 30 days of the knowledge of the decree, hence within time, this order was known to the plaintiffs but they never assailed the same before the Revisional Court nor before this Court.

65. Merely to state that since in the order itself it was written that the application under Section 5 of the Limitation Act is rejected and consequently the application under Order 9 rule 13 C.P.C. would have to be rejected, is apparently an erroneous submission, in the facts of the instant case. May be the language used by the Trial Court while disposing of the application under Section 5 of the Limitation Act, 1963 may not have been very happily worded but the fact remains that in the entire text of the said order dated 26.10.2023, it has been clearly explained by the Trial Court that the application under Order 9 Rule 13 C.P.C. is to be treated within time and for the said reason, the application under Section 5 of the Limitation Act, 1963 was rejected, however, it did not mean nor it is evident from the perusal of the order dated 26.10.2023 that the application under Section 5 of the Limitation Act, 1963 was rejected on merit i.e. to say that the defendants were unable to explain the delay or they could not establish the sufficient cause as required, hence, the submission to the contrary made by learned counsel for the petitioners does not impress this Court.

66. For all the aforesaid reasons, this Court is satisfied that there is no error in the orders impugned which may persuade this Court to entertain the aforesaid petitions which are devoid of merits and all the petitions deserve to be dismissed.

67. Since the matter of R.S. No. 1146 of 2018 is to be contested on merits, accordingly, this Court provides that the Trial Court seized with the Regular Suit No. 1146 of 2018 shall after affording full opportunity of hearing to the parties but without granting any unnecessary adjournments shall expedite the proceedings to decide the suit on its own merits as expeditiously as possible.

68. The writ petitions bearing ***W.P. No. 96 (A-227) of 2024, W.P. No. 91 (A-227) of 2024, W.P. No. 342 (A-227) of 2024 and W.P. No. 347 (A-227) of 2024*** are dismissed. Costs are made easy.

(2024) 3 ILRA 1451
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.03.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Matter Under Article 227 No. 287 of 2006

Parag Memorial Educational Instit.
...Petitioner
Versus
Gram Panchayat Sarehri & Ors.
...Respondents

Counsel for the Petitioner:
Shafiq Mirza, Chandra Has Misra, Manzar Ali Khan

Counsel for the Respondents:

C.S.C., R.N. Gupta, Shiv Kumar, Suresh Chandrashukla

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Section 52 - Appeal - Maintainability of - Petitioner contended that after publication of notification under Section 52 of U.P. Consolidation of Holdings Act, 1953, appellate authority namely Settlement Officer of Consolidation was not empowered to entertain or decide appeal preferred u/s 11 of Act of 1953 - Considering admitted fact that appeal was filed after publication under Section 52 of Act, 1953, and no authority was cited to controvert law settled by Co-ordinate Bench, thus finds no merit in petition, accordingly dismissed. (Para 7, 12)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Kapil Dev Vs Deputy Director of Consolidation, Faizabad & ors..), 1996 (14) LCD 550, Writ Petition No. 203 (Cons.) of 1995

2. Hari Ram Vs Deputy Director of Consolidation, Azamagarh & ors..1989 RD 281

3. Siddh Narayan Vs The Deputy Director of Consolidation & ors..; MANU/UP/1284/2007, (Paras 3 to 20)

4. Nanhki Vs Deputy Director of Consolidation, Pratapgarh & ors.1995 Part 1 Volume 13 LCD 1: 1994 RD 264

5. Chhotey Lal & ors..Vs Up-Zila Adhikari/Sub-Divisional Magistrate & ors..; MANU/UP/1187/2004

6. Dahari Lal & ors..Vs D.D.c. & ors.., MANU/UP/2756/2010: 2010(6) ADJ 705, (Paras 18 to 23)

7. Sudarshan & ors.Vs Chief Revenue Officer & ors.., MANU/UP/1960/2021: 2022 (154) RD 43, (Paras 11 to 13)

(Delivered by Hon'ble Saurabh Lavania, J.)

C.M.Application Nos. IA/8/2023, IA/9/2023 and IA/10/2023 (Application(s) for Condonation of Delay, Setting Aside Abatement and Substitution)

1. Heard.

2. Considering the issue involved in the present petition as also the undisputed facts that private respondent Nos. 3 to 5 were the Members of Chakbandi, this Court finds no force in the application(s), under consideration, as such, the same are hereby rejected.

Order on Petition

3. Heard Mohhd. Arif Khan, learned Senior Advocate assisted by Mr. Shadab Khan, Advocate as also Mr. Akbar Ali Khan, learned counsel for the petitioner, Sri Hemant Kumar Pandey, learned counsel for the State as also Sri Shiv Kumar, Advocate, who preferred the application for impleadment, to which, the objection has been filed before this Court and the same is taken on record.

4. By means of the present petition, petitioner has sought the following main relief:-

"(a) To issue a writ, order or direction in the nature of prohibition prohibiting the opp. party No.6 to proceed with appeal No. 1734/1067/2003 under Section 11 of the U.P. Consolidation of Holdings Act, (Shyama Kumari and Others vs. Parag Memorial Educational Institution)."

5. The aforesaid main prayer has been sought on the following two grounds:-

"(i) Because the order passed by the Consolidation Officer was not challenged and had become final between the parties. The consolidation operation came to an end after the issue of notification Under Section 52 of the U.P.Consolidation of Holdings Act, on 9.6.2001. No appeal could therefore be legally filed or entertained as nothing was pending on the date of aforesaid notification.

(ii) Because opposite party no. 6 patently lacks jurisdiction to entertain and adjudicate upon the appeal."

6. For seeking the prayer sought, based upon the above quoted grounds, Mr. Khan, learned Senior Advocate, placed reliance on the judgment passed in ***Writ Petition No. 203 (Cons.) of 1995 (Kapil Dev vs. Deputy Director of Consolidation, Faizabad and Others), 1996 (14) LCD 550***, and the judgment passed in the case of ***Hari Ram vs. Deputy Director of Consolidation, Azamagarh & Ors. 1989 RD 281***.

7. Learned Senior Advocate Mr. Khan, based upon the judgments, referred above, submitted that after publication of notification under Section 52 of the U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953"), the appellate authority namely Settlement Officer of Consolidation, Hardoi, was not empowered to entertain or decide the appeal preferred under Section 11 of the Act of 1953, as such, interference of this Court is required in the matter.

8. Opposing the present petition, learned counsels for the side opposite namely Sri Hemant Kumar Pandey as also Sri Shiv Kumar, based upon the judgment passed in the case of ***Siddh Narayan vs. The Deputy Director of Consolidation and Ors.; MANU/UP/1284/2007***, submitted that the Co-ordinate Bench of this Court, after taking note of earlier pronouncements on the issue including the judgment passed by the Division Bench of this Court in the case of ***Hari Ram vs. Deputy Director of Consolidation, Azamagarh & Ors.; 1989 RD 281***, as also the judgment passed in the case of ***Nanhki vs. Deputy Director of Consolidation, Pratapgarh and Ors. 1995 Part 1 Volume 13 LCD 1: 1994 RD 264,*** the basis of the judgment passed in the case of ***Kapil Dev (Supra)***, held that the appeal would be maintainable even after publication of notification under Section 52 of the Act of 1953. The relevant paras of the judgment passed in the case of ***Siddh Narayan (Supra)*** are extracted hereinunder:-

"3. It has been urged by learned counsel for the petitioner that appeal filed by Gaon Sabha after de-notification of consolidation operation under Section 52 of the Act was not at all maintainable and his preliminary objection has wrongly been overruled. Reliance in support of the contention has been placed on the decisions of learned single Judge of this Court in the case of Raj Bahadur Singh v. Deputy Director of Consolidation, Hardoi, 1974 R.D. (Suppl.) 181 and Nanhki v. Deputy Director of Consolidation, Pratapgarh, 1994 R.D. 264 and a Division Bench of this Court in the case of Hari Ram v. Deputy Director of Consolidation, Azamgarh, 1989 R.D. 281. In so far as the cases of Hari Ram (supra) and Nanhki (supra) are concerned, the same have no application to the facts and circumstances of the present case inasmuch as in the said two cases the question before the Court was whether Deputy Director of Consolidation could have entertained and

decided reference proceedings in exercise of powers conferred by Section 48(3) of the Act even after issuance of the notification under Section 52 of the Act.

4. The question for consideration in this case is whether an appeal against the order of the Consolidation Officer could be filed, entertained and proceeded with even after notification under Section 52 of the Act has been issued.

5. It is well settled that institution of a suit or proceedings carries with it the implication that all rights of Appeal then in force remain preserved with the parties thereto till the proceedings are finally decided and that right of appeal is a vested right which accrues to the litigant from the date the lis commenced. Reference may be made to the following observation of the Hon'ble Supreme Court in the case of Garikapati v. Subbaih Choudhary, AIR 1957 S.C. 540.

"Legal persuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic entity and are to be regarded as one legal proceeding and that the right of Appeal was not a mere matter of procedure but was a substantive right."

6. Thus, it is clear that right of a litigant to take proceedings to a higher Court, in case of an adverse order, comes into existence the moment proceeding is initiated and continues till the lis continues. The right is to be governed by the law prevailing at the time of institution of the suit, proceedings or appeal and not by the law that prevails at the time of decision or that of the filing of the appeal unless it was expressly or by necessary implication so provided.

7. Section 11 of the Act providing for appeals reads as under:

"11. Appeals:— (1) Any party to the proceedings under Section 9-A aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under that Section, may within 21 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, who shall, after affording opportunity of being heard to the parties concerned, give his decision thereon which, except as otherwise provided by or under this Act, shall be final and not be questioned in any Court of law.

(2) The Settlement Officer, Consolidation, hearing an appeal under sub-section (1) shall be deemed to be a court of competent jurisdiction, anything to the contrary contained in any law for the time being in force notwithstanding."

8. Section 52(1) and (2) of the Act around which the entire controversy revolves reads as under-.

"52. Close of consolidation operations:— (1) As soon as may be after fresh maps and records have been prepared under sub-section (1) of Section 27, the State Government shall issue a notification in the official Gazette that the consolidation operation have been closed in the unit and village or villages forming part of the unit shall then cease to be under consolidation operations:

Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and recover the cost of operations under this Act.

(1-A) The notification issued under sub-section (1) shall be published also in a daily newspaper having circulation in the area and in such other manner as may be considered proper.

(2) Notwithstanding anything contained in sub-section (1), any order passed by a Court of competent jurisdiction

in cases of writs filed under the provisions of the Constitution of India, or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities as may be prescribed and the consolidation operation shall, for that purpose, be deemed to have not been closed.

(3)……."

9. From the aforesaid it would be seen that sub-section (2) of Section 52 which has been added by amending Act No. VIII of 1963 is a deeming clause which clearly provides that for the purpose of giving effect to the orders which may be passed by a Court of competent jurisdiction either in cases of writs or proceedings pending under the Act on the date of issuance of notification under Section 52, Consolidation operation shall not be deemed to have been closed.

10. There is nothing either in Section 11 or in Section 52 of the Act which either expressly or by necessary implication takes away the right of appeal. In view of the deeming clause contained in Section 52(2) of the Act, in cases where the proceedings under the Act are pending on the date of issuance of notification under sub section (1), the consolidation operation shall not be treated to be closed meaning thereby in such cases the provisions of the Act shall continue to remain in force as if notification under Section 52(1) notifying the close of consolidation operation has not been issued.

11. In the case in hand, against the order passed by the Consolidation Officer the contesting respondents had a right to approach the Settlement Officer Consolidation in appeal. However, before their rights to approach the appellate Court came to an end notification under Section 52(1) of the Act was issued. However, in view of the deeming clause under Section 52(2) notification issued under section 52(1) of the Act will have not have the effect of destroying the right of appeal which came to be vested in the constesting respondents inasmuch as the proceedings initiated under Section 9 of the Act had not been finally decided when notification under section 52(1) of the Act was issued.

12. The question whether an appeal or revision could be filed even after issuance of notification under Section 52(1) of the Act came up for consideration before a learned single Judge in the case of Gopi Singh v. Deputy Director of Consolidation, (1967) AWR 264. Learned single Judge while holding that the appeal would be maintainable observed as under;

"The term 'proceedings' in S. 52(2) has, in my opinion, been used in that comprehensive sense to include the entire series of proceedings commencing from the one which is initiated before the Consolidation Officer and including that taken in the appeal court. When an appeal is instituted the proceeding which commenced in the trial Court continues. The appeal does not initiate afresh proceeding. On the institution of the appeal the proceedings which have become dormant on the decision by the trial court, revive and remain pending. The only difference being that it is now pending in the different court, namely the Court of appeal."

It was further observed;

"The word 'cases' in the phrase 'cases of writs filed under the Constitution', in sub-Sec. (2) will include orders passed by higher courts of appeal including the Supreme Court. Thus, sub-Sec. (2) is designed to preserve and make effective orders passed by any one or more of the hierarchy of Courts established under the

Act, irrespective of whether the proceeding was pending in any particular court or in any Court subordinate thereto, on the date of issue of the notification in sub-Sec. (1)"

13. The aforesaid view of the learned single Judge was approved by a Division Bench in the case of Dilawar Singh v. Gram Samaj, 1972 AWR 557. The same was the view of another Division Bench in the case of Ram Bahadur v. Deputy Director of Consolidation, 1973 AWR 207.

14. The same principles have been applied with equal force in case of a revision before the Deputy Director of Consolidation under Section 48 of the Act by the Division Bench in the case of Dilawar Singh (supra) wherein it was observed as under;

"The principle of a vested right of a litigant to take a proceeding to the superior Court by an appeal would be equally applicable in case of a revision. It is true that a revision is a power conferred on a court or authority to be exercised at its discretion but it does not mean that the litigant does not possess the right to approach the superior court through a petition for revision. The only basic difference between an appeal and a revision is that in case of an appeal the appellant is entitled to a relief if he succeeds in establishing that the order of the subordinate Court or authority was unsound contrary to law.

15. In case of a revision that court has discretion to refuse the relief if, for example, in its opinion substantial justice had been done between the parties although the order sought to be revised suffered from infirmitites which could justify an interference by the revising court……. If under a statute a party has a right to approach the superior Court with a prayer to revise the order of the subordinate Court, the proceeding can be said to be Pending till the right to exercise the right of approaching the superior Court subsists in the applicant and so long that right subsists it cannot be said that the proceedings had finally come to an end. The right to approach the superior Court through an appeal or a revision can be exercised only after an adverse judgment order is passed against the party. Till then the right only remains dormant and when that right is exercised, the original proceedings become pending."

16. Even in cases where the limitation of filing recall application or appeal or revision has run out prior to date of notification under section 52 of the Act, aggrieved person can file restoration application, appeal or revision as held by the Division Bench in the case of Ram Bahadur (supra). The Bench was of the view that proceedings for recall are on the same footing as an appeal because they have the effect of reviving the original proceedings. The same view was again reaffirmed by another Division Bench in the case of Jiwa Ram v. Deputy Director of Consolidation, 1974 (Suppl.) R.D. 40. Reference may also be made to the following decisions of the learned single judge taking the same view; Jhagru v. Deputy Director of Consolidation Basti, 1989 RD 126, Shyam Narain Rai v. Deputy Director of Consolidation Ballia, 1981 RD 307, Ram Rati v. Deputy Director of Consolidation, 1998 (2) AWC 973 : (1998 All LJ 1740) and Tara Chand v. Deputy Director of Consolidation Ballia, 2004 (96) RD 193).

17. In view of the aforesaid discussions and the law laid down by the Division Bench pronouncements in the case of Dilawar Singh (supra), Ram Bahadur (supra), Jiwa Ram (supra), the contrary decision of a learned single Judge in the

case of Raj Bahadur Singh v. Deputy Director of Consolidation, Hardoi (supra) relied upon by the learned counsel for the petitioner cannot be accepted as laying down correct law and has no binding or even persuasive value.

18. In view of above, there is no illegality in the impugned orders passed by Settlement Officer Consolidation overruling the preliminary objection raised by the petitioner that the appeal would not be maintainable after issuance of notification under Section 52(1) of the Act as well as the revisional order passed by Deputy Director of Consolidation.

19. In the result, the writ petition fails and is dismissed.

20. Petition Dismissed."

9. It is also submitted by the learned counsel for the State that in the facts of the case particularly the fact that petitioner's Institution was situated on the Gaon Sabha Land i.e. Gata No. 850 and the Consolidation Officer concerned directed the revenue officials to record the name of petitioner's Institution over the land i.e. Gata No. 850 vide order dated 12.02.2001 and being aggrieved by the order dated 12.02.2001 the appeal was filed by the 11 appellants including the Members of Gram Panchayat, State of U.P. as also the Members of Consolidation Committee and taking note of the facts of the case as also that Section 11-C of the Act of 1953 provides that the interest of the Gram Sabha shall be protected by the authorities under the Act of 1953, the appeal was entertainable and maintainable. To support the aforesaid contention, learned counsel for the State also placed the reliance on the judgment passed in the case of ***Chhotey Lal & Ors. vs. Up-Zila Adhikari/Sub-Divisional Magistrate and Ors.; MANU/UP/1187/2004.***

10. On the issue of maintainability of appeal after de-notification under Section 52 of the Act of 1953, the Co-ordinate Bench of this Court in the judgment passed in the case of D***ahari Lal & Ors. vs. D.D.c. & Ors., MANU/UP/2756/2010: 2010(6) ADJ 705***, observed as under:-

"18. Division Bench decisions of this Court in the cases of Ram Bahadur and Jiwa Ram and Anr. (supra) are cited before me by Petitioners' counsel wherein it is clearly held that in certain circumstances, restoration application or application challenging an ex parte order will be governed by Section 52(2) of the Act, therefore. Settlement Officer, Consolidation and Dy. Director of Consolidation were liable to hear objection raised on behalf of Petitioners, at least examine question on merits instead of cursorily rejecting objection without judicially examining the entire matter.

19. Sub-section (2) of Section 52 of the Act was added by U.P. Act 8 of 1953 which is an exception to Sub-section (10). Section 52 of the Act does not take away vested right of appeal which is continuation of proceedings even after denotification and appeal or revision is maintainable if delay is sufficiently explained.

20. In the case of Fateh Singh v. Dy. Director of Consolidation, Mathura and Ors. MANU/UP/2135/2004 : 2004 (96) RD 559 : 2004 (5) AWC 4167, this Court held that provision of Section 5 of Limitation Act to consolidation proceedings is made applicable by virtue of Section 53B which reads as under:

53B. Limitation.--The provisions of Section 5 of the Limitation Act, 1963 shall apply to the applications, appeals, revisions and other proceedings under this Act or the rules made thereunder.

21. It is, therefore, incumbent on the consolidation authorities that in the event application for condonation of delay is moved and the delay is sufficiently explained then it will have an effect of obliterating different status between an appeal filed within time or filed after lapse of period of limitation. Settlement Officer, Consolidation has not even tried to look into grounds for condonation of delay but dismissed the appeal as not maintainable since appeal was filed after village stood denotified.

22. Similar view was accepted in the case of Tara Chand and Anr. v. Dy. Director of Consolidation Ballia and Ors. MANU/UP/0805/2003 : 2004 (96) RD 193 : 2004 (2) AWC 1236, that appeal can be made maintainable in the event delay is sufficiently explained. Obviously, Settlement Officer, Consolidation has completely overlooked explanation given in the application for condonation of delay. He has failed to examine the question of limitation and the reason/explanation for delay.

23. In the case of Bechan Ali v. Dy. Director of Consolidation/A.D.M. Siddharthnagar and Ors. MANU/UP/1060/2001 : 2001 (92) RD 317 : 2001 (2) AWC 1003, it was held that an appeal or revision can very well be filed even after denotification against the order which was passed prior to the date of denotification in spite of fact that limitation of filing of an appeal or revision has already expired."

This Court in the case of Sudarshan and Ors. vs. Chief Revenue Officer and Ors., MANU/UP/1960/2021: 2022 (154) RD 43, on the issue involved in the petition, observed as under:-

"11. So far as maintainability of the appeal after denotification under Section 52 of the U.P.C.H. Act is concerned, in the case of Siddh Narayan (supra), a Co-ordinate Bench of this Court has already held, after considering the decision of a Division Bench of this Court, that the filing of an appeal is a statutory remedy available to the parties and the same cannot be hampered due to denotification under section 52 of the U.P.C.H. Act. Relevant paragraphs i.e. paragraph 10, 11, 13, 14 and 15 of the aforesaid judgment is quoted below:-

"10. From the aforesaid it would be seen that sub-section (2) of Section 52 which has been added by amending Act No. VIII of 1963 is a deeming clause which clearly provides that for the purpose of giving effect to the orders which may be passed by a Court of competent jurisdiction either in cases of writs or proceedings pending under the Act on the date of issuance of notification under Section 52, consolidation operation shall not be deemed to have been closed.

11. There is nothing either in Section 11 or in Section 52 of the Act which either expressly or by necessary implication takes away the right of appeal. In view of the deeming clause contained in Section 52 (2) of the Act, in cases where the proceedings under the Act are pending on the date of issuance of notification under sub-section (1), the consolidation operation shall not be treated to be closed meaning thereby in such cases the provisions of the Act shall continue to remain in force as if notification under Section 52 notifying the close of consolidation operation has not been issued.

13. The question whether an appeal or revision could be filed even after issuance of notification under Section 52(1) of the Act came up for consideration before a learned Single judge in the case of Gopi Singh v. Deputy Director of Consolidation, MANU/UP/0345/1967 : 1967 AWR 264.

Learned Single judge while holding that the appeal would be maintainable observed as under:

"The term proceedings' in Section 52(2) has, in my opinion, been used in that comprehensive sense to include the entire series of proceedings commencing from the one which is initiated before the Consolidation Officer and including that taken in the appeal Court. When an appeal is instituted the proceeding which commenced in the trial Court continues. The appeal does not initiate a fresh proceeding. On the institution of the appeal the proceedings which have become dormant on the decision by the trial Court, revive and remain pending. The only difference being that it is now pending in a different Court, namely the court of appeal."

It was further observed:

"The word cases' in the phrase cases of writs filed under the Constitution', in sub-section (2) will include orders passed by higher Courts of appeal including the Supreme Court. Thus, sub-section (2) is designed to preserve and make effective orders passed by any one or more of the hierarchy of Courts established under the Act, irrespective of whether the proceeding was pending in any particular Court or in any Court subordinate thereto, on the date of issue of the notification in sub-section (1)."

14. The aforesaid view of the learned Single judge was approved by a Division Bench in the case of Dilawar Singh v. Gram Samaj, MANU/UP/0142/1973 : 1972 AWR 557. The same was the view of another Division Bench in the case of Ram Bahadur v. Deputy Director of Consolidation, MANU/UP/0143/1973 : 1973 AWR 207.

15. *The same principle have been applied with equal force in case of a revision before the Deputy Director of Consolidation under Section 48 of the Act by the Division Bench in the case of Dilawar Singh (supra) wherein it was observed as under:*

"The principle of a vested right of litigant to take a proceeding to the superior Court by an appeal would be equally applicable in case of a revision. It is true that a revision is a power conferred on a Court or authority to be exercised at its discretion but it does not mean that the litigant does not possess the right to approach the superior Court through a petition for revision. The only basic difference between an appeal and a revision is that in case of an appeal the appellant is entitled to a relief if he succeeds in establishing that the order of the subordinate Court or authority was unsound contrary to law. In case of a revision that Court has discretion to refuse the relief if, for example, in its opinion substantial justice had been done between the parties although the order sought to be revised suffered from infirmities which could justify an interference by the revising Court ..... If under a statute a party has a right to approach the superior Court with a prayer to revise the order of the subordinate Court, the proceeding can be said to be pending till the right to exercise the right of approaching the superior Court subsists in the applicant and so long that right subsists, it cannot be said that the proceedings had finally come to an end. The right to approach the superior Court through an appeal or a revision can be exercised only after an adverse judgment or order is passed against the party. Till then the right only remains dormant and when that right is exercised, the original proceedings become pending."

12. In this conspectus as above, I do not find any merit in the present writ

petition. Counsel for the petitioners could not substantiate his submissions as made in assailing the impugned orders passed by the S.O.C. and the D.D.C. The findings recorded by the S.O.C. with regard to non compliance of the provisions as enshrined under section 25-A of the U.P.C.H. Rules and not controverting the pleadings taken by the appellants, by filing the counter affidavit, became final between the parties, inasmuch as, the same has neither been challenged before the Revisional court nor before this Court in the present writ petition. There is no illegality, perversity or any manifest error in the impugned orders so as to warrant the indulgence of this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

13. Present writ petition is devoid of merits and it is, accordingly, dismissed."

12. Upon due consideration of aforesaid and also the undisputed position that the appeal was filed after publication of notification under Section 52 of the Act of 1953 as also that to controvert the law settled by the Co-ordinate Bench of this Court in the judgment(s), referred above, no authority has been placed before this Court by Mr. Khan, learned Senior Advocate, this Court finds no force in the present petition. It is accordingly ***dismissed***. No order as to costs.

(2024) 3 ILRA 1460
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Matter Under Article 227 No. 541 of 2024

alongwith

Matter Under Article 227 No. 1644 of 2022

Smt. Shobha Srivastava & Ors.
...Petitioners
Versus
District & Session Judge Faizabad & Ors.
...Respondents

Counsel for the Petitioners:
Vipin Kumar Mishra

Counsel for the Respondents:
R.R. Upadhyaya, Pradeep Kumar Singh, Vats Srivastava, C.S.C., Dr. V.K.

Civil Law - Limitation Act, 1963 - Article 136, Sections 3, 5 & 15 - Execution of Decree - Time-Barred Execution Application - Petitioners (judgment-debtors) challenged execution proceedings (Execution Case No. 8/2017) arising from a decree of eviction dated 21.01.1982 in SCC Suit No. 57/1980, filed on 19.07.2017, as time-barred under Article 136, which prescribes a 12-year limitation period for executing a decree from the date it becomes enforceable. Decree challenged in revision (dismissed 12.05.1983) and writ petition (dismissed 22.01.1997) with no stay orders. Execution application, filed 35 years after the decree and 20 years after writ dismissal, was accompanied by a Section 5 condonation application, which was not pressed. Executing Court and Revisional Court erred in not addressing limitation as a jurisdictional issue under Section 3, wrongly assuming Section 5 applicability to execution proceedings. Supreme Court rulings, including SBI Vs B.S. Agriculture Industries (2009) 5 SCC 121 and W.B. Essential Commodities Vs Swadesh Agro (1999) 8 SCC 315, confirm Section 5 inapplicability to execution applications and mandate courts to examine limitation irrespective of defense. Execution application, filed beyond 12 years (expiring 1994 or at latest 2009), was time-barred. Impugned orders (06.04.2018, 07.08.2018, 14.09.2021, 10.11.2021, 28.04.2022, 31.05.2022, 24.01.2024) set aside as erroneous, and Execution Case No. 8/2017 dismissed as time-barred. Petitions allowed with Rs. 50,000/- costs payable by petitioners to private respondents

within three weeks, failing which recoverable with 9% interest. (Paras 14-55)

Petitions Allowed with Costs.

Case Law Cited:

1. SBI Vs B.S. Agriculture Industries (I), (2009) 5 SCC 121 (Para 39)

2. Noharlal Verma Vs Distt. Coop. Central Bank Ltd., (2008) 14 SCC 445 (Para 39)

3. Chandi Prasad Vs Jagdish Prasad, (2004) 8 SCC 724 (Para 39)

4. Bimal Kumar Vs Shakuntala Debi, (2012) 3 SCC 548 (Para 39)

5. W.B. Essential Commodities Supply Corp. Vs Swadesh Agro Farming, (1999) 8 SCC 315 (Para 41)

6. Ashok Leyland Ltd. Vs St. of Tamil Nadu, (2004) 3 SCC (Para 50)

7. A. Jithendranath Vs Jubilee Coop. House Building Society, (2006) 10 SCC 96 (Para 50)

8. Chandra Mouli Deva Vs Kumar Binoya Nand Singh, AIR 1976 Pat 208 (Para 41)

9. Sunderlal & Sons Vs Yagendra Nath Singh, AIR 1976 Cal 471 (Para 41)

10. Ram Krishna Tarafdar Vs Nemai Krishna Tarafdar, AIR 1974 Cal 173 (Para 41)

11. U.J.S. Chopra Vs St. of Bombay, AIR 1955 SC 633 (Para 39)

12. VSM. Salgaocar and Bros. (P) Ltd. Vs CIT, (2000) 5 SCC 373 (Para 39)

13. Rachakonda Venkat Rao Vs R. Satya Bai, (2003) 7 SCC 452 (Para 39)

14. Hasham Abbas Sayyad Vs Usman Abbas Sayyad, (2007) 2 SCC 355 (Para 39)

15. Bikoba Deora Gaikwad Vs Hirabai Marutirao Ghorgare, (2008) 8 SCC 198 (Para 39)

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

1. Heard Sri Manoj Mishra, learned counsel for the petitioner and Sri R.R Upadhyay, along with Sri P.K. Singh Vats learned counsel for the private respondents.

2. The petitioners are the judgment-debtors of execution case no. 08 of 2017 which emanates from a SCC Suit No. 57 of 1980 which came to be decreed on 21.01.1982.The core question involved in the instant two petitions relates to question of limitation for executing a decree of eviction. Since the dispute between the parties has a chequered history, hence, in order to appreciate the issue involved in this petition, it will be necessary to briefly recapitulate certain facts giving rise to the instant petitions.

3. The predecessors-in-interest of the private respondents no. 3 to 6 namely Harimohan Verma had instituted a SCC suit bearing No. 57 of 1980 against the predecessors-in-interest of the petitioners namely Narsingh Narayan Srivastava which was decreed on 21.01.1982.

4. The predecessors-in-interest of the petitioners had assailed the said decree of eviction dated 21.01.1982 in a revision which was also dismissed on 12.05.1983. The predecessors-in-interest of the petitioners further escalated the matter by filing a writ petition before this Court bearing No. 3408 of 1983 which was also dismissed on 22.01.1997. With this, the original proceedings between the parties came to an end.

5. It is only thereafter that a second round of litigation sprouted between the parties when the private respondent nos. 3 to 6 filed an execution application for

getting the decree dated 21.01.1982 executed.

6. The execution application was filed on 19.07.2017 along with an application seeking condonation of delay which came to be registered as Misc. Case No. 8 of 2017. The Executing Court issued notices and in response the petitioners who are the successors-in-interest of Sri Narsingh Narain Srivastava, the original judgment-debtor filed their objections under Section 47 C.P.C. which was registered as Misc. Case No. 15 of 2018 and was dismissed on 06.04.2018. The petitioners further assailed the said order by filing a revision bearing No. 19 of 2018 which was also dismissed on 07.08.2018.

7. The petitioners further resisted the execution of the decree by moving a detailed application bearing Paper No. Ga-29 raising the the issue of limitation in terms of Article 136 as mentioned in the schedule appended with the Limitation Act, 1963 and contested the decree which could only be executed within 12 years and in the instant case, since the execution application was filed on 19.07.2017 relating to the decree of the year 1982, hence, it was time barred and could not be executed. The Executing Court rejected the said application by means of order dated 14.09.2021 which was again assailed by the petitioners in Revision which was also dismissed on 10.11.2021.

8. It is thereafter that the private respondents who are the decree-holder not pressed their application under Section 5 of the limitation Act which was accompanying the execution application and the petitioners taking cue therefrom moved another application stating that since the decree-holders have not pressed their application under Section 5 of the Limitation Act, consequently, the execution application itself must be rejected as time barred. This application of the petitioners was rejected on 28.04.2022.

9. The petitioners being aggrieved preferred a petition under Article 227 of the Constitution of India before this Court registered as W.P. No. 1644 of 2022 (which is connected with the instant petition) wherein the petitioners laid a challenge to the orders passed by the Executing Court dated 06.04.2018 whereby the objections under Section 47 C.P.C. were rejected, order dated 07.08.2018 whereby the revision of the petitioners arising out of the order dated 06.04.2018 was rejected. The petitioners also challenged the order dated 14.09.2021 by which his separate application bearing Paper No. Ga-29 raising the issue of limitation was rejected by the Executing Court and also the order dated 10.11.2021 whereby the revision of the petitioners was dismissed wherein the order dated 14.09.2021 was challenged. The petitioners also challenged the order dated 28.04.2021 whereby the Trial Court had rejected the contention of the petitioners that since the decree-holders had not pressed their application under Section 5 of the Limitation Act so the execution application must also be dismissed as time barred.

10. The petition bearing No. 1644 of 2022 was entertained by a coordinate Bench of this Court by means of an order dated 23.05.2022 requiring the parties to exchange the pleadings. While the aforesaid petition No. 1644 of 2022 was pending and as there was no stay to the execution proceedings, the Executing Court proceeded and passed an order dated

31.05.2022 permitting the execution to be done by breaking open the locks to enable the Amin to evict the petitioners and also permitting the Court Amin to seek police aid. This order dated 31.05.2022 came to be assailed by the petitioners by filing a petition under Article 227 of the Constitution of India bearing No. 2133 of 2022 wherein a coordinate Bench of this Court while calling upon the parties to exchange pleadings stayed the operation of the order dated 31.05.2022 and the said petition was also connected with the earlier petition bearing No. 1644 of 2022.

11. Later, the W.P. No. 2133 of 2022 came to be dismissed by a coordinate Bench of this Court by means of order dated 18.10.2023 and liberty was granted to the petitioners to assail the order before the Revisional Court. It is in view thereof that the W.P. No. 2133 of 2022 came to be dismissed and de-tagged.

12. In view of the aforesaid liberty granted in the W.P. bearing No. 2133 of 2022, the petitioners filed a revision before the Revisional Court which came to be dismissed on 24.01.2024 and being aggrieved against the said order, the instant petition bearing No. 541 of 2024 was filed wherein the petitioners have assailed not only the order dated 24.01.2024 but also the order dated 31.05.2022. The instant petition bearing No. 541 of 2024 was entertained by a coordinate Bench of this Court by means of a detailed order dated 06.02.2024. The parties were required to exchange the pleadings, however, in the meantime, since there was no stay of the execution proceedings, accordingly, the Executing Court in furtherance of the order dated 31.05.02022 had directed the Court Amin to file its report regarding execution of the decree on 26.02.2024.

13. In the aforesaid circumstances, the learned counsel for the petitioner had mentioned the matter which was listed in the cause list for hearing as the petitioners were under a threat of dispossession and execution of the decree which was to be executed as per the programme set by the Amin on 21.02.2024. The Court with the consent of the respective parties fixed the matter on 21.02.2024 and heard the matter. Since the Court Amin along with the police had reached the site for executing the decree and this Court was simultaneously hearing the matter on merits, accordingly, the Court while reserving the judgment on the said date passed an order dated 21.02.2024 which reads as under:-

"1. Heard Shri Manoj Mishra, learned counsel for the petitioners and Shri R. R. Upadhyaya, learned counsel alongwith Shri P. K. Singh Vats for the private respondents.

2. The instant petition is connected with petition A-227 No.1644 of 2022 in between the same parties and relating to the same subject matter.

3. The issue in question relates to the question of law as to what would be the limitation for executing a decree of eviction and if period of 12 years as provided under Article 126 of the appended to Schedule the Limitation Act expires, then whether the said decree can be executed by taking recourse to Section 5 of the Limitation Act or the decree become inexecutable by lapse of time.

4. This matter was listed before the Court on 20.02.2024 and it was informed by the counsel for the petitioners that since the decree of eviction is being pressed against the petitioners for which the executing court had passed an order directing the decree to be executed with police force fixing the matter on

26.02.2024 and it was also informed that the execution proceedings alongwith Court Amin and police force would be conducted on 21.02.2024.

5. It is in this view of the matter that the petitions were directed to be listed today for hearing. It has also been informed by the learned counsel for the parties that the police has reached the site and is being the process of conducting the execution.

6. The Court has heard the learned counsel for the parties and prima facie a case for consideration is made out as shall also be evident from the order passed by a Co-ordinate Bench of this Court dated 06.02.2024. Since the execution proceedings had commenced, accordingly the Court had requested the learned Standing Counsel to inform the police station concerned from where the possee of the police contingent had accompanied the Court Amin for executing the decree to go back as the matter has been heard and it is reserved for judgment.

7. This order has been passed in presence of Shri Manoj Mishra, learned counsel for the petitioners and Shri R. R. Upadhyaya, learned counsel alongwith Shri P. K. Singh Vats for the private respondents and the learned Standing Counsel.

8. The police is directed to go back and the Court Amin is also directed to stay the execution proceedings forthwith.

9. This order shall be communicated even to the executing court and for that the parties will be at liberty by filing an affidavit which shall be taken note of by the executing court where the matter is listed on 26.02.2024.

10. Accordingly till pronouncement of judgment the execution of the decree shall remain stayed and parties shall maintain status quo as it exists today."

14. The submission of learned counsel for the petitioners is that the decree dated 21.01.1982 passed in SCC Suit No. 57 of 1980 was governed by Article 136 as mentioned in the schedule appended to the Limitation Act, 1963 which provides for a limitation of 12 years for executing a decree.

15. The submission is that the decree was passed on 21.01.1982 and even though the petitioners had filed a revision before the District Court and later a writ petition bearing No. 3408 of 1983 was filed before the Court but nevertheless during this period, there was no stay from either the Revisional Court or the High Court in the writ petition, hence, the period of limitation would start from the date of the decree i.e. 21.01.1982 and the period of 12 years expired in the year 1994.

16. It is further submitted that the execution application was filed on 19.07.2017 i.e. after 23 years from the expiry of the period of limitation and after 35 years from the date of decree. In such circumstances, apparently, the decree was time barred and no execution of such decree could take place.

17. The learned counsel for the petitioners further submits that the private respondents are guilty of sharp tactics, inasmuch as, when the application for execution was filed on 19.07.2017, there is a report of the Munsrim of the Court clearly stating that the application for execution was time-barred.

18. Even though, the provisions of Section 5 of the Limitation Act, 1963 do

not apply to execution proceedings, nevertheless, the private respondents who are the decree-holders have moved an application, along with the execution application, seeking condonation of delay under Section 5 of the Limitation Act, 1963.

19. It is urged that though the Executing Court had passed an order directing the said case to be listed as a misc. case, however, the private respondents tampered with the record and instead of the words 'Prakeen wad darj ho" (register as misc. case) as ordered by the Executing Court, they interpolated the said words as "Ijraywad Darj Ho" (register as execution case)."

20. It is further urged that while the petitioners have filed objections under Section 47 C.P.C. yet the issue of limitation was not decided rather the Executing Court and the Revisional Court had proceeded as if the provisions of Section 5 of the Limitation Act were applicable and held that since the explanation given by the decree-holder for filing the application late was adequate and thus it held that the execution application was within time. It is stated that no clear finding in this regard was given by any of the courts despite several rounds of litigation and though this core issue was raised by the petitioners but remained undecided.

21. Elaborating his submissions, Sri Mishra has urged that the Executing Court who decided the objections under Section 47 C.P.C. completely went on a tangent and concluded that since the parties were litigating and during the pendency of W.P. No. 3408 of 1983 the original decree holder had expired and his heirs were not brought on record. But later when the legal heirs of decree holders came to know, they filed the execution application which it would not impact adversely the filing of the execution application and it further held that the compromise which had been arrived at between the parties was unregistered and insufficiently stamped and could not be taken note of by the executing court, hence, the objections were rejected.

22. On the matter being taken before the Revisional Court, it observed that since the W.P. No. 3408 of 1983 had been dismissed in default and the restorations applications were pending that would come to the benefit of the decree holder and it would be treated as the decree had not attained finality, hence, the limitation was not an issue to refuse execution.

23. It is also urged that the very fact that the decree holders had moved an application seeking condonation of delay along with the execution application, hence, this application in its first instance ought to have been decided by the court irrespective whether the judgment-debtors had raised the objections of limitation or not as it is the duty of the Court in terms of Section 3 of the Limitation Act to consider the issue of limitation first and foremost.

24. It is urged that the petitioners had brought to the notice of the Court as well as the Revisional Court that a hugely time-barred decree could never be executed, yet the said issue was not decided which compelled the petitioner to keep running before different courts for seeking adjudication which was not done. In the aforesaid circumstances, the petitioners filed the petition bearing No. 1644 of 2022, however, while the same was pending, the Executing Court went ahead to get the decree executed through police aid which

resulted in filing of the instant petition bearing No. W.P. 541 of 2024 and as such it is for the first time the correctness of the approach of the subordinate courts is to be tested and a conclusive finding be returned as to whether a decree of 1982 could have been entertained for execution in the year 2017 after a period of 30 years and odd, hence, in light of the provisions of the Limitation Act, the impugned orders are bad and the petitions deserve to be allowed.

25. Per Contra, Sri R.R. Upadhyay, learned counsel for the decree-holder-private respondent nos. 3 to 6 submits that the issue of limitation was raised by the petitioners in their objections under Section 47 C.P.C. which came to be rejected and thereafter the petitioner came forward by filing a revision which was also dismissed.

26. Once, the issue of limitation had been rejected, it was not open for the petitioners to have raised the aforesaid issue once again by moving a separate application bearing Paper No. Ga-29 which needless to say was dismissed and so also the revision wherein it was held that the issue of limitation already stood decided and it could not be re-agitated again.

27. It is also urged that once the issue of limitation had been decided while dismissing the objections under Section 47 C.P.C. and also the revision emanating there from, hence, the subsequent attempts of the petitioners to raise the same issue over and over again by repeated applications only indicates the malafides of the petitioners who want to stall the execution of the decree dated 21.01.1982. It is also submitted that apart from the house in question wherein the petitioners are in occupation, there is large area which still belongs to the petitioners which is adjacent to the disputed property over which the petitioners are attempting to encroach it.

28. It is further urged that since the father of the private respondents namely Harimohan Verma had expired and the private respondents were residing away from District Ayodhya, hence, they were not aware and later when the application for execution was filed along with an application under Section 5 of the Limitation Act, the issue of limitation having been decided, in such circumstances, if the private respondents not pressed their application under Section 5 of the Limitation Act, it could not have any adverse impact on the petitioners who nevertheless were the judgment-debtors and were required to be evicted.

29. It is also urged that in so far as the judgment debtors are concerned, it is not as if any opportunity of hearing has been denied to the petitioners and in the aforesaid facts and circumstances, the petitions are misconceived and deserves to be dismissed since the two petitions are an outcome of malafides whereby the petitioners are attempting to rake up an issue which already stands decided, hence, in the aforesaid facts and circumstances, the petitions are an abuse of process of law and deserve to be dismissed.

30. The Court has heard the learned counsel for the parties and also perused the material on record.

31. The core question that requires adjudication is regarding the issue of limitation viz.a.viz the execution of a decree.

32. In so far as the facts and dates are concerned, there is no dispute in between

the parties. Apparently, SCC Suit No. 57 of 1980 came to be decreed on 21.01.1982. The same was challenged by the petitioners through their predecessors-in-interest by filing a revision which also came to be dismissed on 12.05.1983 which was further escalated by the predecessors of the petitioners by means of W.P. No. 3408 of 1983 which also came to be dismissed on 22.01.1997.

33. It is also not disputed that the decree-holder filed an execution application along with an application under Section 5 of the Limitation Act on 19.07.2017 i.e. after 35 years from the date of decree dated 21.01.1982 and nonetheless after 22 years from the year the writ petition was dismissed for want of prosecution in the year 1997.

34. It is also not disputed that as per Article 136 as mentioned in the schedule appended with the Limitation Act, 12 years limitation period is the provided for executing any decree and the said Article further provides that the time from which the period begins to run is from the date the decree becomes enforceable. At this stage, it will also be relevant to notice the provisions of Section 3, Section 5 and Section 15 of the Limitation Act, 1963 which reads as under:-

***"3. Bar of limitation**.—(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.*

(2) For the purposes of this Act,—

(a) a suit is instituted,—

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set-off or a counter-claim, shall be treated as a separate suit and shall be deemed to have been instituted—

(i) in the case of a set-off, on the same date as the suit in which the set-off is pleaded;

(ii) in the case of a counter-claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.

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5. Extension of prescribed period in certain cases.—Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

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***15. Exclusion of time in certain other cases.**—(1) In computing the period of limitation for any suit or application for*

the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.—In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of Central Government shall be excluded."

35. The conjoint impact of the aforesaid provisions would be that any application made after the prescribed period of limitation subject to the provisions contained in Section 4 to Section 24 of the Limitation Act are liable to be dismissed even though the limitation may not have been set-up as a defense, meaning thereby that it is incumbent upon the court to see the issue of limitation even though it may not have been raised as a defence by the defending party.

36. Section 5 of the Act of 1963 clearly provides that that there cannot be an extension of the prescribed period of limitation in respect of an application moved under Order 21 of C.P.C. meaning clearly that provisions for extension of time/condonation of delay is not applicable on an application filed originally to execute a decree in terms of Order 21 C.P.C., however, in order to compute the period of limitation, if Section 15 is seen with Article 136 mentioned in the schedule appended to the Limitation Act, it would be clear that for the purposes of computing the limitation for any suit or application for execution of a decree, the institution or execution of which has been stayed by an order of injunction, it shall be excluded including the day on which such order was passed as well as the day on which it was withdrawn.

37. If the aforesaid principle is applied in the instant case, it would be absolutely clear that the decree dated

21.01.1982 became enforceable on the said date and the period of limitation would commence from 21.01.1982 and thus 12 years would expire in the year 1994. Though, it is stated by the petitioners that there was no stay on the execution of the decree while the petitioners had preferred a revision which came to be dismissed in the 1983 and even in the W.P. 3408 of 1983 was dismissed for want of prosecution on 22.01.1997 even then if the period of 12 years is reckoned from the year 1997 even then it would expire in the year 2009.

38. Thus, it would be seen that considering the issue of limitation and its computation from any angle, it would reveal that the application for execution filed on 19.07.2017 was much beyond the period of limitation as prescribed in the Limitation Act.

39. It is also to be seen that apparently the Munsrim of the court had given his report to the effect that the application for execution was time barred. Once, such a report was placed by the Munsrim, it was incumbent upon the Executing Court to examine the issue in the first instance as required in terms of Section 3 of the Limitation Act. The decision of the Apex Court in (i) ***SBI v. B.S. Agriculture Industries (I), (2009) 5 SCC 121; (ii) Noharlal Verma v. Distt. Coop. Central Bank Ltd., (2008) 14 SCC 445; (iii) Chandi Prasad v. Jagdish Prasad, (2004) 8 SCC 724 ; (iv) Bimal Kumar v. Shakuntala Debi, (2012) 3 SCC 548*** will be relevant to be noticed wherein it has been held that it is the duty of the court in terms of Section 3 of the Limitation Act to examine the limitation irrespective whether the Limitation has been taken as a defence or not. The relevant paras of the said reports read as under:-

The Apex Court in ***SBI v. B.S. Agriculture Industries (I), (2009) 5 SCC 121*** has held as under:-

12. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of Section 24-A and give effect to it. If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside.

13. In Union of India v. British India Corpn. Ltd. [(2003) 9 SCC 505] while dealing with an aspect of limitation for an application for refund prescribed in the Business Profits Tax Act, 1947 this Court held that the question of limitation was a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it.

14. In HUDA v. B.K. Sood [(2006) 1 SCC 164] this Court while dealing with the same provision viz. Section 24-A of the Act, 1986 held : (SCC pp. 167-68, paras 10-12)

"10. Section 24-A of the Consumer Protection Act, 1986 (referred to as 'the Act' hereafter) expressly casts a duty on the Commission admitting a complaint, to dismiss a complaint unless the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that the complainant had sufficient cause for not filing the complaint within the

period of two years from the date on which the cause of action had arisen.

11. The section debars any fora set up under the Act, admitting a complaint unless the complaint is filed within two years from the date of which the cause of action has arisen. Neither the National Commission nor had the State Commission considered the preliminary objections raised by the appellant that the claim of the respondent was barred by time. According to the complaint filed by the respondent, the cause of action arose when, according to the respondent, possession was received of the booth site and it was allegedly found that an area less than the area advertised had been given. This happened in January 1987. Furthermore, the bhatties which were alleged to have caused loss and damage to the respondent, as stated in the complaint, had been installed before 1989 and removed in 1994. The complaint before the State Commission was filed by the respondent in 1997, ten years after the taking of possession, eight years after the cause of alleged damage commenced and three years after that cause ceased. There was not even any prayer by the respondent in his complaint for condoning the delay.

12. Therefore, the claim of the respondent on the basis of the allegations contained in the complaint was clearly barred by limitation as the two year period prescribed by Section 24-A of the Act had expired much before the complaint was admitted by the State Commission. This finding is sufficient for allowing the appeal."

15. In a recent case of Gannmani Anasuya v. Parvatini Amarendra Chowdhary [(2007) 10 SCC 296] this Court highlighted with reference to Section 3 of the Limitation Act that it is for the court to determine the question as to whether the suit is barred by limitation or not irrespective of the fact that as to whether such a plea has been raised by the parties; such a jurisdictional fact need not be even pleaded."

The Apex Court in **Noharlal Verma v. Distt. Coop. Central Bank Ltd., (2008) 14 SCC 445** and the relevant portion of the said report read as under:-

32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under:

"3. Bar of limitation.—(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence."

(emphasis supplied)

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

The Apex Court again in ***Chandi Prasad v. Jagdish Prasad, (2004) 8 SCC 724*** has observed as follows:-

"18. The reasons for bringing on the statute-book, the present Article 136 may be noticed. By reason of the said amendment, the filing of the execution petition has been simplified and the difficulties faced for computation which used to arise for grant of stay or not have become immaterial. In terms of Article 136 of the Act, thus, a decree can be executed when it becomes enforceable.

19. Article 136 substantially reproduces the provisions of Section 48(1) of the Code of Civil Procedure which by reason of the Act stands repealed. In that view of the matter, Parliament thought it fit to provide for one period of limitation for an application for execution in stead and place governing each of the several execution applications which the decree-holder can make within a period of 12 years.

20. It is not disputed that all decrees, be they original or appellate, are enforceable. Once a decree is sought to be enforced for ***the*** *purpose of execution thereof irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment of money or delivery of any property at a certain date would be considered to be the starting period of limitation.*

21. It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in the presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (See U.J.S. Chopra v. State of Bombay [AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410] .)

22. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.

Merger

23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. (P) Ltd. v. CIT [(2000) 5 SCC 373 : AIR 2000 SC 1623] .]"

Similarly, the Apex Court in Bimal Kumar v. Shakuntala Debi, (2012) 3 SCC 548 has held as under:-

"29.Presently, we shall dwell upon the issue whether the execution levied by the respondents was barred by limitation or not. The executing court, by its order dated 10-7-2006, accepted the plea of the present appellants and came to hold that the execution petition filed by the

decree-holder was hopelessly barred by limitation.

30.In the civil revision, the learned Single Judge overturned the decision on several counts:

(i) that no steps were taken and no objection was raised by the father of the opposite parties for setting aside the ex parte decree passed in the first suit, if he was aggrieved by it, for about 9 years, though he had appeared and had full knowledge about the first suit;

(ii) that as per the compromise decree, the parties were in possession of the respective shares allotted to them and, accordingly, neither preliminary nor final decree was drawn up and there was no occasion for the petitioners for filing an execution case for enforcement of the compromise decree;

(iii) that the second suit challenging the compromise decree passed in the first suit remained pending for about 21 years;

(iv) that the appeal filed against the dismissal of the second suit also remained pending for about 10 years;

(v) that after the appeal was dismissed and the judgment and decree passed in the second suit became final, the execution case was filed by the petitioner alleging dispossession from the family business being run in the ground floor of the building; and

(vi) that on the basis of such allegation, the compromise decree passed in the first suit became enforceable.

31.Apart from the aforesaid reasons, the learned Single Judge has opined that after the execution case was admitted by the predecessor of the learned Sub-Judge presumably after condoning the delay, the successor should not have dismissed it on the ground of limitation. He placed reliance onBharti Devi[AIR 2010 Jhar 10 : (2009) 3 JLJR 90] and buttressed the reasoning that there was no delay in levying of the execution proceeding. The learned Single Judge further took note of the pending Miscellaneous Appeal No. 369 of 2008 preferred by the present appellants to reinforce the conclusion.

32.It is well settled in law that a preliminary decree declares the rights and liabilities, but in a given case, a decree may be both preliminary and final and that apart, a decree may be partly preliminary and partly final. It has been so held inRachakonda Venkat Raov.R. Satya Bai[(2003) 7 SCC 452 : AIR 2003 SC 3322] . It is worth noting that what is executable is a final decree and not a preliminary decree unless and until the final decree is a part of the preliminary decree. That apart, a final decree proceeding may be initiated at any point of time. It has been so enunciated inHasham Abbas Sayyadv.Usman Abbas Sayyad[(2007) 2 SCC 355] .

33.InBikoba Deora Gaikwadv.Hirabai Marutirao Ghorgare[(2008) 8 SCC 198] a two-Judge Bench of this Court has held that only when a suit is completely disposed of, thereby a final decree would come into being. In the said case, it has also been laid down that an application for taking steps towards passing a final decree is not an execution application and further, for the purposes of construing the nature of the decree, one has to look to the terms thereof rather than speculate upon the court's intention.

34.Regard being had to the aforesaid principles and having opined that the decree passed on the basis of a compromise in the case at hand is the final decree, it is to be addressed whether the execution is barred by limitation.

35.Article 136 of the Limitation Act, 1963 (for brevity "the Act") reads as follows:

	"Description of suit	*Period of limitation*	*Time from which period begins to run*
136.	*For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.*	*Twelve years*	*When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place:* *Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation."*

On a perusal of the said article, it is quite vivid that an application for execution of a decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed within a period of twelve years.

36. InChiranji Lalv.Hari Das[(2005) 10 SCC 746] the question arose whether a final decree becomes enforceable only when it is engrossed on the stamp paper. The three-Judge Bench dealing with the controversy has opined that Article 136 of the Limitation Act presupposes two conditions for the execution of the decree; firstly, the judgment has to be converted into a decree and secondly, the decree should be enforceable. The submission that the period of limitation begins to run from the date when the decree becomes enforceable i.e. when the decree is engrossed on the stamp paper, is unacceptable.

37.The Bench, while elaborating the said facet, proceeded to lay down as under: (Chiranji Lal case[(2005) 10 SCC 746] , SCC pp. 755-56, paras 24-26)

"24. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon.

25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon the date of the engrossment of

such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that the period of limitation would remain suspended till the stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. InYeshwant Deoraov.Walchand Ramchand[1950 SCC 766 : AIR 1951 SC 16 : 1950 SCR 852] it was said that the payment of court fee on the amount found due was entirely in the power of the decree-holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

26. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. As abovenoted, there is no statutory provision prescribing a time-limit for furnishing of the stamp paper for engrossing the decree or time-limit for engrossment of the decree on stamp paper and there is no statutory obligation on the court passing the decree to direct the parties to furnish the stamp paper for engrossing the decree. In the present case the court has not passed an order directing the parties to furnish the stamp papers for the purpose of engrossing the decree. Merely because there is no direction by the court to furnish the stamp papers for engrossing of the decree or there is no time-limit fixed by law, does not mean that the party can furnish stamp papers at its sweet will and claim that the period of limitation provided under Article 136 of the Act would start only thereafter as and when the decree is engrossed thereupon. The starting of period of limitation for execution of a partition decree cannot be made contingent upon the engrossment of the decree on the stamp paper."

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45. Thus analysed, the reasons ascribed by the learned Single Judge are absolutely unsustainable. The period of limitation stipulated under Article 136 of the Act could not have been condoned as has been so presumed by the learned Single Judge. The reliance placed onBharti Devi[AIR 2010 Jhar 10 : (2009) 3 JLJR 90] is totally misconceived inasmuch as in the said case, the execution proceeding was initiated for permanent injunction. No exception can be taken to the same and, therefore, reliance placed on the said decision is misconceived."

40. If the Executing Court would have performed its duty and obligation to examine the said issue at the threshold, perhaps it would have saved the parties from multiple litigation and could have saved a lot of judicial time of the courts and forums as the core issue of limitation was raised and more so when the decree holder itself had filed the application under Section 5 of the Limitation Act, 1963 and without passing any formal order of condonation of delay, the execution proceedings could not have proceeded on merits, least realizing that Section 5 of the Act of 1963 was not attracted. Thus, the decree holder knew that the execution application was time barred yet by skirting the issue it led the parties to be at logger heads since 2017.

41. There can be no doubt on the proposition of law that whatever be the cause, the period of limitation for executing a decree cannot be extended as Section 5 of the Limitation Act is not applicable. In this regard, the decision of the Apex Court in West Bengal Essential Commodities Supply Corporation Vs. Swadesh Agro Farming & Storage Pvt. and Another; (1999) 8 SCC 315 has clearly held that the Section 5 of the Limitation Act is not applicable on the Execution Application. The relevant portion of the said report read as under:-

"19. Under the scheme of the Limitation Act, execution applications, like plaints have to be presented in the court within the time prescribed by the Limitation Act. A decree-holder does not have the benefit of exclusion of the time taken for obtaining the certified copy of the decree like the appellant who prefers an appeal, much less can he claim to deduct time taken by the court in drawing up and signing the decree. In this view of the matter, the High Courts of Patna and Calcutta in Chandra Mouli Deva v. Kumar Binoya Nand Singh [AIR 1976 Pat 208 : 1976 BBCJ 124] and Sunderlal & Sons v. Yagendra Nath Singh [AIR 1976 Cal 471] have correctly laid down the law; the opinion to the contra expressed by the High Court of Calcutta in Ram Krishna Tarafdar v. Nemai Krishna Tarafdar [AIR 1974 Cal 173] is wrong. Section 5 of the Limitation Act has no application; Section 12(2) of the Limitation Act is also inapplicable to an execution petition. If the time is reckoned not from the date of the decree but from the date when it is prepared, it would amount to doing violence to the provisions of the Limitation Act as well as of Order 20 and Order 21 Rule 11 CPC which is clearly impermissible.

20. In the result, we hold that the period of limitation under Article 136 of the Limitation Act runs from the date of the decree and not from the date when the decree is actually drawn up and signed by the Judge. We, therefore, do not find any illegality in the impugned judgment of the High Court. The appeal fails and it is accordingly dismissed. No costs.

42. Even if the provisions of Section 15 of the Limitation Act is examined in the facts of the instant case, it would be seen that there is a clear averment made by the petitioners that while they have been assailing the decree dated 21.01.1982 in a revision which was dismissed in the year 1983 and even the W.P. No. 3408 of 1983 was dismissed in the year 1997 yet there was no stay order in the said proceedings. For the said reasons, Section 15 had no applicability but even otherwise for the sake of arguments, if it is to be considered that there may have been an order of stay for some time, even then the fact remains that the writ petition was dismissed on 22.01.1997, consequently, at best the period of limitation could have commenced from 1997 which also came to an end in the year 2009, accordingly, there was no justification for entertaining the execution application in the year 2017.

43. Merely, because some restoration application was filed in the W.P. No. 3408 of 1983 and it remained pending without any substantive hearing or order and in any case there was no stay on the operation of the decree, mere pendency of the said application for restoration in the aforesaid writ petition could not come to the rescue of the decree-holders.

44. Even though, this Court has no sympathy for the petitioners who are the judgment-debtors but the fact remains that this Court is bound to decide the question of law in accordance with the provisions of law which are attracted in respect of the subject matter of dispute.

45. There is nothing on record to indicate that once the Munsrim had given his report that the execution application was time barred, how the Executing Court dealt with the matter and how it satisfied itself treating the application to be within time that it issued notices to the judgment-debtor to respond on merits of the execution application, without a formal order of condonation of delay.

46. It is also to be seen that perhaps the Executing Court and the Lower Revisional Courts were under a misconception that Section 5 of the Limitation Act was applicable, inasmuch as, the reasoning given by the Executing Court in order dated 06.04.2018 and of the Revisional Court in its order dated 07.08.2018 which are under challenge in the connected petition bearing No. 1644 of 2022 would reveal that they have proceeded on the premise that the pendency of the proceedings before the writ court would come to the benefit of the decree holders. This reasoning of the two courts is palpably erroneous and does not flow from the provisions of law.

47. Apparently, looking into the order sheet, a certified copy of which has been brought on record as Annexure No. 4 in W.P. No. 541 of 2024 it would indicate that prima facie there appears to be some interpolation in the order dated 19.07.2017. Even though, it cannot be verified with certainty at this stage as to whether there was any interpolation and if so by which party but the fact which is undisputed and flows from the record is that it was the duty of the court to have considered the issue of limitation at the first instance. The very fact that the decree-holders had filed an application under Section 5 of the Limitation Act, this should have caught the attention of the court in the first instance before proceeding any further on merits but the same has not been done.

48. The record further indicates that the issue of limitation has been most improperly considered by the Executing Court while dismissing the objections preferred by the petitioners under Section 47 C.P.C. by means of order dated 06.04.2018 as well as by the Revisional Court which dismissed the revision on 07.08.2018 and though it was not taken any higher at that stage but the petitioners raised the same issue by moving a separate application and thereafter when they did not find any success, they have yet again raised the same issue over and over again.

49. Even though, the petitioners may not have assailed the order dated 06.04.2018 and 07.08.2018 at that stage but the same has been assailed in the connected petitions no. 1644 of 2022 and though it can be stated that the act of the petitioners may be mired with laches yet the issue which has been raised is an issue of law.

50. It is also a settled proposition of law that where an issue may not have been appropriately considered and is brought to the notice of the court at a later stage and which materially affects the rights of the respective parties then in certain circumstances, the constitutional courts cannot be said to be denuded of its jurisdiction to deal with the issues and the

propositions of limitation, Resjudicata may not come in the way of the courts to do complete justice between the parties. In this regard, the observations of the Apex Court in ***Ashok Leyland Ltd. Vs. State of Tamil Nadu and Another; (2004) 3 SCC*** are relevant and it reads as under:-

"

Res judicata

118.*The principle of res judicata is a procedural provision. A jurisdictional question, if wrongly decided, would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or res judicata. This question has since been considered inRamnik Vallabhdas Madhvaniv.Taraben Pravinlal Madhvani[(2004) 1 SCC 497 : (2003) 9 Scale 412] wherein this Court observed in the following terms: (SCC pp. 518-19, paras 55-57)*

"55. So far as the question of rate of interest is concerned, it may be noticed that the High Court itself found that the rate of interest should have been determined at 6%. The principles of res judicata which according to the High Court would operate in the case, in our opinion, is not applicable. Principles of res judicata is a procedural provision. The same has no application where there is inherent lack of jurisdiction.

56. InChief Justice of A.P.v.L.V.A. Dixitulu[(1979) 2 SCC 34 : 1979 SCC (L&S) 99 : AIR 1979 SC 193] the law is stated in the following terms: (SCC p. 42, para 24)

'23[24]. As against the above, Shri Vepa Sarathi appearing for the respective first respondent in CA No. 2826 of 1977, and in CA No. 278 of 1978 submitted that when his client filed a writ petition (No. 58908 of 1976) under Article 226 of the Constitution in the High Court for impugning the order of his compulsory retirement passed by the Chief Justice, he had served, in accordance with Rule 5 of the Andhra Pradesh High Court (Original Side) Rules, notice on the Chief Justice and the Government Pleader, and, in consequence, at the preliminary hearing of the writ petition before the Division Bench, the Government Pleader appeared on behalf of all the respondents including the Chief Justice, and raised a preliminary objection that the writ petition was not maintainable in view of clause 6 of the Andhra Pradesh Administrative Tribunal Order made by the President under Article 371-D which had taken away that jurisdiction of the High Court and vested the same in Administrative Tribunal. This objection was accepted by the High Court, and as a result, the writ petition was dismissed in limine. In these circumstances — proceeds the argument — the appellant is now precluded on principles of res judicata and estoppel from taking up the position, that the Tribunal's order is without jurisdiction. But, when Shri Sarathi's attention was invited to the fact that no notice was actually served on the Chief Justice and that the Government Pleader who had raised this objection had not been instructed by the Chief Justice or the High Court to put in appearance on their behalf, the counsel did not pursue this contention further. Moreover, this is a pure question of law depending upon the interpretation of Article 371-D.If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the

doctrine of res judicata or estoppel as urged in the case.

(emphasis supplied)

57. InDwarka Prasad Agarwalv.B.D. Agarwal[(2003) 6 SCC 230] it is stated: (SCC p. 245, para 37)

'37. It is now well settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such.' "

Similarly, the Apex Court in ***A. Jithendranath Vs. Jubilee Coop. House Building Society and Another; (2006) 10 SCC 96*** in paragraphs 48 and 49 has held as under:-

"48. *We have, furthermore, noticed hereinbefore the prayers made by the appellant in the said arbitration proceedings. In view of prayer (a) which was the main prayer ex facie the Registrar acted illegally and without jurisdiction in directing the first respondent to allot Plot No. 39. The first respondent made it clear that the plot in question had been allotted in favour of the said Srinivas. The question as to whether he raised constructions thereupon or not was immaterial. He despite such allotment having been made in his favour was not impleaded as a party. He was a necessary party. No award therefor could have been passed in his absence. In any event, so far as Plot No. 39 is concerned, the only prayer made by the appellant was an order of injunction. The Registrar while exercising his judicial function had no jurisdiction to pass such an order of injunction in view of prayer (a) made in the application.*

49. T*he said award, therefore, was a nullity. In this view of the matter, the principles of res judicata will have no application. (SeeHaryana State Coop. Land Development Bankv.Neelam[(2005) 5 SCC 91 : 2005 SCC (L&S) 601] andRam Chandra Singhv.Savitri Devi[(2003) 8 SCC 319 : JT (2005) 11 SC 439] .) An order which was passed by an authority without jurisdiction need not be set aside, being a nullity, it in the eye of the law never existed. (SeeBalvant N. Viswamitrav.Yadav Sadashiv Mule[(2004) 8 SCC 706] .)"*

51. It is also to be seen that a court of law is required to decide the issue before it and in the instant case what this Court finds that the issue of limitation which was a jurisdictional issue and was raised but was never addressed by the courts below on its core strength. The courts at the first instance moved on complete wrong premise moving on the assumption, as if, Section 5 of the Limitation Act was applicable and later when the said issue was raised again it has been discarded for the reason that the issue had already been considered and decided.

52. This Court finds that the impugned orders are patently erroneous and suffers from apparent errors on the face of record. There is no explanation which could be given by the learned counsel for the private respondents as to in what

circumstances, the execution application could have been registered and decided on merits once it was hopelessly time-barred.

53. The learned counsel for the private respondents also could not explain the fact as to when the decree holders themselves had moved the application under Section 5 of the Limitation Act with the Execution Application as they themselves knew that their application was beyond the prescribed period of limitation then in what circumstances such delay could have been ignored, condoned and how such a time barred execution application could be put to execution.

54. In light of the aforesaid discussions, this Court is of the clear opinion that the decree dated 21.01.1982 was hopelessly time barred and could not be executed in the execution proceedings in the year 2017.

55. For the aforesaid reasons, this Court has no hesitation to hold that the proceedings of Execution Case No. 8 of 2017 were ex-facie time barred and could not be proceeded and all orders passed in the execution proceedings including orders by which the application under Section 47 C.P.C. was rejected and the orders passed by the Revisional Court affirming the same are per se against the settled legal principles and the relevant sections of the Limitation Act which have been noticed hereinabove. Accordingly, the writ petition bearing W.P. No. 1644 of 2022 and W.P. No. 541 of 2024 are allowed on a cost of Rs. 50,000/- to be paid by the petitioner to the private respondent within a period of three weeks from today by a demand draft and as a consequence, the Execution Case No. 8 of 2017 shall stand dismissed as time barred subject to deposit of costs as aforesaid. However, this in itself will not entitle the petitioners to claim any right, or interest whatsoever on any part of the land or property of the private respondents except the property which was the subject matter of SCC Suit No 57 of 1980 from which the execution case emerged. Moreover, in case if the cost is not paid within the aforesaid period, it shall be open for the Executing Court in Case No. 8 of 2017 to recover the same through the process of the Court from the judgment debtor and pay it to the decree-holder along with interest at the rate of 9% per annum.

(2024) 3 ILRA 1479
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2024

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Matter Under Article 227 No. 4042 of 2022

Smt. Siya Dulari ...Petitioner
Versus
Awadh Naresh ...Respondent

Counsel for the Petitioner:
Sri Krishna Mohan Garg

Counsel for the Respondent:
Sri Satyvrat Tripathi, Sri Birendra Singh, Sri Brijendra Kumar

Civil law - Gram Nyayalayas Act, 2008 - Sections 13, 14, 23, 24 & 34 - Constitution of India,1950 - Article 227 - Petitioner challenged the judgment dated 24.12.2021 by Gram Nyayalaya, Manikpur, Chitrakoot, dismissing her suit (New Original Suit No. 41/2020, Old Original Suit No. 329/2018) for declaring a sale deed dated 02.06.2018 void (on grounds of fraud and undue influence) and for permanent injunction. Suit, initially filed in Civil Court (Junior Division), was transferred to Gram

Nyayalaya under Section 16 of the Act, 2008, by District Judge's order (11.09.2020). Gram Nyayalaya affirmed its jurisdiction (01.10.2020), unopposed by petitioner at the time. Petitioner contended Gram Nyayalaya lacked jurisdiction under Section 13 and Part I of Second Schedule, as suits for declaring sale deeds void are not covered, and its detailed evidence recording violated the summary procedure mandated by Section 24. Court held that suits for cancellation of sale deeds, being voidable under Sections 19, 19A of Indian Contract Act, require civil court jurisdiction, not Gram Nyayalaya, as they do not fall under "right to purchase of property" or other disputes in Part I of Second Schedule. Jurisdiction is a legislative function, and lack thereof renders the decree a nullity, raisable at any stage (Jagmittar Sain Bhagat Vs Director, Cantonment Board Vs Church of North India, Deva Sahayam Vs P. Savithramma). Revenue court jurisdiction under U.P. Revenue Code, 2006, inapplicable as suit involved voidable sale deed, not tenure-holder declaration. Judgment set aside as without jurisdiction; case remitted to District Court for adjudication by appropriate civil court.

Petition allowed.

Case Law Cited:

1. Jagmittar Sain Bhagat Vs Director (Para 18)

2. Cantonment Board Vs Church of North India (Para 18)

3. Deva Sahayam Vs P. Savithramma (Para 18)

4. Smt. Bismillah Vs Janeshwar Prasad, (1990) 1 SCC 207 (Para 30)

5. Ram Padarath Vs Second Addl. District Judge, (1989) 1 AWC 289 (All)(FB) (Paras 30, 32, 33)

6. Dhurandhar Prasad Singh Vs Jai Prakash University (Para 31)

7. Ganga Prasad Vs Ram Das Alias Pappu (Para 32)

8. G. Mohan Rao Vs St. of Tamil Nadu (Para 34).

(Delivered by Hon'ble Jayant Banerji, J.)

1. Heard Mr. Krishna Mohan Garg, learned counsel for the plaintiff-petitioner and Mr. Brijendra Kumar (Advocate Roll-A/B 0457/23), Advocate holding brief of Mr. Birendra Singh, learned counsel for the defendant-respondent.

2. This petition has been filed seeking to set aside the judgment and order dated 24.12.2021 passed by the Nyayadhikari, Gram Nyayalaya, Manikpur, District-Chitrakoot passed in New Original Suit No. 41/2020 (Old Original Suit No.329/2018) (Smt. Siya Dulari Vs. Awadh Naresh).

3. The contention on behalf of the petitioner is that the plaintiff-petitioner instituted a suit for declaring a sale deed registered on 2.6.2018 as a void document as well as for permanent injunction with regard to the suit property. This suit was instituted as Original Suit No. 329 of 2018 in the court of Civil Judge (Junior Division), Chitrakoot and pleadings were exchanged. The contention is that after coming into force of the Gram Nyayalayas Act, 20081, the District Judge by an order dated 11.9.2020 directed that the record of the suit be transferred to the Gram Nyayalaya, Manikpur and, accordingly, on 14.9.2020, an order was passed by the court concerned transferring the civil suit to the Gram Nyayalaya in exercise of power under Section 16 of the Act, 2008.

4. It is stated that issue No.5 was framed which was that whether the court had jurisdiction to hear the matter. By an order dated 1.10.2020 the Gram Nyayalaya held that since the counsel for the defendant had made no arguments from which it could be gauged that the Gram Nyayalaya had no jurisdiction, therefore,

the Gram Nyayalaya had jurisdiction to decide the case and, accordingly, the issue No.5 was decided in the affirmative.

5. It is stated that despite the jurisdiction of the Gram Nyayalaya to decide those types of civil cases which are provided in Part I of the Second Schedule of the Act, 2008, the Gram Nyayalaya proceeded to decide the suit which was for declaring a sale deed as void. It is contended that the provisions of Section 13 and 14 of the Act, 2008 circumscribe the jurisdiction of the Gram Nyayalayas, and a suit for declaring a sale deed as void would not lie within the jurisdiction of the Gram Nyayalaya. It is further stated that by means of the impugned judgment and order dated 24.12.2021, the Gram Nyayalaya has not only adjudicated and dismissed the suit, but has exercised a jurisdiction and has recorded evidence in a manner that is not required to be done by a court which is required to adopt a summary procedure for adjudication. Learned counsel has referred to the provision of Section 24 of the Act, 2008 in this regard. It is stated that evidence of the plaintiff's witnesses were recorded in detail as were the evidence of the defendant's witnesses and thereafter the judgment was passed, which is wholly without jurisdiction and is void ab initio.

Learned counsel has referred to the plaint to contend that basis of the suit for seeking declaration of the voidance of a sale deed was undue influence and fraud; that the civil courts have jurisdiction to try all suits unless they are expressly or impliedly barred given the provisions of Section 9 of the Code of Civil Procedure, 1908 (CPC); that Order 5 to Order 20 of the CPC provide a detailed procedure for conduct of suit till its logical conclusion and it is Order 37 of the CPC that provides for summary procedure. Learned counsel has referred to clause (a) of Section 2 of the Act, 2008 that defines Gram Nyayalaya, Section 3 of which provides for establishment of Gram Nyayalaya; Sections 11, 12, 13 and 14 that deal with jurisdiction of the Gram Nyayalaya and Sections 23 and 24 which provides for procedure in civil cases. It is stated that Section 24 provides for filing of an application and not a plaint. Under Section 23, the provisions of the CPC, in so far as they are not inconsistent with the provisions of the Act, 2008, would apply to the procedure before a Gram Nyayalaya and for the purpose of the said provision of the code, the Gram Nyayalaya shall be deemed to be a civil court. It is stated that the procedure reflected in Section 24 of the Act, 2008 is in the nature of the summary trial which excludes the detailed procedure provided from Orders 5 to 20 of the CPC. Learned counsel has referred to the provision of Section 26 that provides for efforts for conciliation and settlement of civil disputes; Section 30 which refers to the scope of application of the Indian Evidence Act, 1872; and, the manner of recording of oral evidence as provided in Section 31, to contend that given the special procedure so provided, cases necessitating recording of contentious and admissible evidence / testimonies in detail, would not be fit to be adjudicated by the Gram Nyayalaya. Learned counsel has referred to Part I of the Second Schedule of the Act, 2008 and has stated that sub-clause (b) and (c) of Clause (i) which refers to civil disputes for the use of common pasture and for regulation and timing of taking water from irrigation channel pertain to Government/Gaon Sabha property; sub-clause (a) thereof, which provides for a case relating to right to purchase of property, refers to an agreement to sell

which is prior to purchase of a property, that is to say, the right of purchase of property is a pre-existing right. It is stated that Chapter II of the Specific Relief Act, 1963 refers to specific performance of contracts that falls within the ambit of sub-clause (a) aforesaid, that is, the right to purchase of property. It is stated that given the provisions for cancellation of instruments and declaratory decrees referred to in Chapter V and Chapter VI of the Specific Relief Act, even in specific performance suits where defence of void/voidable agreement is taken on the ground of fraud and indue influence, the same would exclude the jurisdiction of the Gram Nyayalaya and under the circumstances, a declaratory decree, as envisaged under Section 34 of the Specific Relief Act, is not covered by sub-clause (a) of clause (i) of Part I of the Second Schedule of the Act, 2008.

6. Learned counsel for the defendant-respondent has referred to the preamble to the Act, 2008 as well as Section 13 to contend that given the scope of the Act and the suit in question being within the pecuniary limit prescribed for Gram Nyayalayas by the High Court, the Gram Nyayalaya will have jurisdiction in the matter. It is stated that the order of the District Judge, Chitrakoot dated 8.9.2020 is on record which directed that civil cases and criminal matters pertaining to Manikpur and certain other tehsils pending in the District Court, be transferred to the Gram Nyayalaya concerned and therefore, the Gram Nyayalaya would have jurisdiction. It is further stated that under Section 34 of the Act, 2008, if a remedy of appeal would not lie due to valuation, then a remedy of revision would anyway be available. Learned counsel has referred to a Judgement of the High Court of Bombay passed in the Matter of **Shobha Janardhan Masram Vs. Ganpat Gulabrao Thakre**[2], particularly, paragraph nos. 12 and 13 thereof to contend that since no objection was raised before the Gram Nyayalaya with regard to the jurisdiction and neither was any appeal filed before the appellate court against the order of the Gram Nyayalaya affirming its jurisdiction, this petition ought to be rejected.

7. The Act, 2008 came into force on 2.10.2009 by means of a notification dated 11.11.2009. The jurisdiction of Gram Nyayalaya is in respect of both civil and criminal matters under the prescribed procedures and to the extent of the jurisdiction provided in terms of Section 11 by the Act, 2008. As far as civil jurisdiction is concerned, the relevant provision reads as follows:

"13. Civil jurisdiction.- (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, and subject to sub-section (2), the Gram Nyayalaya shall have jurisdiction to-

(a) try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule;

(b) try all classes of claims and disputes which may be notified by the Central Government under sub-section (1) of Section 14 and by the State Government under sub-section (3) of the said section.

(2) The pecuniary limits of the Gram Nyayalaya shall be such as may be specified by the High Court, in consultation with the State Government, by notification, from time to time."

8. The Central and the State Governments are empowered to amend the

schedules to the Act, 2008 under the provisions of Section 14 which reads as follows:

"14. Power to amend Schedules.- (1) Where the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification, add to or omit any item in Part I or Part II of the First Schedule or Part II of the Second Schedule, as the case may be, and it shall be deemed to have been amended accordingly.

(2) Every notification issued under sub-section (1) shall be laid before each House of Parliament.

(3) If the State Government is satisfied that it is necessary or expedient so to do, it may, in consultation with the High Court, by notification, add to any item in Part III of the First Schedule or Part III of the Second Schedule or omit from it any item in respect of which the State Legislature is competent to make laws and thereupon the First Schedule or the Second Schedule, as the case may be, shall be deemed to have been amended accordingly.

(4) Every notification issued under sub-section (3) shall be laid before the State Legislature."

9. Chapter V of the Act, 2008 provides for the procedure in civil cases. The relevant Sections mentioned in Chapter V read as follows:

"23. Overriding effect of Act in civil proceedings.- The provisions of this Act shall have effect notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law, but save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a Gram Nyayalaya; and for the purpose of the said provisions of the Code, the Gram Nyayalaya shall be deemed to be a civil Court.

24. Special procedure in civil disputes.- (1) Notwithstanding anything contained in any other law for the time being in force, every suit, claim or dispute under this Act shall be instituted by making an application to the Gram Nyayalaya in such form, in such manner, and accompanied by such fee, not exceeding rupees one hundred, as may be prescribed by the High Court, from time to time, in consultation with the State Government.

(2) Where a suit, claim or dispute has been duly instituted, a summons shall be issued by the Gram Nyayalaya, accompanied by a copy of the application made under sub-section (1), to the opposite party to appear and answer the claim by such date as may be specified therein and the same shall be served in such manner as may be prescribed by the High Court.

(3) After the opposite party files his written statement, the Gram Nyayalaya shall fix a date for hearing and inform all the parties to be present in person or through their advocates.

(4) On the date fixed for hearing, the Gram Nyayalaya shall hear both the parties in regard to their respective contentions and where the dispute does not require recording of any evidence, pronounce the judgment; and in case where it requires recording of evidence, the Gram Nyayalaya shall proceed further.

(5) The Gram Nyayalaya shall also have the power,-

(a) to dismiss any case for default or to proceed ex parte; and

(b) to set aside any such order of dismissal for default or any order passed by it for hearing the case ex parte.

(6) In regard to any incidental matter that may arise during the course of the proceedings, the Gram Nyayalaya shall adopt such procedure as it may deem just and reasonable in the interest of justice.

(7) The proceedings shall, as far as practicable, be consistent with the interests of justice and the hearing shall be continued on a day-to-day basis until its conclusion, unless the Gram Nyayalaya finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded in writing.

(8) The Gram Nyayalaya shall dispose of the application made under sub-section (1) within a period of six months from the date of its institution.

(9) The judgment in every suit, claim or dispute shall be pronounced in open Court by the Gram Nyayalaya immediately after conclusion of hearing or at any subsequent time, not exceeding fifteen days, of which notice shall be given to the parties.

(10) The judgment shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.

(11) A copy of the judgment shall be delivered free of cost to both the parties within three days from the date of pronouncement of the judgment.

25. Execution of decrees and orders of Gram Nyayalaya.- (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the judgment passed by a Gram Nyayalaya shall be deemed to be a decree and it shall be executed by a Gram Nyayalaya as a decree of the civil Court and for this purpose, the Gram Nyayalaya shall have all the powers of a civil Court.

(2) The Gram Nyayalaya shall not be bound by the procedure in respect of execution of a decree as provided in the Code of Civil Procedure, 1908 (5 of 1908) and it shall be guided by the principles of natural justice.

(3) A decree may be executed either by the Gram Nyayalaya which passed it or by the other Gram Nyayalaya to which it is sent for execution.

26. Duty of Gram Nyayalaya to make efforts for conciliation and settlement of civil disputes.- (1) In every suit or proceeding, endeavour shall be made by the Gram Nyayalaya in the first instance, where it is possible to do so, consistent with the nature and circumstances of the case, to assist, persuade and conciliate the parties in arriving at a settlement in respect of the subject matter of the suit, claim or dispute and for this purpose, a Gram Nyayalaya shall follow such procedure as may be prescribed by the High Court.

(2) Where in any suit or proceeding, it appears to the Gram Nyayalaya at any stage that there is a reasonable possibility of a settlement between the parties, the Gram Nyayalaya may adjourn the proceeding for such period as it thinks fit to enable them to make attempts to effect such a settlement.

(3) Where any proceeding is adjourned under sub-section (2), the Gram Nyayalaya may, in its discretion, refer the matter to one or more Conciliators for effecting a settlement between the parties.

(4) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Gram Nyayalaya to adjourn the proceeding.

27. Appointment of Conciliators.- (1) For the purposes of Section 26, the District Court shall, in consultation with the District Magistrate, prepare a panel consisting of the names of social workers at the village level having

integrity for appointment as Conciliators who possess such qualifications and experience as may be prescribed by the High Court.

(2) The sitting fee and other allowances payable to, and the other terms and conditions for engagement of, Conciliators shall be such as may be prescribed by the State Government."

10. The general procedure is provided in Chapter VI of the Act, 2008 and the relevant provisions are quoted below:

"30. Application of Indian Evidence Act, 1872.- A Gram Nyayalaya may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

31. Record of oral evidence.- In suits or proceedings before a Gram Nyayalaya, it shall not be necessary to record the evidence of witnesses at length, but the Nyayadhikari, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of substance of what the witness deposes, and such memorandum shall be signed by the witness and the Nyayadhikari and it shall form part of the record.

32. Evidence of formal character on affidavit.- (1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Gram Nyayalaya.

(2) The Gram Nyayalaya may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding, summon and examine any such person as to the facts contained in his affidavit."

11. The provisions for appeals in civil cases is provided in Section 34 of the Chapter VII which reads as follows:

"34. Appeal in civil cases.- (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law, and subject to sub-section (2), an appeal shall lie from every judgment or order, not being an interlocutory order, of a Gram Nyayalaya to the District Court.

(2) No appeal shall lie from any judgment or order passed by the Gram Nyayalaya-

(a) with the consent of the parties;

(b) where the amount or value of the subject matter of a suit, claim or dispute does not exceed rupees one thousand;

(c) except on a question of law, where the amount or value of the subject matter of such suit, claim or dispute does not exceed rupees five thousand.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Gram Nyayalaya:

Provided that the District Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(4) An appeal preferred under sub-section (1) shall be heard and disposed of by the District Court within six months from the date of filing of the appeal.

(5) The District Court may, pending disposal of the appeal, stay execution of the judgment or order appealed against.

(6) The decision of the District Court under sub-section (4) shall be final

and no appeal or revision shall lie from the decision of the District Court:

Provided that nothing in this sub-section shall preclude any person from availing of the judicial remedies available under articles 32 and 226 of the Constitution."

12. Part I of the Second Schedule of the Act, 2008 reads as follows:

"PART I

SUITS OF A CIVIL NATURE WITHIN THE JURISDICTION OF GRAM NYAYALAYAS

(i) Civil Disputes:

(a) right to purchase of property;

(b) use of common pasture;

(c) regulation and timing of taking water from irrigation channel.

(ii) Property Disputes:

(a) village and farm houses (Possession);

(b) water channels;

(c) right to draw water from a well or tube well.

(iii) Other Disputes:

(a) claims under the Payment of Wages Act, 1936 (4 of 1936);

(b) claims under the Minimum Wages Act, 1948 (11 of 1948);

(c) money suits either arising from trade transaction or money lending;

(d) disputes arising out of the partnership in cultivation of land;

(e) disputes as to the use of forest produce by inhabitants of Gram Panchayats."

13. In exercise of the powers conferred by Section 39 of the Gram Nyayalayas Act, Section 122 of the C.P.C. and all other powers enabling it in this behalf, the High Court of Judicature at Allahabad in consultation with the Government of Uttar Pradesh made the Uttar Pradesh Gram Nyayalaya (Procedure and Practice) Rules, 20093. With regard to pecuniary jurisdiction of the Gram Nayayalaya and the court fee payable, Rule 10 of the Rules of 2009 provides as follows:

"10. Pecuniary jurisdiction of the Gram Nyayalaya and the court fee payable.- (a) The Gram Nyayalaya shall have jurisdiction to entertain and decide all civil proceeding of valuation up to Rs.25,000/-:

Provided that the value for the purpose of determining the jurisdiction shall be done as per the provisions of the Suits Valuation Act 1887 read with the Count Fees Act, 1989.

Further provided that the High Court may from time to time in consultation with the State Government increase or reduce the limit of pecuniary jurisdiction of the Nyayadhikari.

(b) A fixed Court fee of Rs. 50 shall be payable on every plaint or original petition.

(c) The fees payable on vakalatnama shall be Rs.5 and on all other applications shall be Rs.2."

14. The Act, 2008, thus ousts the jurisdiction of civil courts in view of the jurisdiction conferred on the Gram Nyayalaya with respect to scheduled matters which fall under the pecuniary jurisdiction of Rs.25,000/-. Therefore, Part-I of the Second Schedule to the Act, 2008 read with Clause (a) of sub-section (1) of Section 13 of the Act, 2008, civil disputes, property disputes and other disputes as

mentioned thereunder, confers such jurisdiction on Gram Nyayalayas.

15. In the aforesaid suit, two distinct reliefs were claimed, one being a decree of declaration for declaring the sale deed dated 2.6.2018 as void and another for grant of permanent injunction that the defendant be restrained from disposing of the suit property during pendency of the suit.

16. Evidently, the pleadings were exchanged and at the stage of evidence, the learned District Judge transferred the suit to the Gram Nyayalaya in the year 2020.

17. A copy of the order-sheet of the suit has been enclosed as Annexure No. 7 to this petition and, as reflected therein, on 1.10.2020, counsel for the parties were heard with regard to the issue no. 5 which was that whether the Gram Nyayalaya had jurisdiction to consider the suit. The Gram Nyayalaya observed that the valuation of the suit was made at Rs. 390/- which was affirmed to be correct by the court in its order dated 24.10.2019; learned counsel for the defendants had made no such submission from which it could be reflected that the Nyayalaya had no jurisdiction to hear the suit. Accordingly, it was held that the Gram Nyayalaya has jurisdiction. It is admitted that the aforesaid order dated 1.10.2022 adjudicating the issue no. 5 was not challenged by the plaintiff-petitioner at an earlier point of time. By means of the judgment and order dated 24.12.2021, the suit of the plaintiff-petitioner was dismissed.

18. As regards the submission of the counsel for the respondent that the order dated 1.10.2022 affirming jurisdiction in the case by the Gram Nyayalaya not having being challenged earlier, the Supreme Court has held in various judgments that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if a court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. (Vide: Jagmittar Sain Bhagat v. Director4, Cantonment Board v. Church of North India5, Deva Sahayam v. P. Savithramma6.)

19. As regards jurisdiction, the present case requires consideration on two aspect. Firstly, whether, given the nature of the relief sought in respect of agricultural land, would it be the revenue courts which would have jurisdiction in the matter given the fact that declaration was sought for declaring the sale deed as void, or, would either the civil court or the Gram Nyayalaya have jurisdiction. Secondly, whether the Gram Nyayalaya or the civil court had jurisdiction to try the suit in view of the jurisdiction conferred by Clause (a) of sub-section (1) of Section 13 of the Act, 2008 read with Part I of the Second Schedule of the Act.

20. The Act, 2008 received the assent of the President on 7.1.2009 and was published in the Gazette of India, Extraordinary Part-II, Section I, dated 9th January 2009. The preamble of the Act is to provide for the establishment of Gram Nyayalayas at the grass roots level for the purposes of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and

for matters connected therewith or incidental thereto.

21. In the Statement of Objects and Reasons, with reference to Article 39-A of the Constitution and 114th report of the Law Commission of India on Gram Nyayalayas recommending establishment of Gram Nyayalayas so that speedy, inexpensive and substantial justice could be provided to the common man, the Bill was introduced on the lines recommended by the Department Related Standing Committee on Personnel, Public Grievances, Law and Justice.

22. The extracts of salient features of the Bill as apparent from the Statement of Objects and Reasons, are as follows:-

• The Gram Nyayalaya shall be court of Judicial Magistrate of the first class and its presiding officer (Nyayadhikari) shall be appointed by the State Government in consultation with the High Court;

• The Gram Nyayalaya shall be established for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level in any State, for a group of contiguous Panchayats;

• The Gram Nyayalaya shall try criminal cases, civil suits, claims or disputes which are specified in the First Schedule and the Second Schedule to the proposed Bill with the Central Government as well as the State Governments being given power to amend the First Schedule and the Second Schedule of the proposed Bill as per their respective legislative competence;

• The Gram Nyayalaya shall follow summary procedure in criminal trial as provided under sub-section (1) of Section 262 and Sections 262, 264 and 265 of the Cr.P.C. with certain modifications and as regards other matters which are not provided in the Bill, the provisions of the Cr.P.C. shall be applicable;

• The power of a civil court shall be exercisable by the Gram Nyayalaya with certain modifications and the Gram Nyayalaya shall follow the special procedure; as regards other matters which are not provided in the Bill, the provisions of the C.P.C. shall be applicable;

• The Gram Nyayalaya shall try to settle the disputes as far as possible by bringing about conciliation between the parties and for this purpose, it shall make use of the conciliators to be appointed for this purpose;

• The judgment and order passed by the Gram Nyayalaya shall be deemed to be a decree and to avoid delay in its execution, the Gram Nyayalaya shall follow summary procedure for its execution;

• The Gram Nyayalaya shall not be bound by the rules of evidence provided in the Indian Evidence Act but shall be guided by the principles of natural justice and subject to any rule made by the High Court;

• A person accused of an offence may file an application for plea bargaining in Gram Nyayalaya in which such offence is pending trial and the same will be disposed of by that Gram Nyayalaya in accordance with the provisions of Chapter XXI-A of the Cr.P.C

23. The Statement of Objects and Reasons further provides that justice to the poor at their doorstep is the dream of the common man. Setting up of Gram Nyayalayas, which will travel from place to place, would bring to the people of rural

areas speedy, affordable and substantial justice.

24. There is an aspect of jurisdiction relating to the subject matter of the suit and then there is the aspect of pecuniary jurisdiction that has been fixed by the High Court in the rules mentioned above, which is a limit of Rs.25,000/-. The pecuniary jurisdiction so fixed is in respect of only those suits, claims or disputes that are within the jurisdiction of the Gram Nyayalaya as provided for in the Schedule to the Act, 2008.

25. The Uttar Pradesh Revenue Code, 20067 was passed by the Uttar Pradesh State Legislature and it received the assent of the President on 29th November 2012. The Code, 2006 was amended by the Uttar Pradesh Revenue Code (Amendment) Act, 2016. The Governor appointed 18 December 2015 and 11 February 2016 as the dates on which separate provisions of the Code, 2006 came into force. The provisions of the Code, 2006, except Chapters VIII and IX (which chapters pertain to (i) management of land and other properties by Gram Panchayat or other local authorities, and, (ii) tenures), are mandated to apply to whole of Uttar Pradesh and the aforesaid Chapters VIII and IX are mandated to apply to the areas to which any of the enactments specified at serial nos.19 and 25 of the First Schedule to the Code, 2006 were applicable on the date immediately preceding their repeal by the Code, 2006. At serial no.19 of the First Schedule is the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. At serial no.25 of the First Schedule is the Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956.

26. The aforesaid two enactments of 1950 and 1956, including other enactments, specified in the First Schedule of the Code, 2006, were repealed with effect from 11.2.2016 in terms of Section 230 of the Code, 2006. However, as far as pending proceedings are concerned, Section 231 of the Code reads as follows:-

"231. Applicability of the Code to pending proceedings.- (1) Save as otherwise expressly provided in this Code, all cases pending before the State Government or any revenue court immediately before the commencement of this Code, whether in appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had this Code not been passed.

(2) All cases pending in any Civil Court immediately before the commencement of this Code which would under this Code be exclusively triable by a revenue Court; shall be disposed of by such Civil Court according to the law in force prior to the date of such commencement."

27. The suit was instituted in the year 2018. The plots of land in respect of which the suit has been filed are agricultural plots and the plaintiff's husband is stated to be the owner of the one-third part of each of the three plots. In the plaint, the defendant is referred to as the brother of the petitioner's husband, who is the co-tenure holder of one-fourth part of the property in dispute; that the plaintiff has only a daughter but no sons; that the husband of the plaintiff was ill and the entire expenses of his treatment was borne by the plaintiff and the plaintiff's brother-in-law; that in June, 2018, the plaintiff's husband suddenly fell ill and therefore, the plaintiff sent him

along with his brother (the plaintiff's brother-in-law) to the doctor with all the prescriptions. The plaintiff's husband died on 25.8.2018 and after the funeral and post-funeral rites, when the plaintiff went for mutation of her name to the revenue authorities, she was informed that her brother-in-law has got his name mutated in the revenue records with regard to the aforesaid plots in dispute. After obtaining a copy of the sale deed allegedly executed by the plaintiff's husband in favour of her brother-in-law, it transpired that it was fraudulently executed. It was stated that the sale deed that was fraudulently got executed was a void document which is liable to be declared as such. Further relief of permanent injunction was also sought against the defendant.

28. Therefore, the case in the plaint is of the defendant having got the signatures of the petitioner's husband fraudulently made on the sale deed. Given the provisions under Chapter II of the Indian Contract Act, the alleged sale deed was voidable at the option of the party whose consent was caused by alleged coercion, fraud or misrepresentation or undue influence.

29. The option of avoiding a contract procured in any of the ways mentioned in Sections 19 and 19A of the Contract Act, is exercisable by the party's representatives, unless at the date of his death, he had lost it by acquiescence or otherwise8.

30. Reference, in the plaint to the alleged sale deed as being 'void', would have to be construed in terms of the above provisions of the Contract Act and the various judgments of this Court and the Supreme Court. The Supreme Court in the matter of **Smt. Bismillah Vs. Janeshwar Prasad and others**[9] while referring to the various judgments passed by this Court including in the case of **Ram Padarath and others Vs. Second Addl. District Judge and others**[10] observed as follows:

"9. ….. If as, indeed, is done by the High Court the expression 'void' occurring in the plaint as descriptive of the legal status of the sales is made the constant and determinate and what is implicit in the need for cancellation as the variable and as inappropriate to a plea of nullity, equally, converse could be the position. The real point is not the stray or loose expressions which abound in inartistically drafted plaints, but the real substance of the case gathered by construing pleadings as a whole…."

31. The terms 'void' and voidable' were considered by the Supreme Court in the case of Dhurandhar Prasad Singh Vs. Jai Prakash University11 and it was observed as follows:

"22. Thus the expressions "void and voidable" have been the subject-matter of consideration on innumerable occasions by courts. The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the

transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable."

It needs mention that in **Dhurandhar Prasad Singh,** the Supreme Court was considering an appeal against a judgment of the High Court allowing a revision application while setting aside an order passed by the executing court rejecting an objection under Section 47 CPC as to the executability of a decree.

32. A coordinate Bench of this Court in the case of **Ganga Prasad and another Vs. Ram Das Alias Pappu and others**[12], after considering a gamut of cases of the Supreme Court as well as the Full Bench of this Court in **Ram Padarath** has observed as follows:

"10. From the law noticed above, it is clear that where a document is voidable it is a good act unless avoided and, therefore, its cancellation would be required, if a party seeks to avoid its natural consequences.

……..

……..

14. It is equally well-settled that the question of jurisdiction depends upon the allegations in the plaint and not the merits or the result of the suit (vide Bismillah versus Janeshwar Prasad: (1990) 1 SCC 207, paragraph 9). Therefore in a suit instituted before a Civil Court for cancellation of an instrument, in respect to an agricultural land, if a plea with respect to the bar of section 331 of the UP ZA & LR Act is taken, the Court must first determine as to whether from the plaint averments the instrument, as alleged, is void or voidable. If the plaint averments go to show that the instrument is voidable at the instance of the plaintiff(s), then the suit would be maintainable in a Civil Court, but if it is alleged to be void then the Court may have to undertake a complex exercise so as to assess whether in a given set of facts a declaration of right or status of a tenure-holder is necessarily needed or not. If a declaration to that effect is necessarily needed, in that event, the relief for cancellation would be mere surplusage and redundant, because the Court, which has power to grant declaration can disregard a void document while granting a declaratory relief. In such an event a civil suit would be barred by sub-section (1) of Section 331 of the UP ZA & LR Act.

15. Coming to the facts of the instant case, from the plaint, which is on record as Annexure No.3 to the affidavit, it is found that the ground on which cancellation of the sale-deed has been sought is that the sale-deed was got executed by coercion and by playing fraud on Deepchand, the recorded tenure-holder. There is no dispute with regards to the fact that Deepchand, on the date of execution of

the sale-deed, was the recorded tenure-holder. The cancellation has been sought, primarily, on ground that there was no free consent of the vendor. Section 19 of the Indian Contract Act provides that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Therefore, according to the plaint averments the sale deed in question would be voidable at the option of the plaintiffs. The effect of such a deed cannot be avoided unless it is cancelled by a decree. As the revenue Court has no power to pass a decree of cancellation of a document, the suit would lie before the Civil Court irrespective of the fact that name of the defendant-appellants have been entered in the revenue record consequent to the execution of the sale-deed. ……"

33. Therefore, the plaintiff-petitioner in the present case would be entitled to maintain a suit for cancellation of a sale deed, which suit, as held in Full Bench decision in the case of **Ram Padarath** would lie before a civil court. Though, in the suit in question, a declaration of voidance of the sale deed is sought, which would be seeking the legal status of the instrument. However, it being alleged to be a fraudulent document, the same is voidable, and in effect the suit is for cancellation of the instrument.

34. However, as mentioned above, the Act, 2008 came into on 2 October 2009 by means of a notification dated 11 November 2009. The Code, 2006, on the other hand, has received the assent of the President on 29 November 2013 and its commencement and applicability, as referred to in Sections 1 and 2, were made applicable with effect from 18 December 2015 and 11 February 2016 respectively. Therefore, the repugnancy, if any, in the Code, 2006 qua the Act, 2008 is rendered otiose in view of Article 254(2) of the Constitution (Ref: G. *Mohan Rao Vs. State of Tamil Nadu*[13]).

35. It is pertinent to mention here that even prior to the Act, 2008, the revenue courts have been dealing with matters at the grass-roots level in the rural areas and such courts are available even at the tehsil levels. Hence, suits for partition/division of holdings provided under Section 116 of the Code, 2006, declaratory suits by tenure-holder under Section 144/145 and grant of temporary injunction as provided in Section 146, and, other matters that are covered by the Code, 2006, would lie before the revenue courts constituted under the Code, 2006.

I am conscious of the fact that certain matters listed in Part I of the Second Schedule to the Act, 2008 may overlap the jurisdiction of revenue courts. For illustration, Sections 25 and 26 of the Code, 2006 may be seen which read as follows:-

"25. **Rights of way and other easements**.- In the event of any dispute arising as to the route by which a tenure holder or an agricultural labourer shall have access to his land or to the waste or pasture land of the village (other than by the public roads, paths or common land) or as to the source from or course by which he may avail himself of irrigational facilities, the Tahsildar may, after such local inquiry as may be considered necessary, decide the matter with reference to the prevailing custom and with due regard to the convenience of all the parties concerned. He may direct the removal of such obstacle and may, for that purpose, use or cause to be used such force as may be necessary and

may recover the cost of such removal from the person concerned in the manner prescribed.

26. **Removal of obstacle**. - If the Tahsildar finds that any obstacle impedes the free use of a public road, path or common land of a village or obstructs the road or water course or source of water, he may direct the removal of such obstacle and may, for that purpose, use or cause to be used such force as may be necessary and may recover the cost of such removal from the person concerned in the manner prescribed.

(emphasis supplied)

35- A. As far as Section 23 of the Act, 2008 is concerned which provides for overriding effect of the Act in civil proceedings, it comes under Chapter V which provides for procedure in civil cases. A similar provision of overriding effect also exists in Section 18 of the Act, 2008 which comes under Chapter IV which provides for procedure in criminal cases. Each of these two provisions refer to the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973, respectively. Therefore the usage of the phrase "or any other law" appearing in Section 23 has to be read in reference to the context, which, in my opinion, would be relating to other procedures prescribed in other laws, and not with regard to provisions other than procedural laws in those laws. Accordingly, Section 23 would have no application on the aspect of jurisdiction.

36. It cannot be ruled out that jurisdictional issues may also crop up where an area is notified for consolidation of holdings under the U.P. Consolidation of Holdings Act, 1953. But that is a matter beyond the scope of the present adjudication and may require intervention by the Parliament and the State Legislature. The jurisdiction of the Gram Nyayalaya can always be amended.

37. Be that as it may, given the fact that it has been held that a civil court would have jurisdiction in the matter, the aspect that whether it is the civil court or the Gram Nyayalaya would have the jurisdiction in the present case, is now being considered.

38. Right to purchase of property, as correctly pointed out by the learned counsel for the petitioner, is referable to a right flowing out of an agreement to sell. Subject to the prescribed pecuniary jurisdiction, suits for specific performance of such instruments would be covered by the jurisdiction so conferred on the Gram Nyayalaya. A suit for cancellation of a sale-deed, on the other hand is not referable to a right to purchase of property, inasmuch as, in such a case, the plaintiff may or may not seek an ancillary relief of specific performance. It is accordingly held that the Gram Nyayalaya had no jurisdiction in respect of the suit in question.

39. It is important to mention here that an appeal against any judgment or order of the Gram Nyayalaya lies before the District Court subject to the pecuniary limits specified. As reflected in the aforementioned order dated 1.10.2022 passed by the Gram Nyayalaya, the valuation of the suit was made at Rs. 390/- which was affirmed to be correct by the court in its order dated 24.10.2019. Therefore, no appeal would lie against the aforesaid decree, which anyway has been held to be without jurisdiction.

40. The submission of the learned counsel for the petitioner to the effect that for purpose of ascertaining the nature of

cases that would be covered by Part I of the Second Schedule of the Act, 2008, it is required to be seen whether the special procedure prescribed in the Act, 2008 would be appropriate for effective adjudication, or, whether the detailed procedure prescribed in the CPC would be appropriate, does not appear to be correct given the scheme and the objects of the Act, 2008. Presently, under the Rules of 2009, only those matters of valuation up to Rs.25,000/= can be entertained by the Gram Nyayalaya. Since maintainability of appeals before the District Court against the judgments and orders of the Gram Nyayalaya in civil cases has been restricted on the basis of valuation as provided under sub-section (2) of Section 34 of the Act, 2008, such restricted matters would, generally, deserve to be given a quietus. However, where there is a failure of justice, no one is precluded from availing judicial remedies as indicated in sub-section (6) of Section 34. With regard to matters whose valuation would entail maintainability of appeals on facts, the relevant provisions in CPC would come to the aid of such appellants as the procedure for appellate courts is not prescribed in the Act, 2008. It is therefore, always open for the Parliament or the State Legislature, as the case may be, to amend the Second Schedule to the Act, 2008 to include such other nature of cases as they deem fit.

41. Under the facts and circumstances of the case, the impugned judgment and order dated 24.12.2021 passed by the Nyayadhikari, Gram Nyayalaya, Manikpur, District Chitrakoot, passed in New Original Suit No. 41 / 2020 (Smt. Siya Dulari v. Awadh Naresh) is set aside. The record of the suit with the Gram Nyayalaya is directed to be sent to the District Court within 15 days from today, if not already sent, for its adjudication afresh by the appropriate court.

42. This petition is, accordingly, **allowed**.

(2024) 3 ILRA 1494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matter Under Article 227 No. 7895 of 2023

State of U.P. & Anr. ...Petitioners
Versus
Ashwani Kumar & Anr. ...Respondents

Counsel for the Petitioners:
Sri Surendra Prasad Mishra

Counsel for the Respondents:
Sri Pankaj Saxena(A.G.A.-I)

Civil Law - Negotiable Instruments Act, 1881 - Section 138 - Against summoning order - Cheque issued by petitioner was presented by respondent no. 2 (payee) on 18.09.2019 - Upon its dishonour, return memo dated 17.12.2019 received - Within thirty days thereof, on 04.01.2020, respondent no. 2 issued notice, which was received by petitioner on 08.01.2020 - Held, petitioner had fifteen days from 08.01.2020, date of receipt of notice, to make payment - Period expired on 23.01.2020 and cause of action for filing complaint accordingly arose on 23.01.2020 under clause (c) of proviso to Section 138 - Complaint filed on 20.02.2020 was within prescribed one month period under clause (b) of sub-section (1) of Section 138, reckoned from 23.01.2020, date on which cause of action arose - Concerned Court, therefore,

competent to take cognizance u/s 142 - Thus, summoning order and revisional order cannot be faulted on ground of limitation - Petition dismissed. (Para 4, 5, 22 to 24)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Kusum Ingots & Alloys Limited Vs Pennar Peters on Securities Ltd, (2000) 2 SCC 745

2. MSR Leathers Vs S. Palaniappan & anr., (2013) 1 SCC 177

3. Yogendra Pratap Singh Vs Savitri Pandey & anr.,(2014) 10 SCC 713

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

1. Heard Sri Surendra Prasad Mishra, learned counsel for the petitioner and Sri Pankaj Saxena, learned A.G.A.-I along with Ms. Divya Ojha, learned A.G.A.-I, appearing for the State respondent.

2. The present petition has been filed seeking to assail the order dated 02.12.2021 passed in Complaint Case No. 293 of 2021, under Section 138 of the Negotiable Instruments Act, 18811, in terms of which the petitioner has been summoned, and also the subsequent order dated 21.06.2023 passed in Criminal Revision No. 39 of 2022.

3. Counsel for the petitioner has confined his challenge to the aforesaid order only on the question of limitation.

4. Attention of the Court has been drawn to the fact that a cheque drawn by the petitioner, upon being presented by the respondent no. 2, on 18.09.2019, was returned unpaid by the bank, along with a return memo dated 17.12.2019, with a remark "Amount Insufficient".

5. Upon receipt of the aforesaid return memo, the respondent no. 2 gave a notice dated 04.01.2020 to the petitioner regarding return of the cheque, and the said notice was received by the petitioner on 08.01.2020.

6. On the basis of the aforesaid notice, counsel for the petitioner has sought to contend that the limitation would run from 08.01.2020 i.e. the date when the legal notice was received by the petitioner, and the complaint having been filed on 20.02.2020, was beyond time, and was liable to be rejected.

7. Learned A.G.A.-I submits that the complaint having been filed within one month from the date when the cause of action arose, the same was within the prescribed period of limitation, and, therefore, the orders passed by the courts below cannot be faulted on the question of limitation.

8. In order to examine the challenge to the orders of the courts below, on the ground of limitation, the events leading to filing of the complaint may be summarized as under:

DATE	EVENTS
18. 09. 2019	Cheque presented
17. 12. 2019	Return Memo by the bank
04.01.2020	Legal Notice
08.01.2020	Notice received
23.01.2020	Expiry of 15 days' period from date of receipt of

	notice
20. 02. 2020	Complaint filed

9. The relevant statutory provisions, as contained in Sections 138 and 142, may also be reproduced, for ease of reference:-

"Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months' from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

"142. Cognizance of offences (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:

Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated."

10. The proviso to Section 138 stipulates three distinct conditions, which

must be satisfied, before the dishonour of a cheque, may be held to constitute an offence and become punishable: i.e. (i) cheque is presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (ii) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; (iii) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

11. It is only upon a cumulative satisfaction of the aforesaid three conditions, as enumerated under the proviso to Section 138, as clauses (a), (b) and (c), thereof that an offence under Section 138, can be said to have been committed by the person issuing the cheque.

12. The provisions relating to cognizance of offences is contained under Section 142 of the N.I. Act. The section starts with a non obstante clause, and in terms thereof, no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or as the case may be the holder in due course of the cheque, and such complaint is to be made within one month of the date on which the cause-of-action arises under clause (c) of the proviso to Section 138.

13. The proviso to clause (b) of sub-section (1) of Section 142 prescribes that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

14. A conjoint reading of the aforesaid provisions would indicate that a complaint under Section 138 can be filed within one month of the date on which the cause-of-action arises under clause (c) of the proviso to Section 138, which happens as soon as the drawer of the cheque fails to make payment of the cheque amount to the payee or to the holder in due course of the cheque, within fifteen days of the receipt of the notice required to be sent in terms of clause (b) of the proviso to Section 138 of the N.I. Act.

15. The cause-of-action having once arisen, under clause (c) of the proviso to Section 138, the payee or the holder of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the N.I. Act, and the said right remains legally enforceable for a period of one month from the date on which the cause-of-action has arisen.]

16. The proviso to clause (b) of sub-section (1) of Section 142 empowers the court to take cognizance after expiry of the prescribed period of one month from the date of accrual of the cause-of-action, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.

17. The sequence of events starting from the dishonour of cheque for insufficiency etc. of funds in the account to the stage at which cognizance of the

offence may be taken, as contemplated under Sections 138 and 142 of the N.I. Act, may be represented as follows:

Cheque drawn by the Drawer from his account for discharge, in whole or part, of any debt or
other liability.
Clause (a) to the proviso of Sec. 138 of the Act
Presentation of Cheque to the Bank within a period of six months from the date on which it is
drawn or within the period of its validity, whichever is earlier.
Clause(b) of the proviso of S.138 of the Act
Payee/holder of cheque makes a demand for payment of said amount by notice in writing to the
drawer of cheque within 30 days of receipt of information by the bank regarding return of cheque as
unpaid.
CAUSE OF ACTION ARISES
After 15 days from the receipt of notice of the demand.
Under Clause (b) of Section 142(1) of the Act
Complaint to be made within one month of the date on which cause of action arises.
Or
Under Proviso to Clause(b) of Sec. 142(1) of the Act
After the prescribed period, if complainant satisfies the Court that he has sufficient cause for not making the
complaint.
COGNIZANCE MAY BE TAKEN BY THE COURT
(if all 3 Conditions A,B & C are fulfilled)
Condition A
Condition B
Clause(c) to the proviso of S.138 of the Act
Drawer of such cheque fails to make payment of said amount to the payee / holder within 15 days of
the receipt of said notice.
Amount of money in the account is insufficient to honour the cheque.
Amount exceeds the amount arranged to be paid from that account
or
Returned by the bank unpaid due to either
Condition

18. The ingredients of Section 138 of the N.I. Act were analyzed in the decision in **Kusum Ingots & Alloys Limited Vs. Pennar Peterson Securities Ltd**.[2], and it was observed that the following ingredients would be required to be satisfied for making out a case under Section 138 of the N.I. Act:

"(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for

the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

19. The conditions precedent to constitute an offence, as prescribed under the proviso to Section 138, were subject matter of consideration in **MSR Leathers Vs. S. Palaniappan And Another**[3] , wherein it was held that only upon satisfaction of all three conditions enumerated under clauses (a), (b) and (c) of the proviso to Section 138, can an offence be said to have been committed by the person issuing the cheque.

20. Section 142 of the N.I. Act has been considered in the decision in **Yogendra Pratap Singh Vs. Savitri Pandey And Another**[4], and it has been held that the said section prescribes the mode and also the time within which a complaint for an offence under Section 138 of the N.I. Act can be filed.

21. In the instant case, the cheque drawn by the petitioner, was presented by the respondent no. 2, on 18.09.2019, and thereafter, on 04.01.2020 i.e. within thirty days of the receipt of the return memo dated 17.12.2019 from the bank, the respondent no. 2 (payee) of the cheque, gave notice to the petitioner and the said notice was received by him on 08.01.2020.

22. The petitioner had 15 days' period to make the payment of the said amount from the date of receipt of notice, on 08.01.2020, and the said period expired on 23.01.2020. The cause of action for filing the complaint, therefore, arose on 23.01.2020, as per clause (c) of the proviso of Section 138.

23. The complaint having been filed on 20.02.2020, was within the prescribed period of one month as per clause (b) of sub-Section (1) of Section 138, from the date on which the cause of action arose on 23.01.2020, and accordingly the court concerned would be within its right to take cognizance of the offence, as provided under Section 142.

24. The summoning order dated 02.12.2021 and the order dated 21.06.2023 passed in the revision, therefore, cannot be faulted on the ground of limitation.

25. No other ground has been urged, which may persuade this Court to exercise its supervisory jurisdiction under Article 227 of the Constitution of India, in the facts of the case.

26. The petition stands **dismissed** accordingly.

(2024) 3 ILRA 1499
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2024

BEFORE

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

Matter Under Article 227 No. 8920 of 2023

Anil Kumar Agarwal ...Petitioners
Versus
M/s Devasheesh Business India Pvt. Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Smt. Rama Goel Bansal, Ms. Shalini Goel

Counsel for the Respondents:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh

Civil Law - U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 20(4) - Against decree for eviction - Plaintiff - respondents filed Suit against tenant-petitioner, asserting tenancy of demised shop purchased by them vide sale deed - Tenant, on monthly tenant at Rs.220/-, exclusive of tax, was in arrears since January 1991 - Plaintiffs, as purchasers, claimed entitlement to recover all arrears, contending that Act, 1972 was inapplicable - Relying on mistaken facts in O.S., plaintiffs issued notice erroneously describing tenancy - On acquiring information, they revoked it by next notice clarified demised shop built in 1986, demanded arrears, determined tenancy u/s 106 TPA, 1882 - Tenant, despite notice, neither paid arrears nor vacated - During pendency, Vipul Garg replaced Smt. Rashmi Bansal as Director and impleaded as plaintiff No.3 - Plaintiffs sought eviction, arrears from 01.04.2012 to 28.02.2015 and mesne profits - Suit decreed for eviction with delivery of possession and for damages at Rs.220/- per month from 02.05.2014 to 28.02.2015, and thereafter till possession - Tenant assailed decree in SCC Revision - Revision allowed, set aside decree, remanded matter for fresh decision regarding applicability of Act, 1972 and benefit u/s 20(4) - Held, remand unwarranted, as sufficient evidence available before Revisional Court for final decision u/s 25 of Small Cause Courts Act, 1887 - Leaving little for Trial Court on two issues, it was wasteful of time and money, since Section 25 empowers Revisional Court to decide suit where Trial Court findings perverse or illegal. (Para 5 to 7, 17, 18)

Writ petition partly allowed. (E-13)

List of Cases cited:

1. Anwar Uddin Vs 1st Additional District Judge, Aligarh & ors.., 1999 (2) A.W.C. 1332, (Para 14)

2. Surya Prakash Gupta Vs Smt. Santosh Kumari & anr., 2012 (1) ADJ 109 (Para 13)

3. Mundri Lal Vs Sushila Rani (Smt) & anr., (2007) 8 SCC 609, (Paras 22, 23)

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

1. This petition under Article 227 of the Constitution has been preferred by the tenant, assailing an order of remand dated 12.07.2023 passed by the Additional District Judge, Court No. 6, Mathura on a revision preferred by him, setting aside the decree for eviction and recovery of arrears of rent passed by the Trial Court against the tenant.

2. The tenant, though successful before the Court of revision in dislodging the decree of eviction and recovery of arrears of rent etc., says that all evidence was there on record, on the foot of which the Revisional Court ought to have finally determined the suit. Instead, he remanded the suit to the Trial Court. And, that is why the tenant has preferred the present revision.

3. Mr. Ashish Kumar Singh, learned Counsel, appearing on behalf of the plaintiff-landlords, waived opportunity to file a counter affidavit on 28.08.2023, whereupon this petition was admitted to hearing and heard forthwith. Judgment was reserved.

4. Heard Ms. Rama Goel Bansal, learned Counsel for the petitioner-defendant and Mr. Ashish Kumar Singh, learned Counsel appearing on behalf of the plaintiff-respondents.

5. The plaintiff-respondents instituted SCC Suit No.13 of 2015 against the tenant-petitioner1 with a case that the tenant is in occupation of premises, bearing Water Rate Nos.1409/2-1409/2A (old) and No.167/205 (new). The said premises are entered in the Municipal Assessment Record for the years 1987-93 with the Nagar Palika, Mathura as one situate at 2161/M, Bharatpur Gate, Mohalla Guru Nanak Nagar, Junction Road, Mathura. The former owner and landlord of the premises were Vinod Sharma, Pramod Sharma and Ashok Sharma, all sons of the late Jagannath Sharma and Smt. Anita Rishi and Komal Sharma, from whom the plaintiff-respondents purchased the demised premises, a shop, vide registered sale deed dated 02.05.2014 for their own need. The owner, prior to the plaintiffs' vendee, was Jagannath Sharma, who had purchased the demised premises from Smt. Chhakko Bai. The tenant occupied the premises on a monthly rent of Rs.220/-, exclusive of tax. The demised premises was earlier a kachcha shop with a tiled roof constructed in the year 1982. In place of the kachcha shop, the then owner got a new shop constructed in the year 1986, which was assessed to house tax for the first time by the Nagar Palika Parishad, Mathura in the year 1987. The provisions of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.13 of 1972)2 do not apply to the demised shop. The defendant is in arrears of rent since the month of January, 1991 and he owed all this rent to the plaintiff-respondents' predecessor-in-title, the former landlord and owner. The plaintiff-respondents have acquired the right to recover all rent due in terms of the sale deed executed in their favour.

6. Relying upon the averments in O.S. No.267 of 2014, Anil Kumar and others v. Vinod Sharma and others, pending before the Civil Judge (Jr. Div.), Mathura, a suit brought on wrong facts, the plaintiff-respondents, mistaking those facts, pleaded by the tenant as correct, caused a notice dated 08.07.2014 to be served upon the defendant through their Counsel. In the said notice, the terms of the tenancy were incorrectly mentioned to say that a plot of land was let out to the tenant by the former landlord. Upon acquisition of complete information, the plaintiff-respondents caused a notice dated 05.11.2014 to be served upon the tenant, mentioning that the previous notice be treated revoked, and further saying that the demised shop was constructed by the previous owner in the year 1986. By the said notice, the plaintiff-respondents demanded arrears of rent and determined the tenancy under Section 106 of the Transfer of Property Act, 1882.

7. The notice was served upon the tenant, but was answered taking an incorrect stand. The rent due was not remitted nor the demised shop vacated. Pending suit, Smt. Rashmi Bansal, who was a Director of the plaintiff-respondent No.1, resigned, her resignation being accepted on 20.10.2020. In her place, Vipul Garg was appointed the Director, who was impleaded as plaintiff No.3 to the suit. The plaintiff-respondents, on the said facts, sought a decree for eviction and recovery of arrears of rent from 01.04.2012 to 28.02.2015, besides pendente lite and future mesne profits.

8. The suit was contested by the tenant on various grounds, including that the demised premises were constructed in the year 1981, and not the year 1986. According to the tenant, a plot of land situate at Sonkh Adda, Junction Road, District Mathura was leased out to his

mother Smt. Vimla Devi by its previous owners and landlords, Ghanshyam, Brij Bihari, Baikunth Nath, Anil Kumar and Rakesh Kumar on 01.06.1980. The rent settled was a quarterly sum of Rs.660/-, that would work out to Rs.220/- a month, inclusive of all taxes. The terms of the lease obliged the tenant's mother Smt. Vimla Devi to construct a shop on the demised land and the cost of construction would be payable by the landlords, Ghanshyam and others to Smt. Vimla Devi. The tenant's mother, Smt. Vimla Devi got the demised shop constructed with the consent of the then owners and landlords, Ghanshyam and others, incurring a total expenditure of Rs.8500/-. The cost of construction was not paid to the tenant's mother by the then owners and landlords.

9. It is pleaded that an agreement was entered into between the tenant's mother, Smt. Vimla Devi and the former owners and landlords, Ghanshyam and others on 30.01.1982, where it was covenanted that except for default in payment of two successive quarterly rent, despite service of notice, the tenant's mother would not be evicted. After demise of his parents, the tenant, along with his brothers and sisters, occupies the demised shop, where for the time being he runs a restaurant, as his means of livelihood and to provide for his siblings.

10. The demised shop and the adjoining property were purchased long ago by Jagannath. Jagannath is no more and his heirs and transferees are bound by the terms of the demise between the tenant's mother, the late Smt. Vimla Devi and the former owners and landlords. In violation of the terms of the lease, Jagannath instituted SCC Suit No.3 of 1990 against the tenant's mother, Smt. Vimla Devi, which is pending before the learned Additional District Judge-II, Mathura and proceedings whereof have been stayed by this Court. The tenant's mother, the late Smt. Vimla Devi had been regularly depositing rent in the said suit in accordance with law and after her death, the tenant's father regularly deposited due rent. In this manner, rent up to 31.12.2013 has been deposited in Court. Upon inquiries made by the tenant and one Munna, it transpired that Jagannath Sharma's heirs have transferred the demised shop and those held on a tenancy by Munna in the landlords' favour vide registered sale deed dated 16.04.2014.

11. For some time past, the Director/ Employees/ Agents have been troubling the tenant with their efforts to forcibly dispossess him from the demised shop. Therefore, the tenant brought a suit for the permanent injunction against the landlords, bearing Suit No.267 of 2014, Anil Kumar and others v. Vinod Kumar and others, which is pending before the Civil Judge (Jr. Div.), Mathura. The tenant and the other co-tenants of the demised shop, transferred to the landlord by the alleged sale deed dated 02.05.2014, upon provision of a copy thereof as well as that of the authority letter, are willing to pay rent to them. The landlords, without serving a notice upon the co-tenants, have proceeded against the tenant, which is illegal. The tenant has answered the notices dated 08.07.2014 and 05.07.2014, stating correct facts vide his replies dated 05/06.08.2014 and 03.12.2014, respectively. So long as SCC Suit No.3 of 1990 is pending, the present suit is not maintainable and liable to be stayed under section 10 of the Code of Civil Procedure, 19803.

12. The demised shop, shown by letter P1 in the map, annexed to the written statement, was got constructed by the tenant's mother Smt. Vimla Devi in the year 1981 and was completed in the said year. Payment of rent for the said shop commenced in that year. In these circumstances, the provisions of the Act of 1972 are applicable to the demised shop. Although, the tenant's mother, the late Smt. Vimla Devi and her successors never committed any default in the payment of rent, yet if, in the opinion of the Court, any default is found, the tenant is entitled to the benefit of Section 20(4) of the Act of 1972. In view of the aforesaid facts, the notice is invalid and the tenancy cannot be terminated thereby. The landlords have deliberately, on false and frivolous pleas, in order to make unlawful gain, instituted the present suit, which deserves to be dismissed with special costs of Rs.20,000/- under Section 35-A of the Code.

13. A replication and additional written statement were also filed, as also a written statement, in answer to certain amendments made to the plaint, and a further replication by the landlords as well.

14. On the pleadings of parties, as many as fourteen issues were framed, which read (translated into English from Hindi):

(1) Whether there is relationship of landlord and tenant between parties?

(2) Whether on the basis of the plaint allegations, the plaintiffs are entitled to the reliefs sought?

(3) Whether the defendant, since the month of January, 1991, did not pay rent despite demand?

(4) Whether the plaintiffs terminated the defendant's tenancy vide notice dated 05.11.2014?

(5) Whether the provisions of U.P. Act No.13 of 1972 are applicable to the suit property?

(6) Whether the defendant is entitled to the benefit of Section 20(4) of U.P. Act No.13 of 1972?

(7) Whether the plaintiffs are entitled to relief, if any?

(8) Whether any cause of action has arisen to the plaintiffs?

(9) Whether the suit is bad for non-joinder?

(10) Whether the plaintiffs' suit is barred by estoppel?

(11) Whether the plaintiffs' suit is liable to be stayed under Section 10 of the Code of Civil Procedure?

(12) Whether the plaintiffs' suit is not maintainable?

(13) Whether the suit property is situate in Mohalla Badri Nagar, Bharatpur Gate, Mathura?

(14) Whether the instant suit is bad for mis-joinder?

15. Substantial documentary evidence was led on behalf of the landlords and tenant and two witnesses each were examined. There is a detailed summary of all this evidence set out in the judgment of the Trial Court. No useful purpose would be served, looking to the limited controversy here, by referring to it all over again, except to the extent relevant. That will be done during the course of this judgment.

16. Issue No.1 was decided in the manner that the parties stood in the relationship of landlord and tenant with the rent being Rs.220/- per month together with

taxes. Issues Nos.5 and 6 were answered in the manner that the provisions of the Act of 1972 were not applicable to the demised shop and that the tenant was not entitled to the benefit of Section 20(4) of the Act last mentioned. Issues Nos.3 and 4 were decided together by the Trial Court and both answered in the affirmative, holding that the tenant was in default of rent since 02.05.2014, which he did not pay despite demand, and that the landlords determined the tenant's demise vide notice dated 05.11.2014. Issue No.8 was answered in the affirmative, holding that the plaintiffs had an emergent cause of action to bring the suit. Issues Nos.9 and 14 were again decided together by the Trial Court, answering them in the negative, holding that the suit was neither bad for non-joinder of parties or mis-joinder. Issue No.10 was also answered in the negative, holding that the suit was not barred by estoppel. Issue No.11 was answered in the negative, holding that the defendant, who bore burden on the issue, did not say much to discharge it. Issue No.12 was again a defendant's issue and was decided in the negative, holding that there was nothing established to show that the plaintiffs' suit was not maintainable. Issue No.13 was answered in the negative, because it was not pressed during trial by the defendant. Issues Nos.2 and 7 were decided together, holding that the plaintiff-landlords were entitled to a decree for eviction against the tenant and to recover damages for use and occupation for the period 01.04.2012 to 28.02.2015 as well as pendente lite and future.

17. The suit was, accordingly, decreed for eviction with the direction to deliver possession within two months to the landlords. In addition, the tenant was ordered to pay damages at the rate of Rs.220/- per month from 02.05.2014 to 28.02.2015. The tenant was further ordered to pay, at the same rate, damages for use and occupation until delivery of possession. This decree passed by the Judge, Small Cause Court was assailed by a revision under Section 25 of the Provincial Small Cause Courts Act, 1887, carried to the District Judge of Mathura, where it was numbered as SCC Revision No.92 of 2022. The revision aforesaid came up for hearing before the Additional District Judge, Court No.6, Mathura on 12.07.2023. The learned Additional District Judge, by a judgment and order of the date last mentioned, allowed the revision, set aside the Trial Court's decree and remanded the suit for trial afresh with reference to Issues Nos.5 and 6. These issues, as already discussed, were to the effect if the Act of 1972 was applicable to the demised shop, and, if the tenant was entitled to the benefit of Section 20(4) of the last mentioned Act. The learned Additional District Judge held that the Trial Court in reaching its conclusion that the Act did not apply, had ignored from consideration the certified copy of the Municipal Assessment, bearing Paper No.99-Ga/2, which proves that the demised shop was constructed much prior to 26.04.1985 and had been recorded in the Palika Assessment way back on 30.06.1981. It has also been remarked that in the tax assessment list for the year 1970 to 1987, the demised shop's construction had been reported in the quarterly report and the said shop assessed to tax by the Nagar Palika, Mathura with effect from 01.04.1981. The premises were assigned number 1409/M. It was mentioned in the records of the Nagar Palika, at that time, as a pucca shop, newly constructed. The learned Judge remarked that the aforesaid assessment, Paper No.99-Ga has been totally ignored from consideration by the

Trial Judge and findings recorded entirely on the basis of the assessment for the years 1987-93, bearing Paper No.21-Ga/14, while rendering judgment on Issues Nos.5 and 6. It must be remarked that though the entire suit has been remanded for trial afresh, the findings recorded by the learned Judge in the Revisional Court would clearly show that what he really intends is a decision afresh by the Trial Court on Issues Nos.5 and 6.

18. Upon hearing learned Counsel for the parties, what this Court notices is that for one the Revisional Court has recorded remarks of a kind that do not leave much to be decided by the Trial Court on Issues Nos.5 and 6. In addition, more than sufficient evidence was available on record before the Revisional Court to enable it to pronounce judgment in the suit, deciding it finally in exercise of powers under Section 25 of the Provincial Small Cause Courts Act, 1887. The order of remand, therefore, passed by the Revisional Court is not only unnecessary, but also an exercise that is wasteful of public time and money. It would serve no cause of justice. The consequence of the remand would be a repetition of the trial on at least two issues and a further revision by the aggrieved party. It is a settled principle of the law that if the Court of appeal or revision has all the evidence before it to enable it to decide the suit, an order of remand ought not to be made. Perhaps, the order of remand has been passed by the Court of revision because of a hesitation about limitations on the Revisional Court's power in recording findings of fact or interfering with such findings regarded inherent in that jurisdiction. The powers under Section 25 of the Provincial Small Cause Courts Act are wide, much wider than those under Section 115 of the Code. If the view taken by the Trial Court is perverse or manifestly illegal, the Revisional Court hearing a revision under Section 25 has all the jurisdiction to pass judgment, deciding the suit in case there is sufficient evidence on record. In this connection reference may be made to the decision of this Court in **Anwar Uddin v. 1st Additional District Judge, Aligarh and others**[4], where it was observed :

14. The contention that if the finding recorded by the learned Small Cause Court was erroneous, the revisional court ought to have remanded the case to the Small Cause Court for deciding the same, has also no merit, because evidence was already on record which was not correctly appreciated by the learned Small Cause Court and, therefore, in such a situation, the learned revisional court was justified in deciding the issue itself on the basis of material and evidence on record, instead of remanding back the matter to the learned Small Cause Court. The authorities cited by the learned counsel for the petitioner do not apply in the facts of the present case. That apart, this Court while disposing of the earlier Writ Petition No. 4290 of 1980 of the petitioner, vide order dated 2.9.1982. remitted the case to the learned revisional court for disposing of the revision on merit. Therefore, the learned revisional court has not committed any error or illegality in deciding the issue in terms of the direction of this Court.

19. The same issue was also up for consideration before this Court in **Surya Prakash Gupta v. Smt. Santosh Kumari and another**[5], where it was held :

13. There is no quarrel with the proposition of law that ordinarily the Revisional Court under Section 25 of the

Act cannot record finding of fact on the issue of fact on which no finding has been recorded by the trial Court however in exceptional cases, the revisional can record its own finding. Since, in the present case, entire evidence was available on record, it was not necessary for the Revisional Court to have remitted the case to the trial Court for the purpose of recording a finding of fact, the Revisional Court can decide the case itself on the basis of the material available on record. There is no prohibition in law that under no circumstances, the Revisional Court can record its finding particularly when the entire evidence is available on record. Here, it is not a case of reassessment or reappraisal of evidence. It cannot be ignored that when the matter was remitted to the trial Court by the Revisional Court by its order dated 20.10.2010 for taking evidence, no objection whatsoever was raised by the petitioner, rather he complied with the order and appeared before the trial Court, and lead evidence in his support and also opposed the prayer of the Respondent No. 1 in the trial Court to record finding of fact on the evidence recorded by it. Now after more than a year, he cannot be permitted to raise an objection that the Revisional Court cannot record a finding on the evidence collected by the lower Court particularly when already there is an order of this Court in writ petition No. 48214 of 2010 directing the Revisional Court to decide the S.S.C. Revision No. 7 of 2009, Surya Prakash v. Smt. Santosh Kumari and another, within a period of two months from the date of production of a certified copy of this order.

20. No doubt, in these cases, there was a direction by this Court to the Revisional Court to decide the revision on merits with the existing evidence on record etc., but that, in our opinion, would not make much difference. After all, this Court does not confer jurisdiction on a Court which it does not possess. It would also be of relevance to refer to the decision of the Supreme Court in **Mundri Lal v. Sushila Rani (Smt) and another**[6], where their Lordships, comparing the powers of revision under Section 25 of the Provincial Small Cause Courts Act, 1887 and Section 15 of the Code, observed :

22. There cannot be any doubt whatsoever that the revisional jurisdiction of the High Court under Section 25 of the Provincial Small Cause Courts Act is wider than Section 115 of the Code of Civil Procedure. But the fact that a revision is provided for by the statute, and not an appeal, itself is suggestive of the fact that ordinarily revisional jurisdiction can be exercised only when a question of law arises.

23. We, however, do not mean to say that under no circumstances finding of fact cannot be interfered therewith. A pure finding of fact based on appreciation of evidence although may not be interfered with but if such finding has been arrived at upon taking into consideration irrelevant factors or therefor relevant fact has been ignored, the revisional court will have the requisite jurisdiction to interfere with a finding of fact. Applicability of the provisions of Section 2(2) of the Act may in that sense involve determination of mixed question of law and fact.

21. In the totality of circumstances, this Court is of opinion that the impugned remand order dated 12.07.2023 passed by the Additional District Judge, Court No. 6, Mathura in S.C.C. Revision No. 92 of 2022 deserves to be set aside.

22. In the result, this petition stands **allowed in part.** The impugned judgment and order dated 12.07.2023 passed by the Additional District Judge, Court No. 6, Mathura is hereby **set aside,** with a direction to the Revisional Court to determine the revision on merits, deciding the suit, after hearing both parties, bearing in mind the guidance in this judgment.

23. Since the suit is one of the year 2015, it is directed that the Revisional Court shall proceed to hear the revision, fixing two dates of effective hearing every week and decide it within a period of two months from the date of receipt of a copy of this judgment.

24. There shall be no order as to costs.

25. The Registrar (Compliance) is directed to communicate this order to the Additional District Judge, Court No. 6, Mathura through the learned District Judge, Mathura.

(2024) 3 ILRA 1507
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matter Under Article 227 No. 10305 of 2023

Vipin Kumar ...Petitioner
Versus
Dr. Wahid Ahmad Qureshi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sumit Daga

Counsel for the Respondents:
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Criminal Law - Code of Civil Procedure, 1908 - Order XI Rules 15, 16, 21 - Constitution of India,1950 - Article 227 - Petitioner challenged the order dated 02.09.2023 by Additional District Judge, Meerut, dismissing applications (Paper Nos. 225 Ga and 229 Ga) in Civil Appeal No. 157/2010, seeking dismissal of Original Suit No. 823/2000 for non-compliance with document inspection notice under Order XI Rule 16 and clarification on document filing. Suit for specific performance of a 1975 sale agreement was decreed on 27.08.2010. Petitioner, during appeal, sought inspection of documents referenced in the plaint, claiming applicability of Order XI to appeals under Section 107 and Order XLI Rule 33 CPC. Court held that post-1999 amendment, Order XI Rule 15 limits inspection to "at or before settlement of issues," and petitioner, having contested the suit on merits, could not claim inspection at appellate stage. Reliance on Peoples Education Society Vs St. of A.P., 1971 (1) ALT 63, and Jankidas Vs Kaushalya Devi, AIR 1943 Lahore 207, misplaced as pre-amendment. Salem Advocate Bar Association Vs U.O.I., (2005) 6 SCC 344, clarified discretion in inspection timing but not applicable post-decree. No denial of defence opportunity, as suit was fully contested. Order upheld; petition dismissed for lack of merit. (Paras 9-17)

Case Law Cited:

1. Peoples Education Society, Bombay Vs St. of A.P., 1971 (1) ALT 63 (Para 8)

2. Jankidas Vs Kaushalya Devi, AIR 1943 Lahore 207 (Paras 8, 11)

3. Nagpur Glass Works Ltd. Vs Shree Onama Glass Works Ltd., AIR 1938 Nag 239 (Para 12)

4. Salem Advocate Bar Association Vs U.O.I., (2005) 6 SCC 344 (Para 15)

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

1. Heard learned Counsel for the parties and perused the record.

2. This petition has been filed for the following relief :

"i). Set-aside the order dated 2.9.2023 passed by the learned Addl District Judge, Court No.12, Meerut in Civil Appeal No.157 of 2010 (Vipin Vs. Dr. Wahid Ahmad Qureshi (deceased) & others (Annexure No.14 to this Petition) and the applications, Paper Nos.225 Ga & 229 Ga (Annexure Nos.8 & 11 to this petition) of the defendant/petitioner may be allowed."

3. Brief facts of the case are that the plaintiffs-respondents instituted Original Suit No.823 of 2000 in the Court of Civil Judge (Senior Division), Meerut against the defendant-petitioner for specific performance of an agreement to sell dated 7.1.1975 executed between the father of the plaintiffs-respondents and the defendant-petitioner. The aforesaid suit was contested by the petitioner by filing written statement. The Addl. Civil Judge (Senior Division), Meerut Court No.6 vide the judgment and decree dated 27.8.2010 decreed the suit. The defendant-petitioner filed Civil Appeal No.157 of 2010 challenging the judgment and decree dated 27.8.2010 passed by the trial court. During pendency of the appeal, the appellant-petitioner gave a notice under Order 11 Rule 16 C.P.C. for inspection of documents mentioned in paragraph no. 4, 8 & 9 of the plaint of O.S. No. 823 of 2000. The plaintiffs-respondents contested the application by filing their objections to the effect that document referred in paragraph no. 4 of the plaint are already part of record and no documents are referred in paragraph nos. 8 & 9 of the plait. Since, the plaintiffs-respondents failed to comply with the notice under Order XI Rule 16 C.P.C., the petitioner filed application Paper No.225 Ga under Order XI Rule 21 C.P.C. with a prayer to dismiss the aforesaid suit for non-compliance of the provisions contained in Order XI Rule 16 C.P.C. This application was also contested by the plaintiffs-respondents by filing objections inter alia pleading that the documents are already on record. Then the petitioner moved another application Paper No.229 Ga with the prayer that the plaintiffs-respondents be directed to specify as to when the aforesaid documents were filed. Both these applications filed by the petitioner being Paper No.225 Ga under Order XI Rule 21 and application No.229 Ga were considered and dismissed by the lower appellate court by its judgment and order dated 2.9.2023, hence the present petition.

4. It has been contended by learned Counsel for the petitioner that the provisions of Order XI C.P.C. are applicable in appeal also in view of Section 107 of the C.P.C. read with powers of the Appellate Court conferred by Rule 33 of Order XLI. It has been further contended by learned Counsel for the petitioner that since the provision of Order XI C.P.C. are applicable to appeals filed under Section 96 of C.P.C., the Court below erred in law has rejecting the application filed by the petitioner under Order 11 Rule 21 C.P.C. Before proceeding with the merits of the case, it will be useful to look into the relevant statutory provisions provides for inspection of documents referred to in pleadings or otherwise, which is as under :-

"15. Inspection of documents referred to in pleadings or affidavits.-

Every party to a suit shall be entitled on or before the settlement of issues any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document or who has entered any document in any list annexed to

his pleadings or produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs an otherwise as the Court shall think fit."

***16. Notice to produce.**—Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.*

***17. Time for inspection when notice given.**—The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C; with such variations as circumstances may require.*

***18. Order for inspection.**—(1) Where the party served with notice rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavit of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

***19. Verified copies.**—(1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations:*

Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege [unless the document relates to matters of State.]

(3) The Court may, on the application of any party to suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

***20. Premature discovery**.— Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."*

5. Rule 21 C.P.C. of Order XI C.P.C. provides for the effects of non-compliance with the order of discovery. Rule 21 of Order XI is quoted as under :

"21. Non-compliance with order for discovery.-(1) Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard.

(2) Where an order is made under sub-rule (1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action."

6. Section 107 of C.P.C. provide for the powers of Appellate Court, which is quoted as under:

Section 107. Powers of Appellate Court.- (1)Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

7. Rule 33 of Order XLI C.P.C. quoted as under.

33. Power of Court of Appeal.— The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to

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

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

8. Learned Counsel for the petitioner submitted that the defendant will be entitled to ask for inspection of a document referred to in the plaint in order to formulate his defence and any denial of this right to inspect such document would amount to denying him to an opportunity to meet the case of the plaintiff as set up by him in his plaint. In this regard, learned counsel for the petitioner relied upon the judgment of Andhra Pradesh High Court in case of **Peoples Education Society, Bombay v. The State of A.P. reported in 1971 (1) ALT 63**. Learned counsel for the petitioner has also relied upon the judgment in case of **Jankidas v. Kaushalya Devi** reported in **AIR 1943 Lahore 207.**

9. Contention of the learned counsel for the petitioner are misconceived. Prior to the amendment made by Act No. 46 of 1999, in Rue 15 of Order XI, every party to the suit was entitled for inspection 'at any time' but by the amendment as brought about by the amending Act no. 46 of 1999, the words 'at or before the settlement of issues' have been substituted for the words 'at any time'. The amended Rules 15 of Order 11 prescribes a time limit for the purpose to inspect the document referred in the pleadings or affidavits and i.e. 'at or before the settlement of issues'. This means that the inspection of document has to be completed by the time issues are settled and not later than that.

10. So far as the contention of the learned counsel for the petitioner that refusal to inspect the document would amount to denial of opportunity to defend, is also misconceived. In case of **Peoples Education Society**, Bombay (Supra) , the Andhra Pradesh High Court held in paragraph no. 5 as under:

"5. The defendant, having regard to the scope of Rule 15, will be entitled to ask for inspection of the documents referred to in the plaint in order to formulate his defence, and any denial of this right to inspect such documents would amount to denying him an opportunity to meet the case of the plaintiff as unfolded by him in his plaint."

11. In case of **Jankidas v. Kaushalya Devi (Supra)**, it has been held that inspection of document must be allowed under Order 11, Rule 15 when the when the document in question were themselves material facts supporting the plaintiff's claim and there was some sort of direct or indirect reference to them in the plaint itself, and it would be impossible for the defendant to set up his defence unless he was allowed to know before the trial what were the precise contents. It has been further held in Jankidas v. Kaushalya Devi (Supra) that once the plaintiff makes

reference to certain documents in the plaint, the defendant will be entitled to ask for inspection of those documents, it is for him to think of the lines on which he can formulate his defence and to deny the defendant of an inspection of the documents referred to in the plaint would be denying him the opportunity of fully disclosing his defence. The defendant, is therefore, entitled to ask for inspection of the document referred to in the plaint before filing his written statement. If they are not made available for inspection, then it follows that the plaintiff cannot rely upon them thereafter.

12. There is no dispute as to the principle of the law laid down by the aforesaid judgments but both the judgments were given prior to the amendment brought in Rule 15 of Order 11 by amending the Act No. 49 of 1999 which prescribes a time limit for making an application for inspection. Even earlier, in case of Nagpur Glass Works Ltd. and others v. Shree Onama Glass Works Ltd., Gondia reported in AIR 1938 Nag 239 wherein the Nagpur High Court has held in paragraph no. 5 as under:

"5. This much however is certain: whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18(2) he must act promptly and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. It is of course impossible to lay dawn any hard and fast rule but these observations form a general guide.

13. Coming to the facts of the present case, an application has been moved by the defendant/appellant at the stage of first appeal filed under Section 96 C.P.C. by the defendant/appellant after the suit was decreed against him. Since the suit has been contested on merits by the defendant/appellant by filing written statement and leading evidence there is nothing remains to be disclosed to the defendant/petitioner denial of which may lead to denial of opportunity to the defendant to prepare his defence.

14. So far as the contention of the learned counsel for the petitioner is that in view of Section 107 C.P.C. and the powers of the appellate court under Order 41 Rule 33 C.P.C., the appeal is continuation of suit, therefore, the court below ought to have allowed the application filed by the petitioner is also misconceived for the reasons that though the appeal is continuation of the suit but in view of time limit as fixed by the statute itself, i.e. Rule 15 of Oder 11, the said power cannot be exercised at the appellate stage.

15. So far as the contention of the learned counsel for the petitioner that in case of **Salem Advocate Bar Association v. Union of India** reported in **2005 (6) SCC 344**, the Supreme Court has held that inspection of documents 'on or before the settlement of issues' is discretionary and it does not mean that the inspection cannot be allowed after the settlement of issues, is also, misconceived. Though the Apex Court has held that the amendment is not mandatory but such a power cannot be exercised at the stage of appeal after contesting of suit on merits and passing of decree against the petitioner.

16. In view of the discussion as made above, I am of the view that the court below has committed no illegality in dismissing the application of the petitioner.

17. The writ petition devoid of merits and is, accordingly, dismissed.

(2024) 3 ILRA 1513
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Matter Under Article 227 No. 11211 of 2023

Rakesh Kumar Awasthi & Ors.
...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Bal Ram Gupta

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Sections 156(3) & 173(8) - Constitution of India,1950 - Article 227- Power of Magistrate to Order Further Investigation - Petitioners challenged the order dated 12.07.2023 by Metropolitan Magistrate, Kanpur Nagar, rejecting a final police report and directing further investigation in Misc. Case No. 1124/2023, arguing no protest petition was filed and the Magistrate lacked power post-cognizance under Section 156(3). The application, captioned as 'narazgi yachika' under Section 173(8), was treated as a protest petition. Court held that Section 173(8) empowers police to conduct further investigation post-report, and Magistrates can order such investigation under Section 156(3) read with Section 173(8) until trial commences, as per Vinubhai Haribhai Malaviya Vs St. of Gujarat, (2019) 17 SCC 1. Magistrate's options upon receiving a police report include accepting it, dropping proceedings, or directing further investigation (Minu Kumari Vs St. of Bihar, (2006) 4 SCC 359). No statutory bar restricts this power, and Article 21 mandates ensuring fair investigation. Order upheld as within jurisdiction; petition dismissed for lack of merit. (Paras 12-21)

Petition Dismissed.

Case Law Cited:

1. Vinubhai Haribhai Malaviya Vs St. of Guj., (2019) 17 SCC 1 (Para 13)

2. Minu Kumari Vs St. of Bihar, (2006) 4 SCC 359 (Paras 14, 15)

3. Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762 (Para 15)

4. Hemant Dhasmana Vs CBI, (2001) 7 SCC 536 (Paras 16, 17)

5. Union Public Service Commission Vs S. Papaiah, (1997) 7 SCC 614 (Para 17)

6. Bhagwant Singh Vs Commissioner of Police, (1985) 2 SCC 537 (Para 17)

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

1. Heard Sri Bal Ram Gupta, learned counsel for the petitioners and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-respondent.

2. The present petition has been filed seeking to assail the order dated 12.07.2023 passed by the Metropolitan Magistrate, Court No.9, Kanpur Nagar in Misc. Case No.1124 of 2023 (Syed Tariq Umar Vs. Rakesh Kumar Awasthi and others), whereby the final report submitted by the police has been rejected and a direction has been issued for further investigation.

3. The principal ground urged to assail the aforesaid order is that no protest

petition was filed by the informant before the concerned Magistrate and despite the same, the order impugned has been passed.

4. It is further sought to be contended that the power to order investigation by the police under Section 156(3) of the Code of Criminal Procedure, 19731 CrPC can only be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a), and such a direction could not have been issued in exercise of powers under Section 173(8), wherein the investigating officer alone has been authorized to conduct further investigation.

5. Learned AGA has controverted the submissions made by the counsel for the petitioners by pointing out that the miscellaneous application filed by the informant, upon which the order impugned has been passed by the Magistrate, was captioned as 'narazgi yachika', under Section 173(8) CrPC, wherein a prayer had been made to reject the final report and direct further investigation.

6. It is submitted that the aforesaid application is clearly in the nature of a 'protest petition', filed under Section 173(8) CrPC, wherein the Magistrate is fully empowered to direct further investigation, and the order impugned cannot be faulted with on this ground.

7. Rival contentions fall for consideration.

8. The statutory scheme under the CrPC contains a clear demarcation between the powers of the police to investigate and the jurisdiction of criminal courts in inquiries, followed by the procedure once the trial begins.

9. The expression 'investigation' has been defined under Section 2(h) CrPC, as including all the proceedings under the Code for the purpose of collecting evidence by a police officer, and otherwise by any person authorized by a Magistrate in this behalf, and also pertains to a stage before the trial commences. The investigation which may ultimately lead to a police report is an investigation conducted by the police, and may be ordered in an inquiry made by a Magistrate himself in a 'complaint case'.

10. The Code of Criminal Procedure, 1898, did not contain a provision under which the police were empowered to conduct a further investigation in respect of an offence after a police report under Section 173 had been forwarded to the Magistrate.

11. Taking notice of the difficulties arising as a result thereof, the Law Commission in its 41st report made a recommendation with regard to reopening of investigation, in the following terms:-

"14.23. Reopening of investigation.- A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the

prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused."

12. Sub-section (8) of Section 173, as introduced in the Code of Criminal Procedure, 1973, gives power to the police to further investigate an offence even after a police report has been forwarded to the Magistrate. This power continues until the trial can be said to commence in a criminal case.

13. The question as to whether the Magistrate has the power to order further investigation, after a police report has been forwarded to him under Section 173 was considered in **Vinubhai Haribhai Malaviya and others Vs. State of Gujarat and another**[2] and it was held that the Magistrate's power under Section 156(3) CrPC is very wide, and in order to ensure that a 'proper investigation' takes place in the sense of a fair and just investigation by the police, Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, would include an order for further investigation after a report is received by him under Section 173(2), and which power would continue to enure in the Magistrate at all stages of the criminal proceedings until the trial itself commences.

14. The powers that are vested in Magistrate upon filing a report in terms of Section 173(2)(i), were explained in the decision of **Minu Kumari Vs. State of Bihar**[3], wherein it was held that when a report is filed before a Magistrate, he may either: (i) accept the report and take cognizance of the offences and issue process; or (ii) may disagree with the report and drop the proceedings; or (iii) may direct further investigation under Section 156(3) and require the police to make a further report.

15. In the case of **Vinay Tyagi Vs. Irshad Ali @ Deepak and others**[4], after referring to the decision in the case of Minu Kumari (supra), it was held that the court of Magistrate has a clear power to direct further investigation when a report is filed under Section 173(2), and may also exercise such powers with the aid of Section 156(3) CrPC.

16. Reference was also made to the decision in **Hemant Dhasmana Vs. CBI**[5], where the court had held that although Section 173(8) does not, in specific terms, mention about the powers of the Court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the Court.

17. The judgment in **Hemant Dhasmana** (supra) has made specific reference to the judgments in **Union Public Service Commission Vs. S. Papaiah and others**[6], and B**hagwant Singh Vs. Commissioner of Police**[7], to conclude that the Magistrate could pass an order for further investigation.

18. In terms of the aforesaid decisions it can be concluded that the scheme of the Code nor any specific provision therein bars exercise of jurisdiction by the Magistrate to order further investigation. The language of Section 173(2) is not to be construed in restricted manner so as to

deprive the Magistrate of such powers, particularly, in view of the provisions under Section 156(3), and the language of Section 173(8) itself. The power of the Magistrate to direct further investigation, is, in fact, to be read into language of Section 173(8) CrPC.

19. The question as to whether after a charge-sheet has been filed by the police, the Magistrate has power to order further investigation, and if so, upto what stage of a criminal proceeding, is therefore no longer res integra, in view of the authoritative pronouncements, wherein it has been held that the power to order for further investigation after a police report has been forwarded under Section 173(2), would continue to enure in the Magistrate at all stages of the criminal proceedings until a trial itself commences.

20. The legal position with regard to the power of the Magistrate to order further investigation exercising powers under Section 156(3) read with Section 173(8), being well settled, the order impugned dated 12.07.2023 passed by the Metropolitan Magistrate, Court No.9, Kanpur Nagar in Misc. Case No.1124 of 2023, in terms of which the final report submitted by police has been rejected, and a direction has been issued for further investigation, cannot be faulted on the ground of lack of jurisdiction.

21. The petition lacks merit and is accordingly dismissed.

(2024) 3 ILRA 1516
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.03.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Capital Case No. 19 of 2022
connected with
Capital Cases No. 2 of 2023
&
Capital Reference No. 14 of 2022

Mohd. Shakeel ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
Sri Apul Misra, Sri Sukhvir Singh

Counsel for the Respondent:
G.A., Ms. Mayuri Mehrotra, Ms. Archana Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 374(2) - Appeal against conviction , Section 366 - Sentence of death to be submitted by Court of Session for confirmation , Capital punishment - Murder - Arms possession - Indian Penal Code, 1860 - Sections 302/34, Arms Act, 1959 - Section 25 & 27 - Circumstantial Evidence - Extra-Judicial Confession - Recovery - Last-seen theory - Motive - In case of circumstantial evidence the chain of circumstances has to be proved in such a manner which leads to the conclusion that the accused and none else is responsible for the offence alleged against him - Chain has to be completed in all respect. (Para - 46)

(B) Indian Evidence Act, 1872 - Circumstantial evidence - Panchsheel of the proof of a case based on circumstantial evidence - circumstances from which the conclusion of guilt is to be drawn should be fully established - facts so established should be consistent only with the hypothesis of the guilt of the accused - circumstances should be of a conclusive nature and tendency - should exclude every possible hypothesis except the one to be proved - must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion

consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Para - 44)

Three ladies, the wife, sister and mother of appellant - have been murdered by causing injuries through the firearms as well as a sharp-edged weapon - alleged accused were charged under IPC and Arms Act after confessions and recoveries linked them to the crime - trial court sentenced both to death based on circumstantial evidence and recoveries made. (Para - 5 ,6,7,43)

HELD: - Confessions and recoveries were unreliable due to lack of independent witnesses. No direct link between the accused and the crime was substantiated. Chain of circumstantial evidence was incomplete. Convictions set aside due to insufficient evidence and unreliable prosecution case under settled law regarding circumstantial evidence and Section 27 of the Evidence Act. Prosecution has failed to prove its case against the appellants beyond reasonable doubt, therefore, they are entitled for benefit of doubt, and they deserve to be acquitted from all the charges levelled against them. Capital reference made by trial court for confirmation of death sentence rejected. (Para 59, 47, 58)

Appeals allowed. (E-7)

LIST OF CASES CITED: -

1. Ramanand @ Nandlal Bharti Vs St. of U.P., AIR 2022 SC 5273

2. Subramanya Vs St. of Karn., AIR 2022 SC 5110

3. Rajesh & Anr. Vs St. of M.P., Criminal Appeal No(s). 793-794 of 2022

4. Sharad Birdichand Sarda Vs St. of Maha., AIR 1984 SC 1622: (1984) 4 SCC 116

5. Chatthoo Chero Vs St. of U.P., Jail Appeal No.116 of 2019

6. Mukesh v. St. (NCT of Delhi), (2017) 6 SCC 1

7. Rajesh & anr. Vs St. of M.P. 2023 SCConline SC 1202

8. Munna Pandey Vs St. of Bihar, 2023 SCC OnLine SC 1103

9. Delhi Administration Vs Bal Krishan, (1972) 4 SCC 659

10. Mohd. Inayatullah Vs St. of Maha., (1976) 1 SCC 828

11. Anter Singh Vs St. of Raj., (2004) 10 SCC 657

12. St. (NCT of Delhi) Vs Navjot Sandhu, (2005) 11SCC 600

(Delivered by Hon'ble Anish Kumar Gupta, J)

1. Heard Shri Apul Misra and Shri Sukhvir Singh, learned counsel for both the appellants and Shri Amit Sinha, learned A.G.A. assisted by Ms. Mayuri Mehrotra and Ms. Archana Singh for the State.

2. Capital case **No. 19 of 2022** has been filed by **Mohd. Shakeel**-appellant against the judgement and order dated 3.11.2022 passed by Special Judge (E.C. Act)/Addl. District and Sessions Judge, Farrukhabad whereby he has been convicted in S.T. No. 612 of 2007 arising out of Case Crime No. 1002 of 2007 P.S. Kotwali Farrukhabad District Farrukhabad under section 302/34 I.P.C. and sentenced to death penalty with fine of Rs.50,000/- and in default of payment of fine to go further Rigorous imprisonment for two years. He has also been convicted in S.T. No. 611 of 2011 arising out of Case Crime No. 1011 of 2007 P.S. Kotwali Farrukhabad District Farrukhabad under section 25 of the Arms Act and sentenced to imprisonment for three years Rigorous Imprisonment with fine of Rs.10,000/- and

under section 27 of Arms Act he is sentenced to imprisonment for three years Rigorous Imprisonment with fine of Rs.10,000/-, with default stipulation.

3. Capital case **No. 2 of 2023** has been filed by **Mohd. Kaleem**-appellant against the judgement and order dated 3.11.2022 passed by Special Judge (E.C. Act)/Addl. District and Sessions Judge, Farrukhabad whereby he has been convicted in S.T. No. 612 of 2007 arising out of Case Crime No. 1002 of 2007 P.S. Kotwali Farrukhabad District Farrukhabad under section 302/34 I.P.C. and sentenced to death penalty with fine of Rs.50,000/- and in default of payment of fine to further go Rigorous Imprisonment for two years. He has also been convicted in S.T. No. 611 of 2011 arising out of Case Crime No. 1012 of 2007 P.S. Kotwali Farrukhabad District Farrukhabad under section 25 of Arms Act and sentenced to imprisonment for three years Rigorous Imprisonment with fine of Rs.10,000/- with default stipulation.

Capital Reference No. -14 of 2022 has also been made by the trial court for confirmation of the death sentence of both the appellants.

4. Since both capital cases and capital reference arising out of a common judgement for the same incident, all were heard together and are now being decided by this common judgement.

5. The prosecution case in brief is that upon an incident having had taken place in the night intervening 25/26.07.2007, wherein three ladies have been murdered, a First Information Report was lodged by one Mohd. Shakeel s/o Sabbir Ahmad. First Information Report was scribed by Dr. Dinesh Chandra Agnihotri on the dictation of Shakeel (complainant). The allegation in the First Information Report was that in the house of his cousin (Chacha's son) Mohd. Kaleem in the night intervening 25/26.07.2007 at around 4:00 A.M., certain unknown persons had committed murder of the wife of his brother-Kaleem, namely, Yaasmeen, mother, namely Noorjahan and sister, namely Nasreen and that on the body of the three deceased there was evidence of the fact that they were killed by bullets and there were also other marks of injuries caused by sharp edged weapons. It was stated in the First Information Report that the brother of the first informant, namely Kaleem was also grievously injured and he was sent to Lohiya Hospital for medical treatment. Upon the First Information Report having been lodged, investigation commenced. From the spot a recovery memo of the recovered articles was prepared. On the spot the recovery was made by the Investigating Officer (IO) of two empty cartridges of 315 bore and one empty cartridge of 12 Bore. The other articles which were taken into possession were plain soil and the blood stained soil. Thereafter, on the same date, inquest report was prepared and the three dead bodies of Nasreem, Yaasmeem and Noorjahan were sent for postmortem. As per the case of the prosecution, Kaleem was taken to the hospital by the Police and he was subsequently arrested on the statements made by Mohan and Kamal. As per prosecution case Mohan and Kamal had stated that Kaleem had made certain extra judicial confession before them and therefore they knew the fact that Kaleem had committed the crime. The police also came to know on the statements of Mohan and Kamal that the co-accused Pradeep Dhobi, Lallan @ Lalla and Shakeel were also involved in the crime. On 27.07.2007, Shakeel and Kaleem were arrested by the

police. Thereafter on the pointing of the two accused, Shakeel and Kaleem, from the house of Shakeel one country made pistol of 315 bore was recovered. On the pointing out of accused Shakeel and Kaleem, a Banka which was buried in the same courtyard and covered by some loose bricks was recovered. The recovery memo was thereafter prepared, which is Exh. Ka-4. It may be noted that when the First Information Report was lodged, it had given rise to Case Crime No. 290 of 2007 under Section 302, 307 I.P.C. For the recovered country made pistol, Case Crime No. 1012 of 2007 under Section 4/25 of the Arms Act and for the recovered Banka, Case Crime No. was 1011 of 2007 under Section 25/27 of the Arms Act were registered. The injury on the body of Kaleem was examined on 26.07.2007 itself. Postmortem of the dead bodies were conducted on 26.07.2007. The case of the prosecution further is that the fire arms and the bullets were sent for forensic examination to the Ballistic Expert. The samples of the bullets and the fire arms were got received in the Forensic Laboratory on 03.11.2007 and the Banka was received on 04.11.2007. After taking the statements of the various witnesses the Police concluded the investigation and submitted charge-sheet against all the accused persons, namely, Kaleem, Shakeel, Pradeep, Lallan @ Lalla and Mukesh @ Sanjeev on 16.08.2007 under Sections 147, 148, 149, 302 I.P.C. With regard to Shakeel, a charge-sheet was also submitted on 17.08.2007 under Section 25/27 of the Arms Act and with regard to Mohd. Kaleem, charge-sheet under Section 4/25 of the Arms Act was submitted on 17.08.2007. On the aforesaid charge-sheets, cognizance was taken by the Chief Judicial Magistrate, Farrukhabad on 05.09.2007 and the case was committed to the Court of Sessions Judge where charges were framed on 25.01.2008 by the learned Additional Sessions Judge, Court No.1, Farrukhabad, under Sections 147, 148, 302/149 I.P.C., against Mohd. Kaleem, Shakeel, Pradeep, Mukesh @ Sanjeev and Lalla @ Lallan and the Sessions Trial was numbered as 612 of 2007.

6. With regard to the case under the Arms Act under Section 25/27 vis-a-vis Shakeel, case was registered as Sessions Trial No. 611 of 2007. With regard to the accused Kaleem a case under Section 4/25 of the Arms Act was registered as Sessions Trial No. 612 of 2007.

7. The accused persons denied the charges and claimed trial. However, during trial since the accused, namely, Mukesh alias Sanjeev and Pradeep were absconding, therefore, their trial had been separated on 19.11.2016 and 4.11.2019 respectively and only accused Kaleem, Shakeel and Lallan alias Lalla have been tried for the offences under sections 147, 148, and 302/149 I.P.C. Accused Kaleem has also been tried under section 4/25 Arms Act and accused Shakeel has also been tried for the offence under section 25/27 Arms Act.

8. During trial in order to prove its case the prosecution had examined as many as 14 witnesses. There were two court's witnesses, on the orders of the court, who were examined during trial. The defence had also examined six witnesses in support of its case.

9. The **P.W. 1 Shakeel s/o Sabbir**, who was the first informant has proved the contents of the First Information Report and has stated that Kaleem, is his cousin, who is the accused in the case in respect of

an incident, which occurred in the night intervening 25/26.07.2007 at 4:00 A.M. in which his wife Yasmeen, mother- Noorjahan and sister- Nasreen, have been murdered by firing bullets upon them. He stated that the First Information Report was written on his dictation by Sri Dinesh Chandra Agnihotri. He had stated in his statement that as the wife of his cousin, Kaleem, was of a bad character, therefore, Kaleem and the co-accused Shakeel had in a planned manner, murdered Yasmeen, the wife of Kaleem; the mother of Kaleem- Noorjahan and his sister- Nasreen. He further stated that after lodging of the First Information Report he had gone to Jaipur and what happened in the case thereafter was not known to him. In his cross-examination, he has categorically stated that he had not seen the incident and he had not seen the assailants. He also stated that he had no knowledge about the incident. He has stated that when he reached the house of his brother, Kaleem then he was not there at his house but had been taken to the Lohiya Hospital, and therefore, he had straight away gone to the Police Station to get the report lodged. He has further stated that he did not know that Kaleem was grievously injured in the incident and if this fact was recorded in his statement given under Section 161 Cr.P.C. by the police, he is not aware. He had also no knowledge about panchayatnama of the dead bodies.

10. The **PW-2 Haji Mohd. Ahmad** has stated in his examination-in-chief that Pradeep was not known to him. The person who was in the Court, namely Shakeel s/o Qadir was known to him. He had also stated that Lallan @ Lalla and Mukesh @ Sanjeev were also not known to him. Kaleem, who was present in the court, was also not known to him. He has stated that he had only heard about the fact that Kaleem's wife had been killed around two years back. He had stated that he heard about the murder of Noorjahan, Yasmeen and Nasreen. He has also denied that on 27.07.2007, Pradeep had informed him that Kaleem had developed illicit relations with his sister-in-law and his wife Yasmeen was all the time troubling him because of this illicit relations, therefore, he committed murder of Yasmeen, Noorjahan and Nasreen. Ultimately, the PW-2 was declared hostile.

11. **P.W.-3 Mohd. Qamar**, who was examined by the prosecution to prove the fact that an extra judicial confession was made by Mohd. Shakeel and Mohd. Kaleem. However, he has denied the fact that any extra judicial confession was made before him. This witness was also declared hostile.

12. **P.W.-4 Gaffar**, was also produced by the prosecution but he had stated that on that date he was in Jaipur, and therefore, he was also declared hostile.

13. **P.W.-5 Arif**, proved the inquest reports.

14. **P.W.-6 Prakash Narayan**, is the Constable, who has proved the registration of the case under the Arms Act. He has stated in his statement that before the accused were taken for the recovery, no statement was recorded and no public witness was present at that time.

15. **P.W.-7 Sub-Inspector, Balvant Raj**, was examined by the prosecution for the purposes of proving the Chik F.I.R. He has stated that the court of the Chief Judicial Magistrate was 5-6 Kilometres away from the Police Station but the Chik F.I.R., was sent to the Court of the Chief

Judicial Magistrate on 06.08.2007 i.e. after 11 days of the incident.

16. **P.W.-8 Dr. Ramesh Chandra** examined the injuries on the body of the accused Kaleem and in his opinion they were simple in nature. He stated that the injury no.1 was simple and injury 2 was to be kept under observation. He has stated that injury no.1 could have been caused due to fall and injury no.2 may also have been caused if the injured hit the corner of a Staircase.

17. **P.W.-9 Sri Hakim Singh** is the Sub-Inspector in whose presence the recovery of the country made pistol and the Banka was made. Sub-Inspector, Sri Hakim Singh has proved the recovery as was made with regard to the country made pistol of 315 bore at the indication of Shakeel. He has also proved the recovery of the Banka at the indication of Kaleem. He has very categorically stated that the recovery was made from a populated area and that the house, where recovery had taken place was in the midst of the city, but he has stated that no independent witness came forward despite request from the Police personnel. He has also categorically stated that prior to the recovery no statement of the accused was recorded. He has also proved recovery of the mobile phone No. 9918932015 of kaleem. He has also proved the call details according to which the accused Kaleem used to talk to the accused Pradeep on his Mobile No. 9918267600 and that he has stated that just prior to the incident they had talked to each other.

18. **P.W.-10 Kanhaiya Lal**, who was posted as an assistant at the place where the postmortem took place has proved the fact that the postmortem report was scribed by the doctor in his own hand writing.

19. **P.W.-11 Yash Karan**, is the Sub-inspector in whose presence the bodies were sealed/stitched and he has proved the inquest reports.

20. **P.W.-12 Sri Ashok Kumar**, the Station House Officer was the Investigating Officer of the case and he has stated that he had investigated the case and he has stated that in First Information Report it was stated that some unknown persons had committed the murder and on the statements of Mohan and Kamal, he came to know that Mohd Kaleem, Pradeep Dhobi, Lallan, Shakeel in a planned manner committed murder of Yasmeen, Narseen and Noorjahan by firing on them. He has also stated that there was a lacerated injury on the head of Shakeel (It appears that he wanted to mention the name of Kaleem). He has also stated that the two accused Shakeel and Kaleem were arrested on the same date and they had admitted their guilt. He has further stated that recoveries of the country made pistol and the Banka were made on the pointing out of Shakeel and Kaleem. When the statement of the SHO (PW-12- Ashok Kumar) was being recorded, he has stated that in the court only Banka, one cartridge of 12 bore and cartridges of 315 bore were presented. PW-12 died thereafter and he was never cross-examined.

21. **P.W.-13 Suraj Singh** is the investigating Officer for the offences under the Arms Act. He has stated that he has no knowledge as to whether the recovered country made pistol was sent for Forensic investigation. He has also stated that before the recovery was being made, statements of the two accused Shakeel and Kaleem were not recorded. He has also stated that the fire arms recovered were used in the crime as there was a report of the Forensic

laboratory. He has stated that in his cross-examination that it is wrong to say that site plan was prepared in the Police Station.

22. **P.W. 14, Dr. Yogendra Singh**, the Radiologist has proved the post mortem report of the three deceased Yasmeen, Noorjahan, Nasreen.

23. **Court Witness C.W. -1 Ram Lalli**, who is the mother of accused Pradeep has been examined to confirm the age of the accused Pradeep at the time of the incident.

24. **C.W.-2 Munna Lal**, the father of Pradeep was discharged on the application made by him to the effect that he is not in a position to give any statement as he had lost his memory.

25. **D.W.-1 Raunak** in his examination has deposed that Yasmeen was his daughter and married to Kaleem and there was no dispute between them. Kaleem, he has stated, was innocent. He stated that it was wrong to say that Kaleem had illicit relation with his Saali (sister-in-law) and it was also wrong to say that she became pregnant due to this illicit relation. It is also wrong to say that because of the illicit relation Yasmeen used to quarrel with Kaleem. Kaleem used to come to his house once in a year and stay there for a day or two. He had also stated that the nand (sister-in-law) of Yasmeen, Nasreen was young but he could not know her age. He also deposed that he did not know that Nasreen had developed illicit relation therefore Kaleem was trying to do away with her. He deposed that he informed the police that he was the father of Yasmeen. He also deposed that he did not know that who had killed Yasmeen and it was wrong to say that he was trying to save Kaleem due to pressure.

26. **D.W. -2 Shareef** is the neighbour of Kaleem and has deposed that his house is near the house of Kaleem. He came to know about the killing of wife, mother and sister of Kaleem on the next morning. He deposed that in this case Kaleem was falsely implicated. Police had enquired about this from the local residents and all had denied the involvement of Kaleem in the crime but police had not agreed. In his cross examination he deposed that he had seen the dead bodies in the morning after the incident. He heard the sounds of three to four rounds of firing at about 4 a.m. which was coming from the house of Kaleem. Next morning he went to the house of Kaleem but had not entered in the house. He entered in the house alongwith the police and saw the three dead bodies lying on the floor. He had stated that he knew Kaleem and did not know the other accused persons. He further had stated that the incident occurred in the house of Kaleem and at that time Kaleem was present in his house.

27. **D.W.-3 Altaf** deposed that he was residing in the house of Sabir on rent near the house of Kaleem. In the night he heard the sounds of fire arms at about 3 – 4 a.m. and had gone to the roof and from there saw that a mob had collected in front of the house of Kaleem but the latter was not present there. In his cross examination this witness had stated that in the evening of the incident at about 8 – 8.30 p.m. Kaleem was not present in his house. Thereafter he came there or not he could not tell. He did not go to the spot and he had no information about the incident.

28. **D.W.-4 Raju** deposed that his house was situate near the house of Kaleem. The incident was about 9 years old and he remembered that in the night when the incident had occurred at about 3 – 4 a.m. he had heard the sounds of fire arm and he had reached on the spot alongwith the others. He deposed that there was a rumour that some culprits had committed robbery and committed the murder of the three ladies. He deposed that one day before the incident he had gone to the house of Kaleem and his wife had told him that Kaleem would come by the evening next day. He deposed that they all informed the police that incident had been caused by some culprits. In his cross examination he stated when he went to the house of Kaleem he saw the dead bodies of his wife, mother and the sister. He had stated that it was wrong to say that Kaleem had himself committed the murder. He had stated that he did not know that kaleem had received any injury in the incident. He had stated that Kaleem was in jail in the murder case of his wife, mother and sister but he was wrongly detained in jail. He stated that it was wrong to say that he was deposing to save Kaleem, he being his neighbour.

29. **D.W.-5 Qadar Kawwal** has deposed that Shakeel was taken by the police on 26.7.2007 from his shop and when he went to the police station the Inspector got his signature on a paper and said that your son will be released in the evening. Thereafter police had falsely challaned his son. He deposed that police had not recovered the mobile of Kaleem nor he had seen it. In his cross examination he had stated that Shakeel was present in the house in the night of the incident. He had further stated that when police had taken Shakeel from the shop he was not present there and he was informed by some other persons. It is wrong to say that he is deposing to save the accused.

30. **D.W.-6 Moharram** has deposed that the house of Kaleem was situate at a distance of 700 – 800 meters from his factory. In the night of the incident Kaleem had gone to his house at about 4 a.m. Some persons had reached his factory and had called for Kaleem saying that something had happened in his house. He deposed that he reached the house of Kaleem after about 15 – 20 minutes and saw that Kaleem was lying in a fainted condition at his main gate and there were injuries on his head.

31. The five accused persons got their statements recorded under section 313 Cr.P.C. The accused Kaleem gave his additional statement in writing which is there on record as Paper No. 224-A.

32. The trial court after considering the entire evidence on record had acquitted the accused Lallan @ Lalla of all the offences under Sections 147, 148, 302/149 I.P.C. upon granting him the benefit of doubt. However, the trial court on 13.10.2022 found Mohd. Kaleem & Mohd. Shakeel in Sessions Trial No. 612 of 2007 guilty. This case arose out of Case Crime No. 1002 of 2007 under Sections 302/34 I.P.C. and acquitted them for the offences u/s 147, 148 I.P.C. Accused Mohd. Kaleem in Sessions Trial No. 611 of 2007 arising out of Case Crime No. 1012 of 2007 was also found guilty under Section 4/25 of the Arms Act. Similarly, Mohd. Shakeel in Sessions Trial No. 611 of 2007 arising out of Case Crime No. 1011 of 2007 under Section 25/25 Arms Act was found guilty.

33. They were heard on the question of sentence and on 03.11.2022 after looking into all the mitigating and aggravating

circumstances sentenced Kaleem and Mohd. Shakeel in Sessions Trial No. 612 of 2007 arising out of Case Crime No. 1002 of 2007 with death penalty and they were also fined Rs. 50,000/- each. In default, they had to undergo two years rigorous imprisonment. They were directed to be hanged till death. With regard to Sessions Trial No. 611 of 2007 arising out of Case Crime No. 1012 of 2007, Mohd. Kaleem was convicted under Section 4/25 of the Arms Act with rigorous imprisonment of three years and he was fined for Rs. 10,000/-. In the event of the non-payment of fine, he was to undergo further six months of rigorous imprisonment. Again, with regard to the accused Shakeel in Case Crime No. 1011 of 2007, under Section 25 of the Arms Act, he was sentenced for three years rigorous imprisonment with fine of Rs. 10,000/- and in default of payment of fine, six months further rigorous imprisonment was ordered. He has also been sentenced under section 27 of Arms Act for a period of three years rigorous imprisonment with fine of Rs.10,000/- and in default of payment of fine further six months rigorous imprisonment had to be undergone.

34. Upon order of sentence of death having been imposed, Additional Sessions Judge, referred the matter on 03.11.2022 to this Court and the reference was numbered as Capital Reference No. 14 of 2022. The appellants Mohd. Shakeel and Mohd. Kaleem had filed their separate appeals.

35. Learned counsel for the appellants has made the following submissions :- 20201

(i) The recovery as has been made by the police, itself becomes doubtful as in the recovery memo, it has been stated that at the indication of the accused Shakeel from his own courtyard in the north-southern corner, when certain loose bricks were removed, a country made pistol of 315 bore was recovered. Thereafter from the house of Shakeel itself, it has been stated in the recovery memo that Kaleem, who was the co-accused, in the very same courtyard in the south-western corner after removing certain bricks, got recovered a Banka (gandasa). Learned counsel for the appellants states that if the site-plan is seen then it clearly shows that the country made pistol and the banka was recovered from the house of Kaleem. Learned counsel for the appellants further relying upon the judgments of the Supreme Court in ***Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh*** reported in ***AIR 2022 SC 5273***; ***Subramanya vs. State of Karnataka*** reported in ***AIR 2022 SC 5110*** and in ***Rajesh & Anr. vs. State of Madhya Pradesh*** in ***Criminal Appeal No(s). 793-794 of 2022*** and specifically relying upon paragraphs 53 to 57 and 70 in the case of ***Ramanand @ Nandlal Bharti (supra)*** has submitted that the recovery under section 27 of the Evidence Act itself was doubtful as the accused were in the police custody and before the police proceeded for the recovery, no memo regarding the disclosure statement was prepared which was required to be compulsorily prepared in the presence of independent witnesses. Also, it has been stated that before the police proceeded for recovery of the weapon, no effort was made to have two independent witnesses. Learned counsel for the appellants, therefore, states that the recoveries on the pointing out of the appellants was itself doubtful and they could not have been convicted on such a recovery.

(ii) Learned counsel for the appellants has stated that there was recovery of country made pistol of 315

bore, used in the crime, along with a Banka but there is definite evidence of the fact that there were pellets embedded in the body of Yasmeen which could be possible only on the firing by a 12 bore pistol, which fact is also reflected in the post mortem report.

(iii) Learned counsel has submitted that the accused made extra judicial confessions before Mohan and Kamal and on their statements the appellants Kaleem, Shakeel, Pradeep, Lallan and Sanjeev were involved in the crime but no endeavour was made by the prosecution to get Mohan and Kamal examined during trial to prove the guilt of the appellants. Learned counsel submits that to give credence to the story of extra judicial confession, one Mohd. Qamar (PW-3) was produced and he has specifically, while appearing in the witness box, denied the fact that any extra judicial confession was made to him. Learned counsel for the appellant relied upon the statement of Mohd. Qamar (PW-3), which is being reproduced here as under :-

"शकील पुत्र शब्बीर हाजिर अदालत कलीम के ताऊ के बेटे है। घटना के बाद हाजिर अदालत मोहम्मद कलीम व हाजिर अदालत शकील घटना के बाद मुझे नहीं मिले थे। कलीम और शकील ने मुझसे यह नहीं कहा था पुलिस वालों से मेरी अच्छी जान पहचान है। मैं आप से मदद चाहता हूँ। हम लोगों ने ही यास्मीन, नूरजहाँ व कुमारी नसरीन की हत्या गोली मार कर कर दी थी।"

(iv) Learned counsel for the appellants has further submitted that the prosecution has come up with a case that the empty cartridges, bullets and Banka were sent to the Forensic Laboratory. He submits that there is no evidence of the fact as to when the sealed empty cartridges, country made pistol and the banka were actually sent and as to whom they were sent. He has submitted that the FSL reports dated 14.11.2007 and 5.2.2008 mention that the samples of empty cartridges, pistol and banka were brought by one Laxman Lal but neither Laxman Lal was produced nor any effort was made by the prosecution to prove the fact that the samples which were sealed were actually sent to the Forensic Laboratory. Learned counsel for the appellants states that the missing link, as to who took the empty cartridges, the country made pistol and Banka to the Forensic Laboratory, when goes unproved then the whole case becomes doubtful.

(v) Learned counsel for the appellant has further submitted that if the statement in chief of Sub-Inspector Hakim Singh, who had proved the recovery, is seen then it becomes clear that the bundle of which the seal was opened in the Court contained the country made pistol of 315 bore and that the other bundle, when was opened, contained the banka. He states that the Investigating Officer Ashok Kumar in the witness box has stated that in his presence only the sample of plain soil; blood stained soil; banka, one empty cartridge of 12 bore; and one Gandasa were produced in the Court. Learned counsel for the appellants, therefore, submits that when the Investigating Officer in the witness box stated that the country made pistol and one empty cartridge of 315 bore were not produced, the only conclusion would be that the material exhibits were being tampered with and no reliance could be placed on the evidence which has been produced and relied upon by the prosecution.

(vi) Learned counsel for the appellants has submitted that when there

were five accused persons and only two weapons were introduced in the prosecution story then the whole case becomes doubtful and it was not certain as to whether the deaths were the result of the firing by which of the assailants. He submits that it is not clear as to who exactly was the person responsible for the firing by 12 bore pistol. He also submits that the 12 bore pistol was never recovered.

(vii) Learned counsel for the appellants has submitted that the motive in the case was also not clear. PW-1 had stated that the character of the wife of appellant Kaleem was not good and therefore the appellant-Kaleem with the assistance of Shakeel and other co-accused had done-away with his wife. He had stated that, however, the motive viz.-a-viz. PW-2 was changed and he had submitted that because Kaleem had an affair with the sister-in-law (sali) and this affair was known to his wife Yasmeen, the mother Noorjahan and sister Nasreen therefore they were done away. Learned counsel for the appellants further states, relying upon the statement of the accused Kaleem as has been recorded under section 313 Cr.P.C. and as had also been written down by him in Paper No.224-A, that the appellant was never present on the spot and that he was in fact engaged in the work of embroidery at his work-place. He submits that this statement of Kaleem is also corroborated by the statement of DW-6 Moharram Ali who was the employer of the accused Kaleem and also stated that when the whole incident had taken place, someone had come to call Kaleem and thereafter Kareem left his work-place and had gone home. Learned counsel for the appellants has further relied upon the statement of DW-1 Raunak Ali who is the father-in-law of Kaleem and has very categorically stated that the accused Kaleem was in no manner involved in the crime and Kaleem was in fact injured during the course of a fall and that he had been taken to the hospital.

(viii) Learned counsel for the appellants thereafter submitted that the case was of a circumstantial evidence and relying upon ***Sharad Birdichand Sarda vs. State of Maharashtra reported in AIR 1984 SC 1622 : (1984) 4 SCC 116*** he submits that when the chain of circumstances is not completed then the crime could not be proved. He, therefore, submits that the appellants deserve to be acquitted. Relying upon the decision of Sharad Birdichand Sarda (supra) learned counsel for the appellants states that there were five salient points which are to be seen for the conviction of an accused which are as follows :

"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;

2. The fact so established should be consistent only with the hypothesis of the guilt of the accused;

3. The circumstances should be of conclusive nature and tendency;

4. They should exclude every possible hypothesis except the one to be proved; and

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

These ingredients have to be necessarily there for the trial court to come to a conclusion that the accused were guilty.

(ix) Further learned counsel for the appellants submits that the motive was not

there; there was no extra judicial confession proved; the evidence as was produced by the prosecution do not speak of any person who had last seen the accused either entering or leaving the place, then the case which was based on circumstantial evidence could not be proved and the appellants ought to be acquitted. Learned counsel for the appellants further submitted that the provisions of section 106 of the Evidence Act would not apply as the accused-appellant was not in the house and that there was no knowledge which would specifically make him liable to discharge his burden. He submits that absolutely no evidence was produced by the prosecution to prove that any of the accused was present at the place of incident. To bolster his submissions, learned counsel for the appellants relied upon a judgment of this Court in ***Jail Appeal No.116 of 2019 (Chatthoo Chero vs. State of U.P.)*** decided on dated 7.4.2022, and has specifically relied upon paragraph 36 of it, which is being reproduced here as under :-

"36. The circumstance proved by the prosecution is that the appellant was not alone with his wife in the house when she was murdered. Admittedly, grown up children i.e. sons and daughters were also present; the witnesses of fact and independent witnesses have not been able to prove that the relation between the appellant and his wife was strained; the theory of strained relationship driving the appellant to commit suicide few days earlier of the incident for money was not proved by the witnesses examined by the prosecution, including, independent witnesses. The motive has not been proved nor assigned for commission of the offence."

(x) With regard to the fact that recovery did not complete the chain of evidence, learned counsel for the appellants has relied upon paragraph 42 of the judgment dated 7.4.2022 passed in Jail Appeal No.116 of 2019, which is also being reproduced here as under :-

"42. With regard to Section 27 of the Evidence Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible under Section 27 is the information leading to discovery and not any opinion formed on it by the prosecution."

(xi) Learned counsel for the appellants further submitted that if the entire circumstances are seen, even if the appellants were to be convicted, no case was made out for awarding the capital sentence as it would definitely not fall in the rarest of the rare cases.

36. Per contra, learned A.G.A. for the State submits that the accused Kaleem was having illicit relationship with his sister-in-law, which was being objected by his wife. Therefore, the accused Kaleem in a pre-planned manner had called the other co-accused persons in his house in the night on phone and had murder his wife, sister and mother by causing injuries by fire arms and Banka etc. Learned A.G.A. for the State further submits that coupled with the aforesaid motive, there are confessional statements made by the accused Kaleem and Shakeel and on their indication the recovery of one country made pistol of 315 bore and one Banka was made from the house of Kaleem himself. From the

evidence as available on record, there is no evidence of any forcible entry of any outsider in the house nor any robbery has been committed, which indicates that it was only on the planning by the accused Kaleem that he called the other persons and opened the door for them and thereafter all of them had assaulted the deceased persons. The accused Kaleem has not explained the injuries received by him and it was only an afterthought after recording his statement u/s 313 Cr.P.C. that he had made a further written statement in Paper No. 224-A, wherein he had taken a plea of alibi and submitted that when he got the intimation about the incident, he came back to the house and due to the sudden shock he fell down and sustained the injuries due to the fall.

38. Learned A.G.A. for the State further submits that the recovery of the weapons used in the crime cannot be disbelieved only on the ground that there is no public witness to the recovery. The testimony of the Police personnel with regard to recovery and recovery memo is sufficient and the same cannot be doubted. From the FSL report, it has been categorically proved the weapons recovered were used in commission of the crime.

39. Learned A.G.A for the State further submits that the judgement relied upon by the appellants in ***Ramanand @ Nandlal Bharti (supra)*** is a new dimension given by the Apex Court that first time in the year 2020, the same is not in consonance with the law as declared by the Apex Court in ***Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.*** Learned A.G.A. therefore submits that the judgement of the Apex Court in ***Ramanand @ Nandlal Bharti (supra)***, has been subsequently followed in the judgement of ***Subramanya (supra)*** and ***Rajesh and another vs. State of M.P. 2023 SCConline SC 1202.***

40. Having heard the rival submissions made by learned counsel for the parties, this Court has also carefully gone through the records and the judgement of the trial court. These are the appeals filed by the appellants u/s 374(2) of the Code of Criminal Procedure as well as the references made by the trial court u/s 366 Cr.P.C.

41. The Apex in ***Munna Pandey vs. State of Bihar : 2023 SCC OnLine SC 1103***, has dealt with the manner in which the appeals as well as the references u/s 366 Cr.P.C. is required to be dealt with as under:

"58. According to Section 366 when a Court of Session passes a sentence of death, the proceedings must be submitted to the High Court and the sentence of death is not to be executed unless it is confirmed by the High Court. Section 367 then proceeds to lay down the power of the High Court to direct further enquiry to be made or additional evidence to be taken. Section 368, thereafter, lays down the power of the High Court to confirm the sentence so imposed or annul the conviction. One of the powers which the High Court can exercise is one under Section 368(c) of the CrPC and that is to "acquit the accused person". Pertinently, the power to acquit the person can be exercised by the High Court even without there being any substantive appeal on the part of the accused challenging his conviction. To that extent, the proceedings under Chapter XXVIII which deal with "submission of death sentences for confirmation" is a proceeding in continuation of the trial. These provisions

thus entitle the High Court to direct further enquiry or to take additional evidence and the High Court may, in a given case, even acquit the accused person. The scope of the chapter is wider. Chapter XXIX of the CrPC deals with "Appeals". Section 391 also entitles the appellate court to take further evidence or direct such further evidence to be taken. Section 386 then enumerates powers of the appellate court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial". The powers of the appellate court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the CrPC.

59. Ordinarily, in a criminal appeal against conviction, the appellate court, under Section 384 of the CrPC, can dismiss the appeal, ***if the Court is of the opinion that there is no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the Trial Court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving at an independent decision of its own whether the conviction of the appellant is fully justified. The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under Section 366 of the CrPC. On a reference for confirmation of sentence of death, the High Court is required to proceed in accordance with Sections 367 and 368 respectively of the CrPC and the provisions of these Sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person.*** *It is true that, under the proviso to Section 368, no order of confirmation is to be made until the period allowed for preferring the appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of, so that, if an appeal is filed by a condemned prisoner, that appeal has to be disposed of before any order is made in the reference confirming the sentence of death. In disposing of such an appeal, however,* ***it is necessary that the High Court should keep in view its duty under Section 367 CrPC and, consequently, the Court must examine the appeal record for itself, arrive at a view whether a further enquiry or taking of additional evidence is desirable or not, and then come to its own conclusion on the entire material on record whether conviction of the condemned prisoner is justified and the sentence of death should be confirmed. [See : Bhupendra Singh (supra)]"***

(emphasis supplied)

42. The **Malimath Committee of Judicial Reforms** has discussed the paramount duty of the Court. The relevant observations of the Committee are as under:

"69. Malimath Committee on Judicial Reforms *discussed the paramount duty of Courts to search for truth. The relevant observations of the Committee are as under:—*

*(a) The Indian ethos accords the highest importance to truth. The motto "**Satyameva Jayate"** (Truth alone succeeds) is inscribed in our National Emblem "Ashoka Sthambha". Our epics extol the virtue of truth.*

(b) For the common man truth and justice are synonymous. So when truth fails, justice fails. Those who know that the acquitted accused was in fact the offender, lose faith in the system.

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

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

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

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

43. Therefore, from the above observations it is crystal clear that while dealing with the reference u/s 366 Cr.P.C., it is the duty of the Court not only to see whether order passed by the Sessions Judge is correct but to examine the case for itself and even direct a further inquiry or take the additional evidence if the Court considers it desirable. The reference u/s 366 Cr.P.C. is a continuation of the trial. Whereas, the scope of the appeals is limited to the extent of verifying the correctness of the judgement passed by the Sessions Judge. Since, in the instant case there is a reference by the Sessions Judge as well as there are two independent appeals by the convicted accused persons then, it will be appropriate to deal with the case in its entirety and it should not be limited to the grounds urged by the appellants. This is the case where three ladies, the wife, sister and mother of the appellant Kaleem, have been murdered by causing injuries through the fire arms as well as a sharp edged weapon. The incident has taken place between 3:00 to 4:00 A.M. in the night intervening 25/26.07.2007 and the accused Kaleem was also found in the house who was taken to the hospital by the SHO concerned on receipt of the intimation with regard to the incident at 5:30 A.M. on 26.07.2007.

44. From perusal of the facts of the case as well as the evidence, as noted above, the instant case is based on the circumstantial evidence. A three judge Bench of Apex Court in ***Sharad Birdhichand Sarda (supra)*** in paragraphs 152, 153 and 154 has held as under:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias)

Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

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

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

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

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

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

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

45. In **Subramanya (supra)** the Apex Court relying upon the Sharad Birdhichand Sarda (supra) has observed in paragraph 49 as under:

"49. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal proposition. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether

the chain of circumstances is complete, and when the circumstances there are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused"

46. From the above observations made by the Apex Court, it is settled proposition of law that in the case of circumstantial evidence the chain of circumstances has to be proved in such a manner which leads to the conclusion that the accused and none else is responsible for the offence alleged against him. Chain has to be completed in all respect.

47. From analysis of the circumstances of the present case the first and foremost circumstance against the appellants is that they made an extra judicial confession to Mohan and Kamal and also to P.W. 3 Mohd. Qamar and admitted their involvement in the crime. The prosecution has failed to examine Mohan and Kamal as witnesses in the instant case though Mohd Qamar has been examined as P.W. 3 but he has not supported the prosecution story with regard to any extra judicial confession made to him by the appellants and he has categorically denied that any extra judicial confession was made before him. The said witness was declared hostile. However, nothing could be brought by the prosecution in his cross examination to prove the extra judicial confession. The prosecution story is based on the statement made by Mohan and Kamal with regard to extra judicial confession and the Investigating Officer has arrested the appellants on the basis of such statement. Since the prosecution failed to examine them, thus in our considered opinion the prosecution has utterly failed in proving the said extra judicial confession made by the appellants, therefore that cannot form the basis for their conviction at all.

48. Another aspect of the matter is that the motive to commit such murder of the three ladies who are the wife, mother and sister of the appellant Kaleem. Though P.W. 1 has stated about the illicit relationship of appellant Kaleem with his sister-in-law and the prosecution has relied upon the same as a motive for commission of the offence, no other witness has supported the version narrated by P.W. 1. P.W. 2 Hazi Mohammad has categorically denied any such illicit relationship between Kaleem and his sister-in-law and the father of victim Yasmeen D.W. 1 Raunak has categorically denied any illicit relationship of Kaleem with his sister-in-law who happens to be another daughter of D.W. 1 Raunak and he has also denied any involvement of accused Kaleem in the entire incident.

49. Another aspect of the matter with regard to the motive is that the sister of Kaleem namely Nasreen was having illicit relationship. However, the prosecution has also failed to prove the said fact beyond reasonable doubt, therefore, though the aforesaid motive has been attributed to the appellant Kaleem the prosecution has failed to prove the said motive beyond reasonable doubt. However, the prosecution has utterly failed to prove or assign any motive to the other appellant Shakeel to cause the said incident. Thus, the prosecution has not been able to establish any motive to the appellants to commit the murder of the three ladies, who are wife, mother and sister of appellant Kaleem.

50. With regard to last seen theory of the prosecution that the appellant Kaleem was found on the spot after the incident alongwith the dead bodies and he had also sustained some injuries on his head and from the place of incident he had been carried to the Hospital by the police personnel where he was treated, we can only say that none of the witnesses has deposed against the appellant Kaleem that he was present on the spot at the time of incident. Rather the appellant Kaleem had explained his presence on the spot after the incident stating that he was actually working and doing the work of embroidery in the factory owned by D.W. 6 Moharram which was situated about 700 to 800 meters away from his house. We find that someone had had reached the factory and informed Kaleem that something had happened in his house. Thereafter Kaleem reached the spot and upon looking at the dead bodies of his wife, mother and sister had fainted and had fallen down on the stairs and had thereby sustained injuries on his head. D.W. 6 Moharram has categorically supported this explanation of the appellant Kaleem. However, the prosecution has not been able to prove and produce any witness with regard to the fact that the appellant Kaleem was seen or was present in the house at the time when the incident had taken place. Therefore, in the considered opinion of this Court the prosecution has utterly failed to prove the circumstance of "last seen" with the deceased persons prior to the incident.

51. Another circumstance which has been brought on record by the prosecution is the recovery of country made pistol on the disclosure and indication of Shakeel from the courtyard of appellant Kaleem and recovery of Banka/Gandasa on the disclosure and indication of appellant Kaleem from his own courtyard. With regard to the relevance, the prosecution has tried to establish that after their arrest, the accused persons admitted their involvement in the crime and on their disclosure the police had recovered the aforesaid weapons used in the crime on the pointing out of the appellants. With regard to the prosecution statement as well as the recovery of the weapons at the indication of the accused persons -appellant, the Apex Court in the case of ***Delhi Administration Vs. Bal Krishan (1972) 4 SCC 659***, analysing the concept, use and evidentiary value of recovered articles has observed as under:

"7. Section 27 of the Evidence Act permits proof of so much of the information which is given by persons accused of an offence when in the custody of a police officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to confession or not. Under sections 25 and 26 of the Evidence Act, no confession made to a police officer whether in custody or not can be proved as against the accused. But Section 27 is by way of a proviso to these sections and a statement, even by wayof confession, which distinctly relates to the fact discovered is admissible as evidence against the accused in the circumstances as stated in Section 27. ……."

52. In ***Mohd. Inayatullah Vs. State of Maharashtra (1976) 1 SCC 828***, the Apex Court dealing with the scope and object of Section 27 of the Evidence Act has held in paragraph 12 and 13 as under:

"12. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in

this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan v. Crown [AIR 1929 Lah 344 : ILR 10 Lah 283 (FB)] ; Rex v. Ganee [AIR 1932 Bom 286 : ILR 56 Bom 172 : 33 Cri LJ 396]). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Palukuri Kotayya v. Emperor [AIR 1947 PC 67 : 74 IA 65 : 48 Cri LJ 533] ; Udai Bhan v. State of Uttar Pradesh [AIR 1962 SC 1116 : 1962 Supp (2) SCR 830 : (1962) 2 Cri LJ 251])."

53. Relying upon the earlier decisions the Apex Court in ***Anter Singh Vs. State of Rajasthan (2004) 10 SCC 657*** has analysed and summed up the various requirement under section 27 of the Evidence Act, as follows:

"16. The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

54. Subsequently, in ***State (NCT of Delhi) Vs. Navjot Sandhu (2005) 11SCC 600***, the Apex Court has considered the divergent views and approaches and thereupon has observed as under:

"120. The history of case-law on the subject of confessions under Section 27 unfolds divergent views and approaches. The divergence was mainly on twin aspects: (i) Whether the facts contemplated by Section 27 are physical, material objects or the mental facts of which the accused giving the information could be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by Section 27. (ii) The other controversy was on the point regarding the extent of admissibility of a disclosure statement. In some cases a view was taken that any information, which served to connect the object with the offence charged, was admissible under Section 27. The decision of the Privy Council in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] which has been described as a locus classicus, had set at rest much of the controversy that centred round the interpretation of Section 27. To a great extent the legal position has got crystallised with the rendering of this decision. The authority of the Privy Council's decision has not been questioned in any of the decisions of the highest court either in the pre-or post-independence era. Right from the 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this Apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State.

121. The first requisite condition for utilising Section 27 in support of the prosecution case is that ***the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion.*** *The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating*

factor against the accused. As pointed out by the Privy Council in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] : (AIR p. 70, para 10)

"clearly the extent of the information admissible must depend on the exact nature of the fact discovered"

and the information must distinctly relate to that fact.

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said: (AIR p. 70, para 10)

"Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."

(emphasis supplied)

We have emphasised the word "normally" because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words: (AIR p. 70, para 10)

"If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect."

Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court: (AIR p. 70, para 10)

"In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

(emphasis supplied)

55. The Apex Court in a recent judgement in ***Ramanand @ Nandlal***

Bharti (Supra) in paragraphs 52 and 53 has held as under:

"52.Section 27 of the Evidence Act, 1872 reads thus:

27. ***How much of information received from accused may be proved.-*** *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

53. If, ***it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence along with his blood stained clothes then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act.*** *If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."*

(Emphasis supplied)

56. In **Subramanya** ***(Supra)*** the Apex Court has reaffirmed the observation made by the Apex Court in ***Ramanand @ Nandlal Bharti (supra)*** and has observed as under:

"77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that ***none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27*** *of the Evidence Act.*

78.If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of

offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."

57. Thus from the aforesaid observations as made in the recent judgements in ***Subramanya (supra)*** and ***Ramanand @ Nandlal Bharti (supra)*** the law has been settled that once the accused who is in custody of the police shows his willingness to make disclosure statement and recovery of the weapons used in the crime, the primary duty of the Investigating Officer is that he should call two independent witnesses at the police station itself and once the two independent witnesses arrive at the police station thereafter in their presence the disclosure statements of the accused has to be recorded and thereupon on the basis of disclosure statement the police authority has to proceed for recovery of the weapons at the indication of the accused persons. Two independent witnesses are required to be brought in to establish the recovery of such weapons and such disclosure statement would be beyond reasonable doubt. If the aforesaid procedure is not followed during recording of disclosure statement as well as during the recovery of weapons such recovery of weapon cannot be relied upon for the conviction of the accused persons solely on the basis of said recovery.

58. In view of the aforesaid settled position of law, if we analyse the evidence available on record as has been alleged in the instant case the accused Kaleem and Shakeel the appellants herein were arrested on the basis of extra judicial confession which is not established in the case and thereupon in the police custody it is alleged that they made the confessional/disclosure statements and on their indication the weapons of crime were recovered.

However in the entire process the Investigating Officer has utterly failed to involve the independent witnesses which is a mandate of law as observed by the Apex Court in ***Ramanand @ Nandlal Bharti (supra)*** and in the entire process no disclosure statement was ever recorded and only on the basis of alleged disclosure statement, the recovery of the weapons had been made without any independent witnesses. Such recovery cannot be said to be a valid recovery for the purpose of conviction of the appellants herein and on the basis of such recovery they cannot be convicted.

59. Thus from the aforesaid analysis it is crystal clear that the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellants. They have failed to prove the motive and also the Extra judicial confession. The prosecution also failed to establish if any witness had "last seen" the appellants with the deceased prior to the incident. The alleged recovery of weapons at the indication of the accused persons for want of independent witness, as has been observed by the Apex Court in ***Ramanand @ Nandlal Bharti (supra)*** and ***Subramanya (supra)***, also becomes irrelevant. In the considered opinion of the court, therefore, the findings recorded by the trial court are manifestly erroneous and are not sustainable in the light of the aforesaid discussions. Thus in the considered opinion of the Court, since the prosecution has failed to prove its case against the appellants beyond reasonable doubt, therefore, they are entitled for benefit of doubt and they deserve to be acquitted from all the charges levelled against them.

60. For the aforesaid reasons both the appeals are **allowed** and both the appellants are acquitted of the charges levelled against them in the aforesaid sessions trials. The capital reference made by the trial court for confirmation of death sentence is also **rejected**. The appellants Mohd. Shakeel and Mohd. Kaleem are in jail. They shall be set at liberty forthwith unless wanted in any other case, subject to furnishing the bonds for their appearance before the Supreme Court in compliance of Section 437A Cr.P.C. in the event any appeal is preferred against this judgement.

61. Office is directed to send a copy of this judgement to the trial court within a week for compliance and the lower court's record be remitted back to the court concerned within the same period of time.

(2024) 3 ILRA 1539
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 79 of 2005

Rajendra Prasad ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.S. Singh, Sri Chetan Chatterjee

Counsel for the Respondent:
G.A.

(A) Criminal Law - Classic case of blind faith and unfortunate realities - Indian Penal Code, 1860 - Section 302 - Murder - Homicide – Human/Child Sacrifice - exorcism – Test Identification Parade (TIP) - Social Evil - rustic witness -

evidence of a rustic witness should be appreciated as a whole - If the evidence has a ring of truth, the discrepancies, inconsistencies and infirmities cannot be a ground for rejecting the evidence - Non-holding of a test identification parade does not adversely affect the prosecution's case. (Para - 59)

Appellant was accused of murdering an infant child (one-year-old child) - broad daylight at a religious fair - where exorcism was practiced - Appellant allegedly used a knife to stab the child multiple times - leading to death - Eyewitnesses, including the child's family, witnessed the attack. (Para - 2 to 12)

HELD: - Prosecution proved the guilt of the accused-appellant beyond reasonable doubt. Testimony of four eyewitnesses was reliable and credible. Conviction and sentence against the accused-appellant confirmed. Appellant was directed to serve out sentence imposed by trial court.(Para – 59,63,64)

Appeal dismissed. (E-7)

LIST OF CASES CITED: -

1. Kishore & ors. Vs St. of Punj., Criminal Appeal No.1465 of 2011

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Chetan Chatterjee, learned counsel for the appellant, Shri Jitendra Kumar Jaiswal, learned AGA for the State and perused the record.

2. The instant criminal appeal has been filed against the judgment and order dated 12.08.2004 passed by Additional District and Sessions Judge (F.T.C.), Sonbhadra in Sessions Trial No.54 of 2003, arising out of Case Crime No.101 of 2003, under Sections 302 IPC, Police Station Babhani, District Sonbhadra, whereby the appellant has convicted for the offence under Sections 302 IPC and awarded the sentence of life imprisonment with a fine of Rs.5,000/- with default stipulation.

3. Shorn of unnecessary details, the prosecution story is that in front of the house of one Ramadhar Dubey, there is a 'Bramh Baba Sthan', where every year during Navratra a fair is held, in which, exorcism is practiced and 'Bhabooti' is given to the victims by the priest. On 10.04.2003, the first informant Amerika Prasad along with his wife Gangotri, daughter Kusum, son-in-law Ram Dular and his infant child aged about 11 months Rameshwar, had reached in the fair for treatment of his wife through practice of exorcism, as his wife was suffering from mental sickness. It is further stated that on 12.04.2003, at about 10:00 a.m., he along with his wife and other family members were having their meals at a distance of 10-15 paces from 'Bramh Sthan' and his infant child Rameshwar, aged about one year, was playing there. A large crowd had assembled there. Out of the said crowd, a person aged about 26-27 years wearing vest and underwear, having a knife in his hand came and picked up his fondling child and after moving 10 paces ahead kept the child on the ground and started stabbing him with a knife. The first informant along with his son-in-law and other family members, in order to rescue his child, tried to apprehend him, however, the appellant made his escape good. It is further alleged that he immediately rushed to provide medical treatment to the infant child, however, on the way, the infant child breathed his last. Many people present in the fair, at the scene of occurrence, had informed him that in order to offer 'human sacrifice' his child has been killed. He has brought the corpse of the child, which is kept in front of the road. The first informant reached in the

police station and gave a written scribe (Tahrir) to the Head Moharrir to lodge the report.

4. On the basis of a written report, marked as Ext. Ka-1, the FIR has been registered vide Case Crime No. 101 of 2003 under Section 302 IPC. Carbon copy whereof has been drawn vide G.D. Report No. 16 at 1430 hours, which has been proved and marked as Ext. Ka-4. The investigation of the said case was entrusted to the Investigating Officer (P.W.-7), who copied out the G.D. report and the chik FIR in the case diary and set out to visit the place of incident, however, outside the gate of the police station, the parents of the deceased child met him alongwith the corpse of the child.

5. The Investigating Officer thereafter, conducted inquest on the person of the deceased and prepared the inquest memo in his own hand-writing and at the same time prepared the other relevant documents namely Form 13, photo-nash, challan-nash, letter to C.M.O., letter to R.I., sample seal and thereafter sent the body of the deceased child to the mortuary for post-mortem.

6. An autopsy was conducted on the person of the deceased Rameshwar in Community Health Centre, Duddhi on 13.04.2003 and in the post-mortem report, the Doctor has noted as many as four ante-mortem injuries, as under:

(i) Clean cut punctured wound 0.8 cm x 0.6 cm over temporal region of head 1 cm above Rt. Ear depth 2 cm brain matter coming out.

(ii) Clean cut smooth margin punctured wound 0.8 cm x 0.4 cm over neck Rt just below Rt ear depth 2.5 cm. Bleeding present.

(iii) Clean cut smooth margin punctured wound Rt. shoulder 0.8 cm x 0.6 x 1 cm deep.

(iv) Clean cut punctured would 0.8 cm x 0.6 cm Neck 1 cm below chin depth 1.5 cm.

7. On internal examination, membranes are clean cut and brain has been found lacerated coming out of wound. The cause of death has been noted to be coma due to penetrating injury in brain.

8. After conducting the inquest by P.W.-7, the investigation of the instant case was handed over to P.W.-8 S.I. Keshav Ram on 12.04.2003 itself, who is said to have reached the place of incident and recorded the statement of the first informant and collected the blood stained earth and plain earth from the place of incident and kept it in a container and prepared its recovery memo, which has been proved and marked as Ext. Ka-12. The site plan was also prepared, which has been marked as Ext. Ka-11. Thereafter the Investigating Officer recorded the statement of Ramadhar Dubey, Rajesh Kumar Dubey, Ram Naresh Harijan, Gangotri Devi, mother of the deceased, Kusum, sister of the deceased and Ram Dular, brother-in-law of the deceased.

9. On 14.04.2003, on the basis of the information given by the informer, the appellant was arrested from village Chamanpur, who was identified by the first informant to have killed his son by a knife. On his arrest, the appellant disclosed his name to be Rajendra Prasad Gaur, resident of Police Station Basantpur, District Ambikapur, Chhatisgarh, who confessed to have killed the infant child by a knife,

which he had thrown in the *khalihan* of the priest and could get it recovered.

10. After effecting the arrest of the appellant, an arrest memo was prepared by the Investigating Officer and proved it as Ext. Ka-2, who also prepared a site plan of the place from where the appellant was arrested, which is marked as Ext. Ka-13 and thereafter the appellant was taken to the place, where he stated to have thrown the knife by which he killed the deceased and on his pointing, a knife was recovered from the khalihan of Ramadhar Dubey. The I.O. Prepared the recovery memo of the knife, which has been marked as Ext. Ka-14 and also prepared a site-plan of the place from where the knife was recovered, which has been proved and marked as Ext. Ka-15.

11. Thereafter, the Investigating Officer has recorded the statements of several other relevant witnesses and concluded the investigation by submitting the charge-sheet in the court of learned Magistrate against the appellant on 23.06.2003 vide Charge-sheet No. 11 of 2003, under Section 302 IPC, which has been proved and marked as Ext. Ka-16.

12. On the basis of the said charge-sheet, learned Magistrate had taken cognizance of the case. Since the case was exclusively triable by court of Sessions, made over it to the court of Sessions for trial. The Sessions court vide its order dated 26.07.2003 framed the charge under Section 302 IPC simplicitor against the appellant, who abjured the said charge and claimed to be tried.

13. During the course of trial, the prosecution has examined as many as four witnesses of fact and four other formal witnesses. Their testimony in brief is enumerated hereunder.

14. P.W. 1 Amerika is the father of the deceased and the first informant and in his testimony he has stated that in village Needhra Tola Mujhariya, in front of the house of Ramadhar, there is a 'Bramh Sthan' and on the occasion of '*Navratra'* and '*Dusshera'*, a fair is held there. Ramadhar Dubey used to practice exorcism there and distribute *'Bhabhooti*'. About nine months back, he had gone in the said fair along with his wife Gangotri, son-in-law Ram Dular, daugther Kusum and infant child Rameshwar for the treatment of his wife through practice of exorcism.

15. On the day of incident, he was sitting near the '*Bramh Sthan*' and taking his meals along with his wife, son-in-law, daughter and infant child, when Rajendra Prasad, present in the court, came and picked up the child and took him about 15 paces away and after throwing him forcibly on the ground assaulted him with a knife. When his family members tried to rescue him, he started threatening them. Due to fear, they could not apprehend the appellant or go near the child and the appellant ran away.

16. Thereafter, they picked up the child and rushed for providing him the medical treatment, however, on the way, the child succumbed to his injuries. The said incident is said to have been witnessed by he himself, his wife Gangotri, daughter Kusum and son-in-law Ram Dular, who is resident of Chhatisgarh. On the way, P.W. 1 got the written report (Ext. Ka-1) scribed by an unknown person, who read out the same to him, who then affixed his thumb impression on it and thereafter handed it over in the police station, on the basis of

which FIR has been registered, which has been proved and marked as Ext. Ka-3.

17. While going to the police station, he had also carried the corpse of the child. The Investigating Officer had interrogated him at the police station and recorded his statement. On the third day, the Investigating Officer on identification made by the first informant had arrested the accused and prepared the arrest memo, which is proved and marked as Ext. Ka-2.

18. During cross-examination, he stated that he has been attending the said fair for the last three years during 'Chaitra Navratra' and earlier there had been no dispute between him and appellant Rajendra. At the time of incident, he along with his family members were taking his meals and his child was with his mother, who was feeding him from where he was picked up by the appellant and thereafter assaulted by a knife in the presence of 100-200 persons.

19. He further reiterated that, on the way to the police station, the written report of the incident was scribed, which was read out to him, who affixed his thumb impression and gave it in the police station, on the basis of which, chik FIR was drawn. At the time of incident, he was not aware of the name of the appellant, however, his name was disclosed by the residents of Jhumariya. He denied the suggestion that he was not eye-witness to the incident and falsely deposing in the case on hearsay. He further denied the suggestion that the FIR was scribed at the police station itself.

20. P.W. 2 Ramadhar Dubey is another eye-witness of the incident and is the resident of 'Bramh Sthan' where, along with '*Bramh Sthan*', a Durga temple is situate and a pucca chabutra is constructed under Pipal tree. People suffering from evil spirits also visit the said place. About nine months back, on the eve of '*Navratra*' people from various corners had reached there and on that day, Amerika (first informant) along with his wife, son-in-law and infant child had also reached there.

21. He further stated that the wife of Amerika was mentally sick, however, had recovered and as such, she had reached there to offer prayers. At about 10:00 a.m., Amerika along with his wife, son-in-law and daughter were taking meals and his infant child was playing, when the appellant Rajendra reached there and picked up a knife used for peeling coconut and thereafter went near the child and after picking him up walked 10-15 paces further and then threw the child on the ground and assaulted him with the knife and tried to run away. Some people tried to apprehend him, however, they were threatened. He further categorically stated that he had seen Rajendra assaulting the child by a knife, who thereafter while being taken to the hospital, succumbed to his injuries.

22. During cross-examination, he stated that wife of Amerika was suffering from evil spirits and used to visit the '*Bramh Sthan*'. He further stated that the Investigating Officer immediately after the incident recorded his statement under Section 161 Cr.P.C. At the time of incident, number of persons were present there and the child was playing with her mother and he had seen Rajendra assaulting the victim by knife and that the place of incident is 25 meters away from the 'Bramh Sthan'.

23. He further denied the suggestion that the incident had not taken place in his presence. He has further denied the

suggestion that at the '*Bramh Sthan*', sacrifices are offered and further denied the suggestion that he is falsely deposing in the court.

24. P.W. 3 Gangotri is the wife of the first informant and mother of the deceased and stated that in the '*Chaitra Navratra*', two days prior to the incident, she had reached the *'Bramh Sthan*' for offering prayer and at about 10:30 a.m. in the morning, she along with her husband, son-in-law, daughter and infant child were taking their meals, when the incident took place and has identified the witness in the court. On objection being raised by the counsel for the appellant, the witness went near the accused-appellant and by pulling his clothes, had correctly identified him.

25. She further stated that the appellant, on the day of incident, had taken away her child and after throwing him on the ground assaulted him with a knife and when her husband, son-in-law and daughter tried to rescue him, he threatened them and ran away. His son thereafter, while being taken to the Babhani hospital succumbed to his injuries. She further stated that they had no enmity with the appellant and she is an eye-witness of the incident.

26. During cross-examination, she stated that at the time of incident, large number of persons were present there in the fair. At the time, when the appellant picked up her child, he was not having a knife in his hand. Prior to the incident, there has never been any quarrel or altercation between them. Rajendra, on the day of incident, came and picked up her child but did not hurl abuses, however, she showed her ignorance as to how such statement has been recorded by the Investigating Officer.

27. She further categorically stated that she was not acquainted with the appellant at the time of incident and his name was disclosed by the priest. She further stated that she had no knowledge where the written report was scribed. She further stated that the appellant Rajendra Prasad gave 4-5 blows by knife to her child. She further denied the suggestion that on account of earlier enmity, she is falsely deposing in the court.

28. P.W.-4 Ram Dular is the another eye-witness and son-in-law of the first informant, who was present at the time of incident. He stated that about 11 months back, he along with his wife Kusum Kumari, father-in-law Amerika, mother-in-law Gangotri had visited 'Bramh Sthan' two days prior to the incident. On the day of incident, at about 10.30 a.m. he along with his wife, father-in-law Amerika, mother-in-law Gangotri and brother-in-law (infant child), were taking meals. He further stated that the infant child was playing, when Rajendra Prasad armed with a knife, used for peeling coconut, came and picked up the child and after taking him 10-15 paces away assaulted him with a knife by keeping him on the ground. When they tried to rescue the child, the appellant challenged them and ran away. Thereafter, while being taken to the Babhani hospital, the child succumbed to his injuries and his father-in-law lodged the FIR. He further identified the appellant in the court and stated that he assaulted Rameshwar with a knife.

29. During cross-examination, he stated that he was interrogated by the Investigating Officer, who recorded his statements. He further categorically stated that his brother-in-law Rameshwar was killed by a knife. The name and address of the appellant was not known to them but

was later disclosed by the priest and his men. He further stated that at the time of picking the child, no abuses were hurled by the accused-appellant nor they were threatened.

30. He denied to have given any statement to the police that the appellant came there armed with knife and started hurling abuses in retaliation to the earlier incident during last 'Navratra', when he was abused by them. At the time of incident, large number of persons had assembled there. He further stated that the FIR was not scribed in his presence. He further stated that the police has truthfully recorded in his statement that on the way to the hospital, an unknown person met them and his father-in-law disclosed him the entire incident, who scribed the same on a piece of paper on which his father-in-law affixed his thumb impression and who asked him to deliver it at the police station Babhani.

31. He further stated that the assailant had given four-five blows to his brother-in-law by a knife and that he was arrested two-three days after the incident. He denied the suggestion that under the pressure of his father-in-law and mother-in-law, he is falsely deposing in the court.

32. P.W. 5 Kedar Yadav is the Head Moharrir, who had drawn the chik FIR (Ext.Ka-3), on the basis of written report given to him, proved and marked as Ext. Ka-1 and thereafter G.D. report was drawn by him, which is marked as Ext. Ka-4. During cross-examination, he categorically stated that the first informant got the written report scribed outside the police station and had reached there alone.

33. P.W. 6 Doctor U.P. Pandey is the Medical Officer at Community Health Centre, who had conducted autopsy on the person of the deceased and proved the autopsy report and contents thereof, which has been exhibited as Ext. Ka-5.

34. During cross-examination, he stated that the victim may die instantaneously or within one hour of receiving the injuries. He further stated that the injuries could be caused by a pointed object. He denied that he has no knowledge of '*summi'* and except the injuries noted by him in the post-mortem report, there were no other injuries.

35. P.W. 7 Ram Samujh Yadav is the Sub-Inspector in whose presence, the instant case was registered and who was entrusted with the investigation. He after copying the G.D. report and the chik FIR in the case diary proceeded to the place of incident, however, the first informant along with the corpse had reached at the gate of police station, as such, he conducted the inquest at the gate of the police station itself and drawn the inquest memo along with other relevant documents namely challan-nash, photo-nash, letter to R.I., letter to C.M.O. and sample seal and wrapped the dead body in a sealed cloth, which was sent for autopsy. The inquest report and other relevant documents have been proved and marked as Ext. Ka 6 to Ka-10.

36. During cross-examination, he has stated that the inquest was conducted by the side of the road outside the gate of the police station in presence of his parents and number of other persons.

37. P.W. 8 Keshav Ram is the second Investigating Officer of the instant case, who was later entrusted with the investigation of the case. He after recording

the statement of the first informant under Section 161 Cr.P.C. reached the place of incident and had collected the blood stained earth and plain earth from the place of incident and prepared its recovery memo, which is proved and marked as Ext. Ka-12. He further prepared the site plan, which has been proved and marked as Ext. Ka-11.

38. Witnesses were also interrogated by the IInd Investigating Officer at the place of incident and an attempt was made to arrest the accused person. Further on 14.04.2003, at the pointing out of the first informant and the other witnesses, the appellant was arrested and his arrest memo was prepared, which has been proved and marked as Ext. Ka-2 and the site plan, from where the arrest was made, was also prepared, which has been proved and marked as Ext. Ka-13.

39. After the arrest, on the disclosure made by the appellant, he was taken to the place of incident and from the *'khalihan*' of Ramadhar Dubey, got recovered the knife (summi), the recovery memo of which was also drawn and proved as Ext. Ka-14 and its site plan was also prepared, which has been marked as Ext. Ka-15. The material exhibits were also produced before the court along with blood stained black 'tabeez' and knife on which human blood was found as per the forensic report, which has been proved as material Exts. Ka-3 and Ka-4.

40. During cross-examination, on being questioned as to whether the material Ext. Ka-4 is, in fact, a knife or a 'summi', he stated that it is both 'summi' as well as a knife, which is used for peeling coconut. He further stated that the witnesses in their statements recorded under Section 161 Cr.P.C. had disclosed him that on the last 'Navratra', there had been some altercation between first informant and Rajendra Prasad and in that background to settle the score personally, the instant incident had occurred.

41. He further stated that after two days of the incident, the assailant was arrested and on his disclosure, the weapon of assault was recovered and further stated that all the witnesses in their testimony had disclosed to him that prior to the incident, the accused person hurled abuses and threatened them. He further stated that the first informant in his statement had disclosed that on the way to the police station, he got the FIR scribed by an unknown person and then reached in the police station and lodged the FIR.

42. He denied the suggestion that he falsely got the FIR registered against an innocent person and further denied the suggestion that on the basis of suspicion, the priest was taken at the police station. He further denied the suggestion that the appellant was arrested from his house and a conspiracy to falsely implicate him was made against the accused.

43. Thereafter, the statement of the accused under Section 313 Cr.P.C. has been recorded by putting all the incriminating circumstances to the appellant. The appellant denied all the incriminating circumstances and stated that he was not on inimical terms with the first informant, however, the defence has not led any evidence to prove its case.

44. The trial court after appreciating the evidence on record has held that the prosecution has successfully established its case against the appellant by relying upon the testimony of all the prosecution

witnesses, whose presence at the place and time of the incident has been cogently and clearly established and who being the parents, sister and brother-in-law of the deceased are natural witnesses. The explanation tendered by the appellant is false and inadequate.

45. Learned counsel for the appellant has submitted that the incident in question has not taken place in the manner as alleged by the prosecution and some unknown person killed the deceased and the appellant has been falsely implicated by creating eye-witness account of the incident in the form of statements of P.W. 1, P.W. 3 and P.W. 4, who are close relatives of the deceased being his father, mother and brother-in-law respectively and are highly interested and parisan witnesses, therefore, their testimony is liable to be discarded.

46. Learned counsel for the appellant has next submitted that the recovery shown to be made at the pointing out of the appellant is a pointed weapon 'summi' and not a knife and therefore, the injuries found on the person of the deceased cannot be said to be caused by the said 'summi' which further creates serious dent in the prosecution story.

47. Learned counsel for the appellant has next submitted that the appellant was not known to the accused and subsequently he has been falsely implicated on the instigation of other witnesses.

48. Learned counsel for the appellant has further submitted that the recovery of knife has not been proved and it is stated to be recovered from an open place, which is unacceptable to all.

49. Learned counsel for the appellant has next submitted that in the FIR, the appellant has not been named and he has not been put to test identification parade, which makes the prosecution story further doubtful.

50. Learned counsel for the appellant has next submitted that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt and as such, he is liable to be acquitted by setting aside the order of conviction and sentence recorded by the trial court, which is bad in law.

51. Per contra, learned AGA has submitted that in the instant case, a prompt FIR has been lodged by the father of the deceased and it is a broad day light murder of an infant child aged about one year in presence of his parents, sister and brother-in-law, whose presence at the time and place of incident is quite natural and entire prosecution story cannot be thrown over-board merely on the ground that the witnesses are interested and partisan.

52. Learned AGA has further submitted that P.W. 2 is an independent witness, resident of the place of incident and is acquainted with both the accused as well as the first informant, who categorically in his statement has stated that he had seen the appellant assaulting one year old child of the first informant by a knife and thereafter escaping from the place of incident and has truthfully deposed in the court, which lends corroboration to the prosecution story and inspires confidence. He has further submitted that each of the eye-witnesses i.e. P.W. 1, P.W.3 and P.W. 4 has correctly identified the appellant in the court and there remains no doubt about his identity.

53. Learned AGA has further submitted that the identity of the appellant had also been disclosed by the priest, who was well acquainted with the appellant, therefore, there was no question of holding the test identification parade for identifying the appellant.

54. Learned AGA has further submitted that the eye-witnesses have cogently and unerringly proved the participation of the appellant in the instant case and the defence has not been able to elicit any doubt about the credibility of the said witnesses.

55. Having considered the rival submissions made by learned counsel for the parties and having gone through the material on record and the evidence adduced, it is evident that the incident is said to have taken place in the broad day light in presence of parents, sister and brother-in-law of the deceased, who was an infant child aged about one year by assaulting him with a knife. The FIR, admittedly, has been promptly lodged in the police station and the manner and place of incident has been cogently and unerringly established by the prosecution. Though the factum of enmity has been pleaded by the appellant in his statement recorded under Section 313 Cr.P.C. but no evidence in this respect has been led. The nature of injury as pointed out by the Doctor in the post-mortem report clearly indicates that it could have been caused by the knife or a 'summi', a pointed object alike a knife.

56. The identity of the appellant had already been disclosed by the witnesses and therefore, there was no question of holding the test identification parade of the appellant for determining his identity as pleaded by the counsel for the appellant.

57. It is germane to point out here that the Hon'ble Apex Court in the case of ***Kishore & others Vs. State of Punjab, Criminal Appeal No.1465 of 2011*** dated 07.02.2024 has held as under:-

8. It is true that a test identification parade is not mandatory. The test identification parade is a part of the investigation. It is useful when the eyewitnesses do not know the accused before the incident. The test identification parade is usually conducted immediately after the arrest of the accused. Perhaps, if the test identification parade is properly conducted and is proved, it gives credence of the identification of the accused by the concerned eyewitnesses before the Court. The effect of the prosecution's failure to conduct a test identification parade will depend on the facts of each case.

9. In this case, the evidence of both eyewitnesses was recorded within one year of the date of the incident. There is no significant time gap between the date of the incident and the identification by the witnesses before the Court. If the evidence of these two witnesses is reliable and inspires confidence, the conviction can be based on their testimonies.

58. Even in the instant case, at the time of arrest, the appellant has been identified by the first informant. The appellant was well-known to P.W. 2, who had disclosed his identity to the witnesses and even in the court, he has been correctly identified by each of the witnesses, as such, non-holding of test identification parade in the instant case, as submitted by the counsel for the appellant, would not adversely affect the prosecution case.

59. The testimony of all the four eye-witnesses, except minor contradictions, do

not suffer from any shortcomings to doubt their credibility. Their presence at the scene of incident is quite natural and being a broad day light incident has been witnessed by them. It is well settled principle of law that, if the evidence has a ring of truth, the discrepancies, inconsistencies and infirmities cannot be a ground for rejecting the evidence. Moreover, it is important to note that in the present case, all the eye-witnesses P.W.1, P.W.3 and P.W.4 are rustic witnesses.

60. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness.

61. It is further germane to point out here that looking to the testimony of P.W.1, P.W.3 and P.W.4, they are the eye-witnesses, present at the time and place of incident and there is no reason for them to spare the actual assailant and falsely implicate the appellant in the instant case.

62. Moreover, the instant case is a classic case of blind faith and unfortunate realities of our times still prevalent in remote areas. Human/child sacrifice has been practiced on a number of different occasions and in many different cultures. Human/child sacrifice is typically intended to bring good fortune and to appease the Gods, which in our opinion, shocks the conscience of the civilized society and is to be condemned by one and all, to curb such social evils.

63. Considering the entire aspect of the matter and taking a holistic view of the circumstances in which the present offence has been committed, we are of the view that the judgment and order passed by the trial court is well considered and discussed and the trial court has rightly held that the prosecution has succeeded to prove the guilt of the accused-appellant beyond reasonable doubt, as such, the impugned judgment and order passed by the trial court is liable to be upheld and the appeal has no force and it is, accordingly, liable to dismissed.

64. Accordingly, the present criminal appeal is **dismissed**. The conviction and sentence against the accused-appellant vide impugned judgment and order dated 12.08.2004 is hereby confirmed. The appellant is in jail. He is directed to serve out the sentence imposed upon him by the trial court.

65. Let a copy of this order be forwarded to the trial court along with the record for information and compliance.

Court No. - 45

Case :- CRIMINAL APPEAL No. - 79 of 2005

Appellant :- Rajendra Prasad Gaur

Respondent :- State of U.P.

Counsel for Appellant :- S.S. Singh,Chetan Chatterjee

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajiv Gupta,J.

Hon'ble Mohd. Azhar Husain Idrisi,J.

Mr. Chetan Chatterjee, Advocate was appointed an Amicus Curiae in the instant case. He has rendered valuable assistance to the Court. The Court quantifies Rs.10,000/- to be paid to Mr. Chetan Chatterjee, Advocate towards fee for the able assistance provided by him in hearing of the instant criminal appeal. The said payment shall be made to Mr. Chetan Chatterjee, Advocate by the Registry of this Court within one month from today.

(2024) 3 ILRA 1550
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 437 of 2017

Radhey Jaiswal & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Raj Kishore Yadav, Sri Raj Kishore Yadav

Counsel for the Respondent:
G.A.

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Sections 302, 498-A, 304-B, 323, 506, The Dowry prohibition Act, 1961- Section 3/4, Indian Evidence Act, 1872 – Section 32(1) - dying declaration - Mental Fitness vs. Consciousness - Separate Residence - Hostile Witness - Corroborative Evidence - The Code of criminal procedure, 1973 - Section 313 - Power to examine the accused - Recording of statement under Section 313 of the Cr.P.C. is not an empty formality during trial - Dying declaration could only be relied upon if the deceased was mentally fit and conscious at the time of making it.(Para - 72,75)

Accused – appellant (Sasur i.e. Father-in-law) and co-accused were convicted - for the alleged murder of appellant's daughter-in-law - setting her ablaze for dowry demands - incident took place at appellant's daughter-in-law residence - reportedly in her separate home from the accused - Several witnesses, including family members, turned hostile - case largely relied on two recorded dying declarations - questioning appellant's daughter-in-law mental fitness at the time of her statements - Medical reports indicated severe burns - court found discrepancies in the thumb impressions on the declarations due to her injuries.(Para - 1 to 49)

HELD: - Court recorded statement under Section 313 of Cr.P.C. but omitted to put questions regarding a vital circumstance to accused during his statement. Insufficient credible evidence to satisfy the judicial mind that the deceased was conscious and mentally fit at the time of giving her statement. Prosecution failed to substantiate the charges against the appellants beyond a reasonable doubt through consistent, cogent, and reliable evidence. Without the dying declaration, the prosecution case lacks substance, entitling the appellants to the benefit of doubt. Judgment and order of conviction quashed and is set aside. (Para -72,75)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Jagbir Singh Vs St. (NCT of Delhi), (2019) 8 SCC 779

2. Paparambaka Rosamma Vs St. of A.P. (1999) 7 SCC 695:1999 SCC (Cri) 1361

3. Kanchy Komuramma Vs St. of A.P., 1996 SCC (Cri) 31

4. Puran Chand Vs St. of Har. (2010) 6 SCC 566

5. Ramesh Harijan Vs St. of U.P., (2012) 5 SCC 777

6. Reena Hazarika Vs St. of Assam, AIR 2018 SC 5361

7. Sharad Birdhichand Sarda Vs St. of Maha., AIR 1984 SC 1622

8. Sujit Biswas Vs St. of Assam, (2013) 12 SCC 406

9. Asraf Ali Vs St. of Assam, (2008) 16 SCC 328

10. Nar Singh Vs St. of Har., (2015) 1 SCC 496

(Delivered by Manish Kumar Nigam, J)

1. Criminal Appeal No. 437 of 2017 has been filed against the judgment and order of conviction dated 31.07.2014 passed by Additional Sessions Judge, Court No.4, Maharajganj and the sentence awarded on 25.08.2014 in Sessions Trial No. 18 of 2013 (State Vs. Radhey Jaiswal) and Sessions Trial No. 101 of 2013 (State Vs. Virendra @ Santosh Jaiswal and 3 others), whereby the sessions court has convicted Radhey Jaiswal (accused-appellant) in Sessions Trial No. 18 of 2013 (State Vs. Radhey Jaiswal) for offence punishable under Section 302 I.P.C. and sentenced him for life imprisonment and has ordered him to pay a fine of Rs. 10,000/- (in default of payment of the fine, he had to further suffer rigorous imprisonment for a period of one year). The accused-appellants, Munna Jaiswal, son of Radhey and Sita Devi, wife of Munna Jaiswal, were also convicted by the sessions court in Sessions Trial No. 101 of 2013 (State Vs. Virendra @ Santosh Jaiswal and 3 others) for the offence punishable under Section 302 I.P.C. and sentenced them for life imprisonment and has ordered them to pay a fine of Rs. 10,000/- (In case of default of the payment of fine, they had to further suffer rigorous imprisonment for a period of one year). All the appellants in Appeal No. 437 of 2015 have been acquitted by the trial court under Sections 498-A, 304-B, 506 I.P.C. and under Section ¾ Dowry Prohibition Act by the same judgment.

2. The factual matrix of the case is that the informant, namely, Chunni Devi, wife of late Pradeep Jaiswal submitted a written complaint (Ex.Ka-1) dated 03.09.2012 on which the first information report (Ex.Ka-8) was registered in Case Crime No. 1041 of 2012 under Sections 498-A, 323, 506, 307 I.P.C. read with Section 3/ 4 of Dowry Prohibition Act at P.S.- Ghughuli, District- Maharajganj against Virendra @ Santosh s/o Radey Jaiswal (husband), Munna s/o Radhey (Devar i.e. Brother-in-law), Kaushilya w/o Radhey (Saas i.e. Mother-in-law), Sita Devi (Devarani i.e. Sister-in-law) and Radhey Jaiwal (Sasur i.e. Father-in-law).

3. As per the first information report, the informant stated that her daughter Gudiya was married to Santosh s/o Radhey Jaiswal about six years back. It was further stated by the informant that her daughter used to come to her house and used to complain to the informant that Virendra @ Santosh used to torture her daughter for dowry. On 02.09.2012 at about 3:00 A.M. her daughter Gudiya was burnt. It was further stated by the informant that Virendra @ Santosh requested J.P. Jaiswal son of unknown on mobile to get her daughter eliminated and whatever money would be required, the same will be paid. On the instigation of J.P. Jaiswal, Munna s/o Radhey Jaiswal, Sita Devi, Kaushilya Devi and Radhey poured kerosene oil on her daughter while she was sleeping in her room and set her on fire. As she was burning and crying, people from the vicinity come and somehow the informant came to know about the incident and

rushed to the District Hospital from where her daughter was referred to Gorakhpur Medical College and thereafter, admitted in A-1 Hospital, Mohaddipur.

4. The statement of the patient i.e. Gudiya was recorded on 02.09.2012 by the Naib Tehsildar at about 02:25 P.M. at Mohak Hospital Medical College, Gorakhpur (Ex. Ka-6/16) and thereafter once again the dying declaration of Gudiya was recorded on 08.09.2012 at about 07:15 P.M. by Naib Tehsildar, Sadar Gorakhpur which was marked as Ex. Ka-7.

5. After the first information report was lodged, the police investigated the crime and after collecting the evidence a charge-sheet dated 23.11.2012 was submitted against Radhey Jaiswal s/o Rangi Lal Jaiswal (Ex. Ka-11) under Sections 498-A, 323, 506, 302 I.P.C. A second charge-sheet dated 19.12.2013 was submitted by the Investigating Officer against Virendra @ Santosh Jaiswal s/o Radhey, Munna Jaiswal s/o Radhey, Smt. Kaushilya Devi w/o Radhey and Sita Devi w/o Munna Jaiswal (Ex. Ka-12) under Sections 498-A, 323, 506, 302 I.P.C. The learned Magistrate after taking cognizance and complying with the provisions of Sections 207 of Cr.P.C. committed the case for trial to the court of Sessions. On 26.02.2013 Radhey Jaiswal (accused-appellant) was charged under Sections 498-A, 304-B, 506 I.P.C and alternatively under Section 302 I.P.C. and Section 3 of Dowry Prohibition Act in Sessions Trial No. 18 of 2013 (State Vs. Radhey Jaiswal). Similarly on 15.07.2013 Virendra @ Santosh Jaiswal, Munna Jaiswal, Smt. Kaushilya and Sita Devi were charged under Sections 498-A, 304-B and 506 I.P.C and alternatively under Section 302 I.P.C. and Section 3 of the Dowry Prohibition Act in Sessions Trial No. 101 of 2013.

6. Since both the trials i.e. Sessions Trial No. 18 of 2013 (State Vs. Radhey Jaiswal) and Sessions Trial No. 101 of 2013 (State Vs. Virendra @ 3 others) under Sections 498-A, 304-B, 506 I.P.C and in alternative under Section 302 I.P.C. and Section 3 of the Dowry Prohibition Act arose from the same case crime number i.e. Case Crime No. 1041 of 2012, the cases were tried together and decided by a common judgment dated 25.08.2014 passed by Addl. Sessions Judge Court No. 4 Maharajganj. The Sessions Trial No. 18 of 2013 (State Vs. Radhey Jaiswal) was treated to be leading case and therefore, the statements of witnesses were recorded in S.T. No. 18 of 2013.

7. During the trial, statements of 18 persons were recorded by the prosecution, namely, Chunni Devi, (mother of the deceased) as P.W.-1, Dinesh (uncle of the deceased) as P.W.-2, Sonu Jaiswal (brother of the deceased) as P.W.-3, Dinesh Madhesia (independent witness) as P.W.-4, Prabhunath (independent witness) as P.W.-5, Dinnanath Madhesia (independent witness) as P.W.-6, Awadesh Jaiswal (independent witness) as P.W.-7, Rambriksha Rai (Sub-Inspector of Police Station- Gulhariya,, District- Gorakhpur) as P.W.-8, Santosh Kumar Rai (Tehsildar Sadar-Gorakhpur) as P.W.-9, Latawan Yadav (Constable) as P.W.-10, Jitendra Yadav (Sub-Inspector, Paniyara, Janpad-Maharajganj) as P.W.11, Ram Nayan Yadav (Station In-charge, P.S. Farenda, District-Maharajganj) as P.W.-12, Mohd. Shakeel (Medical Officer of Community Health Centre, Chauri Chaura) as P.W.-13, Dr. Bhanu Pratap Singh (Medical Officer District Hospital, Maharajganj) as P.W.-14,

Shashank Shekhar Rai (Naib Tehsildar Khajni District- Gorakhpur) as P.W.-15, Dr. Chandra Dev (Emergency Medical Officer D.R.T. Medical Officer, Gorakhpur) as P.W.-16. Dr. Ashok Kumar Srivastava (Medical Superintendent, Nehru Hospital) as P.W.-17 and Ram Pyare Yadav (Head Constable) as P.W.-18, in support of prosecution case.

8. The statements of all the accused namely, Radhey Jaiswal, Virendra @ Santosh Jaiswal, Smt. Kaushilya w/o Radhey Jaiswal, Munna Jaiswal s/o Radhey Jaiswal and Sita Devi w/o Munna Jaiswal were recorded under Section 313 Cr.P.C. and on behalf of accused-appellants statement of Prabu Madhesia s/o Rajendra Pratap was recorded as D.W.-1.

9. The prosecution produced written complaint (Ex.-Ka-1), F.I.R. (Ex. Ka-8), dying declaration dated 08.09.2012 (Ex. Ka-7), statement of patient dated 02.09.2012 (Ex.Ka 6/16), bed head ticket dated 02.09.2012 (Ex. Ka-14), injury report dated 02.09.2012 (Ex. Ka-15), post-mortem report dated 10.09.2012 (Ex. Ka-13), panchayatnama dated 10.09.2012 (Ex. Ka-2), charge-sheet dated 23.11.2012 (Ex. Ka-11), charge-sheet dated 19.12.2013 (Ex. Ka-12) as documentary evidence during trial. After considering the entire evidence the learned Sessions Judge acquitted accused-appellants, namely, Radhey Jaiswal, Munna Jaiswal, Smt. Kaushilya, Sita Devi and accused Virendra @ Santosh under Sections 498-B, 304-B, 506 and Section 3 of Dowry Prohibition Act. Accused Virendra @ Santosh Jaiswal was also acquitted under Section 302 I.P.C. Accused/appellants, namely, Radhey Jaiswal, Munna Jaiswal, Smt. Kaushilya and Sita Devi were however convicted under Section 302 I.P.C. and were sentenced with life imprisonment and fine of Rs. 10,000/-. In case of default, they were to further undergo one year rigorous imprisonment.

10. Heard learned counsel for the accused-appellants , learned A.G.A. for the State and perused the record.

11. Learned counsel for the accused-appellants vehemently assailed the order of conviction and made following submissions i.e:-

i. Accused-appellants are innocent and have not committed any offence as alleged by the prosecution.

ii. The order of conviction is passed on conjecture and surmises.

iii. All the prosecution witnesses of fact turned hostile and have not supported the prosecution case.

iv. The sessions court had held all the accused-appellants guilty under Section 302 I.P.C. only on the basis of the dying declaration (Ex. Ka-7) and the statement of Gudiya recorded on 02.09.2012 (Ex. Ka-6/16).

v. The trial court erred in relying upon the dying declaration as the same does not inspire confidence.

vi. As per the post-mortem report (Ex. Ka-13) deceased Gudiya sustained severe burn injuries and the deceased Gudiya was not in a position to give the dying declaration.

vii. The evidence of Santosh Kumar Rai, P.W.- 9, who recorded the dying declaration Ex. Ka-7 on 08.09.2012 and of Dr. Chandra Dev P.W. 16, who had given the fitness certificate for recording of the dying declaration do not inspire confidence. The evidence of P.W. 9 and P.W. 16 create a strong suspicion about the consciousness and mental fitness of the

deceased, while the statement was being recorded.

viii. The deceased was living separately from the accused-appellants in a separate house where she was burnt at about 03:00 A.M. without there being any evidence of forced entry into the house by the accused-appellants, who were charged for committing the alleged crime.

ix. The statements of the children of the deceased, who were staying with the deceased on the fateful night were not taken and they were also not examined as witnesses by the prosecution and lastly, it was submitted by the learned counsel for the appellants that the appellants were not confronted with the dying declaration at the time of recording of their statement under Section 313 Cr.P.C. and therefore, the same cannot be relied upon and has to be excluded from evidence.

12. *Per contra*, learned A.G.A. for the State refuted the submissions made by the learned counsel for the appellant and made the following submissions:-

i. Sessions court rightly relied upon the dying declaration of the deceased for convicting the accused as the witnesses of fact were won over by the defence.

ii. There is no impediment in convicting the accused only on the basis of dying declaration without there being any other corroborative evidence.

iii. From the evidence of P.W. 14 and P.W. 16 it is established that the deceased was physically and mentally fit while recording the dying declaration by P.W. 9 and P.W. 15 and they were independent witnesses and there is no suggestion by the defence as to why P.W. 9 and P.W. 15 would give false evidence against the accused-appellants.

iv. Not putting a question to the accused with regard to dying declaration (Ex. Ka-7) and Ex. Ka-6/16 during questioning the accused under Section 313 Cr.P.C. will not vitiate the trial and the accused had to establish the prejudice caused to them and it was lastly submitted by the A.G.A. that sessions court rightly passed the judgment convicting the accused-appellants after considering the entire evidence and the appeal has no merits and is liable to be dismissed.

13. With the help of both the counsels, learned counsel for the accused-appellants and the learned A.G.A. for the State, we have perused the record of the case from which it is clear that P.W. 1 Smt. Chunni Devi, who was mother of the deceased Gudiya had not supported the prosecution version and was declared hostile by the prosecution. P.W. 1 –Chunni Devi in her examination-in-chief stated that Gudiya was her daughter and she was married about six years back with Virendra @ Santosh. They gave all the Dan-Dahez, jewellery and other household items, which was agreed earlier but could not give the motor-cycle. Chunni Devi in her statement stated that Radhey Jaiswal, his wife and his sons Virendra @ Santosh, Munna and wife of Munna, used to torture her daughter Gudiya for motor-cycle and this was informed by Gudiya to her mother Chunni Devi on mobile phone. On the date of incident, her son-in-law Virendra @ Santosh was in Saudi Arabia and Virendra instructed on telephone to one J.P. Jaiswal that before he returns from Saudi, Gudiya be killed and whatever money will be required, he will pay the same. This was informed by her daughter as she heard J.P. Jaiswal talking to her son-in-law Virendra and informed her on phone. It was further stated that on the date of incident at about 8

to 9 P.M. her daughter informed her on phone that accused/appellants would kill her and then P.W. 1 stated to her daughter that she would come the next day but on the same night at around 3:00 P.M. her daughter Gudiya informed her on mobile phone that all the accused-appellants had burnt her after pouring kerosene oil on her body. When the next morning P.W. 1 reached the house of her daughter, she was informed on mobile phone that Radhey and her daughter were in Maharajganj Hospital and when she reached the hospital, she found her daughter to be fully burnt and was crying. Thereafter, she was taken to the medical college where she was admitted at about 10-11 A.M. After being admitted for two days in the medical college, she was shifted to a private hospital where she remained for four days and thereafter, she was again referred to medical college. The statement of Gudiya was recorded twice at the Medical college and her daughter was fully conscious while she was admitted in the medical college. After the condition of her daughter become stable Chunni Devi P.W.-1 got an application drafted by someone and after signing the same, gave it to the Police Station- Ghughuli and got the same registered. Gudiya died six days after the incident at the medical college. In her cross-examination, P.W.1 stated that she had not dictated the complaint but the same was transcribed by one child, which was not read over to her that what was written in that she did not know and she had put her signature over the same. When confronted with her statement in examination-in-chief, P.W. -1 stated that the (Ex. Ka-1) was never read over to her, she was unable to read the Ex. Ka-1 because she was not literate. In her cross-examination, P.W.1 stated that she had no personal knowledge of the torture of her daughter by the appellants and stated that the said fact was informed to her by certain persons residing nearby the house of her daughter. In her cross-examination, she further stated that Gudiya had no mobile phone, she never talked to her from her sasural (in-law's house). It was also stated by P.W. 1 in her statement that mother, father, brother and the brother's wife of her son-in-law Virendra resided separately in another house separate from her daughter's Gudiya. It was also stated that her daughter never told her about the talks between J.P. Jaiswal and her son-in-law and the said fact was narrated by the P.W.-1 in her examination-in-chief on the basis of information given on phone by certain persons of Ghughuli, whose names were not known to her. It was also denied by P.W.-1 that on the date of incident, no phone call was made by her daughter informing that the accused appellants would kill her. In cross-examination she further denied that on the fateful night at about 3 P.M. her daughter called P.W. 1 on mobile phone. She further stated that her daughter never informed how she was burned because after being burned she was unconscious and the doctor had administered sleeping pills as well as injections, therefore she could not inform anything about the incident. In her cross-examination, she stated that twice some Magistrate or Officer came to record the dying declaration of Gudiya but on both the occasions, her daughter could not give her statement because she was unconscious and on both the occasions Naib Tehsildar or Tehsildar had not recorded any statement of deceased Gudiya but had asked P.W.-1 regarding the incident and recorded the information given by her. It was further stated that her son-in-law Virendra @ Santosh was in Saudi Arabia on the date of incident and Munna Jaiswal his wife Sita Devi resided in a separate house and on the

date of incident her daughter was all alone in her house.

14. P.W.-2 Dinesh in his statement stated that Gudiya was my Bhatiji, who died 10-11 months back but P.W.2 had not supported the prosecution version and was declared hostile. It was stated by P.W.-2 that Gudiya had two daughters, namely, Rani aged about six years and Neetu aged about four years. It was also stated by P.W.-2 in his cross-examination that about eight months prior to the date of incident Munna, Kaushilya, Sita Devi and Radhey had separated from Virendra and Gudiya and had started living separately in a house which was after two to three houses away from the house of Gudiya.

15. P.W.3- Sonu Jaiswal, the real brother of the deceased Gudiya had also not supported the prosecution story and was declared hostile. In his cross-examination, P.W.3 stated that his sister never informed him anything as she was unconscious and denied the suggestion that the deceased Gudiya told P.W. 3 as she was conscious that her in-laws along with J.P. Jaiswal had killed her. P.W. 3 in his cross-examination stated that the father, mother, brother and sister-in-law of his brother-in-law-Virendra were residing separately from Gudiya in another house and at the time of incident Gudiya was alone in her house. It was also stated by P.W. 3 that on 02.09.2012 and 08.09.2012 when Tehsildar and Magistrate came to record statement of Gudiya, she was unconscious on both the occasions and therefore, they recorded the statement of her mother Chunni Devi because Gudiya was not able to speak.

16. P.W.-4 Dinesh Madhesia, who was an independent witness had also not supported the prosecution version and was declared hostile. P.W.-4 had denied the suggestion in his cross-examination that Gudiya told her that Radhey Jaiswal, Munna Jaiswal and Kaushilya burnt her.

17. P.W.-5 Prabhunath, who was also one of the independent witnesses had also not supported the prosecution story and was declared hostile. In his examination-in-chief, P.W.-5 had stated that at about 04:00 A.M. Gudiya informed him on his mobile phone that somebody has burned her and when P.W.5 reached the house, he found that Gudiya was lying out of the house in Osara and no other person was present there. It was also stated that Radhey, Kaushilya were living separately in a different house, which was about 40 to 50 mts. away from the house of Virendra. It was also stated that Gudiya never informed P.W.5 that her in-laws burnt her or had ever tortured her for dowry. P.W.-5 in his statement had denied the suggestion by the prosecution that on the date of incident, the deceased was living along with her in-laws, brother-in-law or with the wife of her brother-in-law.

18. P.W.-6 Dinnanath Madhesia, who was also an independent witness had not supported the prosecution version and was declared hostile. It was stated by P.W.-6 that at about 04:00 A.M. in the morning, when he reached the house of Virendra, he found Gudiya in a burnt state and she never told him that she was burnt by her in-laws. P.W.-6 denied the suggestion that at the time of incident deceased Gudiya was residing with her in-laws in the same house and had also denied the suggestion that the deceased had informed the witness that her in-laws, *Devar and Devrani* had tried to burn her to death.

19. P.W.-7 Awadesh Jaiswal, who was also an independent witness examined by the prosecution, did not support the prosecution version and was declared hostile. In his cross-examination P.W.-7 has denied the suggestion that the deceased Gudiya informed her that her in-laws, *Devar and Devrani* have burnt her.

20. P.W.-8 Rambriksha Rai, Sub-Inspector proved the Panchayatnama.

21. P.W.-9 Santosh Kumar Rai, Tehsildar Sadar proved the dying declaration recorded by him on 08.09.2012 and stated that he recorded the dying declaration of the deceased at the Medical College, Gorakhpur. It was further stated that on 08.09.2012 at about 07:15 P.M., the doctor after seeing Gudiya had informed him that she was conscious and fit for recording the dying declaration and the said statement was endorsed by the doctor on the page on which the dying declaration was recorded on 08.09.2012 at about 07:15 P.M. It was also been stated by the P.W.-9 that from the appearance, deceased Gudiya was conscious and was in a position to get her statement recorded. It was stated by P.W. -9 that he had put questions to Gudiya to which she had replied and he had recorded the same. It was stated by P.W.-9 that the deceased "Gudiya" had stated that her husband reside in Saudi Arabia and had kept another women, she had two daughters and her husband, in–laws, nanad and devar did not want to keep her and wanted to throw her out from her sasural (in-law's house). It was stated by P.W.-9 that Gudiya informed that on 01.9.2012 / 02.09.2012 at about 02:00 A.M. she was sleeping in her room when her father-in-law-Radhey Jaiswal, mother-in-law-Kaushilya, devar-Munna, devrani–Sita Devi and nanad-Nirmala poured kerosene oil on her and set her on fire and after she shouted, the neighbours came. His father-in-law took her to the District Hospital, Maharajganj and after seeing the mother of the deceased and other relatives he ran away. The statement was read over to Gudiya and thereafter, her right thumb impression was taken over the statement. The statement of Gudiya was recorded at 07:15 P.M. which was completed by 07:30 P.M. It was also stated by P.W.-9 that before the statement of Gudiya was recorded the Emergency Medical Officer endorsed her to be fit for recording the dying declaration and after completion of the statement, the Emergency Medical Officer put his signatures. At the time of recording of the statement of Gudiya, nobody else was present in the room except the P.W.9. The statement so recorded by the P.W.-9 was shown to the witness, which he endorsed and was marked as Ex. Ka-7. The P.W.-9 had also proved the Inquest Report. In his cross-examination, P.W.-9 stated that he could not tell the name of the Medical Officer, who informed him after seeing Gudiya that she was in a fit state for getting the dying declaration recorded. In his cross-examination, it was further stated by P.W.-9 that he had not noted in the dying declaration (Ex. Ka-7) that Gudiya was conscious and was in a state to give the evidence. It was written " मैं गुडिया पत्नी संतोष पुरे होशो हवाश में बयान करती हूँ". In his cross-examination P.W.-9 also stated that he asked questions to the deceased Gudiya, to which she replied but the dying declaration was not recorded in a question and answer form. It was further stated by P.W.-9 that before recording the dying declaration her family members i.e. her mother and brother were present in the room but at the time of recording the statement they were asked to go. It was also stated by P.W.-9 that while recording the dying declaration he never

informed the deceased that he was a Magistrate and that he had come for recording her statement. It was also stated by the P.W.-9 that Emergency Medical Officer identified the deceased Gudiya and her thumb impression.

22. P.W.-10 Latawan Yadav, was the Police Constable who proved the Chik F.I.R.

23. P.W.-11 Jitendra Yadav, Sub-Inspector stated that he had taken over the investigation on 11.10.2012, proved the Naksha Nazri, Panchayatnama and also proved the chargesheet. In his cross-examination P.W.-11 had admitted that at the time of dying declaration, there was no fitness certificate.

24. P.W.-12 Ram Naresh Yadav, S.H.O., has proved the initial investigation and stated that on 05.09.2012 the mother of the deceased informed that deceased was not in a position to give statement.

25. P.W.-13 Mohd. Shakeel, Consultant, Kaili Hospital, Basti had stated that on 10.09.2012, he was posted at Community Health Centre, Chauri Chaura as Medical Officer. P.W.-13 proved the post-mortem. In his cross-examination, P.W.-13 stated that inside portion of the right hand of the deceased was burned. It was also stated that the palm of the right hand and thumb of the right hand both were burned.

26. P.W.-14 Dr. Bhanu Pratap Singh stated that on 02.09.2012, he admitted the deceased at 08:00 A.M. at the District Hospital, Maharajganj as the case of burn injury. It was also stated that the victim was conscious. The father-in-law of the victim, who brought the victim informed P.W. 14 that at about 02:00 A.M., she was burned which he had noted. It was also stated by P.W.-14 that the injured was administered injections, Injection ceferiaxon 1 mg, Injection Gentamucin 80 MI, Injection Dyclo, Injection Ranitidine and Injection Compose I.V. Fluid R.L. It was also stated that the injured was referred to Medical College and had also proved the bed head ticket. The doctor denied the suggestion that in the medico-legal register, the thumb impression was of some other person and not of the deceased.

27. P.W.-15 Shashank Shekhar Rai, Naib Tehsildar proved the statement of the victim recorded by him on 02.09.2012 and stated that when he reached the Medical College, Gorakhpur, the deceased Gudiya was admitted in the burn ward and the doctor of the medical college had orally informed that Gudiya was fit for giving statement. It was also stated by the P.W.-15 that at about 02:05 P.M., he had recorded the statement of Gudiya, wherein she stated that about 03:00 A.M., when she was sleeping in her sasural and her father-in-law-Radhey, her mother-in-law and brother-in-law-Munna and Munna's wife poured kerosene oil on her and set the fire and she was brought to the hospital by Radhey. It was also been stated that after the statement was recorded, the same was read over to Gudiya and after that he called Emergency Medical Officer, who was outside. The Emergency Medical Officer got the thumb impression of Gudiya which was also verified by the E.M.O. It was also certified by the E.M.O. that Gudiya was conscious prior to, at the time and after recording of the evidence and had put her signature. It was also been stated that he inquired Gudiya and whatever she said, same was recorded by him. P.W.15 denied the suggestion that the right thumb of

Gudiya was burned and the thumb impression at Ex.Ka 6/16 was not of Gudiya. It was admitted by the P.W.-15 that fitness certificate was given orally by the doctor, the doctor never gave certificate in writing as to fitness of Gudiya.

28. P.W.-16 Dr. Chandra Dev, E.M.O. proved the endorsement of fitness given by him on 08.09.2012. In his cross-examination, the P.W.-16 has stated that during the time of recording the statement, the fact regarding her fitness was recorded on the basis of presumption as neither the victim nor the Naib Tehsildar had informed anything against it.

29. P.W.-17 Dr. Ashok Kumar has stated that on 02.09.2012, he was posted at Nehru Hospital, Medical College Gorakhpur as E.M.O. and stated that he had informed orally to the Naib Tehsildar that she (deceased) was fit to give her statement and after recording the same, the P.W.-17 was called by the Naib Tehsildar and thereafter, he went inside and gave a certificate to the effect that Gudiya was fit before, during and after the recording of the statement.

30. P.W.-18 Ram Pyare Yadav, Head Constable has proved the police papers and is a formal witness.

31. From the oral evidence as referred above, we find that all the witnesses of fact had not supported prosecution version and were declared hostile by the prosecution. The sessions court relied upon the dying declaration (Ex. Ka-7) and the statement of the deceased (Ex. Ka-6/16) and convicted the accused appellants under Section 302 I.P.C. Since all other witnesses were declared hostile, the court acquitted the accused-appellants for charges under Sections 304B, 498A, 506 and 3/4 Dowry Prohibition Act.

32. It has been submitted by the learned Counsel for the appellant that since all the witnesses of fact had not supported the prosecution version, learned sessions court ought not have convicted the accused-appellant only on the basis of dying declaration of the deceased without there being any other corroborative evidence. In this regard, submission of learned AGA on behalf of the State is that there is no impediment in relying upon dying declaration of the deceased without there being any corroborative evidence.

33. The question that whether a conviction can be recorded only on the basis of dying declaration without there being any corroborative evidence is no more res-integra as the dying declaration is a substantive piece of relevant evidence in view of Section 32(1) of the Evidence Act. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which resulted in his death, in cases in which the cause of person's death comes in to question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased before death is called a "dying declaration".

34. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration.

35. It would be appropriate here to remind ourselves that generally, there are two issues with respect to a dying

declaration. The first one would be, whether the declaration was actually made. Naturally, this would be assessed on the basis of the evidence of the witnesses, who claim that such declaration was made and witnessed by them. There would be a question of accuracy of the recording of such declaration, if made or maintained by such witnesses. If the evidence in that regard is satisfactory, the Court would come to a conclusion that a particular statement was, indeed, made by the deceased. It is not the end of the matter, the Court thereafter would be required to decide whether such statement made by the deceased was true. In other words, the fact of having made the statement and the truthfulness of the said statement are both required to be established before a declaration is termed as reliable.

36. For ascertaining the truthfulness of the statement of a dying person, the parameters, which are applied to the witnesses while judging reliability of their evidence, must be applied. The reliability of a version of a witness would depend on several factors including opportunity available to witness to know, physical and mental capacity of the patient to convey, kind of treatment which the patient was undergoing, chances of tutoring, relation of witness with patient and so on. The law does not afford to take a risk of blindly relying on the statement only because it has been recorded by Executive Magistrate. Usual scrutiny from every possible angle is must and evidence of Executive Magistrate must withstand the test of reliability.

37. In **Jagbir Singh Vs. State (NCT of Delhi) reported in (2019) 8 SCC 779**, the Supreme Court reiterated *"It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be solely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This Court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition- mentally and physically- to make such statement."*

38. In the light of such settled legal position, the facts of the case are to be assessed. On the basis of the factual aspects one has to independently decide whether the evidence of dying declaration inspires confidence. The principles would provide a guide but one has to decide the worth of a dying declaration only on the basis of facts and the attendant circumstances. The law is well settled that there is no specific format for writing a dying declaration, meaning thereby, written dying declaration can be in any form, but the essence is, it should inspire full confidence of the Court regarding its correctness and the statement of deceased was not a result of tutoring or product of imagination. More importantly, there should be evidence that the victim was well oriented and in a fit state of mind to give statement. It is duty of the recorder to satisfy himself that the deceased was in fit mental condition to give the statement and later the Court should also satisfy that the deceased was in a fit state of mind while giving statement.

39. Learned counsel for the appellants contended that the first statement as alleged to have been recorded of the deceased was on 02.09.2012 at about 02:25 P.M. by the

Naib Tehsildar. Learned counsel for the appellants drew over attention to Ex.- Ka 6/16, wherein there was an endorsement by the Medical Officer that patient was conscious before, during and after the recording of the statement. The counsel further drew over attention to the statement of P.W. 17-Dr. Ashok Kumar Srivastava, who made the aforementioned endorsement. In his statement, P.W.-17 has stated that after examining and seeing the deceased to be conscious, P.W.-17 informed the Tehsildar (who recorded the statement) orally that "मरीज गुडिया म्रत्युपुर्व बयान देने के लिए उपुक्त है" and thereafter, he left the room, after recording the statement Naib Tehsildar called P.W.-17 and after seeing patient Gudiya, it has been stated by P.W.-17 that he has given a certificate that patient Gudiya was conscious prior to, during and after the statement. After recording such a statement on the dying declaration, the same was authenticated by putting the right thumb impression of Gudiya. It has further stated by P.W.17 that P.W.17 has not mentioned in the certificate that Gudiya was mentally fit for recording of dying declaration.

40. Learned counsel for the appellants contended that there is a distinction between consciousness and fitness of a state of mind to make a statement. Learned counsel for the appellants relied upon judgment of Supreme Court **Paparambaka Rosamma Vs. State of A.P. (1999) 7 SCC 695:1999 SCC (Cri) 1361**, wherein Apex Court has drawn distinction between consciousness and fitness of state of mind to make a statement and observed in paragraph no. 9 as under:-

"9. It is true that the medical officer Dr. K.Vishnupriya Devi (PW 10) at the end of the dying declaration had certified patient is conscious while recording the statement. It has come on record that the injured Smt. Venkata Ramana had sustained extensive burn injuries on her person. Dr. P.Koteswara Rao (PW 9) who performed the post mortem stated that injured had sustained 90% burn injuries. In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the dying declaration being genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr. Smt. K.Vishnupriya Devi (PW 10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that patient is conscious while recording the statement. In view of these material omissions, it would not be safe to accept the dying declaration (Ex.P-14) as true and genuine and was made when the injured was in a fit state of mind. From the judgments of the courts below, it appears that this aspect was not kept in mind and resultantly erred in accepting the said dying declaration (Ex.P-14) as a true, genuine and was made when the injured was in a fit state of mind. In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below."

41. Thus, according to the learned counsel for the appellants, the statement of the deceased recorded by Naib Tehsildar on 02.09.2012 becomes doubtful as there was

no certificate by the doctor as to the fact that the deceased was in a fit state of mind to give the dying declaration. The only certificate was that the deceased was conscious at the time of the statement. In the present case also the deceased received severe burn injuries soon before the statement was recorded and as per the Bed Head Ticket (Ex.- Ka.14) there was an endorsement that the condition of the patient was serious and was referred to medical college.

42. Referring to the statement of the deceased dated 02.09.2012 recorded by Naib Tehsildar, learned counsel for the appellant submitted that it has been stated by the deceased that she was sleeping in her sasural and at about 03:00 A.M. in the morning his father-in-law, mother-in-law, devar-Munna and wife of Munna, poured kerosene oil on the deceased and set afire. It was also stated that at the time of incident these were the persons present in the house. The deceased has also mentioned that she was brought to the hospital by Radhey (father-in-law). It had also been stated by the deceased that earlier also her in-laws used to beat the deceased. It had also been mentioned in the aforesaid statement that she had two daughters aged about 5 years and 3 years. The statement recorded on 02.09.2012 (Ex. Ka. 6/16) also bears right thumb impression of the deceased. Referring to the other dying declaration of the deceased, which was recorded on 08.09.2012, learned counsel for the appellants contended that the deceased has stated that her husband resided in Arab and had kept another women, she had two daughters. Her husband and in-laws did not want to keep her and wanted to throw her out of the Sasural. It was further stated by the deceased that in the intervening night of 01.09.2012 and 02.09.2012 at about 02:00 A.M. while she was sleeping in the room, her father-in-law Radhey, mother-in-law Kaushilya, devar Munna, devrani Sita and nanad Nirmala, poured kerosene oil and burned her. On her making hues and cries, persons from the neighbouring area came and the Sasur had taken her to the District Hospital, Maharajganj and after that he ran away seeing the mother and other relatives of the deceased. The aforesaid statement bears certificate issued by the doctor fit for dying declaration at 07:15 P.M. and also bears a thumb impression of deceased Gudiya.

43. Learned counsel drew the attention of the court to the statement P.W.-16 Dr. Chandra Dev, Emergency Medical Officer B.R.D. Medical College, Gorakhpur in which P.W.16 had stated that he had given the certificate of fitness at 07:15 P.M. which had been endorsed by him before the statement was recorded. The certificate as endorsed upon the declaration was “fit for dying declaration at 07:15 P.M. on 08.09.2015”.

44. It had been stated by P.W. 16 that after giving certificate he had come out of the room and on the basis of presumption he told that she was fit during the statement as the Naib Tehsildar had also not mentioned anything adverse to the doctor. It was also stated by the P.W.16 that he had not stated that the deceased was mentally fit and had written only “fit for dying declaration”.

45. Learned counsel for the appellants contended that neither of the statements of the deceased which were treated as dying declaration by the sessions court, there was certificate by the doctor as to mental fitness of the deceased to get statement recorded.

46. It has been further contended by the learned counsel for the appellants that in both the statements, which were relied upon by the sessions court to convict the accused-appellants, there were contradictions such as in the second statement recorded on 08.09.2012, the deceased added the name of nanad as one of the co-accused and mentioned that on her making hues and cries, the persons of the neighbouring area came. In the second statement, the deceased had also tried to explain the motive for the aforesaid crime.

47. The P.W. 15, Shashank Shekhar Rai, Naib Tehsildar, who has recorded statement on 02.09.2012 and P.W. 9, Santosh Kumar Rai, Tehsildar, Sadar Gorakhpur, who has recorded the statement on 08.09.2012 had not stated that they were themselves satisfied with regard to fitness of the deceased to get her statement recorded. They had also not stated as to whether they had put any preliminary questions to the deceased or by any other mode they themselves got satisfied about the the mental fitness of the deceased at the time when the statement was being recorded by them. Such evidence is totally absent.

48. Learned counsel for the appellants also drew attention of the court to Ex.-Ka.14, the bed head ticket, which bears the left and right thumb impression of the deceased and also to the two statements relied upon by the sessions court i.e. Ex.-Ka.7 and Ex. Ka. 6/16, wherein also right thumb impression of the deceased was affixed.

49. Learned counsel for the appellants contended that from the statement of Dr. Shakeel Consultant, Kaili Hospital, Basti, who conducted the post-mortem of the deceased on 10. 9.2012 found that the palm and thumb of right hand were burned and therefore, there was no possibility of right thumb impression being taken upon the statement. The learned counsel also drew attention of the court to that thumb impressions which were there on the aforementioned statements and contented that from bare perusal, the thumb impressions did not inspire confidence as there was no similarity in two thumb impressions.

50. *Per contra*, learned A.G.A appearing for the State contended that these were the minor contradictions, which had been pointed out by the counsel for the appellants but otherwise the statement of the deceased was consistent and did not create any doubt. It has also been contended by the learned A.G.A. that both the statements were recorded by the responsible government officers i.e. Magistrates and nothing had been suggested by the appellants as to why they would depose against them.

51. In our view, from the evidence as discussed above, it is clear that in order to establish the dying declaration, the evidence of Dr. Ashok Kumar Srivastava, Medical Officer B.R.D. Medical College-P.W. 17, evidence of Shashank Shekhar Rai, P.W.15 (who recorded the statement of the deceased on 02.09.2012) and statement of Dr. Chandra Dev, EMO B.R.D. Medical College, Gorakhpur-P.W.16 and evidence of Santosh Kumar Rai, Tehsildar, P.W.9 (who has recorded statement on 08.09.2012) were taken into consideration by the prosecution. Neither the medical officer nor the magistrate gave evidence to the fact as to how they got satisfied about the mental fitness of the deceased.

52. The evidence of such type coupled with the fact that all the other prosecution witnesses of fact had turned hostile and had not supported the prosecution version, the whole case becomes suspicious. Further from the statement of the doctor, who had conducted the postmortem, it is clear that the right palm and the thumb was burnt. Though, on the statements of Gudiya recorded by the magistrates bear the right thumb impression creates a doubt.

53. So far as contention of learned A.G.A that the statement was recorded by the magistrates, who are responsible officers is concerned, the the Apex Court in case of **Kanchy Komuramma Vs. State of A.P. reported in 1996 SCC (Cri) 31** has held that a dying declaration even if, has been recorded by a judicial Magistrate, by itself is not a proof of truthfulness of the declaration. It has to go through the scrutiny of the court. There are certain safeguards which must be observed by a Magistrate when requested to record a dying declaration. The Magistrate before recording the dying declaration must satisfy himself that the deceased is in a proper mental state to make the statement. He must record that satisfaction before recording the dying declaration. He must also obtain the opinion of the doctor, if one is available, about the fitness of the patient to make a statement and the prosecution must prove that opinion at the trial in the manner known to law. (Refer to para 11).

54. The Apex Court in the case of **Puran Chand Vs. State of Haryana (2010) 6 SCC 566** advised the courts to remain alive to all attending circumstances when the dying declaration comes into being before making the same the basis of conviction. The relevant observations are contained in paragraphs 15 of the judgment extracted below:-

"15. The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous.

The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigation agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration."

55. No doubt, a dying declaration is a valuable piece of evidence but it has to be considered as just another piece of evidence and has to be judged in the light of all surrounding circumstances and with reference to the principles governing the weighing of evidence and if it is not found wholly trustworthy or truthful, it should not form the sole basis of conviction without corroboration.

56. Though all the prosecution witnesses have turned hostile, but their testimony can be relied upon to the extent the same is consistent with the case of prosecution or the defence.

57. In the case of **Ramesh Harijan Vs. State of Uttar Pradesh (2012) 5 SCC 777, the Supreme Court observed** :-

"24. In State of U.P. Vs. Ramesh Prasad Misra and another (1996) 10 SCC

360, *this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde Vs. State of Maharashtra, (2002) 7 SCC 543; Radha Mohan Singh @ Lal Saheb & others Vs. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla Vs. Daroga Singh and others, AIR 2008 SC 320; and Subbu Singh Vs. State (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."*

58. P.W. 1, mother of the deceased, though turned hostile, in her cross-examination, stated that the statement of the deceased could not be recorded by the magistrate as she was not conscious, further the brother of the deceased P.W. 3 also stated that the statement could not be recorded by the magistrates on 02.09.2012 and 08.09.2012 as the deceased was unconscious and was not able to speak.

59. The P.W.1 mother of the deceased, P.W.2 Dinesh (an independent witness from village), P.W. 3 Sonu Jaiswal (brother of the deceased) P.W.5,Prabhunath (an independent witness) P.W. 6 Dinanath Madhesia (an independent witness) P.W.7 Awadesh Jaiswal (an independent witness) stated in their statements that the deceased was living separately from her in-laws in a separate house which was 3-4 houses from the house of her in-laws. The prosecution failed to explain this fact and also that how the accused-appellants entered into the house of the deceased at about 2:00-03:00 AM on the fateful night. Whether the entry of the accused-appellants was forceful or it was the deceased who had opened the door, the evidence on this score is completely silent. Further, the prosecution also failed to explain that when the deceased was residing in a separate house along with her two kids, why no injury was caused to the kids, because the case of the prosecution was that the deceased was poured with kerosene and set to fire while she was asleep at about 2:00-03:00 A.M. on the fateful night. Further the prosecution had not examined the children of the deceased, who were the most probable witnesses of the aforesaid crime.

60. The appellant-Radhey Jaiswal in reply to the Question No. 25 in his statement under section 313 Cr.P.C. stated that he and his wife- Kaushilya, were living separately from Virendra and his wife in a separate house since much before the incident. Similarly, appellant-Kaushilya in her reply to Question No. 25 stated the same fact and had also stated that she was unable to walk. The accused Munna Jaiswal in reply to Question No. 25 stated that he along with his wife was residing in Bombay and came to the house only after coming to know about the incident. Accused Sita in reply to Question No. 25 also stated the same fact. The D.W.-1 Prabhu Madhesiya examined on behalf of the defence stated the fact that the deceased was living separately from her in-laws and had also stated thatMunna used to work in Mumbai and was not there at the time of incident. It was also stated by D.W.1 that the spinal cord of the accused – Kaushilya was damaged and she was not able to walk.

61. The answers to the Question No. 25 which were given by the accused-

appellants clearly showed that the appellants had come with a clear and plausible explanation of their innocence. The specific explanations offered by the appellants find support from the statements of prosecution witnesses as well as defence witnesses. The trial court while convicting the appellants completely failed to take note of the explanation offered by the appellants in their statement under Section 313 Cr.P.C., which was probable in the facts of the present case .

62. The Supreme Court in the case of **Reena Hazarika Vs. State of Assam, reported in AIR 2018 SC 5361**, in paragraph-16 of the judgment, observed as follows:

"16. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing"

63. In the present case, as the appellant came with a specific and plausible defence but the trial court did not consider the same and without considering it convicted the appellant. In our considered opinion, therefore, the conviction of the appellant from this angle too, is unsustainable.

64. Lastly, it was submitted by learned Counsel for the appellant that no question with regard to the dying declaration was not put to the appellants at the time of recording their statement under Section 313 Cr.P.C., and, therefore, the same cannot be relied upon and has to be excluded from the evidence.

65. In support of his contention, learned Counsel for the appellant referred the judgment of Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra, reported in AIR 1984 SC 1622** and contended that if the circumstances are not put to the accused, their statements under Section 313 of Cr.P.C., 1973, must be completely excluded from consideration because the accused did not have any chance to explain them. In Sharad Birdhichand Sarda (supra), the Hon'ble Supreme Court in paragraph

nos.142 and 144 of the judgment has held as under:-

"142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4,5,6,8,9,11,12,13,16, and 17. As these circumstances were not put to the appellant in his statement under s.313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Fateh Singh Bhagat Singh v. State of Madhya Pradesh(1) this Court held that any circumstance in respect of which an accused was not examined under s. 342 of the Criminal procedure code cannot be used against him ever since this decision. there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under s.342 of the or s.313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra(2) this Court held thus:

"The fact that the appellant was said to be absconding not having been put to him under section 342, Criminal Procedure Code, could not be used against him."

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decision of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration."

66. Learned Counsel for the appellant also referred to the judgment in **Sujit Biswas Vs. State of Assam, reported in (2013) 12 SCC 406** for the proposition that the very purpose of examining the accused persons under Section 313 Cr.P.C., 1973 is to meet the requirement of the principles of natural justice, i.e., audi alteram partem. The accused, thus, must be given an opportunity to explain the incriminating material that has surfaced against him and in the circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., 1973, cannot be used against him and must be excluded from consideration.

67. Section 313 Cr.P.C., 1973 has amended by Act no.5 of 2009, Section 22 (w.e.f. 31.12.2009) is quoted as under :-

"313. Power to examine the accused.- *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-*

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1). (3) The accused shall not render himself liable to punishment by refusing to answer such

questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

68. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus :-

"342.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

69. In view of the judgments referred to by the learned Counsel for the appellant, the incriminating material has to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. The Hon'ble Supreme Court in **Asraf Ali Vs. State of Assam reported in (2008) 16 SCC 328** has made following observations in paragraphs 21 and 22 of the judgment which are quoted as under :-

"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22.The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to

rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 Supreme Court 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

70. Learned Counsel for the appellants also referred to statements of the appellants under Section 313 Cr.P.C., 1973. Learned Addl. Sessions Judge, Court No.4, Maharajganj on the basis of evidence of prosecution put certain questions during the examination of the accused under Section 313 Cr.P.C. The questions put to appellants were common and therefore, questions put to only one appellant are being reproduced here as under. Similarly, the answers of only one appellant are being reproduced:

"प्रश्न संख्या-1 साक्ष्य में यह आया है कि दिनांक 02.09.2013 से पूर्व के लगभग 06 वर्ष की अवधि में वहद ग्राम पुरानी घुघुली थाना घुघुली जिला महराजगंज में आप अभियुक्तगण राधे जायसवाल, वीरेन्द्र उर्फ सन्तोष जायसवाल, मुन्ना जायसवाल, श्रीमती कौशिल्या एवं सीता देवी ने वादिनी श्रीमती चुनी देवी की लड़की गुड़िया, जो कि वीरेन्द्र उर्फ सन्तोष जायसवाल की विवाहिता पत्नी थी को दहेज में मोटरसायकिल की गांग की तथा मोटरसायकिल की मांग न पुरी होने पर उपरोक्त दिनांक व स्थान पर समय रात्रि 03.00 बजे लगभग आपलोगों ने गुड़िया के शरीर को हाति कारित कर जलाकर उसकी हत्या कर दी। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- गलत है।

प्रश्न संख्या-2 साक्ष्य में यह आया है कि उपरोक्त के बावत घटना की तहरीर वादिनी श्रीमती चुनी देवी ने थाना घुघुली में दिया जिसके आधार पर आप अभियुक्तगण के विरूनचं मुकदमा अपराध संख्या 1041/2012 अन्तर्गत धारा 498ए,323,506,307 मा०द०सं० एवं 3/4 डी०पी० एक्ट के तहत पंजीकृत किया गया। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- चुन्नी देवी ने गलत तथा का तहरीर देकर मुकदमा दर्ज कराया

प्रश्न संख्या-3 साक्ष्य में यह आया है कि मुकदमा अ0सं0 1041/2012 पंजीकृत होने के पश्चात उक्त प्रकरण की विवेचनां प्रारम्भ हुई और विवेचक ने घटना स्थल का निरीक्षण किया, नक्शा नजरी बनाया, गवाहों के बयान लिये और आवश्यक कार्यवाही कर पर्याप्त साक्ष्य के आधार पर धारा 498ए,323,504,302 गा0द0सं0 के अन्तर्गत आ अभियुक्तगण के विरुद्ध आरोप पत्र न्यायालय में प्रेषित किया। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- मुकदमा का सही विवेचना नही हुआ, गवाहान के साक्ष्य बिना लिए ही सरसरी तोर पर विवेचना कर आरोपपत्र प्रेषित किया गया

प्रश्न संख्या-4 साक्ष्य में यह आया है कि पी डबलू 1 श्रीमती चुनी देवी ने आपके विरूद्ध न्यायालय में साक्ष्य दिया है और तहरीर को प्रदर्श का के रूप में साबित किया में आपको क्या है?

उत्तर- साक्षी चुन्नीदेवी ने मेरे विरुद्ध को साक्ष्य दिख है, वह गलत है

प्रश्न संख्या-5 साक्ष्य में यह आया है कि पी डब्लू 2 दिनेश ने न्यायालय में साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी दिनेश द्वारा दिये गये साक्ष्य के संबंध में कुछ नहीं कहना है।

प्रश्न संख्या-6 साक्ष्य में यह आया है कि पी डब्लू-३ सोनू जायसवाल ने न्यायालय में साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर-साक्षी सोनू जायसवाल द्वारा दिये गये साक्ष्य के संबंध में कुछ नहीं कहना है।

प्रश्न संख्या-7 साक्ष्य में यह आया है कि पी डब्लू-4 दिनेश मधेशिया, ने न्यायालय में साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी दिनेश मद्धेशिया द्वारा दिये गये साक्ष्य के संबंध में कुछ नही कहना है।

प्रश्न संख्या-8 साक्ष्य में यह आया है कि पी डब्लू-5 प्रभूनाथ ने न्यायालय में साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी प्रभुनाथ द्वारा दिये गये साक्ष्य के संबंध में कुछ नहीं कहना है।

प्रश्न संख्या-9 साक्ष्य में यह आया है कि पी उल्लू 6 दीनानाथ मधेशिया ने न्यायालय में साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी दीनानाथ मद्धेशिया द्वारा दिये गये साक्ष्य के संबंध में कुछ नहीं कहना है।

प्रश्न संख्या-10 साक्ष्य में यह आया है कि पी डबलू 7 अवधेश जायसवाल ने न्यायालय में साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी अवधेश जायसवाल द्वारा दिये गये साक्ष्य के संबंध में कुछ नहीं कहना है।

प्रश्न संख्या-11 साक्ष्य में यह आया है कि पी डबलू 8 रामवृक्ष राम उ०नि० ने आपके विरूद्ध साक्ष्य दिया है और पंचनागा प्रपत्र को प्रदर्श कर, चालान लाश को प्रदर्श क३. पुलिस फार्म नं0 33 को प्रदर्श क4, फोटो नाश को प्रदर्श क5 एवं पत्र सी०एम०ओ० को प्रदर्श कह के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- कुछ नहीं बहना है।

प्रश्न संख्या-12 साक्ष्य में यह आया है कि पी डब्लू-9 सन्तोष कुमार राय तहसीलदार ने आपके विरूद्ध साक्ष्य दिया है और मृतक गुड़िया के मृत्यू कालिक कथन दिनांक 08.09. 2012 को प्रदर्श क 7, के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी सन्तोष कुमार राय ने गुडिया की बेहोशी की हालत में बिना मृतका गुडिया के मृत्यु कालिक कथन के चुन्नी देवी के प्रभाव में गलत बयान लिखा है।

प्रश्न संख्या-13 साक्ष्य में यह आया है कि पी डबलू, 10 लुटावन का0 ने आपके विरुद्ध साक्ष्य दिया है और चिक एफ०आई०आर० एवं जी०डी० कायमी को कमशः प्रदर्श क 8, प्रदर्श क 9 के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी लुटावन ने गलत बयान दिया है

प्रश्न संख्या-14 साक्ष्य में यह आया है कि पी डबलू-11 जितेन्द्र यादव थानाध्यक्ष ने आपके विरूद्ध साक्ष्य दिया है और नवशा नजरी एवं आरोप पत्र सं० 158//2012 तथा आरोप पत्र सं0 158ए/2012 को कमशः प्रदर्श क10, प्रदर्श क11, प्रदर्श क12 के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- साक्षी जितेन्द्र यादव ने सही विवेचना करके गलत आरोप पत्र प्रेषित किया।

प्रश्न संख्या-15 साक्ष्य में यह आया है कि पी डब्लू 12 राम नयन यादव उ० नि० ने आपके विरूद्ध साक्ष्य दिया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- गलत साक्ष्य मेरे विरूद्ध दिया है।

प्रश्न संख्या-16 साक्ष्य में यह आया है कि पी डबलू 13 डा0 शकील ने आपके विरुद्ध साक्ष्य दिया है और पी०एम० रिपोर्ट को प्रदर्श क13 के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- सही अन्त्य परीक्षण (पी.एम) नहीं किया है।

प्रश्न संख्या-17 साक्ष्य में यह आया है कि पी डबलू-14 डा0 मानु प्रताप सिंह चिकित्साधिकारी ने आपके विरुद्ध साक्ष्य दिया है और बेड हेड टिकट व चिकित्सीय परीक्षण आख्या गुडिया कागज सं 6क/1 को कमशः प्रदर्श क14, प्रदर्श क15 के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- कुछ नही कहना है।

प्रश्न राख्या-18 साक्ष्य में यह आया है कि पी डबलू-15 शशांक शेखर राय नायब तहसीलदार ने आपके विरूद्ध साक्ष्य दिया है और मृत्यु पूर्व बयान दिनांक 02.09.2012 को प्रदर्श क16 के रूप में साबित किया है। इस सम्बन्ध में औपको क्या कहना है

अत्तर- चुन्नी देवी के प्रभाव में बेहोशी की हालत में पडे गुडिया का गलत मृत्यु कालिक कथन लिखा।

प्रश्न संख्या-19 साक्ष्य में यह आया है कि पी डब्लू 16 डा० चन्द्र देव ई०एम०ओ० ने आपके विरूद्ध साक्ष्य दिया है और प्रदर्श क 7 का समर्धन किया है इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मेरे विरूद् गलत साक्ष्य दिया है।

प्रश्न संख्या-20 साक्ष्य में यह आया है कि पी डब्लू-17 डा० अशोक कुमार श्रीवास्तव ने आपके विरूद्ध साक्ष्य दिया है और प्रदर्श क 16 का समर्थन किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मेरे विरुद्ध गलत साक्ष्य दिया है।

प्रश्न संख्या-21 साक्ष्य में यह आया है कि पी डबलू 18 राम प्यारे यादव हेड का0 ने आपक विरूद्ध साक्ष्य दिया है और तरमीमी जी०डी० कायमी) को प्रदर्श क17 के रूप में साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मेरे विरुद्ध गलत साक्ष्य दिया है

प्रश्न संख्या-22 आपके विरुद्ध मुकदमा क्यों चला ?

उत्तर- वादनी चुन्नी देवी ने मलत तथ्य का फर्जी मुकदमा दर्ज कराया

प्रश्न संख्या-24 क्या आपको सफाई देनी है ?

उत्तर- जी हाँ

प्रश्न संख्या-25 क्या आपको कुछ और कहना है ?

उत्तर- मैं व मेरे पति घटना के काफी पूर्व से वीरेन्द्र व उसकी पत्नी गुडिया से अलग होकर अलग मकान में रहते थे। मैं घटना के पहले से चलने में असमर्थ हूं"

71. Per contra, learned A.G.A. relied upon the judgment of the Apex Court in case of **Nar Singh Vs. State of Haryana reported in (2015) 1 SCC 496,** wherein in Paragraph 30 of the aforesaid judgment, the Hon'ble Supreme Court has held as under:-

"30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:-

(i) Whenever a plea of non-compliance of Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;

(ii) In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

(iii) If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

(iv) The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused. "

72. The sessions court, though recorded the statement under Section 313 of Cr.P.C., omitted to put questions regarding a vital circumstance to the accused during his statement. The sessions court, while convicting the accused mainly relied upon the written dying declaration Ex.Ka.-7 and Ex. Ka.6/16. However, the contents of written dying declaration were not put to the accused during his statement. It is really a matter of concern that the sessions court did not frame the question specifically putting the incriminating material stated by deceased in her statement. Thereby, a very important circumstance was lost. The deceased in her statement (dying declaration) stated that the appellants had poured Kerosene on her person and set her on fire. Particularly, this incriminating part of dying declaration was not put to the accused to get his explanation. Although, the dying declaration Ex.Ka-6/16 and Ex. Ka.7 were treated as the basis to convict the accused, the same was not put to the accused in her

statement recorded under Section 313 Cr.P.C. Apparently, the accused was not given opportunity to explain this vital circumstance. Recording of statement under Section 313 of the Cr.P.C. is not an empty formality during trial.

73. We may note that considering the importance of statement under Section 313 of Cr.P.C., Sub-clause (5) has been added in Section 313 by amendment which permits the court to take help of prosecution and defence in preparing relevant questions which are put to the accused. One of the reasons for such amendment was to see that Court should not miss putting any incriminating circumstance to the accused while recording his statement.

74. In the result, the finding of guilt based on the written dying declaration for this reason alone would not sustain apart from the other reasons which we have recorded above. In the result, we hold that the dying declaration was not trustworthy and reliable.

75. To summarise we hold that, the evidence on the point of dying declaration does not inspire confidence and it cannot be relied upon. There is no reliable evidence to satisfy the judicial mind that the deceased was conscious and mentally fit at the time of giving her statement. Rather, the genesis of the case i.e. recording the statement of deceased itself becomes doubtful. From the material on record, we are absolutely not satisfied about the truthfulness of the voluntary nature of the dying declaration and the fitness of the mind of the deceased. In the aforesaid facts and circumstances, we find and hold that the prosecution failed to substantiate the charges levelled against the appellants beyond all reasonable doubt by adducing consistent, cogent and reliable evidence. If dying declaration is excluded, nothing remains in the prosecution case, therefore the appellants are legitimately entitled to avail the benefit of doubt. Hence, the impugned judgment and order of conviction passed by learned Additional Sessions Judge, Court No.4, Maharajganj could not withstand the legal position and requires to be reversed by acquitting the appellants from charges levelled against them. Consequently, the appeal deserves to be allowed by setting aside the impugned judgment and order of conviction.

In view of the above:-

(I) The appeal stands **allowed.**

(II) The judgment and order of conviction dated 31.07.2014 passed by Additional Sessions Judge, Court No.4, Maharajganj stands quashed and is set aside consequently, the sentence awarded on 25.08.2014 is also set aside.

(III) The accused-appellants, Radhey Jaiswal, Munna Jaiswal and Sita Devi are acquitted of the offence punishable under Section 302 of IPC.

(IV) The appellants be released from jail forthwith, if not required in any other offence.

(V) The amount of fine, if deposited, be refunded to the appellants.

(2024) 3 ILRA 1572
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2024

BEFORE

THE HON'BLE SIDDHARTH , J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 472 of 2001
with
Criminal Appeal No. 118 of 2001

Akhilesh Kumar Mishra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sarvesh, Sri Ram Singh Kushwaha, Sri Ankit Shukla, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Respondent:
G.A.

(A) Criminal Law - Dowry Death - Indian Penal Code, 1860 - Sections 304-B, 498-A - Indian Evidence Act, 1872 - Section 106, 113-B - Presumption of dowry death - Cruelty and harassment for dowry - Negative viscera report - Benefit of doubt - Once cruelty or harassment related to dowry is established prior to the death of a woman within 7 years of marriage, the presumption of dowry death under Section 304-B IPC read with Section 113-B Evidence Act is attracted - Benefit of negative viscera report cannot be extended to the accused persons. (Para - 15, 16, 20, 22)

Deceased was married to appellant - accused demanded dowry from deceased's family - cruelty and harassment - died under suspicious circumstances within seven years of marriage - deceased and her husband residing separately from accused at the time of death - viscera report did not conclusively determine cause of death - Whether the accused can be convicted of dowry death under Section 304-B IPC, even if the exact cause of death is not ascertained.(Para 3-10 ,22)

HELD: - Deceased constituted a dowry death under Section 304-B IPC, thereby invoking the presumption under Section 113-B of the Evidence Act against the accused persons. (Para -15,16,22)

Criminal Appeal No. 472 of 2001: Conviction of appellant upheld with a reduction in sentence from life imprisonment to 10 years rigorous imprisonment, taking into account mitigating factors.

Criminal Appeal No. 118 of 2001: Co-accused's were acquitted due to insufficient evidence of harassment or dowry demands after the couple's separation. Apellant extended benefit of doubt and acquitted of all charges. (Para - 23,26)

Criminal Appeal No. 472 of 2001 partly allowed.

Criminal Appeal No. 118 of 2001 allowed. (E-7)

LIST OF CASES CITED: -

1. Sandeep Kumar Vs St. of Uttrakhand, AIR 2021 SC 491

2. Buddhadeb Saha & Ors. Vs St. of Bengal, 2023 SCC Online SC 1457

3. Devendra Singh & Ors. Vs St. of Uttrakhand, 2022(2) Crimes 277 (SC.

4. Bhupendra Vs St. of M.P., (2013) 4 Crimes 480 (Supreme Court)

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Ram Singh Kushwaha and Sri Ankit Shukla, learned counsels for the appellant and learned A.G.A for the State.

2. Above criminal appeals have been preferred against the judgment and order dated 12.01.2001 passed by VIIth Additional Sessions Judge, Kanpur Nagar, in Session Trial No. 960 of 1995 by which the appellant, Akhilesh Kumar Mishra, has been convicted and sentenced for life under Section 304-B IPC, while appellants, Smt. Meera Jha and Jagdanand Jha, have been convicted and sentenced to 8 years rigorous imprisonment. All the appellants have been convicted and sentenced under Section 498-A IPC for 2 years rigorous imprisonment and under Section 4 of D.P. Act to undergo rigorous imprisonment for one year. The appellants are acquitted of alternative charge under Section 302 IPC.

3. Prosecution case is that informant, Shyam Shanker Mishra, married his

daughter, Sudha, three years ago to the accused, Akhilesh Kumar Mishra. Rs. 51,000/- was given in cash and other goods were given in dowry but accused, Akhilesh Kumar Mishra, was demanding a motorcycle and a plot and was threatening to kill his daughter. Akhilesh Kumar Mishra and his Fufa, Jagdanand Jha, also used to come and threaten him. On 19.07.1994 at 6:00 p.m informant came to know that the accused, Akhilesh Kumar Mishra, his Fufa, Jagdanand Jha and Bua, Meera Jha, have murdered his daughter, Sudha and have ran away leaving her dead body behind. FIR dated 19.07.1994 was lodged on 20:55 registered at Police Station- Kakadev.

4. After committal, charges were framed under Sections 498-A/304-B IPC and alternative charges under Section 302 IPC and Section 4 of Dowry Prohibition Act were framed against accused persons.

5. Before the trial court, informant was examined as P.W.-1. His wife, Smt. Gambhira Devi, was examined as P.W.-2. Abdul Haq, was examined as P.W-3. Dr. D.K. Vaish, who conducted the post-mortem of dead body of the deceased was examined as P.W.-4. Milap Singh, Deputy Superintendent of Police, was examined as P.W.-5.

6. P.W.-1 stated in his statement before the trial court that he is resident of Bihar and is residing at Kanpur for last 14 years. He had one daughter, Sudha, the deceased, another daughter, Vinita and two sons, Ashutosh and Nyaytosh, and is wife is P.W.-2. Accused, Akhilesh Kumar Mishra, was residing with his Fufa, Jagdanand Jha and Bua, Meera Jha. They also belong to Bihar. He saw accused, Akhilesh Kumar Mishra, in the house of Jagdanand Jha and in the presence of accused, Jagdanand Jha and Smt. Meera Jha, demand of Rs. 51,000/- as dowry was made and they agreed to the marriage of accused, Akhilesh Kumar Mishra, with his daughter, Sudha. He paid Rs. 8,000/- for making jewellery to the accused, Akhilesh Kumar Mishra and Rs. 25,000/- for expenses of marriage. After marriage the accused persons started demanding a motorcycle and also a plot of land. They started abusing the daughter of P.W.-1 and took away her clothes and jewellery. He went to meet his daughter but he was not allowed to meet her. Therefore, he lodged a complaint at Police Station-Kakadev, District- Kanpur Nagar. Accused, Jagdanand Jha, is working in UPSIDC and was quite influenced. Police got a compromise entered between the parties recorded at Police Station. Both the parties put their signatures thereon. Whenever, accused, Akhilesh Kumar Mishra, came to his house he demanded money. One and a half months prior to death of Sudha, Akhilesh Kumar Mishra, started living separately from her Bua and Fufa with the deceased. 10-12 days thereafter one bengali lady informed him that Sudha is ill. He went their to see her. Akhilesh Kumar Mishra again started talking about motorcycle and after reprimanding him he took Sudha to Dr. Devendra Kaur who informed that Sudha is pregnant and not ill. She is not getting sufficient food to eat. After 7-8 days one vegetable vendor informed that Sudha is ill. The informant, P.W.-1m reached the house of accused, Akhilesh Kumar Mishra and found his daughter lying dead. Her entire body had turned blue. He lodged the FIR before the police station in Bihari language and its translation has been filed before this court. He cremated his daughter but none of the accused joined the last rites of the deceased. Accused persons threatened him

of withdrawing the case. P.W.-1 lodged a case against younger brother of Akhilesh Kumar Mishra, Kailash. Thereafter he lodged a complaint against accused, Jagdanand Jha, since he got his younger son, Nyaytosh abducted. Both the reports have been filed before the Court in evidence.

7. P.W.-2, Smt. Gambhira Devi, mother of deceased, proved that amount of Rs. 51,000/- was demanded by the accused person as dowry. They came to see her daughter and she welcomed them and gave them clothes, Rs. 1100/- was given in engagement and Rs. 51/- was given to accused, Jagdanand Jha. After 20 days, father of accused, Akhilesh Kumar Mishra, came and gave saaree and blouse to Sudha and Rs. 101/- in cash. Accused, Jagdanad Jha, demanded Rs. 8000/- for jewellery which she gave him in the presence of his wife. Again Jagdanand and Akhilesh Kumar demanded money. After sometime she gave them Rs. 5,000/-. After the marriage, accused persons, Jagdanand Jha and Akhilesh Kumar Mishra, came to her house and demanded motorcycle and a plot of land as precondition for taking Sudha to their house. When she refused to give motorcycle and plot, they abused her and Akhilesh Kumar Mishra also beated her. Accused persons used to beat her daughter and did not gave her food. When her daughter was 10 months pregnant, accused, Akhilesh Kumar Mishra, dropped her in her house where she gave birth to a female child. Akhilesh Kumar Mishra, refused to keep the female child and asked Sudha to kill her. After one month and 22 days he came and took her daughter and grand-daughter back. After killing her grand-daughter, he threw her on her door while her daughter was weeping outside. The doctor saw her grand-daughter and opined that she has been administered poison, hence she has died. Thereafter she used to go to meet her daughter and the deceased. She was ill and taken to Guru Nanak Hospital. The doctor informed that she is pregnant and not getting sufficient food. Accused, Akhilesh Kumar Mishra, used to fight with her daughter. After coming to know of her death when she went to her matrimonial home and asked the accused person how she has died, they pleaded ignorance.

8. P.W.-3, Abdul Haq, was although declared hostile but he proved the fact that there was dispute between the parties regarding demand of dowry.

9. P.W.-4, Dr. K.K. Vaish, who performed post-mortem of the body of deceased, was examined before the trial court. He stated before the court that cause of death of deceased was not ascertained and therefore her viscera was preserved. He admitted that in the medical examination of viscera poison was not detected. He proved the post-mortem report before the court. The aforesaid witness was recalled but he only stated that he could not ascertain the cause of death of the deceased and therefore viscera was preserved.

10. P.W.-5, Investigating Officer, proved the investigation record and the statements of witnesses recorded by him. Statement of P.W.-6, Sub-Inspector was also recorded. Statements of accused persons were recorded under Section 313 Cr.P.C., wherein they denied allegations made against them.

11. Counsel for the appellant has submitted that the demand of dowry by the accused is not established by the prosecution in proximity to the time of

death of deceased. There is inconsistency in the statement of P.W.-1 and P.W.-2 with regard to the amount of dowry demanded. The letter of deceased has not been corroborated by report of handwriting expert. Statement of P.W.-1 regarding alleged compromise entered between the parties at police station is contradictory. Before the death of deceased accused, Akhilesh Kumar Mishra and co-accused, Jagdanand Jha, and wife were living separately as accepted by P.W.-1. P.W.-3 has not supported the case set up by P.W-1 and P.W-2 and was declared hostile. Post-mortem report and viscera report do not suggests any poisoning of deceased. Death of deceased was not homicidal and she did not died unnatural death.

12. Counsel for the appellant has relied upon the judgment of the Apex Court in the case of ***Sandeep Kumar vs. State of Uttrakhand, AIR 2021 SC 491***, in support of his contention.

13. Learned A.G.A has vehemently opposed the submission and has submitted that from the evidence of P.W-1 it is clear that within two months of the marriage of appellant demand of motorcycle and one plot was made by the accused persons from P.W.-1. When P.W.-1 was not permitted to meet his daughter, he had lodged a report at police station – Kakadev, District- Kanpur Nagar, against the accused persons but he was compelled to make compromise with the accused persons at police station. He has further submitted that P.W.-2 has also proved the allegation of demand of dowry against the accused persons. He has submitted that the conduct of accused persons is relevant since they never informed the father and mother of deceased after she died. P.W.-1 came to know from vegetable vendor about the death of daughter and went there. As per Section 106 of Indian Evidence Act the burden of proof was on the accused person to explain how the deceased died while living in their house.

14. Learned A.G.A has relied upon the judgment of the Apex Court in the case of ***Buddhadeb Saha and Others vs. State of Bengal, 2023 SCC Online SC 1457*** and ***Devendra Singh and Others vs. State of Uttrakhand, 2022(2) Crimes 277 (SC).***

15. After hearing the rival contentions, this court finds that as per Section 304-B IPC where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand of dowry, such death shall be called dowry death and such husband or relative shall be deemed to have caused her death. As per Section 113-B of Evidence Act, there is presumption against the accused of causing dowry death where it is shown that soon before her death such woman was subjected by such person to cruelty or harassment for, or in connection with, any demand of dowry. Section 304-B IPC read with Section 113-B of Evidence Act makes it clear that once prosecution has succeed in demonstrating that a woman has been subjected to cruelty or harassment for, or in connection with, any demand of dowry soon before her death, a presumption shall be drawn against the accused person however the accused can demonstrate before the trial court that the ingredients for constituting offence under Section 304-B IPC are not made out.

16. In the present case, it is clearly discernible that the deceased was being subjected to harassment for fulfilling the demand of one motorcycle and a plot of land soon after her marriage with the accused-appellant, Akhilesh Kumar Mishra. Initially, the accused persons refused to take her along to their house after marriage unless their demand of dowry is met as proved by P.W.-2 before the trial court. However, they took the deceased to her house and subjected her to cruelty. She gave birth to a female child who was allegedly done to death by the accused, Akhilesh Kumar Mishra or the child died for some other reason. The deceased prior to her death was taken to the doctor by P.W.-2, where the doctor opined that she was not ill but not getting sufficient food. The deceased has clearly died within 7 years of her marriage with the accused, Akhilesh Kumar Mishra and she was living with accused, Akhilesh Kumar Mishra only at the time of her death, separately from co-accused, Jagdanand Jha and Smt. Meera Jha. The cause of death was not ascertained but it will not make any difference since as per Section 304-B IPC where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage and it is proved that she was subjected to cruelty or harassment soon before her death, her death shall be called dowry death and her husband or relative of her husband shall be deemed to have caused her death. In the present case the death may have been caused by poisoning or any other reason but keeping in view the fact that the deceased was subjected to cruelty and harassment soon after her marriage and prior to her death, the presumption of causing dowry death is against the accused persons. The accused have not been able to rebutt the presumption under Section 113-B of Indian Evidence Act against them.

17. The argument of learned A.G.A that as per Section 106 of Indian Evidence Act, the burden of proving that death of deceased was caused by accused person with whom she last resided, would be attracted only against the accused-appellant, Akhilesh Kumar Mishra, with whom the deceased was living separately at the time of her death. The prosecution witnesses have admitted that the couple had separated from the co-accused, Jagdanand Jha and Smt. Meera Devi, one and one and a half months prior to her death. Therefore, at the time of her death the deceased was clearly residing with the accused-appellant, Akhilesh Kumar Mishra.

18. The argument of counsel for the appellant is that no sign of poisoning was found in the viscera of the deceased also deserves consideration. He has submitted that in the case of ***Buddhadeb Saha and Others (Supra)***, the Apex Court has held in paragraph 24 that in the case of poisoning white froth may come out from the mouth and nose of the deceased. In case of opium or its alkaloid the internal organs like stomach or lungs may be congested. On opening of stomach detectable smell may be found in cases of poison like organo phosphorus compound, opium, formaldehyde, etc. However, this court finds that in the same judgment of Apex Court in paragraph 25 it has been held that even if in the viscera report there is no poison found such death shall be covered under the phrase “otherwise that under normal circumstances” which means death not being in the usual course but apparently under suspicious circumstances. In the case of ***Bhupendra v. State of Madhya Pradesh reported in (2013) 4 Crimes 480 (Supreme***

Court) it was held that chemical examination of viscera is not mandatory in every case of dowry death. For the purpose of Section 304-B IPC mere fact of an unnatural death is sufficient to invite a presumption under Section 113-B of the Evidence Act.

19. The Apex Court has considered the effect to negative viscera report in the case of dowry death in the aforesaid judgment in paragraph nos. 28 to 35 :-

" 28. In a research article titled, "Negative viscera report and its medico-legal aspects", it has been mentioned that in many cases, the viscera report is negative on three major basis, namely it can be procedure based, sample based or lab based. The said research paper reveals that there are circumstances in which viscera test may not reveal the presence of compounds from the following circumstances:—

1. Sample quantities received by FSL much less than those prescribed for optimal analysis;

2. Required quantity and quality of preservative not used during sampling;

4. Difficulty in detection of poison due to vomiting, purging or elimination from the system by the kidneys or due to prolonged stay in the hospital immediately prior to the death;

5. Not sending stomach wash (gastric lavage) and vomit along with viscera for examination;

6. Some organic poison decompose due to improper preservation or temperature control;

7. Site of sample collection on the body also play an important role;

8. In postmortem decomposition, many poisons present in the tissue undergo chemical changes which cannot be detected in routine toxicological analysis;

29. This Court in Mahabir Mandal v. State of Bihar, (1972) 1 SCC 748, looked into the observations found at page 477 of the Modi's Medical Jurisprudence and Toxicology (Seventeenth edition) and held that under some circumstances, if the whole of the poison has disappeared from the lungs by evaporation, or has been removed from the stomach and intestines by vomiting and purging, and after absorption has been detoxified, conjugated and eliminated from the system by the kidneys and other channels, it is possible that there may not be traces of poison.

30. Thus, the absence of detection of poison in the viscera report alone need not be treated as a conclusive proof of the fact that the victim has not died of poison.

31. In Mahabir Mandal (supra), this Court has ob- served as under:-

"Empty reference has been made by Mr.Chari to report dated December 23, 1963 of the Chemical Examiner, according to whom no poison could be detected in the viscera of Indira deceased. This circumstance would not, in our opinion, militate against the conclusion that the death of the deceased was due to poisoning. There are several poisons particularly of the synthetic hyp- notics and vegetable alkaloids groups, which do not leave any characteristic signs as can be noticed on post mortem examina- tion."

(Emphasis supplied)

32. The above observation of this Court was based on the reference made in the Modi's Medical Jurisprudence and Toxicology. Those references were also referred to by this Court, which are as follows:-

"It is quite possible that a person may die from the effects of a poison, and

yet none may be found in the body after death, if the whole of the poison has disappeared from the lungs by evaporation, or has been removed from the stomach and intestines by vomiting and purging, and after absorption has been detoxified, conjugated and elimi- nated from the system by the kidneys and other channels. Certain vegetable poisons may not be detected in the viscera, as they have no reliable tests, while some organic poisons, especially the alkaloids and glu- cosides, may be oxidation during life or by putrefaction after death, be split up into other substances which have no characteris- tic reactions sufficient for their identi- fication." (Emphasis supplied)

33. As pointed out by this Court in a number of cases, where the deceased dies as a result of poi- soning, it is difficult to successfully isolate the poison and recognise it. Lack of positive evi- dence in this respect would not result in throwing out the entire prosecution case, if the other cir- cumstances clearly point out the guilt of the ac- cused.

34. According to Modi's Medical Jurisprudence and Toxicology, 23rd Edition, Editors : K. Mathoharan and Amrit K Patnaik, the preserved materials should be sent to the concerned Forensic Science Laboratory, through the concerned police station as quickly as possible. Otherwise, the poison may not be detected during the analysis of the vis- cera, even though they may contain some poison.

35. Ken Kulig MD, in Critical Care Secrets (Fourth Edition), 2007 states that the gastric lavage must be performed soon after ingestion to be at all effective in removing the drugs from the stomach. For this reason, many clinicians do not lavage patients who have overdosed if more than 1 hour has elapsed since ingestion. "

20. Therefore, it is crystal clear that benefit of negative viscera report cannot be extended to the accused persons.

21. The facts of the case of ***Sandeep Kumar (Supra)*** relied upon by learned counsel for the appellant are different. In this case, no poison was found in the viscera but the doctor opined that the deceased was patient of Tuberculosis and the congestion in internal organs could be due to Tuberculosis. The deceased was also having below normal weight and therefore the court did not found to be established case of unnatural death.

22. However, this court finds that in the statements of P.W.-1 and P.W.-2 allegations of demand of dowry have been generally made against accused, Jagdanand Jha and specifically against accused, Akhilesh Kumar Mishra. At the time of death the deceased and her husband were residing separately from the accused, Jagdanand Jha and Smt. Meera Jha. There is no allegation that even after moving to separate accommodation the co-accused, Jagdanand Jha and Smt. Meera Jha, went to the house of deceased and co-accused, Akhilesh Kumar Mishra and harassed her on demanded any dowry from her. P.W.-1 and P.W.-2 have also not stated that after the couple separated the accused, Jagdanand Jha and Smt. Meera Jha, ever visited their place. It appears that their relations had deteriorated and it cannot be expected that the accused, Jagdanand Jha and Smt. Meera Jha, had any motive for demanding dowry and harassing the deceased since they may not have been beneficiary of any dowry once the couple had separated from them. Co-accused, Jagdanand Jha, was aged about 46 years in the year 2000 and now must be about 70 years of age. His wife was aged about 35

years at that time and is now aged about 59 years. They are not the father and mother of accused, Akhilesh Kumar Mishra and are his Fufa and Bua. Even if the land demanded as dowry and motorcycle was given in dowry by P.W.-1, only accused, Akhilesh Kumar Mishra, would have been beneficiary of the same and not the other co-accused.

23. In view of the above consideration, the conviction of appellant, Akhilesh Kumar Mishra, who has preferred Criminal Appeal No. 472 of 2001 is confirmed.

24. However, we are of considered opinion that the trial court has awarded maximum sentence prescribed for offence under Section 304-B IPC to appellant, Akhilesh Kumar Mishra, without taking mitigating circumstances in the case into consideration like cause of death of the victim neither could be ascertained in post-mortem report nor in viscera examination report. No mark of violence was found on person of the deceased. Thus, the sentence is reduced from imprisonment to life to rigorous imprisonment of 10 years. The sentence awarded to the appellant, Akhilesh Kumar Mishra, stands modified accordingly.

25. He is on bail. His bail bond is cancelled and sureties are discharged. He is directed to surrender and complete the remaining sentence. However, the accused, Jagdanand Jha and Smt. Meera Jha, are extended benefit of doubt and acquitted of all charges. They are on bail and need not surrender. Their bail bonds are cancelled and sureties are discharged. The period of custody already undergone by the appellant will be set off against this modified sentence for 10 years rigorous imprisonment.

26. Criminal Appeal No. 472 of 2001 is ***partly allowed*** and Criminal Appeal No. 118 of 2001 is ***allowed***.

(2024) 3 ILRA 1580
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Criminal Appeal No. 523 of 1986

Khemi ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri G.S. Hajela, Sri Gavendra Kumar Mishra, Neelam Pandey, Sri Devendra Kumar Mishra

Counsel for the Respondent:
D.G.A.

(A) Criminal Law - Appeal against conviction and sentence for murder - Indian Penal Code, 1860 - Section 302, 148, 149 - Murder - Fire arm injury - Eyewitness testimony - Motive - Motive not essential in cases of direct evidence - In a case where there is an eye witness account, motive takes a back seat and is not of any consequence where the deposition of the eye witnesses is found trustworthy - Minor discrepancies in witness statements do not necessarily undermine the prosecution's case.(Para - 12,14,21)

Appellant convicted of murder - Incident occurred on 1/2.4.1984 at 12:30 AM - Appellant allegedly fired gun at deceased, causing fatal injury - motive was there - deceased was killed because he had deposed against the accused in

an earlier murder case - Prosecution relied on eyewitness testimony of PW1 Teeka Ram and PW2. - Prosecution successfully proved case against appellant through eyewitness testimony - Eyewitness testimony of PW1 and PW2 found credible. (Para 3-4,14 ,22)

HELD: - Prosecution successfully proved case against appellant through eyewitness testimony. No illegality in findings recorded by trial court. No illegality or infirmity in the impugned judgment of trial court. Conviction and sentence upheld. Appellant directed to surrender and serve sentence. (Para - 25,26,27)

Appeal dismissed. (E-7)

LIST OF CASES CITED: -

1. Shardul Singh Vs St. of Har., (2002) 8 SCC 372

2. Ravindra Kumar Vs St. of Punj., (2001) 7 SCC 690

3. St. of U.P. Vs Baburam, (2000) 4 SCC 515

4. Thaman Kumar Vs St. of U.T. of Chand., (2003) 6 SCC 380

5. Shivaji Genu Mohite Vs The St. of Mahra., (1973) 3 SCC 219

6. Rajagopal Vs Muthupandi @ Thavakkalai & ors., (2017) 11 SCC 120

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Devendra Kumar Mishra, learned counsel for the appellant and Sri Amit Sinha, learned AGA for the State.

2. The instant criminal appeal has been filed by the appellant- Khemi being aggrieved by the judgment and order dated 15.02.1986 passed by the Vth Additional Sessions Judge, Mathura in S.T. No. 302 of 1985 (State vs. Phooli and others) under Section 302/149 IPC, P.S. Nauhjhil, District Mathura, whereby the appellant has been convicted for the offence under Section 302 IPC and has been awarded sentence of life imprisonment.

3. The prosecution story, in brief, is that the P.W. 1, Teeka Ram lodged a report at 02:45 A.M. on 02.04.1984 alleging that in the night intervening 1/2.4.1984, his brother deceased Ram Swarup was sleeping on a cot in front of his house. The informant Teeka Ram was also sleeping in front of his house, which was adjoining to the house of the deceased Ram Swarup at a distance of 5 to 6 hands from the deceased. The daughters Veeri and Champa and Kasturi wife of deceased were sleeping inside the house and at nearby place, Kishori son of Doji and Prahlad son of Teeka and Handal son of Doji were also sleeping. As usual the lantern, which was lit was kept on the wall of the house of the deceased Ram Swarup. At around 12:30 in the night, five persons came there and due to the noise of their coming, the informant woke up and saw that the aforesaid five persons were standing around the cot of his deceased brother. He got up, shouted and ran towards the house. In the meantime the accused/appellant Khemi had fired from the gun, which hit on the neck of his brother. Hearing the noise, Kishori son of Doji, Prahlad son of Teeka, Veera and Champa daughters of informant and the wife of the deceased and Handal son of Doji along with other persons of the village reached there. The informant has identified that the accused-appellant was having the gun in his hand, the other accused Dharmpal and Phooli sons of Mohan were having country made pistols in their hands and the accused Rajendra s/o Sukhi and Raghuveer s/o Nripati were having ballams in their hands and after killing the deceased, all the accused persons ran away. The informant

had overheard the accused saying that since stating that the deceased had deposed against them, therefore, revenge had been taken.

4. After receipt of information, the police personnel reached on the spot and conducted the inquest at 6:30 A.M. and the dead body of the deceased was sent for postmortem. The postmortem was conducted by Dr. M.K.Srivastava, who found the following ante-mortem injuries on the body of the deceased :

(i) Fire arm wound of entry 2 c.m. x 1-5 cm x muscle deep oon the Lt. Side neck just below the angle of mandible 6 c.m. below the Lt. ear scorching present on the Lt. cheek, Lt. ear and Lt. side neck;

(ii) Fire arm wound of exit 3 c.m. x 2 c.m. x bone deep on the Rt. side angle of the mandible 2.5 c.m. below the Rt. ear; communicated of the mandible. Injury communicated with injury no.1.

5. As per opinion of the doctor, the death of the deceased was caused due to shock and haemorrhage on account of ante-mortem injuries sustained by the deceased.

6. P.W. 3 S.I. Banwari Lal investigated the case till 05.04.1984 and thereafter, the investigation was conducted by S.I. K.P.Singh and S.I. V.K. Sirohi. During investigation, S.I. Banwari Lal collected the blood stained and plain soil from the place of occurrence and also the blood stained cot and the seizure memos were prepared. He also seized the lantern, which was alleged to be lit at the time of occurrence at the house of Ram Swarup. After submission of the charge sheet, the case was committed to the Court of Sessions Judge and thereupon the learned trial court framed charges against all the accused persons namely Khemi, Phooli, Doji, Prahlad and Rajendra under Sections 148 and 302/149 IPC. On framing of the charges against the accused persons, they pleaded “not guilty” and claimed trial.

7. During the trial, six witnesses were examined on behalf of the prosecution to prove the prosecution story. Thereupon the statements of the accused persons were recorded under Section 313 Cr.P.C. Thereafter the D.W.1 Hemant, D.W. 2 Dulichand were examined on behalf of the accused persons. After conclusion of the trial, the learned Additional Sessions Judge, Mathura vide judgment and order dated 15.02.1986 convicted the accused appellant herein for the offence under Section 302 IPC and all other accused persons namely, Phooli, Dharmraj, Rajendra and Doji were acquitted from the charges under Sections 302/149 IPC. All the accused persons were also acquitted under Section 148 IPC. After conviction of the appellant herein, he was awarded the sentence of life imprisonment under Section 302 IPC.

8. Aggrieved by the aforesaid judgment and order dated 15.02.1986, the instant appeal has been filed by the appellant.

9. Learned counsel for the appellant submits that in the instant case, the lantern has been recovered and seized by the Investigating Officer vide seizure memo dated 02.04.1984. As per the seizure memo, the lantern was containing oil at the time of seizure. Learned counsel for the appellant further submits that as per the P.W.1 Teeka, the lantern was lit in the evening at 7:00 P.M. and the same lit for entire night. Therefore, it was not possible that the said lantern could be found filled with oil. He further submits that the evidence with

regard to the seizure of lantern and placement of the same at the place of incident is a fabricated evidence to cover up the prosecution story and to show that there was a source of light at the time of incident. Learned counsel for the appellant further submits that there are various discrepancies with regard to the location of the lantern.

10. P.W.1 in his chief-examination has stated that at the time of incident, the lantern was lit on the door of the deceased. In his cross – examination, he has stated that the lantern was kept on a niche, which was two and a half feet from the ground. The P.W. 2 also stated that the lantern was lit on the door of the deceased. The Investigating Officer has stated in his deposition that the lantern was kept at the wall, which was three and a half hands in height. From the perusal of the seizure memo of lantern, it appears that the lantern contained oil at the time of its seizure, however it is not stated as to whether it was fully filled with oil. Therefore, the submission made by learned counsel for the appellant that since it was filled with oil, that will show that it was implanted purposefully is not sustainable as the quantity of oil has neither been mentioned in the seizure memo nor it has been reflected from the cross-examination of the concerned Investigating Officer.

11. So far as the location of the lantern is concerned, all the witnesses have categorically stated that the lantern was lit near the place of incident and was kept on some height. The narration in the statements of witnesses namely P.W.1 and P.W.2 that the lantern was lit on the door of Ram Swaroop does not mean that the lantern must be kept exactly in between the door but everybody has categorically stated that the said lantern was placed on the niche of the wall at a height of two and a half feet or three and a half feet. Therefore, so far as the presence of lantern is concerned, there was sufficient evidence available on record and the minor discrepancies with regard to the exact height of the wall where the lantern was kept, has no relevance and no prudent man could have measured the exact height of the lantern from the ground. It can only be stated in approximate terms. Therefore, such discrepancies are minor in nature which are not sufficient to demolish the case of the prosecution, with regard to the presence of lantern, near the place of incident.

12. Learned counsel for the appellant has also submitted that there are discrepancies with regard to the reaching of the Investigating Officer on the spot along with the informant. He has also stated that the Investigating Officer came a little later after the informant came back. From the record, it appears in the instant case that the incident had taken place at 12:30 A.M. in the night intervening 1/2. 4.1984. The report of the incident was lodged at 2:45 A.M. on 02.04.1984 i.e. within 2 hours and 15 minutes from the time of the incident. Also from the perusal of inquest report, it appears that the inquest had started at 6:30 A.M. on 02.04.1984. From the depositions of the P.W.1 and P.W.2, it is crystal clear that the Investigating Officer has reached the place of incident a little later after the incident was reported to the police station and, therefore, the discrepancy in the statement of the P.W. 1 and P.W. 2 with regard to reaching of the Investigating Officer on the spot immediately or a little later, is not of any importance whatsoever. It would definitely not damage the case of prosecution against the appellant herein.

13. Learned counsel for the appellant further submits that the motive for committing the murder of the deceased against the appellant has also not been proved beyond doubt. Since it is a case of eye witness account and P.W. 1 and 2 had categorically stated that they had seen the appellant assaulting the deceased, therefore, the motive takes a back seat. However, P.W.1 and P.W.2 have categorically stated that the applicant had committed murder of the deceased due to the fact that the deceased had deposed against the father of the appellant and they had also very categorically stated when they had left the place of incident that they had taken revenge as the deceased had deposed against the father of the appellant.

14. Therefore, we may reject the submission of the learned counsel for the appellant out right on the ground that there were eye witnesses of the said incident and they have specifically and very clearly narrated the incident in their testimony. Therefore when there are injured or unimpeachable eye witness accounts of an incident, motive becomes irrelevant. It is a well settled legal position that in a case where there is an eye witness account, motive takes a back seat and is not of any consequence where the deposition of the eye witnesses is found trustworthy.

15. In the case of ***Shardul Singh Vs. State of Haryana (2002) 8 SCC 372***, it has been held that :-

"motive', which is not always capable of precise proof, if proved, may lead additional support to strengthen the probability of the commission of the offence by the person accused but the absence of motive does not ipso facto warrant an acquittal."

16. Similarly, in the case of ***Ravindra Kumar Vs. State of Punjab, (2001) 7 SCC 690***, the Apex Court has held that-

"It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. It is therefore not possible to change the tide on account of the inability of the prosecution to prove the motive aspect to the hilt.

17. Similarly in the case of ***State of U.P. Vs. Baburam (2000) 4 SCC 515*** it has been held that-

"It is not possible to accept the view that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would be weaken the prosecution to any would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it is generally in a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in

evidence by them due to the ban imposed by law. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of offender to such a degree as to impel him to commit the murder cannot be construed as a fatal weakness of the prosecution."

18. Similarly, in the case ***Thaman Kumar Vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380***, it has been held that-

"There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. Hence in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused.

19. Similarly, in the case of Yunis alias Kariya Vs. State of M.P. (2003) 1 SCC 425, it has been held that-

"Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is settled law that establishment of motive is not a sine qua non for proving the prosecution case."

20. In ***(1973) 3 SCC 219 (Shivaji Genu Mohite Vs. The State of Mahrashtra)*** the Supreme Court in paragraph 12 has held as under:

"12. As stated earlier, the fact that the prosecution in a given case has been able to discover a sufficient motive or not cannot weigh against the testimony of any eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such case if a motive is properly proved such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of any eye-witness is rendered untrustworthy."

21. In ***(2017) 11 SCC 120 (Rajagopal Vs. Muthupandi alias Thavakkalai and Others)*** the Supreme Court n paragraph 14 has held as under:

"14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence."

22. In any view of the matter on the perusal of the evidence on record we find that in fact motive was there and the deceased was killed for the reason that he had deposed against the accused in an

earlier murder case. Nothing could be pointed out by the appellant whereby the reliability of P.W.1 and P.W.2 could be shaken.

23. Learned counsel for the appellant has further raised the question with regard to the aiming of the firearm to the deceased as the accused persons are stated to be surrounding at the left side of the cot. He further submitted that whether the gunshot was fired upon the deceased in the standing position or while the deceased was lying on the cot, has not been explained by the prosecution. Relying upon the statement of Dr. M.K. Srivastava who conducted the postmortem, learned counsel for the appellant submits that the doctor has not opined in any definite term that the said firearm injury could be caused only by a rifle and in the position in which the deceased was lying on the cot.

24. From a perusal of the deposition of Dr. M.K. Srivastava, it can be seen that it has been very categorically stated by the doctor that the injuries on the deceased were possible to have been caused by alone bullet and the Doctor has categorically stated that this injury could have been caused as per the direction of the barrel. The P.W.1 has also stated that the one leg of the deceased was on the cot and the other was on the ground. Therefore, it appears that the deceased had tried to rise from the bed after he had woken up and at that time the Firearm injury was caused from the left side of the deceased on his neck from a close distance and the injuries are corroborating the statements made by P.W.1 and P.W. 2. Therefore, the injury had been caused as per the manner described by the P.W.1 and it was a single firearm injury as has been stated by the doctor.

25. Thus from the evidence brought on record by the prosecution we find that the prosecution has succeeded in proving the case against the appellant and there is no reason to disbelieve the prosecution witnesses and therefore, we do not find any illegality in the findings recorded by the trial court, which has rightly convicted and sentenced the appellant, as aforesaid.

26. For the reasons aforesaid, we do not find any illegality or infirmity in the impugned judgment of the trial court. The conviction and sentence of the appellant awarded by the trial court is upheld. The criminal appeal lacks merit and is accordingly dismissed.

27. The appellant Kheemi is on bail. C.J.M. Mathura is directed to take him into custody in the aforesaid case and send him to jail to serve out the sentence as was awarded by the trial court and is being affirmed by us.

28. Office is directed to send a copy of this order to the court concerned within a week for compliance. The compliance report shall be sent by the court concerned to this court within a further period of fifteen days.

(2024) 3 ILRA 1586
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 665 of 2004

Lal Ram & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Brij Raj Singh, Sri Akhilesh Singh, Sri Amit Tripathi, Sri Pankaj Upadhyay, Sri S.P. Tiwari

Counsel for the Respondent:
G.A., Sri P.K. Singh

(A) Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 302 - Direct evidence and motive - Interested witness - evidence of interested witnesses should be scrutinized carefully but can be relied upon if found credible - significance of prompt FIR - Unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating effect on the case of the prosecution - Motive in a case of direct evidence does not adversely affect the prosecution case - If the evidence of the eye-witness is trustworthy, there is no need to establish any motive. (Para - 48 to 61)

Appellants and his sons were accused of murder - enmity over a property dispute - attacked with firearms and a sharp weapon (Gandasa) - resulting in death - Incident occurred in broad daylight - in presence of parents and neighbours of deceased - FIR was promptly lodged - post-mortem report confirmed nature of injuries - which were consistent with use of a firearm and a sharp-edged weapon. (Para - 2 to 24 ,38,39)

HELD: - Offence of murder committed by appellants. No infirmity, illegality or perversity in the impugned judgement. Court upheld conviction and sentence against the appellants.(Para - 62,63)

Appeal dismissed. (E-7)

LIST OF CASES CITED: -

1. Manish Kumar Etc. Vs St. of U.P, (2004) 49 ACC 755

2. Mahadeo Kundalik Vaidya & ors. Vs St. of Maha., (2001) Cri L. J. 4306

3. Meharaj Singh (L/Nk.) Vs St. of U.P., (1994) 5 SCC 188

4. St. of U.P. Vs Bhagwan & ors., AIR (1997) SC 3292

5. Manohar Vs St., (1982) 0 Supreme (All) 568

6. Leela Ram (Dead) Through Duli Chand Vs St. of Haryana & anr., (1999) 9 SCC 525

7. Dalip Singh & ors. Vs St. of Punj., AIR 1953 SC 364

8. Piara Singh Vs St. of Punj., (1977) 4 SCC 452

9. Hari Obula Reddy Vs St. of A.P., (1981) 3 SCC 675

10. S. Sudershan Reddy & ors. Vs St. of A.P, (2006) 10 SCC 163

11. Kamta Yadav Vs St. of Bihar, (2016) 16 SCC 164

12. Nand Kumar Vs St. of Chhatisgarh, (2015) 1 SCC 776

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Brij Raj Singh, learned counsel for the appellants, Shri Jitendra Kumar Jaiswal, learned AGA for the State and perused the record.

2. The instant criminal appeal has been filed against the judgment and order dated 16.01.2004 passed by Additional District Sessions Judge, Court No.3, Fatehgarh, Farrukhabad in Sessions Trial No. 626 of 2000 (State Vs. Lala Ram and Others), arising out of Case Crime No. 41 of 2000, under Sections 147, 148, 149, 302 IPC, Police Station Kayam Ganj, District Farrukhabad, by which the accused-appellants have been convicted for the offence under Section 147 IPC and awarded the sentence of two years' rigorous imprisonment, under Section 148 IPC and awarded the sentence of three years' rigorous imprisonment, under

Section 302 read with Section 149 IPC and awarded the sentence of life imprisonment with a fine of Rs. 5,000/- each with default stipulations.

3. Chief Judicial Magistrate, Farrukhabad vide his letter dated 22.03.2021 has informed this Court that appellant no.1 Lala Ram has passed away about seven months back, as such, the instant criminal appeal on behalf of appellant no.1 Lala Ram, is **dismissed** as having been abated.

4. Shorn of unnecessary details, prosecution story as unfurled in the FIR, is that one Satya Prakash was bearing enmity with his step uncle Lala Ram owing to dispute over a piece of land, in respect of which, civil case has been decided by the trial court in favour of Satya Prakash. Thus, on account of dispute over possession of the said piece of land, there were inimical terms between Lala Ram and his sons, on one hand and Satya Prakash on the other.

5. It is further stated that on 03.03.2000 at about 4:30 PM, while Satya Prakash was returning back to his house after purchasing some articles from the shop of Girish Chand Tailor, when he reached near the house of Durjan Lal, he was encircled on the way by Lala Ram and his sons, namely, Ram Naresh, Narottam, Mahima @ Mahipal and Karamveer. Lala Ram instigated them to kill Satya Prakash. Satya Prakash raised alarm to rescue him. Hearing his alarm, first informant Ram Chand alongwith his wife Bhagyawati, Shyam Singh, Mahaveer Singh and several other villagers rushed to save him, however, Mahima and Narottam, armed with country-made pistol, fired upon him and Ram Naresh and Karamveer, who were having Gandasa in their hands, assaulted Satya Prakash on his head, consequent to which, he fell down. Lala Ram and his sons, however, made their escape good towards their house.

6. It is further stated that while taking Satya Prakash for medical treatment and had reached near the plot of Vishram, Satya Prakash breathed his last. Leaving the dead body on the plot of Vishram, first informant visited the Police Station to lodge the report, on the basis of a written report scribed by one Rama Nand. On the basis of written report, marked as Exhibit Ka-1, a First Information Report has been registered vide Case Crime No. 41 of 2000, under Sections 147, 148, 149, 302 IPC, carbon copy whereof has been drawn vide G.D. Report No.32 at 5:40 PM, which has been proved and marked as Exhibit Ka-12.

7. The first information report was registered in presence of the Station House Officer, Kayam Ganj, who was entrusted the investigation of the instant case. He recorded the statement of Head Moharrir Netra Pal Singh (PW-6) and the first informant Ram Chand (PW-1) and thereafter, proceeded to the place of incident alongwith ASI Mahaveer Singh and other police personnels. On reaching there, the Investigating Officer found the dead body of the deceased lying in the plot of Vishram and thereafter, he instructed ASI Mahaveer Singh to conduct the inquest proceedings and the inquest memo was drawn. The other relevant documents, namely, Form-13, Photo Nash, Challan Nash, Letter to C.M.O., Letter to R.I. and sample seals were prepared and thereafter, the dead body of the deceased was sent to the Mortuary for post-mortem.

8. An autopsy was conducted on the person of the deceased Satya Prakash on

04.03.2000 at 2:30 PM at Ram Manohar Lohiya Hospital, Farrukhabad. The Doctor has noted three anti-mortem injuries on his person, which are as under :-

(i). Internal examination shows that left occipital and parietal have cut under injury no.3.

(ii). 3rd, 4th, 8th and 9th ribs were fractured. Right lungs were fractured at several places.

(iii) Two wad pieces, 4 Tikuli and 4 large pellets, 29 (twenty nine) small pellets recovered from left arm and right lungs and plural cavity.

9. The Investigating Officer thereafter reached the place, where Satya Prakash was done to death by firing shot and assaulted by Gandasa and on the pointing out of the first informant, prepared the site plan, which has been proved and marked as Exhibit Ka-8. The Investigating Officer has also collected the bloodstained earth and plain earth from the said place and kept in a separate container and prepared its recovery memo, which has been marked as Exhibit Ka-9. Thereafter, statement of other witnesses were recorded and effort was also made to apprehend the accused persons but to no avail.

10. Thereafter, on the transfer of Investigating Officer, investigation was handed over to Virendra Singh, who concluded the investigation and submitted the charge-sheet against the accused persons, which has been proved as Exhibit Ka-10. On the basis of the said charge-sheet, learned Magistrate has taken cognizance, however, since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial. The Sessions Court vide its order dated 03.08.2000 framed the charges against the accused-appellants under Sections 147, 148, 302/149 IPC. The accused-appellants abjured the said charges pleaded not guilty and claimed to be tried.

11. During the course of trial, the prosecution has examined as many as three witnesses of fact and four other formal witnesses. Their testimony, in brief, is enumerated hereunder :-

12. PW-1 Ram Chand, is the step father of the deceased and the first informant of the case, in his testimony, has stated that civil case was pending between Lala Ram and the deceased Satya Prakash before the trial court, which was decided in favour of deceased Satya Prakash, as such, Lala Ram along with his family members started bearing enmity with Satya Prakash. On 03.03.2000 at about 4:00 PM, while Satya Prakash was returning back to his house after purchasing some articles from tailoring shop of Girish Chand Tailor and when, he reached near the house of Durjan Lal, he was encircled by Lala Ram and his sons, namely, Ram Naresh, Narottam, Mahima and Karamveer. Satya Prakash in order to rescue him, raised alarm. Hearing the alarm, he alongwith his wife Bhagyawati, Shyam Singh, Mahaveer Singh reached at the place of the incident. On instigation of Lala Ram, his sons Narottam and Mahima fired at Satya Prakash from their respective country-made pistol and Ram Naresh and Karamveer assaulted him on his head by Gandasa, consequent to which, he fell down and thereafter, Lala Ram and his sons ran away towards their house. Satya Prakash, while being taken to the hospital for medical treatment, breathed his last in the plot of Vishram. Leaving the dead body there, he got written report scribed by one Rama Nand on his dictation and after putting his

signatures on it, the first information report has been lodged in the Police Station. The written report has been marked as Exhibit Ka-1.

13. During cross-examination, he stated that he is the only person in the village by the name of Ram Chand. Some criminal cases were registered against the deceased Satya Prakash, however, he can not state if cases under Sections 302, 304 or 307 IPC and under Section 25 of Arms Act were registered against him. He further stated that civil case was decided in favour of Satya Prakash and against the said decision, Lala Ram had filed an appeal, however, before the appeal could be decided, Satya Prakash was done to death. He further stated that incident had taken place near the house of Shyam Singh, which on its western side is connected to his house, while Satya Prakash was returning back to his house from the shop of Girish Tailor, he was encircled on the way and only on being encircled, Satya Prakash raised alarm. Hearing the alarm, he alongwith his wife, Shyam Singh and Mahaveer Singh rushed to rescue him. He further stated that on the instigation made by Lala Ram, the assailants killed Satya Prakash by firing shot and assaulting by Gandasa. He further stated that at the time of incident, he has reached the place of incident and Satya Prakash, while being taken to the hospital, had reached near the plot of Vishram, Satya Prakash breathed his last. He further stated that assailants had assaulted Satya Prakash, where they have encircled him, however, Satya Prakash breathed his last at the plot of Vishram, while being taken to the hospital and his dead body was lying there.

14. PW-1 further stated that the plot of Vishram, where the deceased breathed his last, is at a distance of 100 feet from his house towards East. The distance between his house and the assailants is 200 yards towards the West. At the time, when Satya Prakash had gone at the shop of Girish Tailor, he alongwith his wife were present in their house. It is wrong to state that he had not witnessed any incident and falsely deposing in the court. It is further wrong to state that in the village, gambling was going-on and there, the deceased was killed. It is further wrong to state that Shyam Singh and Mahaveer Singh has falsely been nominated as witnesses. The police reached the place of the incident at 5:30 PM and conducted the inquest and completed the other necessary formalities. He further denied the suggestion that he had not witnessed the incident and on account of inimical terms, he is falsely deposing.

15. PW-2 Bhagyawati is the wife of PW-1 and mother of the deceased Satya Prakash. She stated that civil case was going-on between the deceased Satya Prakash and Lala Ram, which was decided in favour of Satya Prakash and due to this reason, Lala Ram and his sons used to bear animosity with Satya Prakash. On the day of the incident, while the deceased Satya Prakash was returning back from the shop of Girish Tailor after purchasing some articles and reached near the house of Durjan Lal, he was encircled by Lala Ram and his sons, namely, Ram Naresh, Narottam, Mahima and Karamveer and on exhortation by Lala Ram to kill, Satya Prakash raised alarm to rescue him. On hearing his alarm, she alongwith her husband Ram Chand and villagers Shyam Singh and Mahaveer Singh reached the place of the incident. Lala Ram instigated his sons to kill Satya Prakash, consequent to which, Mahima and Narottam opened

fire, which hit the deceased Satya Prakash and Ram Naresh and Karamveer assaulted him on his head by Gandasa, due to which, he fell down. Lala Ram alongwith his sons made their escape good to their house. While Satya Prakash was being taken to the hospital and reached at the plot of Vishram, he breathed his last. Leaving the dead body there, her husband rushed to the Police Station to lodge the first information report.

16. During cross-examination, she has stated that the place, where the assailants had encircled and killed the deceased Satya Prakash, was a pakka way and lot of blood had spread there. She further categorically stated that before the fire was made, she had reached the place of incident, she alongwith her husband Ram Chand, Shyam Singh and Mahaveer Singh took him at the plot of Vishram, where Satya Prakash succumbed to his injuries. The police had reached within an hour at the plot of Vishram, where dead body of the deceased Satya Prakash was kept. At the time of incident, Satya Prakash had gone to buy some articles from the shop of Girish Tailor. The house of Shyam Singh is situate near the place, where the deceased Satya Prakash was killed. Hearing the alarm, she alongwith her husband Ram Chand, her daughter-in-law, Shyam Singh and Mahaveer Singh reached the place of the incident. She further stated that she was standing at a distance of 3-4 paces, from where, Satya Prakash was killed and at the said place, her husband Ram Chand, Shyam Singh and Mahaveer Singh were also present and she had seen the incident from the distance of 3-4 paces. Ram Naresh and Karamveer had assaulted Satya Prakash by Gandasa on his head, due to which, he fell down, then other sons of Lala Ram shot him and thereafter, they escaped towards their house. The police had reached the place, where dead body of the deceased was kept and prepared inquest and sealed the dead body, which was handed over to the police for carrying it to the Mortuary. She further stated that at the time, when the alarm was raised by Satya Prakash, she alongwith her husband Ram Chand were present at their house, from where, they reached the place of incident. On the alarm, Shyam Singh and Mahaveer Singh also reached the place of incident. The place where, she alongwith her husband Ram Chand, Shyam Singh, Mahaveer Singh had witnessed the incident, has been specifically pointed out to the Investigating Officer, however, she could not state the reason as to why Investigating Officer has not shown the said place in the site plan.

17. PW-2 denied the suggestion that the factum of witnessing the murder has not been mentioned in the FIR. She further denied the suggestion that she alongwith her husband Ram Chand, daughter-in-law, Shyam Singh and Mahaveer Singh had not witnessed the incident and only after the incident was over, they had reached at the place of incident. She denied that number of criminal cases were reported against the deceased Satya Prakash. She further denied the suggestion that when she reached at the Police Station, then with due deliberations and consultations with the police, the assailants were nominated.

18. PW-3 Shyam Singh is the resident of place of the incident. He stated that on 03.03.2000 at 4:30 PM, on hearing an alarm to rescue from near the house of Durjan Lal, he alongwith Mahaveer, Ram Chand, Bhagyawati reached the place of incident, where Lala Ram and his sons had encircled Satya Prakash. The assailants Mahima and Narottam were armed with

country-made pistol, whereas Karamveer and Ram Naresh were armed with Gandasa. Seeing the witnesses, Lala Ram instigated his sons to kill Satya Prakash, then Mahaveer and Narottam fired shot with their country-made pistol, whereas Karamveer and Ram Naresh started assaulting him with Gandasa on his head, due to which, he fell down. The assailants then escaped towards their house. While taking Satya Prakash to the hospital, near the plot of Vishram, he breathed his last. He further stated that on account of animosity over civil dispute between Satya Prakash and Lala Ram, he was done to death. He further stated that house of the first informant Ram Chand is situate at a distance of 150-200 yards from his house. He further stated that at the time of the incident, bricks were kept at the plot of Bhajan Lal and on the North, where the bricks are kept, is an open field of Kishan Lal, where eucalyptus tree is planted. He further stated that the deceased Satya Prakash was returning back to his house from the shop of Girish Tailor and Satya Prakash lives in the house of Ram Chand. He further stated that the victim was killed in the plot of Bhajan Lal and not on the way. He further stated that when he heard the alarm to save, he was at his house and eucalyptus tree is planted at a distance of 150-200 paces from his house.

19. PW-3 denied the suggestion that at the time of incident, he alongwith Mahaveer was present at the house of Ram Chand and reached the place of incident. He further stated that when he reached the place of incident, Ram Chand, Pramod Kumar and Bhagyawati Devi and others were already present there. He further stated that from the place of incident, he was at a distance of 4-5 feet on the North side, where Bhagyawati and Ram Chand were at a distance of 60 feet. From the place of incident, Satya Prakash was brought in the plot of Vishram, where he breathed his last. Satya Prakash was being taken to the hospital by him, Ram Chand, Bhagyawati and others. He denied the suggestion that he had not witnessed the incident and gambling was being played in the village and Satya Prakash was also involved in the act of gambling, where he was done to death. He further denied the suggestion that any case under Section 307, 302 IPC or under Section 25 of Arms Act was registered against the deceased.

20. PW-4 is the Medical Officer at Ram Manohar Lohiya Hospital, Farrukhabad, who had conducted an autopsy on the person of the deceased and proved the autopsy report and contents thereof, which has been marked as Exhibit Ka-2. He, during cross-examination, stated that blackening and tattooing could be caused by fire being made within one meter and injury no.4 could be caused from a distance of one meter or 10 feet. He further stated that deceased could have died between 6:00 PM to 8:00 PM with the margin of six hours. He further stated that instantaneous death could be caused from ante-mortem injuries sustained by the deceased within few minutes.

21. PW-5 is the Station House Officer, in whose presence, the instant case was registered and who was entrusted with the investigation. He, after registrations of the first information report, recorded the statement of Head Moharrir Netrapal Singh and the first informant Ram Chand and thereafter, he left for place of incident alongwith other police personnel. He further stated that dead body of the deceased was kept in the plot of Vishram and on his instructions, ASI Mahaveer

Singh conducted the inquest and prepared the inquest memo alongwith other relevant documents, namely, Photo Nash, Challan Nash, Letter to R.I., Letter to C.M.O. and sealed samples were prepared after keeping the dead body in a cotton cloth, it was sent for autopsy. Inquest report and other relevant papers were proved as Exhibit Ka-3 to Exhibit Ka-7. The relevant site plan was prepared at the pointing out of the first informant Ram Chand, which has been proved as Exhibit Ka-8. The plain earth and bloodstained earth were also taken from the place of incident and were kept in a separte container, which has been proved as Exhibit Ka-9. Thereafter, on his transfer, the investigation was entrusted to Virendra Singh, who concluded the investigation and submitted the charge-sheet, which has been proved as Exhibit Ka-10.

22. During cross-examination, he stated that investigation of the instant case was entrusted to him and he has recorded the statement of the witnesses and the check report had reached the Office of Circle Officer on 06.03.2000. When, he reached the place of incident, the dead body was kept in the plot of Vishram and blood was noted there. He further stated that he had noticed the house of Durjan Lal and shown it in the site plan and on the east of the house of Durjan Lal, vacant plot of Bhajan Lal is situate. At Point "A", the deceased was done to death and the witnesses are said to have seen the incident from Point "B" and the distance between Point "A" and Point "B" is 60 paces. He further denied the suggestion that information about the incident was orally given in the Police Station and subsequently, after due deliberations and consultations, the FIR was registered. He further expressed his ignorance of the criminal cases, which are said to be pending against the deceased. He further denied the suggestion that earlier, a complaint was lodged against SHO, Kayam Ganj, District Farrukhabad in the court of Chief Judicial Magistrate, Farrukhabad, as such, the police has animosity against the assailants. He further denied to have found any tailoring articles like buttons and buckram at the place of incident.

23. PW-6 is the Head Moharrir Netrapal Singh, who was handed over the written report by the first informant, on the basis of which, he has drawn the check FIR and carbon copy thereof was prepared vide G.D. Report No.32 at 5:40 PM and the case was registered vide Case Crime No. 41 of 2000, under Sections 147, 148, 149, 302 IPC and contents thereof, has been proved and marked as Exhibit Ka-11. G.D. Report whereof has been proved as Exhibit Ka-12. The said witness has not been cross-examined at all and his cross-examination has been noted to be nil.

24. Thereafter, the statement of accused-appellants under Section 313 Cr.P.C. has been recorded by putting all the incriminating circumstance to the accused-appellants. The accused-appellants have stated that they have been falsely implicated, however, defence has not led any evidence. The trial court, on appreciating the evidence on record, has held that prosecution has successfully established its case against the accused-appellants by relying upon the testimony of all the three prosecution witnesses of fact, who were present at the place and the time of incident, being the natural witnesses like parents and neighbours of the deceased residing in the vicinity closed to the place of incident, where the deceased has been done to death.

25. The explanation tendered by learned counsel for the appellants is false and inadequate.

26. Learned counsel for the appellants has further submitted that at the time of the incident, the deceased was returning back to his house from the shop of Girish tailor master after purchasing some articles and has been killed near the house of Durjan Lal and thereafter, while being taken for medical treatment, he succumbed to his injuries at the plot of Vishram, where his dead body was kept, however, no trail of blood has been found between the two points, which makes the prosecution story doubtful.

27. Learned counsel for the appellants has next submitted that prosecution story regarding reaching of the witnesses at the place of incident after hearing the alarm of the deceased is too far-fetched and cannot be relied upon and therefore, presence of the witnesses at the time of the incident is wholly doubtful and no reliance can be placed on their testimony, which is liable to be discarded. The conviction of the appellants is, therefore, wholly illegal and is liable to be set aside.

28. Learned counsel for the appellants has further submitted that on reaching at the place of incident and witnessing the killing of their son, PW-1 and PW-2 have not raised any alarm, which also falsifies the presence of the witnesses at the place of incident. Furthermore, except the deceased, no other person has received any injury nor the assailants had made any attempt to assault the parents of the deceased and no injury has been found on their person, which further falsifies their presence at the time and place of incident.

29. Learned counsel for the appellants has further submitted that incident had taken place at 4:30 PM and within one hour and ten minutes, the FIR has been shown to be lodged, which practically is impossible. In fact, FIR has been lodged subsequently by making it ante-time.

30. Learned counsel for the appellants has further submitted that no independent witness has been examined, except P.W.-3 Shyam Singh, even Mahavir Singh, who is also said to be reached the place of incident, has not been examined, which further creates serious dent in the prosecution story.

31. Learned counsel for the appellants has next submitted that motive has not been cogently established by the prosecution, yet the trial court has recorded the finding of conviction against the appellants is wholly illegal and is liable to be set aside.

32. Learned counsel for the appellants has further submitted that there has been complete non-compliance of Section 157 Cr.P.C. and therefore, prosecution story becomes doubtful. He has further submitted that in the FIR, the distance has been mentioned as 10 Kms. South-East, whereas in the Inquest Report, distance has been mentioned as 11 Kms. towards South, which further makes prosecution story doubtful.

33. Learned counsel for the appellants has next submitted that prosecution has not been able to establish its case beyond all reasonable doubts, yet the trial court has recorded the finding of conviction against the appellants, which is wholly illegal and is liable to be set aside.

34. In order to buttress his arguments, learned counsel for the appellants has relied upon the decision reported in ***(1). (2004) 49 ACC 755 Manish Kumar Etc. Vs. State of U.P., (2). (2001) Cri L. J. 4306, Mahadeo Kundalik Vaidya and Others Vs. State of Maharashtra, (3). (1994) 5 SCC 188, Meharaj Singh (L/Nk.) Vs. State of U.P., (4). AIR (1997) SC 3292, State of U.P. Vs. Bhagwan and Others, (5). (1982) 0 Supreme (All) 568, Manohar Vs. State.***

35. Per contra, learned AGA has submitted that in the instant case, prompt FIR has been lodged by father of the deceased and it is broad day light murder in the presence of the witnesses, who are the parents of the deceased, being the natural witnesses. Even P.W.-3 is an eye-witness of the incident, who has also supported the prosecution story in all material particulars, except minor contradictions, which do not go to the root of the case and from their testimony, the prosecution case has been cogently and clearly established against the appellants.

36. Learned AGA has further submitted that the FIR in the instant case, by no stretch of imagination, can not be said to be ante-time and no suggestion in this regard has been given to the witnesses, as such, no doubt can be raised about lodging of the FIR at the time specified, the contrary argument made by learned counsel for the appellants is wholly not worth consideration and is liable to be discarded.

37. Learned AGA has further submitted that eye-witness of the incident has cogently and unerringly established the prosecution case against the appellants and the defence has not been able to elicit any doubt about the credibility of the said witnesses.

38. Having considered the rival submissions made by learned counsel for the parties and having gone through the material on record and the evidence adduced, it is evident that the incident is said to have taken place in the broad day light in presence of the parents and neighbours of the deceased, who are residing in the same vicinity. The FIR, admittedly, has been promptly lodged in the Police Station and the manner and place of the incident has been cogently and unerringly established by the prosecution.

39. The nature of the injury as pointed out by the Doctor in the post-mortem report, clearly indicates that injury could be caused by fire-arm and sharp edged weapon as stated by the witnesses and no doubt can be raised in respect of the injuries sustained by the deceased.

40. It is further germane to point out here that as per the prosecution case, the incident, in question, has taken place in front of house of Durjan Lal and thereafter, victim was lifted by his father alongwith other persons of the vicinity and was being taken to the hospital for providing him the medical treatment, however, on the way, victim succumbed to his injuries and as such, his dead body was kept in the plot of Vishram. It is submitted by learned counsel for the appellants that though the victim was having bleeding injuries but no trail of blood has been found in between the two places, where he has been assaulted and the place, where he died, which creates a serious doubt in the prosecution story, however, the trial court has not appreciated the evidence in right perspective and illegally recorded the finding of conviction against the appellants. It would be noted that the time of incident is day time, when large number of persons were moving on

the way, where the incident is said to have taken place and as such, merely on the ground that no trail of blood was found, the entire prosecution story, which otherwise inspires confidence, can not be thrown over board. In the facts of the case, the said argument of learned counsel for the appellants is liable to be repelled.

41. It has further been submitted by learned counsel for the appellants that the place, from where, the incident is alleged to have taken place and the house of parents of the deceased is 120-130 paces and as such, after hearing the alarm of the victim, there is no possibility for the said witnesses to reach the place of the incident.

42. This argument of learned counsel for the appellants also does not hold much water in view of the fact that at the time, when the victim was attacked, he, in order to rescue himself, raised alarm under fear of death, which were heard by the witnesses, who reached the place of incident and witnessed the entire incident, which has unerringly deposed by them in their testimony, which inspires confidence. The defence has not been able to elicit any doubt about the credibility and reliability of their evidence, which has been cogently and truthfully established.

43. It is further submitted by learned counsel for the appellants that parents of the deceased, while witnessing the incident of killing of their son, had not raised any alarm nor made any attempt to save him, as such, their presence is completely ruled out from the place of incident.

44. The said argument of learned counsel for the appellants, in our considered opinion, is unacceptable as held by the Hon'ble Apex Court in the case of ***Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another reported in (1999) 9 SCC 525***, Hon'ble Apex Court has held that different witnesses react differently under different situations: whereas some become speechless, some started wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact, it depends upon individuals and individuals. There can not be any set pattern or uniform rule of human reaction and to discard the piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

45. Moreover, the assailants, in the instant case, were armed with deadly weapon including fire-arm and Gandasa and therefore, witnesses did not dare to reach near the victim in order to rescue him.

46. It is further germane to point out here that on account of personal enmity with regard to dispute over a plot of land, in respect of which, civil proceedings were going-on between the parties, as such, he alone was the target of the assailants and after achieving the target of killing of the deceased, they immediately ran away. Therefore, non-receiving of the injury on the witnesses would not, in any way, effect the credibility of the prosecution case.

47. The said argument of learned counsel for the appellants is also liable to be repelled.

48. Furthermore, it is germane to point out here that the instant case is a case of direct evidence and therefore, as per the

settled proposition of law, motive in a case of direct evidence pales into insignificance, however, the instant case is an outcome of property dispute between the parties, which has resulted in causing the death of the deceased. Motive in a case of direct evidence does not adversely affect the prosecution case. Motive not being apparent or not being proved only requires deeper scrutiny by the court while coming to the conclusion. Where there are different evidence, proving an incident and eye-witness account proved the role of the accused, absence in proving of the motive does not affect the prosecution case.

49. Further, it is also feebly contended on behalf of the appellants that special report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously and as such, the prosecution story becomes doubtful.

50. In respect of the said submissions, it is relevant to point out here that Hon'ble Apex Court as well as this Court in several of its decisions, particularly, in Pala Singh Vs. State of Punjab (1972) 2 SCC 640 has clearly held that where the FIR was actually registered without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned, it can not by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

51. As far as commencement of the investigation, in the instant case, is concerned, our earlier discussions discloses that there was no infirmity in the case of prosecution on that score. Time and again, Hon'ble Apex Court has held that unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating effect on the case of the prosecution.

52. In the instant case, no prejudice whatsoever has been pointed out at all, therefore, the said submission on behalf of learned counsel for the appellants can not be sustained and the judgments cited by learned counsel for the appellants is clearly distinguishable on the facts.

53. Furthermore, it is argued that in the chik FIR, the distance between the place of incident to the Police Station has been mentioned 10 Kms, whereas in the inquest report, it has been noted to be 11 Kms. The said slight difference in this regard does not have any bearing on the reliability of the prosecution case. Moreover, no suggestion whatsoever has been given to the witnesses in respect of the said fact, as such, the said argument of learned counsel for the appellants, in our considered opinion, is liable to be repelled.

54. Now, considering the submission of learned counsel for the appellants that PW-1 and PW-2 are the parents of the deceased and therefore, they are the interested and partisan witnesses, hence, their evidence could not be relied upon.

55. The above noted submission was considered by Hon'ble Apex Court elaborately way back in ***Dalip Singh and Others Vs. State of Punjab AIR 1953 SC 364***. The Hon'ble Apex Court observed that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocent person. His/her evidence can only be discarded when it is established that the witness has a

cause, due to enmity to implicate him falsely. In *Dalip Singh (supra)* also, the testimonies of two women witnesses were impeached on the ground that they were close relatives of the deceased. Following principles were enunciated in *Dalip Singh (supra)*:-

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

56. In ***Piara Singh Vs. State of Punjab (1977) 4 SCC 452***, same principles were reiterated:-

"4. The central evidence against the appellant consisted of the three eye-witnesses, namely, P.W.-3 Harbhajan Singh, P.W.-5 Chanan Kaur and P.W.-6 Kesar Kaur. It is true that the three witnesses were relations of the deceased and bore animus against the accused but as the occurrence had taken place near the door of the house of the deceased these persons were the natural witnesses and were in fact sitting in the court-yard when the occurrence took place. It may be difficult to get witnesses from the village when an assault of the type suddenly takes place in the house of the deceased. It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence. The High Court was fully alive to these principles and has in fact found that the evidence of these three witnesses has a ring of truth. After having perused the evidence ourselves also we fully agree with the view taken by the High Court. In fact, the learned Sessions Judge has not made any attempt to dwell into the intrinsic merits of the evidence of these witnesses but has rejected them mainly on general grounds most of which are either unsupportable in law or based on speculation. The evidence of the eye-witnesses is sought to be corroborated by the evidence of P.W.-7 Kundan Singh to whom the whole occurrence was narrated immediately after the accused left the house. There is also the evidence of Balbir Singh, P.W.-17, who is a Sarpanch of the village and an independent witness and who proves that the appellant Piara Singh had made an extra judicial confession before him in which he admitted to have committed the murder of the deceased Surjit Singh along with his companions Kashmir Singh, Gian Singh and Joginder Singh. This witness also proves that Kashmir Singh on being narrated by the details made a disclosure which resulted in the recovery of the Kirpan from the sugar-cane field of Meja Singh for which a search list was prepared and the Kirpan was also found stained with human blood. According to the Investigating Officer an empty cartridge was also found at the spot and he sent the same to the Ballistic Expert along with the rifle recovered from Piara Singh who was a constable in the Border Security

Force and the Ballistic-Expert found that the empty could have been shot from the rifle in question. These circumstances fully corroborate the evidence of the eye-witnesses. Finally, there is the medical evidence of Dr. Jatinder Singh who performed the postmortem examination on the deceased and he found as many as 7 incised wounds on the various parts of the body of the deceased and 7 incised punctured wounds on some vital parts of the body. Apart from these injuries the deceased had also sustained a gun shot injury with a wound of entry and exit on the left buttock, which according to Dr. Jatinder Singh could be; caused by a fire-arm including a rifle. The Doctor further deposed that the contusions and abrasions were caused by a blunt weapon and the other incised wounds were caused by a sharp cutting instrument like the Gandasa. Another Doctor was examined by the Sessions Judge as Court Witness No. 1 who on seeing the post-mortem report of Dr. Jatinder Singh was of the view that Injury No. 11 could not have been caused by a rifle and much capital was made by the accused but of the evidence given by Dr. Paramjit Singh."

57. A three Judge Bench in ***Hari Obula Reddy Vs. State of A.P. (1981) 3 SCC 675*** observed as under:-

"13. ...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

58. Again in ***S. Sudershan Reddy and others Vs. State of A.P. (2006) 10 SCC 163,*** the Hon'ble Apex Court has held as under:-

"12. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

15. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses."

59. In this context, the reference may also be made to the judgement of Supreme Court in the cases of Kamta Yadav vs. State of Bihar (2016) 16 SCC 164 and Nand Kumar vs. State of Chhatisgarh (2015) 1 SCC 776.

60. Thus, we find unbroken line of authorities to the effect that the evidence of eye-witness, if found forceful, can not be discarded simply because witness is a relative of the deceased. The only caveat is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Thus, close scrutiny of testimony of eye-witness shows that they witnessed the incident, in question. The evidence of P.W.-4 Dr. P.K. Jain, who conducted the post-mortem and post-mortem report also points out conclusively to the culpability of the appellants for commission of the offence.

61. It is trite law that in case of direct evidence, the motive looses its significance. If the evidence of the eye-witness is trustworthy, there is no need to establish any motive.

62. Thus, from the statements of the witnesses adduced during the course of trial, we are satisfied that the offence of murder has been committed by the appellants. We have carefully gone through the impugned judgment and order of the trial court and satisfied that the trial court has appreciated the entire evidence on record in proper perspective and learned counsel for the appellants could not point out any perversity in the finding of the trial court.

63. Thus, we do not find any infirmity, illegality or perversity in the impugned judgement dated 15.01.2004 upholding conviction and sentence against the appellants, by the trial court in Sessions Trial No. 626 of 2000 (State Vs. Lala Ram and Others), under Sections 147, 148, 302/149 IPC. The instant criminal appeal lacks merit and is accordingly **dismissed**. Surviving appellants, namely, Ram Naresh, Narottam, Mahima @ Mahipal and Karamveer are directed to surrender before the court below and serve out the sentence awarded to them by the trial court and affirmed by this Court.

64. Let a copy of this judgment and order be forwarded to the court concerned along with trial court record for compliance.

(2024) 3 ILRA 1600
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.01.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Criminal Appeal No. 826 of 1986

Vinod Kumar & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri A.K. Saxena, Sri Akhilesh Chandra Shukla, Sri R.R. Singh

Counsel for the Respondent:
D.G.A.

(A) Criminal Law - Appeal Against Conviction - Indian Penal Code, 1860 – Section 302 – murder - Doubt on Prosecution's Case - Hostile Witnesses - Reliability of Witnesses and Interpolation in Panchayatnama - Absence of Identification Parade - Dock Identification -Doubt on Witness Presence at Crime Scene - Indian Evidence Act, 1872 - Section 154 - P**arty calling its own witnesses may claim permission of the Court to cross-examine them -**
Mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not

make him as unreliable witness so as to exclude his evidence from consideration altogether. (Para -18)

Appellant was convicted of murder - case involved long-standing enmity - prosecution's main witness, PW-1, alleged that appellant and accomplices killed his father - due to prior disputes - Witness reliability, timing discrepancies, Interpolation in Panchayatnama timing and absence of family members as witnesses raised doubts - lack of a test identification parade raised doubts about the prosecution's case. (Paras 2-15, 20,21)

HELD: - Conviction of appellant was set aside due to doubts regarding prosecution's case, unreliable witness testimony and procedural discrepancies in the Panchayatnama and post-mortem handling. (Paras - 20 to 23)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Rabindra Kumar Dey Vs St. of Orissa, AIR 1977 SC 170

2. Namdeo Vs St. of Maha., AIR 2007 SC (Supp) 100

(Delivered by Hon'ble Siddhartha Varma, J. & Hon'ble Anish Kumar Gupta, J.)

1. Written Arguments submitted by learned counsel for the appellant be kept on record.

2. When on 2nd December, 1979, Virendra Kumar was shot dead, a First Information Report allegedly was got lodged on 02.12.1979 at 02:30 pm. The first informant was one Girish Kumar, the son of the deceased. In the First Information Report, it has been stated that the first informant was belonging to Mauja - Gandhaur P.S. - Chandpur, District - Bijnor. He has stated that in the year 1977 when the elder brother of his father one Sri Bhupendra Kumar was killed by Radheyshyam etc. then there were a case contested by Radhyshyam in which he was acquitted. Thereafter in the year 1978, Radheshyam himself was killed. For the murder of Radheyshyam, Virendra Kumar, the father of the First Informant, Harendra Kumar, Atul, Surendra Kumar and Dushyant, were named as accused and ever since then Radheyshaym's brother Vinod Kumar and others were inimical to Virendra Kumar the father of the First Informant and they were always in the look out for taking revenge of the death of Radheyshaym. He has stated in the First Information Report that around 15 days prior to the incident, Narayan @ Madan resident of Meerapur, District – Muzaffarnagar and the Pradhan of the village Om Prakash had contacted the father of the first informant and had stated that the date in the case of the murder of Radheyshaym was approaching and insisted that a compromise could be entered into between the parties. The first informant specifically took the name of Vinod Kumar and said that the compromise could be entered into between Virendra Kumar and Vinod Kumar who was the brother of Radhey Shyam. It has further been stated that Vinod was a teacher in Shiv Inter College, Gajraula. Still further, it has been stated that Om Prakash had taken the first informant to Gajraula for a meeting with Vinod Kumar. There, he could not meet Vinod Kumar. Later Narayan and Om Prakash told him that on 2.12.1979 it was Sunday and they had to bring Virendra and, thereafter, a compromise could be entered into and, their matter with regard to the murder case vis-a-vis Radheyshyam would be settled between the parties. When Girish, the first informant, told these happenings to his father Virendra, he did not agree with Girish and said that now the

date with regard to the case of the murder of Radhey Shyam was approaching and that he was also busy with the business of crushing and therefore no meetng could take place. Thereafter, it has further been stated that on 2.12.1979 despite the fact that the father of first informant had not agreed to meet Vinod etc. for the purpose of conciliation, Om Prakash and Narayan reached the house of Virendra and he was taken from Gajraula to meet Vinod Kumar. The first informant has further stated that along with Om Prakash and Narayan, the first informant had also gone to meet Vinod. He has stated that along with Om Prakash and Narayan, Som Prakash son of Radhey Shyam residents of Bareilly and Subhash son of Roop Kishore resident of Bijnor had headed for Gajraula. Narayan had asked the first informant and all the other persons who had accompanied him to Gajraula to sit at the Almora Hotel, station road, Gajraula and, thereafter, he went away to call Vinod. It has been stated that while these persons were having tea, from the northern side, at around 2:00pm, Vinod armed with a gun and Narayan armed with a country made pistol approached the five of them, namely, Virendra, Girish, Om Prakash, Som Prakash and Subash.

3. Om Prakash instigated Vinod to kill Virendra and, thereafter, both of them i.e. Narayan and Vinod fired at Virendra, the father of the first informant, who fell down. Vinod and Narayan, thereafter ran away from the spot, but despite the fact that they were followed, they could not be apprehended. Upon unsuccessfully having tried to catch hold of the assailants, the first informant returned to the spot and over there he found that Om Prakash had also disappeared. He, therefore, stated that in a planned manner his father was brought to the place of the incident and was killed by Narayan, Vinod and Om Prakash. He had, thereafter, has stated that he left the dead body on the spot and had gone to the Police Station to get the first information report lodged.

4. Investigation, thereafter, ensued. Panchayatnama was got prepared and in the Panchayatnama, it had been stated that it commenced at 3:00PM on 2.12.1979 in the presence of 5 witnesses, namely, Trilok Singh s/o Ram Singh, Dev Singh son of Ram Singh, Mangal Singh son of Khushal Singh, Jaipal Singh s/o Dayaram and Mahendra Singh s/o Phool Singh. The first three witnesses had given out as residents of Almora Hotel, Station Road, Gajraula, while Jaipal Singh son of Dayaram Singh were a resident of Salempur, Police Station – Gajraula and Mahendra Singh son of Phool Singh had been described as resident of Mandi, Ghanaura, Bahraich. Thereafter, from the spot, the Investigating Officer kept in his custody, three articles found there, namely, one pair of shoes, a pair of socks and a coat which was blood stained. These were worn by the deceased. The recovery memo was exhibited as exhibit – Ka.11. Also the plain soil and blood stained soil were taken from the spot and a recovery memo was prepared and exhibited as Exhibit -ka.13. The recovery memo of empty cartridges was also prepared and exhibited as Exhibit – ka 14.

5. From the record, we find that the post-mortem, thereafter, was conducted on 3.12.1979 at 3:30pm. The investigation after having been completed, a police report was submitted before the Magistrate who took cognizance on 15.1.1980 and forwarded the same before the Sessions Judge for trial on 1.9.1980. Charges were framed against Vinod Kumar & Narayan @ Madan under Section 302 IPC and against

Om Prakash, the charges was framed under Section 302/34 IPC. When they denied the charges, trial commenced. From the side of the prosecution 7 witnesses appeared.

6. P.W. - 1 was the first informant Girish Kumar; P.W. - 2 was Som Prakash son of Radhey Shyam; P.W. - 3 was Dr. Naveen Chandra; P.W. - 4 was Dev Singh; P.W. - 5 was Suresh Chandra; P.W. - 6 was Subhash and Chandra Pal who was the Investigating Officer was produced as P.W. - 7.

7. The trial when was concluded, the 7th Additional Sessions Judge on 5.3.1986 acquitted Narayan but convicted Vinod Kumar under Section 302 IPC and Om Prakash under Section 302/34 IPC and sentenced them to life imprisonment. Aggrieved thereof, the two accused, namely, Vinod Kumar and Om Prakash filed the instant Criminal Appeal.

8. It has been stated that the appellant no. 2, Om Prakash, died during the pendency of the Appeal and, therefore, the Appeal against the appellant no. 2, Om Prakash, abated on 2.5.2019. The appellant Vinod too had died but this Court by the order dated 2.5.2019 permitted the wife of the appellant Vinod Kumar, namely, Smt. Sushma Sharma, under Section 394 (2) Cr.P.C. to continue the Appeal.

9. P.W. - 1 in his statement-in-chief has proved the first information report and he has reiterated the facts as were mentioned in the first information report. He has tried to establish the place of incident i.e. the Almora Hotel and has narrated the facts as had, according to him, taken place. The P.W. - 1 in the cross-examination has stated that he had not mentioned this fact in his first information report that Om Prakash was with Radhey Shyam in the election of Pradhan. He has stated that in the murder of Radhey Shyam his father was wrongly implicated. He has further stated that Ramesh had got the first information report lodged with regard to the murder of Radhey Shyam against his father Virendra. He has stated that because of the implication of his father in the case, his father had to suffer a lot and he had also to remain in jail for quite sometime and had to contest the case. He has very categorically stated that Vinod Kumar was neither the first informant in the murder case of Radhey Shyam and nor was he a witness in it. He has further stated that at the time, when the murder of Radhey Shyam had taken place, Girish Kumar, the first informant was studying in Kanpur. He has also stated very categorically that in the talks which were initiated for settling the murder case with regard to Radhey Shyam around 15 days prior to the incident, the other accused in Radheyshyam murder case, namely, Surendra, Harendra and Atul had not participated and that on the date of incident also they had not come. He has also stated that nobody had brought to the fore that, in a murder case, no compromise could take place. He has stated that on the date of the incident, the father of the first informant and others, namely, Om Prakash, Narayan, Subhash and Som Prakash had started from Gandhaur which was his village. Subhash and Som Prakash, he has also stated, were not related to either of the parties. Narayan, he submits, also was not having any relation with any of the parties. He has stated that he had also accompanied the others alongwith his father. They had started from Gandhaur at around at around 9:45 AM on 2nd December, 1979 and had a mind to come back on the same night.

10. This witness has further tried to give credence to the story as was narrated

in the first information report and has stated that on the date of incident he alongwith his father, Om Prakash, Narain, Subhash and Som Prakash started from Gandhaur, reached their sister's house where they had taken food which was packed with them with tea which was prepared by their sister. Thereafter, it has been stated that they had got down from the bus at the bus stand which was situate near the place of incident. Upon a question being asked as to whether Virendra had travelled to the place of incident alone, he denied. He reiterated that the Roadways Bus Stand was 35 steps away from the Hotel. He had stated that the Restaurant was a full fledged Restaurant and that the tables were laid from east-west and that the chairs were placed in such a manner that the occupants either faced the north or the south and that the occupants i.e. five persons who had reached the Hotel were sitting facing southwards and it has been stated that apart from the six persons i.e. the father and five others no one else was sitting there. Thereafter, he has tried to give the position as to in what manner the six occupants were sitting. He has stated that the Tehrir (report) was written while the informant was sitting at the Hotel on the paper which he had obtained from the Hotel itself. He has further stated that he reached the police station on a Rickshaw and that the police station was around one furlong away from the place of incident. He has specifically denied the fact that he was called later on at the spot and that he was not there at the time of incident at all. He has also stated that Virendra, before the incident, had smoked a Biri and the Biri must have fallen down at the place of incident. He has stated that the police had taken the dead body to the police station but he was not aware that how long the dead body was lying at the police station. However, he has stated that he had left the police station at 4 p.m. for his home. The first informant had stated that prior to the incident he was living in Kanpur but at the time when the incident had taken place he had returned to his village after completion of his educational course at Kanpur. He had then stated that he had done M.Sc. in the year 1978 and that he had returned to the village around 6 – 7 months prior to the death of his father.

11. P.W.-2 Som Prakash was the person who had allegedly accompanied Girish, Virendra, Om Prakash and Narain to the place of incident. In his deposition, he had stated that he had no knowledge about the incident and that in fact he did not know the three accused persons. He was thereafter declared hostile.

12. P.W.-3 Dr. Naveen Chand Pandey has proved the post mortem report.

13. P.W.-4 Dev Singh is allegedly the owner of the Hotel. He had stated that he was at the Hotel on the date and time of the incident. He did not recognize the deceased Virendra. He had stated that the incident actually occurred outside his Restaurant. He has also stated that he did not recognize the assailants. He has also stated that the Panchayatnama was not prepared in his presence and that his signature were obtained at the police station. He was declared hostile but was cross examined by the prosecution and he stood firm in his cross examination about what he had stated in his chief. However, in the cross examination done by defence counsel, he had stated that his shop was called Laxmi Mishthan Bhandhar. He has further stated that the person who had died had come from the side of Gajraula station and had come all alone and that he was not accompanied by anyone.

14. P.W.-5 is Suresh Chand, Constable and has deposed that he reached the place of incident at around 4.30p.m. on 2.12.1979 and that he had remained at the place of the Panchayatnama till the dead body was sealed and that thereafter he had taken the dead body on a vehicle of the Police to Moradabad. He has stated that the vehicle when had reached Rajjopur had developed certain defects and therefore he had reached Moradabad late. He has stated that the distance between Gajraula and Moradabad was of two hours and not of one hour. He has further stated that throughout the night he had stayed at Rajjopur in the vehicle. The defects in the machinery of the vehicle were rectified at around 8.00 a.m. and thereafter vehicle had proceeded from Rajjopur and reached Moradabad at around 10.00 a.m. on 3.12.1979. He has specifically stated that at the time of arrival, he had got his arrival recorded in the General Diary but he has specifically stated that he had not got recorded in the General Diary the fact that the vehicle had developed certain defects.

15. P.W. 6- Subhash is again the person who had accompanied Virendra, Girish, Om Prakash, Narayan and Som Prakash to Gajraula. He has stated that though he had known Virendra and Girish but at the time of incident he was not with them. He has also stated that he had not seen the assailants. This witness was also declared hostile but thereafter was cross-examined wherein he had denied all the statement which he had got recorded under section 161 Cr.P.C.

16. P.W. -7 Chandra Pal Singh, Inspector is the Investigating Officer of the case and he had stated that at the time of incident he was posted as Station Officer, Gajraula and that on 2.12.1979 Girish Kumar had reached the police station to lodge the first information report. He has proved the chik FIR. He had also stated that on the FIR being lodged he reached the place of incident and had taken the dead body in his custody and that he had deputed S.I. Surat Singh and other persons to search out the accused persons. He has further stated that the Panchayatnama was prepared in his presence and that he had also sealed the dead body and had handed it over to Constable Suresh Chandra for a post mortem examination. He has stated that he had prepared the site plan and had seized all the articles that were there in the recovery memos. He has stated that he had taken the statements of Girish Kumar, the informant, Dev Singh, Mohan Singh, Triloki and Mangal and that on the next day i.e. 3.12.1979 the statements of Som Prakash, Subhash were also taken and that the accused Narain and Om Prakash were being searched for. He has stated that on 13.12.1979 the accused Vinod had surrendered himself and on 29.12.1979 charge sheet was submitted before the court. In his cross examination he stood firm to what he had stated earlier. However, when he was specifically asked about the overwriting which had taken place in the Panchayatnama with regard to the time when the proceedings of the Panchayatnama were initiated, he has stated that some ink had spread and therefore it appeared that there was some overwriting. He has denied that before writing 0 after 3, 14 was written. He has also denied the fact that before 3 was written some other digit or figure was written. When he was questioned about the Thana and district being filled in different ink he stated that the pen and the ink were the same but because of the fact that the ink in the pen was about to finish the shine in the alphabets was different. He had stated

that it is wrong to say that the name, address and age of the deceased was written by a different pen and the police station and district were written by a different pen. He has also denied the fact that the crime number was written by a different pen. He has stated that he was not remembering that the first informant had shown his hands smeared with blood. After seeing the case diary he has stated that this fact was not reduced in writing in the G.D. He had specifically stated that the witnesses Som Dutt and Subhas had not met him on the place and date of the incident and that he had stated that these witnesses had given their statements in the police station on 3.12.1979. He has also denied the fact that the FIR was actually written on a date after 2.12.1979. He has denied the fact that the Chief Judicial Magistrate had passed any orders on the application which had been filed by Vinod Kumar and Narain which was for test identification parade. He has also stated that he had not got the test identification parade done as the accused in the FIR were named and that they were known to the witnesses from before.

17. In the statements of the accused persons recorded under section 313 Cr.P.C. they have specifically denied having committed the crime and had stated that they were falsely implicated in the case due to old enmity.

18. Learned counsel for the appellant Sri Akhilesh Chandra Shukla has argued that the conviction of Vinod Kumar was wrongly done. In support of his argument, he has made the following submissions :-

(i) The signature of the first informant Girish Kumar on the Tehrir (written report) is absolutely different from the signature he had made in the statement before the Court. For this purpose, learned counsel for the appellant showed to the Court the record. This record was also shown to the learned AGA. Evidently, even by naked eyes, one can make out that definitely there were signatures in two different styles and cannot, by any stretch of imagination, be said to be of the same person.

(ii) Learned counsel for the appellant has stated that the panchayatnama, if is perused, then the time of commencement of the proceedings of panachayatnama had been stated to be 3.00 PM. It does not stand to reason that how when the incident had occurred at 2.00 PM the First Information Report could be lodged at 2.30 PM when the PW-5 had stated in his statement before the Court that he and P.W. - 7 had, in fact, reached the place of incident much later. He states that the place where the panchayatnama was being performed was around 1 kilometer away from the place of incident and, therefore, immediately on their reaching the spot, the panchayatnama proceedings could not have commenced. He has further, looking to the statement of PW-5, stated that the PW-5-Suresh Chandra had actually reached the spot at 4.30 PM along with the Sub-Inspector Chandra Pal-PW-7. Since, learned counsel for the appellant relied heavily upon the statement of PW-5, which is found at page 44 of the Paper-Book, same is being reproduced here as under :-

"मैं करीव 4 1/2 वजे शाम मौके पर पहुंच गया था। दरोगा चन्द्र पाल भी मेरे साथ थाने से गये थे उस दिन 2.12.79 तारीख थी मुझे लाश 4 1/2 वजे मिल गई थी खुद कहा हम मौके पर पहले पहुँच गये थे। मैं मौके पर जव तक पंचायतनामा भरा गया व लाश सील मोहर की गई तव तक रहा था करीव एक डेढ़ घन्टा

मौके पर रहा होऊंगा। लाश को मैं मौके से ही सवारी में रखकर मुरादाबाद ले आया था यह सवारी पुलिस की वड़ी गाड़ी थी।"

(iii) Learned counsel for the appellant to prove the fact that the PW-1 Girish Kumar was not there at the spot has stated that had PW-1 been on the spot then he would definitely have been a witness of the panchayatnama. He has further stated that Trilok Singh, Dev Singh, Mangal Singh, Jaypal Singh and Mahendra Singh were absolute outsiders and they had stated in their statements that they had not even recognised the deceased person. Learned counsel, therefore, states that under such circumstances how the name of the deceased person was recorded in the panchayatnama was also not known.

(iv) Learned counsel for the appellant has stated that the panchayatnama continued till 4.30 PM but the PW-1 had left the spot at 4.00 PM. Learned counsel relying upon the statement of PW-1, states that this becomes evident as per paragraph 31 the statement of PW-1 which is at page 30 of the Paper-Book. The statement relied upon by learned counsel for the appellant is reproduced here as under :-

" वकुअे के बाद 20-25 आदमी वहां इकट्ठा हो गये थे। जब गोली काण्ड हुआ तो हम सब चाये पी चुके थे व कप वगैरा दुकान वाले ने उठा लिये थे। मेरे पिता उस समय बीM+h पी रहे थे। बीडी मेरे पिता के हाथ में थी। माचिस व बीM+h बण्डल कहा था मैं नहीं कह सकता। बीM+h वहीं नीचे गिर गयी होगी। मैंने दरोगा जी को वह बीड़ी नही दिखाई। लाश को दरोगाजी थाने ले गये थे थाने पर लाश कब तक रही मुझे नही मालूम। मैं थाने से करीब 4 बजे शाम घर चला गया था। उस वक्त तक लाश थाने पर ही थी। थाने पर मेरे जाने से पहले न कोई लिखा पढी हुई न मेरे किसी कागज पर दस्तखत कराये। मुझे कोई कागज भी थाने से नही मिला। खुद कहा नकल की रपट मुझे दी थी। थाने से जाने के कुछ देर पहले ही दी थी।"

(v) Learned counsel for the appellant has stated that if the panchayatnama is seen and if the location which has been given of the dead body is seen then it is evident that the dead body was facing the northern direction but the PW-1 in his statement has stated that the dead body was facing the south. Since, learned counsel for the appellant has relied upon paragraph 23 of the statement of PW-1, the relevant portion of it, is being reproduced here as under :-

दखिन को हमारा मुंह था। हम छ (6) आदमियों के अलावा उस मेज पर कोई नही बैठा था। । जो पक्की सडक स्टेशन को जाती है उसके पूरब तरफ यह मेज पड़ी थी। सडक से मेज कितनी दूर थी मुझे ध्यान नही। यह मेज सड़क व होटल के बीच में पडी थी। हम सभी छओं जने बराबर 2 दखिन को मुंह किये बैठे थे

(vi) Learned counsel for the appellant has stated that from the recovery of the empty cartridges, it can be made out that only one bullet was fired but there were in fact 4-5 injuries.

(vii) Learned counsel for the appellant has stated that the details of the deceased were written in a different ink and the ink in which the police station and the district were written were very different. This fact, he says, if is taken into consideration then it could mean that the name and the details of the deceased were filled in later after P.W. - 1came on the spot.

(viii) Learned counsel for the appellant has stated that the police after had submitted the charge sheet on 29.12.1979, the Magistrate had taken cognizance of the crime on 15.1.1980 and before that, on 21.12.1979, on the application of Vinod Kumar and Narayan which says that Girish Kumar did not recognize them, an order was passed that a test identification parade be done. He, however, submits that this test identification parade was never conducted.

(ix) Learned counsel for the appellant has further stated that if the statement of Girish Kumar (P.W.-1) is perused, then also it becomes evident that he had never stated that he had recognized the accused Vinod Kumar and Narayan

who were present in the Court i.e. to say that there was also no dock identification of the accused Vinod Kumar and Narayan. This non-recognition makes the case very doubtful and it gives credence to the fact that, in fact, the first informant was not present at the spot.

(x) Learned counsel for the appellant has further submitted that if the First Information Report is perused, it becomes evident that the First Information Report has gone into such minute details the recording of which is highly unlikely. He submits that in fact Om Prakash and Narayan though had met Virendra, the appellant Vinod had never met the deceased or the informant. He, therefore, submits that the entire story was a concocted story. He submits that in fact at the time of incident, the PW-1 who had got the First Information Report lodged was never at the spot of the incident and that the First Information Report was a well thought out document and this was the reason, he states, that the post mortem was also conducted almost after 24 hours of the death and not immediately when the body was sent for post mortem at around 4.30 PM on 2.12.1979. He further submits that since the post mortem had to be conducted well within a reasonable time and the First Information Report was also not lodged by the time the post mortem was conducted, there was no mention of the case crime number in the post mortem report.

(xi) Learned counsel for the appellant has stated that though the PW-2, PW-4 and PW-6 have been declared hostile, they are important witnesses and that what had been stated by them could not be just thrown out. Learned counsel for the appellant relying upon a decision of the Supreme Court in the case of **Rabindra Kumar Dey vs. State of Orissa** reported in **AIR 1977 SC 170** has submitted that simply because a witness is declared hostile by a party which had called him would not make him an unreasonable witness so as to exclude his evidence from consideration altogether. Since, learned counsel for the appellant has relied upon paragraphs 10 and 12 of the judgment, the same are being reproduced here as under :-

10. Before proceeding further we might like to state the law on the subject at this stage. Section 154 of the Evidence Act is the only provision under which a party calling its own witnesses may claim permission of the Court to cross-examine them. The section runs thus:

"The Court may, in its discretion permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party."

The section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. It is, however well settled that the discretion must be judiciously and properly exercised in the interests of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One of the glaring instances in which this Court sustained the order of the Court in allowing cross-examination was where the witness resiles from a very material statement regarding the manner in which the accused committed the offence. In Dahyabhai v.

State of Gujarat, (1964) 7 SCR 361 at pp. 368, 369, 370: (AIR 1964 SC 1563 at p. 1569) this Court made the following observations:

"Section 154 does not in terms, or by necessary implication confine the exercise of the power by the Court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination-in-chief faith- fully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the Court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by 'he adverse party."

"Broadly stated, the position in the present case is that the witnesses in their statements before the police attributed a clear intention to the accused to commit murder but before the Court they stated that the accused was insane and, therefore, he committed the murder."

A perusal of the above observations will clearly indicate that the permission to cross-examine was upheld by this Court because the witnesses had categorically stated before the police that the accused had committed the murder but resiled from that statement and made out a new case in evidence before the Court that the accused was insane. Thus it is clear that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The Court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

12. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him as unreliable witness so as to exclude his evidence from consideration altogether. *In Bhagwan Singh v. State of Haryna, (1976) 1 SCC 389,391-92: (AIR 1976 SC 202 at p. 203), Bhagwati, J. speaking for this Court observed as follows:*

"The prosecution could have even avoided requesting for permission to cross-examine the witness under section 154 of

the Evidence Act. But the fact that the Court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. ***The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."***

(Emphasis supplied)

(xii) Learned counsel for the appellant very categorically states that if the statement of PW-2 is perused then it becomes evident that this witness who allegedly had accompanied the deceased and the First Informant at the place of incident, when had stated that he did not recognize the persons who were the accused in the case, then that statement could not be simply thrown out. The witness Som Prakash was much relied upon by the PW-1 and when he states certain facts then in conjunction with all the other facts, namely, that the panchayatnama had no witness known to the deceased; the panchayatnama had interpolations and the post mortem report had no case crime number, could not be simply thrown away. It had to be given some credence and the case had to be decided accordingly. Similarly, learned counsel for the appellant states that when the prosecution was throughout trying to base its case on the fact that the incident had occurred at Almora Hotel the owner of which was Dev Singh and when Dev Singh had himself stated that he did not recognize Vinod Kumar and that the panchayatnama was not written in his presence and that the signature of his was taken subsequently then the case of the prosecution becomes doubtful. This again in view of what had been argued by the learned counsel for the appellant, cannot be simply thrown out. He further submits that when the PW-4 Dev Singh had stated that he had noticed that the deceased (whose name was not known to him) had walked into his restaurant alone from the side of Gajraula Station then also his statement cannot be thrown out without considering its evidentiary value.

(xiii) Learned counsel for the appellant has further stated that the evidence of PW-6 Subhash, who again was a much relied upon witness throughout by the PW-1 when had turned hostile could not be junked as he had stated that he knew Girish Kumar and Virendra Kumar but when he had refuted the claim of PW-1 that he had accompanied him, then that statement cannot be lightly ignored. Learned counsel for the appellant, therefore, has submitted that the fact that PW-1 was on the spot becomes doubtful. Learned counsel states that the fact that panchayatnama was prepared immediately at the time of incident also becomes doubtful. Still further, learned counsel for the appellant states that the presence of such persons who the PW-1 alleged were there at the time of incident, for the arguments which have been made earlier, also becomes doubtful.

(xiv) Learned counsel for the appellant has submitted that the guilty could have been convicted even on the witness of a sole witness had it been reliable but in the instant case the evidence of even the sole witness i.e. P.W. - 1 was absolutely unreliable. He submits that the evidence of P.W. - 1 becomes unreliable also because of the fact that he had borne grudges for the past so many years. For this purposes, he relied upon a decision of the Supreme Court in Namdeo vs. State of Maharashtra reported in AIR 2007 SC (Supp) 100, and has submitted that the

value of every piece of evidence had to be seen and evaluated individually.

19. Learned AGA Sri Amit Sinha has, however, opposed the appeal and has submitted that all such evidence of the crime specially with regard to the presence of the witnesses; the ante-dating of the First Information Report; the fact that the panchayatnama was interpolated are subject matters which were looked into by the Trial Court and the Trial Court after having seen the relevancy and admissibility of evidence had concluded that the appellants were to be convicted and this Court therefore may while reassessing the evidence acquit the accused-appellant. He submits, therefore, that when the PW-2, PW-4 and PW-6 had turned hostile then definitely their statements could not be looked into and cannot be considered while deciding the case.

20. Having heard learned counsel for the appellant Sri Akhilesh Chandra Shukla and the learned AGA Sri Amit Sinha, we are of the view that the appeal deserves to be allowed. Learned counsel for the appellant has very successfully created a doubt in our minds with regard to the presence of PW-1 at the spot. The PW-1 in the First Information Report had come up with a case that he was accompanied by the deceased Virendra Kumar and four other persons. A perusal of the statements of PW-2 and PW-6 definitely shows that they were not in the know of the incident. PW-2 Som Prakash had stated that he did not even know the three accused persons. PW-4 had stated that even though he did not know the deceased Virendra Kumar, with regard to PW-1, he has stated that he was not at the place of incident. PW-4, who is the witness of the panchayatnama, and should have known about the deceased, as no one from the family was a witness in the panchayatnama, has stated in his statement that he had seen the deceased walk in to his restaurant and that too all alone. This falsifies the case of the PW-1 absolutely and demolishes the case as was taken by him in the First Information Report and, thereafter, also when he had led his evidence.

21. The statements and the discrepancies as had been pointed out by learned counsel for the appellant with regard to the interpolations in the panchayatnama coupled with the fact that no witness of the family was a witness in the panchayatnama have to be definitely noted in this judgment. The ink in which the names, age and sex of the deceased was written was an absolutely different ink from the one in which the names of the police station and the district were written. Further more, there is a definite interpolation with regard to the time when the panchayatnama proceedings were initiated. The panchayatnama even by the interpolated time had started at 3.00 PM but the PW-5 Suresh Chandra and PW-7 Chandra Pal who ought to have been there at 3.00 PM, had stated in their statements that they had in fact reached the place of incident at 4.30 PM. This definitely raises a doubt in the mind of the Court as to whether the time at which the proceedings of the panchayatnama were initiated was interpolated.

22. Also, we are of the view that when the PW-1 had not identified the accused Vinod Kumar and Narayan in the Court (i.e. to say there was no dock identification) then the application which the accused Vinod Kumar and Narayan had made for a test identification parade gains importance. When the application was made on

21.12.1979, the Chief Judicial Magistrate had not taken cognizance of the case which was actually taken on 15.1.1980 and we find from the record that in fact the Chief Judicial Magistrate had also passed orders for the test identification parade. This identification having not taken place definitely renders the evidence of Girish Kumar absolutely worthless, inasmuch the accused Vinod Kumar and Narayan were throughout saying that Girish Kumar did not recognize them. If the P.W. - 1 Girish Kumar had never identified the alleged assailant Vinod Kumar then all evidence which he had led becomes absolutely worthless.

23. For the reasons stated above, the appeal succeeds and is allowed. The judgment and order dated 5.3.1986, so far as it concerns the appellant, Vinod Kumar is set aside and is quashed. The appellant Vinod Kumar who, as of today is dead, is acquitted of the charges which were levelled against him.

24. The appeal stands allowed so far as the appellant Vinod Kumar is concerned.

(2024) 3 ILRA 1612
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Criminal Appeal No. 1640 of 2012
with
Criminal Appeal No. 1647 of 2012

Pravesh & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Atul Kumar Srivastava (Amicus Curiae), Sri Apul Misra

Counsel for the Respondent:
G.A.

(A) Criminal Law - Appeals Against Conviction for Murder - Acquittal - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 504, Arms Act, 1959 - Section 25 - Eyewitness reliability - Juvenile - The importance of consistent eyewitness testimony and the reliability of witness statements in establishing guilt beyond reasonable doubt - Contradictions in eyewitness statements can render the prosecution's case unreliable, leading to acquittal. (Para - 20 to 28)

Case involved a incident - where three individuals were allegedly murdered by accused - who were charged under various sections of the IPC - Eyewitnesses claimed that accused stopped the tractor-trolley carrying victims and shot them - Contradictory statements and inconsistencies between eyewitnesses and police reports became key issues during the trial. (Paras – 1 to 8,20)

HELD: - Appellants were in fact not guilty of crime as the prosecution had failed to prove its case beyond reasonable doubt against the appellants. Appellants were acquitted due to unreliable and contradictory witness testimonies, procedural issues in the investigation. Court ordered the release of the appellants unless required in other cases. (Paras – 26,27,28)

Appeal allowed. (E-7)

(Delivered by Hon'ble Anish Kumar Gupta, J)

1. Upon an incident having taken place on 26.07.2007 at around 6:30 P.M., wherein three persons, namely Ram Murti, s/o Mohkam Singh, Malkhan Singh, s/o Ratan Singh and Pappu, s/o Mohkam Singh, had died, a First Information Report

was got lodged at 8:15 P.M. (20:15 P.M.) by one Sri Shyam Singh (PW-1), s/o Mohkam Singh. Upon the First Information Report being lodged, the Police got into action and thereafter recoveries of the dead bodies was done. Thereafter, the inquest report was prepared by Sri R.D. Gautam (PW-3). The investigation, thereafter, ensued and a charge-sheet was submitted against five accused persons namely Kishan Singh, Vipin, Pravesh, Manoj and Rajveer. At the time of submission of the charge-sheet, initially on 17.10.2007, the accused Pravesh and Manoj were absconding. Subsequently, when they were found out the Police submitted its charge-sheet. Initially charges were framed against Kishan Singh, Vipin and Rajveer on 21.04.2008 u/S 147, 148, 149, 302 and 504 I.P.C in Case Crime No. 412 of 2007. The sessions trial was numbered as 112 of 2008. Upon taking cognizance by the Magistrate and thereafter after the trial being placed before the Sessions Court, the latter initially framed charges against Vipin in Sessions Trial No. 112 of 2008 under sections 147, 148, 302, 504 I.P.C. and thereafter charges were framed against Kishan Singh and Rajveer in the same session trial under sections 147, 148, 149, 302 and 504 I.P.C. Subsequently the charges were framed against the accused Pravesh and Manoj under sections 302/149, 148, 147, 504 IPC in Sessions Trial No.538 of 2008. Against the accused Vipin, separate charge under section 25 of the Arms Act was also framed in Sessions Trial No.113 of 2008. The accused persons were read over the charges and they denied the charges and claimed trial.

2. From the side of the prosecution, there were five prosecution witnesses who were examined. Shyam Singh, s/o Mokam Singh was produced as PW-1; Rakesh Kumar, s/o Om Prakash was produced as PW-2; Sub-Inspector R.D. Gautam, who had prepared the inquest report, was examined as PW-3 and the Doctor Ajay Agarwal, who had conducted the postmortem and had proved the postmortem report, was examined as PW-4. The Inspector Rakesh Sharma, who was the Investigating Officer of the case, was examined as PW-5.

3. The PW-1, Shyam Singh, who appeared in the witness box and gave his examination-in-chief on 15.09.2008 stated that on 26.07.2007, his cousin Rakesh Kumar alongwith him was going on a tractor trolley of one Harprasad, from Sadabad to Rasgawan. Alongwith them, three persons, it has been stated, namely his uncle Malkhan Singh and his brothers Ram Murti and Pappu, were also travelling on the tractor. When the tractor trolley reached near the field of Chandrapal, then Kishan Singh, Manoj, Vipin Pravesh and Rajveer accosted the tractor on two motorcycles and got the tractor trolley stopped. He states that from the tractor trolley, uncle Malkhan Singh and his own brothers Ram Murti and Pappu, were pulled down by the three accused namely Vipin, Pravesh and Manoj and Kishan Singh and Rajveer exhorted the accused Vipin, Pravesh and Manoj that the three may not go alive. At this exhortation, Vipin, Pravesh and Manoj, took out their country made pistols from their belts, which they were wearing at their waist and shot at uncle Malkhan, brothers Ram Murti and Pappu, as a result of which the three died on the spot. He has stated that he himself alongwith Rakesh ran towards the fields and they raised a hue and cry, as a result of which a lot many people from the Village- Rasgawan came on the spot. He has further stated that upon the crime having been committed, the accused

persons ran away firing in the air on their motorcycles. He has specifically stated that the incident occurred at 6:30 P.M. He has further stated that there was a legal case with regard to their agricultural fields, which was going on in the Court and after attending the case they were returning home. He has stated that because of this case the accused persons had enmity with them. He has proved the first information report and had stated that he had himself lodged the same at the police station. The written report, which he had proved, was marked as Exhibit 4-अ/3. He has further stated on 26.07.2007, the panchayatnama of the dead-bodies of Ram Murti, Malkhan Singh and Pappu, were prepared in his presence. He has stated that when the panchayatnama was prepared, he was a witness therein. The Inspector had also got his signature on the panchayatnama and had also got his views about the incident and the panchayatnama was exhibited as क-2, क-3, क-4.]

4. In his cross-examination, however, the PW-1 has stated that the written report (Tehrir) was written while he was sitting at the Roadways Bus Stand. He specifically states that the report was not written at the Police Station. He then states that the report was written while sitting in a shop and when he was sitting in the shop, the time was 9:15 P.M. and then he clarifies that the shop was of STD/PCO. He states that the paper on which the report was written was brought by his cousin (bua's son). He further states that the cousin had come to his village one day prior to the incident. He clarifies that he had not gone to his village after the incident. He further states that when the cousin (bua's son) had come to him, the Police had also reached the place of incident. The police had, thereafter, alongwith his cousin, brought the first informant and other persons to the Police Station. He states that the cousin had come from Agra. He further states that the information was scribed by PW-1 himself. It was not written on the dictation of anybody. Upon being asked as to how the cousin had reached him, he states that probably the villagers had phoned him up. He specifically stated that at that point of time, the dead bodies were in the premises of the Bus Stand, in a Police Van, at the time when the information was being written down. He then reiterates that the writing of the information took place at around 9:15 P.M. He specifically states that at 9:15 P.M., the dead bodies were not lying at the Bahardoi Crossing (Teeraha). He, thereafter, specifically states that the dead bodies were sealed at the place of incident at around 8:30 P.M. He further states that the Thana- Hasanpur was around 20 Kilometres from Sadabad. Upon being probably asked as to whether the case in the District Court of Hathras was in the Lower Court or the Appellate Court, he states that he was not aware whether the case was in the Lower Court or the Appellate Court. He, however, states that his counsel at Sadabad was one Mahesh Chand Sharma. He then further states that he had, in fact, not gone to the courts. The uncle Malkhan, brother Ram Murti and Pappu alone had gone to the court. He still further states that Rakesh (PW-2), who was his uncle's son had also gone to the Court. He states that it was wrong to say that there was no date fixed in the case on the date of incident. In the further cross-examination, which was done on 22.09.2008, the PW-1 states that he was not aware as to whether on the date of incident any case was fixed in Sadabad. He states that as a routine he used to go to Sadabad everyday. Then, he states that he used to go to Sadabad on tractor as he was employed by someone at

Sadabad. Then, he further states that in Kukargawan, one Rohitash Singh had employed him in a dairy. Then, he states that he was commuting daily between Kukargawan and Sadabad and he rarely went to his village. He further states that on the date of incident, he was returning from Kukargawan. He states that the milk, which he was carrying, was being transported by a tanker and that he used to drive the tanker. He further states that the accused persons had come on two separate motorcycles. Pravesh, Kishan and Rajveer were on one motorcycle whereas Manoj and Vipin were on the other motorcycle. One motorcycle was being driven by Manoj and the other motorcycle was being driven by Pravesh. He, however, had stated that he was not aware about the name and number of the motorcycle.

5. In his further cross-examination, the PW-1 states that when the accused persons had come near the tractor, they were having their country made pistol in their hands and when they had pulled down the deceased persons then also they were having their country made pistols in their hands. He specifically states that throughout the fire arms were never in the belt, which they were wearing and he states that it was such a fact which he had also got stated in the first information report. Upon being confronted with the F.I.R. he states that he did not know as to how in the F.I.R., it had been stated that the accused persons had taken out the fire arms from their belts. He states that when the incident occurred, he was sitting in the trolley attached to the tractor and when the accused persons were around 10 to 12 yards away, he had already seen them. He states that the deceased persons were sitting on the tractor and they were not sitting in the trolley. He specifically states that he knew the difference between a tractor and a trolley. He states that the accused persons had pulled down the deceased from the tractor and they were not taken out from the trolley. He states that if he had stated in the first information report that they were pulled out from the trolley, then it was a wrong fact. He also states that if he had stated in the examination-in-chief that they were pulled out from the trolley, then also it was stated inadvertently. He states that he had told the Investigating Officer also that the deceased were pulled down from the tractor and if the Investigating Officer had not written about the fact that the deceased had been pulled out from the tractor then he did not know why that statement had been written and in fact he states that if the Investigating Officer had written that the deceased were pulled out from the trolley then it was a wrong fact. He further states that in the tractor and on the trolley there were 8 to 10 people. He specifically states that he had not got their names recorded in the complaint despite the fact that he knew the names of those persons. He states that he had not given names of the persons present in the trolley as they were not ready to be the witnesses in the case. He states that the tractor belonged to one Har Prasad, who was a resident of his village and he states that the tractor was being driven by his son. He further states that the moment he had seen the accused persons, he had jumped out from the trolley and had run away and that before the incident had actually occurred, he had run across 2 to 4 fields. He specifically states that Rakesh had also jumped out and run away in the same direction i.e., towards the village-Rasgawan. He specifically states that what happened after they had run away was not known to him. However, he was not aware as to how many rounds of firings he had heard. He states that he had run towards the

village for help. He further states that when people from the village reached the spot, then he had come thereafter. The three deceased had died on the spot. He states that village- Rasgawan was one kilometre away from the place of incident and when he came back, the motorcycles were not there. The tractor trolley had also gone to the village. He states that he had seen that the accused persons had run away from Bahardoi. Probably, there was no mention about the presence of food in the dead body at the time of postmortem and when the question was put, then, PW-1 states that he did not know as to whether the deceased had taken food when they left their homes. He further states that when the spot was shown to the Police, it was around 9 or quarter to 9 and this showing of the spot was done after the First Information Report was got lodged. To show that the PW-1 was in the tractor, the PW-1 states that even though routinely the PW-1 used to go on bus or tempo, he had traveled by tractor on that day as he had got the tractor as a means of travel on that day incidentally.

6. When the accused Pravesh and Manoj were apprehended, the court framed charges against them on 01.04.2009, the PW-1 was again brought in for his statement-in-chief and cross-examination on 09.07.2010. Here again, he reiterates what he had stated in the examination-in-chief, earlier. He reiterates that the first information was actually written down by him at around 9:15 P.M. He states in his cross-examination that the panchnama of the dead bodies was done prior to his getting the First Information Report lodged and he states that the Police had reached the spot on the information given by someone else. He states that on the date of incident at around 3:00 P.M., he had returned from Kukargawan and that thereafter he had stayed there and at around 6:30 P.M. he was still at the village- Kukargawan and he had received information at Kukargawan itself about the incident and upon getting the information, he came to village Rasgawan. He states that when he had reached the place of incident, the Police had already reached before him and the primary investigations were going on. He further states that from Kukargawan, he had come on a motorcycle to the place of incident. He states that he had neither seen any motorcycle nor any tractor trolley. He also states that he was not aware as to who was present in the tractor. He further states that he was not aware as to who had called Rakesh (PW-2) at the place of incident. From where Rakesh had appeared, he had no knowledge. He states that the distance between Kukargawan and Rasgawan was two and a half to three kilometres and that as soon as he has heard about the incident at Kukargawan, he reached the spot. He further states that when he reached the place of incident, quite a few people had collected at the spot and that the three deceased had already died.

7. The PW-2, Rakesh Kumar, s/o Om Prakash, on 21.10.2008, appeared in the witness box and gave his statement-in-chief and stated that the incident was of 26.07.2007 and the PW-2 and Shyam Singh were on the tractor of Harprasad. He further states that Kishan, Rajveer, Pravesh, Vipin and Manoj, came on motorcycles. They got down from the motorcycles, came to the tractor trolley which they had stopped and thereafter fired. From the tractor Malkhan, Ram Murti and Pappu, were pulled out by Vipin, Manoj, Kishan, Pravesh and Rajveer, wherein Kishan and Rajveer had exhorted the other three that the deceased may not escape alive. At the

exhortation, Manoj, Pravesh and Vipin took out their country made pistols from their belts, which they had tied on their waists and fired on Malkhan Singh, Ram Murti and Pappu and upon being shot at they immediately fell down on the spot. He further states that Shyam Singh (PW-1) and he himself had seen whole incident with their own eyes. However, upon the firing having taken place, the two had jumped out from the trolley and had run away towards Bardohi. He further states that in the trolley there were many other persons sitting.

8. In the cross-examination, the PW-2 has stated that on the date of incident at around 12:00 P.M., the PW-2 had started from Sadabad. He had stated that there were many cases pending against Malkhan Singh. However, he states that he had not gone to the courts on the date of the incident alongwith the deceased. He states that even though there were 15 to 20 cases against Malkhan Singh, there was only one case in between Malkhan Singh and the accused persons. He specifically states that Malkhan Singh, Ram Murti and Pappu, were sitting in the trolley attached to the tractor and that he too was also sitting in the trolley. He states that Shyam Singh (PW-1) had gone to Sadabad in connection with the delivery of milk and that Shyam Singh had, in fact, come to the spot on a milk tanker. He states that Shyam Singh had driven the tanker and at that time he was accompanied by one more boy, whose name he did not remember. He states that Shyam Singh and the boy, who accompanied him, had come from Kukargawan. He states that Shyam Singh had gone from the village- Rasgawan to Kukargawan and from Kukargawan, he had taken milk and had gone to Sadabad. He states Shyam Singh had stayed in his village- Rasgawan, for about an hour, after the incident. He states that the fact that Shyam Singh had stayed at his village for an hour, after the incident, was not told to him by anybody but it was from his personal knowledge that he was stating this fact. He also states, as has been stated by PW-1, that in the tractor trolley, there were 10 to 12 people sitting and they were all from his village and he also knew them. However, he did not know the women sitting in the tractor. He states that the panchnama of the dead bodies took place between the 8:30 P.M. and 9:00 P.M. He further states that apart from him, the witnesses of the panchnama were Jaswant (Pradhan), Ram Gopal and Neetu. He states that the Police had reached the spot one and a half hour after the incident and they were called by the villagers of some other village on the phone. He states that the Police had reached the spot even before he had reached. He states that nobody had called him on the spot but because the other villagers were going, he had accompanied them upon hearing the hue and cry.

9. PW-2 further states that the accused persons had fired in the air and had stopped the tractor. He further states that when the firing took place, Shyam Singh ran away towards Bardohi. He states that he also ran towards Bardohi. Still further, he states that at the time when the accused pulled out the deceased, the two i.e. Shyam Singh and Rakesh had already jumped out from the trolley and had run away. He specifically states that Pappu had been pulled out by Manoj, Malkhan had been pulled out from the trolley by Vipin and Pravesh had been pulled out by Ram Murti and these three the persons (deceased) were sitting by the side of the trolley attached to the tractor. He states that the accused persons had pulled out the deceased victims from the trolley.

10. PW-2 further stated that the accused persons had also tried to catch hold

of him and PW-1 Shyam Singh but they could not do so as they had already run away by that time. He further states that at the time when the accused had gone into the trolley, they were empty handed. The accused had got into the trolley and after that they had pulled out the three deceased and before they pulled them out from the trolley, there was some physical altercation also. He states that the accused persons had fired on the deceased after two or three minutes when they had pulled the victims out from the trolley.

11. The PW-3 Ram Dev Gautam (Sub-Inspector) who had prepared the inquest gave his statement on 14.1.2011 and had proved the inquest reports Exhibit Ka-2, Ka-3 and Ka-4. He had also proved the related documents being Exhibit Ka-9, Ka-10, Ka-11 and Ka-12. He has stated in his cross examination that he had reached the spot and had prepared Exhibit K-2 on the spot at 23.00 hours (11.00 PM) and had prepared Exhibit Ka-4 at 2200 hours (10.00 PM) and Ka-3 at 2400 hours (12.00 PM) and then all the three dead bodies were sent for post-mortem. He has also stated that the three dead-bodies, before being sent for the post mortem, were lying at the spot till 12.00 PM. Upon being confronted by the statements of Shyam Singh PW-1 with regard to the dead bodies being sealed at 8.30 PM, he had stated that he was telling the truth and that the statement of Shyam Singh was a wrong one. He has throughout through his statements stated that the statements of the witness Shyam Singh were irrelevant and wrong.

12. PW-4 Dr. Ajay Agarwal who had conducted the post-mortem had stated that on 27.7.2007, he had conducted the post-mortem and had proved the post mortem reports and had given his opinion that the death had occurred because of the injuries caused by firing. He had also stated that he did not mention the fact as to whether there was food in the stomach and in the intestines of the dead-bodies and he had still further stated that it was wrong to state that he had not mentioned about the food in the dead bodies of the deceased because this fact gives the probability to ascertain the right time of death. He specifically had stated that on the dead bodies of the deceased, there were no physical injuries other than the injuries caused by firing.

13. PW-5 is the Investigating Officer Sub-Inspector Rakesh Sharma. He has proved the site plan and the recovery of the country made pistol. He has stated that upon the recovery being made of the firearms at the behest of the accused Vipin, the firearms and the bullets etc. were sent to the ballistic expert on 12.3.2008. He states that the delay had occurred despite the fact that the District Magistrate had given the permission on 9.10.2007. He had stated that in between 9.10.2007 and 12.3.2008 the firearm and the bullets samples etc. could not be sent as there were other businesses to perform and, therefore, he could not send the samples expeditiously. The Investigating Officer has, upon being questioned as to why he had not put Guddu, the driver of the tractor, in the list of witnesses, answered that it was a correct fact that he had not taken any statement of the independent witness namely Guddu. He has also stated that at the time of the incident, there were Amar Singh son of Vasdev; Brijmohan son of Ram Khiladi; Bhole son of Mauji; Sunil Kumar; Anil Kumar and Susheela Bahan Ji sitting on the tractor trolley but he had not taken the statements of these persons. He has stated that he had not taken the statements of these persons as they were

not ready to give their statements and he had even mentioned this fact in his inquiry report. He had stated that he knew the difference between a tractor and a trolley attached to it. He has stated that the witnesses had told him at the time of investigation that the three deceased were sitting in the trolley and that they were not sitting on the tractor.

14. CW-1 Constable 170 Har Narayan Singh has proved the death of accused-Rajveer.

15. Thereafter statements were taken of the accused persons under section 313 Cr.P.C. and the accused persons namely Kishan Singh and Vipin had stated that all the evidence were got prepared and were a bundle of lies and that the reports were all false. They denied the incident saying that they had been falsely implicated due to enmity.

16. From the side of the accused persons, DW-1 Guddu was produced and examined who allegedly was the driver of the tractor which was carrying the three deceased namely Ram Murti, Pappu and Malkhan and also the PW-1 and PW-2. However, the DW-1 in his statement had categorically stated that the PW-1 Shyam Singh and PW-2 Rakesh were not sitting in his tractor trolley. He also in fact had stated that Rajveer, Kishan Singh, Manoj, Pravesh and Vipin had not killed Ram Murti, Pappu and Malkhan after pulling them out from the tractor. He states that he would recognize the accused assailants. He also states that he does not even remember the number of the tractor.

17. Upon trial having been completed, the District & Sessions Judge, Hathras on 24.3.2012 convicted the accused Kishan Singh, Pravesh, Manoj and Vipin under section 302 read with section 149 IPC. With regard to the offences under sections 147, 148 and 504 IPC, no conclusion was arrived at. Under section 25 of the Arms Act, the accused Vipin who was charged under section 25 of the Arms Act, was acquitted. During trial, accused Rajveer died on 10.11.2010 and, therefore, the trial had abated viz.-a-viz. Rajveer.

18. Sri Apul Mishra, learned counsel appearing for the appellants assisted by Sri Atul Kumar, Advocate in effect argued that the appellants were innocent and that they had been wrongly implicated. Following were the arguments raised by learned counsel for the appellants :-

(i) Learned counsel for the appellants states that though the incident occurred but the appellants were not the ones who had committed the crime. Learned counsel relying upon the statements made by the PW-1 and PW-2 has stated that the eye-witness account of the PW-1 and PW-2 were absolutely not convincing. Learned counsel took us through the statements made by PW-1 Shyam Singh and has stated that despite the fact that Shyam Singh had lodged the First Information Report on 26.7.2007 and the FIR clearly had stated that it was being lodged at 20.15 (8.15 PM). Shyam Singh had stated in his cross-examination that the written report was scribed by him at around 9.15 PM while sitting at a STD shop in the neighbouring bus stand. He had stated that the paper on which the complaint/written report was written was brought to him by his cousin (Bua's son) and on it he scribed the report. Learned counsel states that this is in direct contravention to the time which had been given in the FIR. Relying upon this contradictory statement of the PW-1,

learned counsel states that the statement of the eye-witness PW-1 becomes very unreliable and the evidence can be said to be a shaky one and not to be relied upon for convicting the accused.

(ii) He further states that in the statement of PW -1 it had been stated that the dead bodies were sealed and were in the police van stationed at the bus stand while he was writing down the written report but the Investigating Officer, PW -5, in his statement had stated that he had not received the information with regard to the incident on phone and he had reached the spot on his own on getting information at about 10:00 PM and at that point of time the dead bodies were still lying on the spot.

Since the learned counsel for the appellants compared the statements of PW-1 and PW-5, they are being reproduced here as under:-

"मै कक्षा 8 तक पढा लिखा हूँ। F.I.R. थाने के बाहर लिखी थी। रोडवेज बस स्टेन्ड पर बैठ कर लिखी थी। दुकान पर बैठकर (का० फटा) थी। रात के सवा नौ बज रहे थे दुकान किसकी थी मुझे नही मालुम। दुकान STD की थी। रिपोर्ट लिखने के लिए कागज मेरी बूआ का लडका लेकर आये थे। बुआ का लडका मेरे घर पर एक दिन पूर्व घूमने आया था। मै घटना स्थल से गाँव नही गया था। जब तक बुआ का लडका घटना स्थल पर आ चुका था तब तक मौके पर पुलिस आ चुकी थी। पुलिस मुझे तथा मेरे बुआ के लडके तथा अन्य व्यक्तियों को लेकर थाने आई थी। मेरी बूआ का लडका आगरा से आया था। F.I.R. मैंने स्वय लिखी थी किसी ने बोली नही थी। मेरी बूआ का लड़का बब्लू मुड़ी जहांगीर पुर का रहने वाला है। विजय कुमार पुत्र उदयभान सिंह भी मेरी बूआ का लडका है जो हसनपुर का रहने वाला है।"

The statement of the P.W.-5 which states that the dead bodies were lying at the place of incident at 10:00PM is being reproduced here as under :-

"मुझे इस घटना की सूचना फोन से नही मिली थी, मै रिपोर्ट दर्ज होने से पहले घटना स्थल पर नही पहुँचा था, मैं घटनास्थल पर करीब दस बजे पहुँचा था और उस समय तक लाशें घटना स्थल पर मौजूद थी।"

(iii) The counsel for the appellants has stated that the statements of PW-1 and PW-2 with regard to the fact that as to whether the deceased Ram Murthi, Pappu and Malkhan were sitting on the tractor or trolley is not reliable. In the first information report, the PW-1 had stated that the deceased were sitting in the trolley whereas in the cross-examination he has categorically stated that the deceased were, in fact, sitting on the tractor and they were, in fact, pulled out from the tractor. The PW-2 has, in direct contravention to what had been stated by PW-1, had stated that the deceased were sitting in the trolley. Upon being cross-examined, the two witnesses had clearly stated that they knew the difference between a tractor and a trolley and, therefore, the statements, learned counsel for the appellants states, of the two eyewitnesses becomes absolutely unreliable.

(iv) The counsel for the appellants has questioned about the presence of the PW-1 and PW-2 also. He has stated that PW-1 has, in the first information report, stated that he was sitting in the tractor trolley when the incident occurred. However, in the cross-examination, he has stated at one point of time that when he saw the assailants coming he alongwith PW-2 had jumped out and had run away and at another point of time he had stated that he was, in fact, working for a businessman who was dealing in milk and that he was, in fact, in Kukargawan at the time when the incident had occurred and that he later on came by a motorcycle upon getting the information that the incident had occurred.

(v) Learned counsel for the appellants has further relying upon the statements of PW-2 stated that even PW-2 was not clear as to whether the PW-1 and PW-2 were present at the time of incident.

He states that PW-2 has very categorically stated that at the time when the incident had occurred the two i.e. the PW-1 and PW-2 had already jumped out from the trolley and had ran away.

(vi) Learned counsel for the appellants has further stated that had the witnesses been on the spot they would not have given contradictory statements as to whether the firearms were taken out from the waist of Vipin, Pravesh and Manoj or whether the firearms were in their hands. In the First Information Report, it has been stated that at first firing was done in the air and the tractor was stopped and the deceased victims were pulled out from the trolley and thereafter at the exhortation of Kishan and Rajveer, the three assailants i.e. Vipin, Pravesh and Manoj had taken out the pistol from their waists and had shot the bullets whereas in the cross-examination of PW-1 and PW-2, a contrary statement had been given that the three assailants namely Vipin, Pravesh and Manoj had throughout held the firearm in their hands and along with the firearms they had entered the trolley and pulled the three victims out and killed them.

(vii) Learned counsel for the appellants has stated that the tractor trolley as per the PW-2 and 5 had around 10-12 other persons in it. They all were known to the PW-1 and PW-2 but their names were not mentioned in the list of witnesses and that they were also never produced in the witness box. They were uninterested witnesses as compared to PW-2 and the PW-1 who was the brother of Pappu and Ram Murti and the nephew of Malkhan. He, therefore, states that only on the basis of an unreliable interested witnesses, the conviction of the accused could not take place.

(viii) Learned counsel for the appellants also has further submitted that despite the fact that the PW-5, the Investigating Officer, was in the know of the fact that the driver was Guddu and that he was a neutral person, PW-5 had not examined Guddu even at the time of the investigation and, therefore, definitely he was not produced in the witness box. He submits that the driver of the tractor namely Guddu was produced as DW-1 and was cross-examined by the parties and he, as per the learned counsel for the appellants, has very categorically stated that even though the incident had occurred, definitely, Rakesh and Shyam Singh were not there in the tractor trolley. This, learned counsel states, was a conclusive evidence of the fact that the PW-1 and PW-2 who were claiming themselves to be eye-witnesses, were in fact not present at the spot.

(ix) The DW-1 has further in definite terms had stated that the appellants were not the assailants in the incident and he could identify the actual assailants. Thus, learned counsel for the appellants submits that though the incident has taken place but the appellants were not the actual assailants and they have been implicated due to enmity.

(x) Learned counsel for the appellants Sri Apul Mishra has further submitted that the whole investigation becomes doubtful in view of the fact that the Exhibit Ka-8 which has been prepared by the Investigating Officer PW-5 shows that the Investigating Officer has signed the documents on 29.7.2007 whereas the seizure of the empty cartridges was done on 26.7.2007. He further states that if the statement of PW-5 is seen then it would become clear that in fact he had seized the empty cartridges on 27.7.2007.

19. Learned AGA Sri Amit Sinha assisted by Ms. Mayuri Mehrotra has

argued that if the incident has been proved to have occurred and if the injuries were proved by the medical report then even if there were certain discrepancies in the statements of PW-1 and PW-2 then the conviction was proper and that the appeal be dismissed. Learned AGA has submitted that as the recovery of arms was done at the pointing of Vipin, it was only indication of the fact that Vipin was definitely involved in the incident. Also, he has submitted that there was absolutely no ground whatsoever to exonerate the appellants.

20. We have heard learned counsel for the appellants Sri Apul Mishra assisted by Sri Atul Kumar and the learned AGA Sri Amit Sinha for the State. The counsel appearing for the appellants has argued primarily that two eye-witnesses i.e. PW-1 and PW-2 were not reliable eye-witnesses. There is contradiction in the statements of PW-1 to a very large extent. Initially, it was stated that the deceased were sitting inside the trolley but subsequently the PW-1 had stated that they were sitting on the tractor and that the deceased was pulled out from the tractor.

21. Learned counsel for the appellants has stated that even though the PW-1 in the first information report has stated that he was sitting in tractor trolley, in his cross-examination he had stated that he alongwith PW-2 had jumped out of the tractor trolley and at the point of time when the incident had occurred, he was not there in the tractor trolley.

22. Still further in the cross-examination, the PW-1 had stated that he was working for a businessmen and that, in fact, at the time of the incident, he was at Kukargawan and that he reached the spot later on by a motorcycle.

23. Learned counsel for the appellants has still stated that even the statement of PW-2 was not reliable as his statement was in contradiction to the statement of PW-1. The PW-2 had stated in his cross-examination that at the time when the incident had occurred, both the PW-1 and PW-2 were not there in the tractor trolley and that they had at an earlier point of time jumped out of the trolley.

24. Still further, we find substance in the argument of learned counsel for the appellants that when the eye-witnesses were giving eye-witness account, they would not have given contradictory statement as to whether the fire-arms, from the beginning till the firing taken place, were in the hands of the appellants or whether they were in their waist and that they were taken out at the time of firing.

25. We also find substance in the argument of learned counsel for the appellants that had the PW-1 and PW-2 been at the spot and had witnessed the incident then they would definitely have mentioned the names of 10 to 12 persons who were accompanying them and the deceased persons in the tractor trolley.

26. We also find substance in the fact that the PW-5, the Investigating Officer, had despite the fact known the name of the driver of the tractor never examined and had never included him in the list of witnesses. We also find substance in the argument of learned counsel for the appellants that the recovery of the empty cartridges was done in a very slipshod manner. Even though the seizure of the empty cartridges was done on 26.7.2007, the document showing the recovery was signed on 29.7.2007. The manner in which the prosecution witnesses had changed

there stand about the fact as to how they had witnessed the incident makes the entire prosecution story unreliable. Even though it is correct that minor discrepancies should be ignored, we find that the discrepancies are of such a nature which cannot be ignored and we thus hold that the appellants were in fact not guilty of the crime as the prosecution has failed to prove its case beyond reasonable doubt against the appellants herein.

27. The appeals are, therefore, allowed. The judgment and order 24.3.2012 is set aside. The appellants before us, in both the appeals, are declared innocent and are acquitted of the charges levelled against them in the instant case. The appellant-Kishan Singh is already on bail. Therefore, his bail bonds as well as sureties are discharged.

28. In the instant case, the appellant-Pravesh was declared juvenile vide order dated 24.3.2018 by the Juvenile Justice Board, Hathras after his conviction by the impugned order and in pursuance of the order dated 24.3.2018, he was released in the instant case. The appellant-Vipin was also declared juvenile vide order dated 10.5.2018 by the Juvenile Justice Board, Hathras and was released in the instant case. The appellant-Manoj is in jail. He shall be released forthwith unless required in any other case.

(2024) 3 ILRA 1623
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2024

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 10336 of 2023

Vikram Singh ...Appellant
Versus
State & Anr. ...Respondents

Counsel for the Appellant:
Sri Anil Kumar Pathak, Sri Vijay KUmar

Counsel for the Respondents:
G.A.

(A) Criminal Law - Attachment of Property under Gangster Act - Reference made under Section 15(1) - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 2(b), 2(c), 14, 15(1), 16, 17 - Must be a nexus between the commission of any offence and the acquisition of the property – Nexus between "reason' and "belief' - District Magistrate's order attaching property must be based on reasonable belief and not arbitrary - For the purpose of enquiry, the Court is empowered to take any evidence and to summon any person as a witness as it considers necessary - If the appellant was not a gangster at the time of acquiring the property, he could not commit an offence under the Act - Burden of proof lies on State to prove property was acquired through commission of offence. (Para - 9,10,11,12,14)

Appellant's vehicle attached under Gangsters Act - attachment order challenged before D.M. and ASJ – rejected by both court - Vehicle purchased in 2016, prior to appellant's involvement in criminal cases - appellant contended - vehicle was financed through a bank loan and agricultural income - not criminal earnings - Special Judge, Gangster Act affirmed seizure - prompting this appeal. (Para 2-5,12)

HELD: - Attached vehicle was acquired by appellant with the aid of his earnings from legal resources and not due to commission of any offense under the Act. Impugned orders were not reasoned orders. D.M. only attached vehicle based on a police report. State had to initially prove the appellant was a gangster, but the

claimant had to prove in the negative. Impugned order of attachment was arbitrary and mechanical. Enquiry under Section 16 of the Act was not performed in accordance with the Act's proceedings and object. Entire proceeding initiated under Sections 14, 15, and 17 was vitiated. Impugned judgment and order quashed. Property vehicle 'Scorpio' attached in the matter was released from attachment forthwith. (Para -15,16)

Appeal allowed. (E-7)

LIST OF CASES CITED: -

1. Smt. Rashida Bano Vs St. of U.P. & ors., 2014 6 ADJ 575

2. Badan Singh @ Baddo Vs St. of U.P. & ors., (2001)10 AHC CK 0033

3. Smt. Maina Devi Vs St. of U.P., 2013 9 ADJ 542

4. Waseem Khan Vs St. of U.P., 2023 LawSuit (All)751

5. Abrar Vs St. of U.P. & anr., Crl. Appeal No. 2130 of 2021

6. St. of U.P. Vs Manoj Kumar Pandey, 2010 (69) ACC 1

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

1. In the present criminal appeal the judgment and order dated 5.11.2022 passed by Special Judge Gangster Act / Additional Sessions Judge, Court No. 4, Aligarh in Criminal Misc. Case No. 330 of 2022, which is a reference made to the court under Section 15(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Act") whereby the orders of the District Magistrate, Aligarh dated 13.8.2021 seizing / attaching the vehicle of appellant under Section 14 of the Act as well as order dated 23.5.2022 dismissing the objection moved by the appellant have been affirmed, has been questioned.

2. The facts of the case, in brief, are that the District Magistrate, Aligarh passed an order under Section 14(1) of the Act seizing / attaching the vehicle of the appellant on the basis of report of in-charge Inspector, Police Station Pisawa, District Aligarh dated 29.7.2021, submitted through S.S.P., Aligarh. It was mentioned in the report that during investigation of Case Crime No. 88 of 2021 under Section 2/3 of the Act, it was found that appellant owned a vehicle Scorpio bearing registration no. UP 81-BL2333 which was purchased with illegally earned money as gangster in the year 2016.

3. Against the aforesaid attachment / seizure order, the appellant made a representation under Section 15(1) of the Act to the District Magistrate, Aligarh, who dismissed the same and affirmed the order of attachment dated 13.8.2021. Simultaneously, he referred the matter to the Court of Additional Sessions Judge, Gangster Act under Section 16(1) of the Act vide order dated 23.5.2022. The appellant approached the competent Court at Aligarh but his application was rejected by the Special Judge Gangster Act / Additional Sessions Judge, Court No. 4, Aligarh vide order dated 5.11.2022. Feeling aggrieved with the said order, this criminal appeal has been preferred by the appellant before this Court.

4. Heard Shri Anil Kumar Pathak, learned counsel for the appellant, Shri Nitesh Kumar Srivastava, learned A.G.A. and perused the record.

5. It is submitted by the learned counsel for the appellant that the appellant

has been falsely implicated in two criminal cases i.e. Case Crime No. 71 of 2021 under Sections 420, 272, 273, 120-B IPC and 60(1) Excise Act, P.S. Pisawa, District Aligarh and Case Crime No. 72 of 2021 under Sections 420, 272, 273, 467, 468, 471, 120-B IPC and 60(1) Excise Act, P.S. Pisawa, District Aligarh. On the basis of pendency of the aforesaid two cases, proceeding under the Act was initiated by the Station House Officer, P.S. Pisawa, district Aligarh against the appellant. It is also submitted that the Scorpio vehicle said to be in his possession was purchased with the money earned by him. He took a loan of Rs. 12,50,000/- from Canara Bank, S.M.E. Branch, Aligarh on 31.5.2016 and repaid the same by way of EMI for Rs. 20,255/-. He had filed income tax return showing his income in the years 2015-16 as Rs. 10,15,504/-, 2016-17 as Rs. 6,23,497/-, 2017-18 as Rs. 09,39, 162/-, 2018-19 as Rs. 03,18,350/-, 2019-20 as Rs. 03,01,350/-. It is further submitted that he had paid the cash money of Rs. 03,06,200/- from the earning of agricultural products. It is further submitted that the District Magistrate, Aligarh did not consider the plea of appellant and arbitrarily confirmed his order of attachment while rejecting his representation and holding that the vehicle was procured by illegally earned money by a gangster as a result of commission of an offence triable under the Act and referred the case to Special Judge Gangster Act, Aligarh. It is further submitted that the Additional Sessions Judge, Court no. 4, Aligarh passed the order dated 5.11.2022, under challenge in this appeal, upholding the orders of the District Magistrate dated 13.8.2021 and 23.5.2022 and dismissed the application of the appellant which is illegal and against the mandate of law.

6. Learned A.G.A. vehemently opposed the contentions made by learned counsel for the appellant and submitted that the Court concerned after examining all the facts and evidence on record passed the impugned order and there is no illegality in the same.

7. I have considered the rival submissions made by the learned counsel for the parties and have gone through the entire record carefully.

8. Before examining the arguments advanced by the learned counsel for the parties, it is appropriate to first consider the provisions of Section 2(b) and 2(c) of the Act, which read as under:

"2(b). "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

.....

.....

2(c). "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;"

9. On a conjoint reading of Section 2(b) and 2(c) of the Act, it appears that for taking action under Section 14 of the Act against a person, there must be material for objective determination of the District Magistrate that he either, as a member, leader or organiser of a gang acquired any property as a result of commission of any

offence under the Act. There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property, as it is necessary to find out whether his acquisition of property was a result of commission of any offence enumerated in the Act being a gangster. Further, one might have committed several offences but if the property is acquired by him with the aid of his earning from legal source, no action under Section 14 of the Act can be taken against him.

10. Section 14 of the Act reads as under :

"14. Attachment of property*.- (1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.*

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property."

This Court had an opportunity to go through the various judgments of this Court viz. ***Smt. Rashida Bano vs. State of U.P. and others, 2014 6 ADJ 575, Badan Singh @ Baddo vs. State of U.P. and others, (2001)10 AHC CK 0033, Smt. Maina Devi vs. State of U.P., 2013 9 ADJ 542, Waseem Khan vs. State of U.P., 2023 LawSuit (All)751 and Criminal Appeal No. 2130 of 2021 (Abrar vs. State of U.P. and another),*** decided on 23.10.2021 propounding legal dictums on the subject and a co-joint reading of the same leads to draw a conclusion that Section 14 clearly provides that the order of the District Magistrate attaching one's property, must be based on reason and not arbitrary. The expression "reason to believe" appearing therein has some intent and purpose. It puts fetter in the arbitrary exercise of power of attachment to deny a person of his right to any property. Law requires that there must be reason to believe that the property sought to be attached, has been acquired by a "gangster' as a result of commission of any offence under the Act. The expression "reason to believe" contemplates an objective determination based on intelligent care and deliberation involving judicial review, as distinguished from purely subjective consideration. There must be rational and intelligible nexus between "reason' and "belief'. The word "believe' is a much stronger word than "suspect' and it involves the necessity of showing that the circumstances were such that a prudent man must have felt convinced in his mind that what has been alleged, is true. The expression "reason to believe" is also defined in Section 26 of the Indian Penal Code. According to the said definition, a person is said to have "reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise. "Reason to believe" is not the same thing as the "suspicion' or "doubt' and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. The Court, of course, cannot investigate

into the adequacy or sufficiency of the reasons examined by the authority in coming to the believe, but the Court can certainly examine whether the reasons are relevant and have a bearing in the matter in regard to which it is required to entertain the belief.

11. To add further, it is to be kept in mind that initial burden is always upon the State to satisfy the District Magistrate with necessary materials that the appellant being a gangster acquired the properties as a result of commission of any offence mentioned in Section 2 of the Act. So far as the present case is concerned, this has not been done by the State. It is also to be kept in mind that the appellant / aggrieved is not liable to establish the source of income to acquire the property in question. It is no requirement of law that the aggrieved person seeking release of properties from attachment must prove the source of income for acquisition thereof. There must be a nexus between the commission of any offence and the acquisition of the property. It reflects from the perusal of the impugned order passed by the District Magistrate concerned that he being influenced by the report of the police, hastened to exercise power under the Act and attached the property in question in absence of any material to show that the said property was acquired as a result of commission of any offence triable under the Act.

12. This fact cannot lose sight of that prior to the year 2021, there was no criminal case lodged against the appellant and the property in question was purchased by him prior to the year 2021 but in the year 2016 and thus, at that point of time he was not a gangster and in this situation the requirement of law does not fulfil at all. If the appellant was not a gangster at the time of acquiring the property, he could not commit an offence under the Act. It is an admitted case that the vehicle in question was purchased by the appellant in the year 2016 when he was having no criminal history to his credit and he was not a gangster.

13. Sub-sections (3) and (5) of Section 16 of the Act, which are relevant, are as under:

"3 (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed on any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(5) In any proceedings under this Section the burden of proving that the property in question or any part thereof was not acquired by gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act notwithstanding."

14. The Court while dealing with the reference made under sub-section (2) of

Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the inquiry held by him under section 16 of the Act. Sub-section (3)(b) of Section 16 of the Act provides that the Court shall hear the parties, receive evidence produced by them and take such further evidence as it considers necessary to decide whether the property was acquired by a gangster as a result of the commission of an offence triable under the Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case. In the present case the appellant has shown before the Court concerned the source of money whereby he purchased the aforesaid vehicle (i) from the loan of Rs. 12,50,000/- taken from Canara Bank, Aligarh, (ii) Rs. 2,00,000/- from the earning of agricultural products of ancestral properties, and (iii) from the earning of his three shops allotted to him as excise contractors for which Rs. 01,06,200/- has been paid as income tax by him in the financial year 2016-17. In the impugned order, the Court concerned while dealing with the matter has observed that the appellant had leased out his agricultural land for two years and received Rupees Two Lakhs and made down payment in respect of the said car but he did not prove it by presenting the person to whom he had leased his agricultural land. It is true that the appellant has not presented the person to whom he had leased his agricultural land before the Court but sub-section (3)(b) of Section 16 of the Act empowers the Court to take such further evidence as it considers necessary to decide the issue. It was held in ***State of U.P. vs. Manoj Kumar Pandey, 2010 (69) ACC 1*** that "For the purpose of enquiry, the Court is empowered to take any evidence and to summon any person as a witness as it considers necessary." But in the matter in hand such power has not been exercised by the Court. If the Court concerned was of the view that the person, to whom land was given on lease, ought to have been presented before the Court, he could very well be summoned by the Court itself but instead of proceeding in this direction, the Court concerned acted in a hasty manner and did not consider this aspect of the matter. The District Magistrate concerned has also not considered the fact that at the time of procuring the vehicle the appellant was not a gangster and rejected his representation.

15. Hence, keeping in view the facts and circumstances of the case the Court is of the view that the vehicle, which was attached, was acquired by the appellant with the aid of his earning from legal resources and it was not a result of commission of any offence triable under the Act and the impugned orders are not reasoned orders. It appears that only on the basis of the police report, the District Magistrate has attached the vehicle in question and no relevant material was supplied to the District Magistrate to have reason to believe that the property in question was acquired by the gangster, the present appellant, as a result of commission of any offence triable under the Act though it was incumbent upon the State to initially prove that the appellant was a gangster who has allegedly acquired the property by way of commission of offence and after its proof burden lies on claimant to prove in negative. It vitiates the subjective satisfaction of the District Magistrate also. From the perusal of record it also appears that the District Magistrate had no relevant material in support of the police report with regard to that the vehicle in question was

acquired by the present appellant being gangster. It also appears that the appellant was having enough source of income from which he had procured the vehicle and even the said vehicle was procured by him much prior to the registration of criminal cases and imposition of provisions of Act against him, which was invoked in the year 2021 and the impugned order of attachment was passed in mechanical manner without application of mind and was arbitrary. The enquiry under Section 16 of the Act was not performed in accordance with the proceedings and object of the Act and the provisions of Sections 14, 15 & 17 of the Act were also not followed in true spirit. Hence, the entire proceeding initiated in pursuance thereof is vitiated.

16. In view of the discussions made above, in my view the impugned judgment and order dated 5.11.2022 passed by Special Judge Gangster Act / Additional Sessions Judge, Court No. 4, Aligarh in Criminal Misc. Case No. 330 of 2022, which is a reference made to the court under Section 15(1) of U.P. Gangsters and Anti-Social Activities (Prevention) Act, the orders of the District Magistrate, Aligarh dated 13.8.2021 seizing / attaching the vehicle of appellant under Section 14 of the Act as well as order dated 23.5.2022 are liable to be quashed and the appeal is liable to be **allowed.** Accordingly the aforesaid orders are quashed and the appeal is allowed. The property vehicle 'Scorpio' attached in the matter shall be released from attachment forthwith.

17. Copy of this judgment be transmitted to the Court / District Magistrate concerned for necessary compliance.

(2024) 3 ILRA 1629

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE GAJENDRA KUMAR, J.

Criminal Misc. Writ Petition No. 27 of 2024

Upasana Kumari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gambhir Singh, Sri Amit Kumar Verma, Sri Amit Kumar Verma

Counsel for the Respondents:
G.A.

Criminal Law –Constitution of India,1950 - Article 226 – medical examination during investigation – offences under Sections 498A, 323, 354, 504, 420 IPC and Sections 3/4 D.P. Act – allegation of non-consummation of marriage and impotency of husband – FIR lodged by wife – medical examination of husband conducted – Medical Inquiry Committee advising gynecology examination of wife – objection by petitioner – sexual intercourse involves both husband and wife – comprehensive report regarding potency test cannot be prepared without medical examination of petitioner – investigation includes all proceedings for collection of evidence under Section 2(h) Cr.P.C. – no illegality or impropriety in medical advice – no interference required .

W.P. dismissed. (E-9)

Cases Cited:

1. Ameet Bhuvan v. Smt. Swati Bhaskar, First Appeal No. 111 of 2014, decided on 10.07.2017 (Uttarakhand High Court)

2. Jagdish Lal v. Smt. Shyama Madan and others, AIR 1966 All 150

3. T. Rangaswami v. T. Aravindammal, AIR 1957 Mad 243

4. Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582

5. Sharda v. Dharmpal, (2003) 4 SCC 493

6. Yuvraj Digvijay Sinhji v. Yuvrani Pratap Kumari, AIR 1970 SC 137

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Gajendra Kumar, J.)

1. Heard Sri Gambhir Singh, learned counsel for the petitioner and Mrs. Manju Thakur, learned A.G.A.-I for the State respondents.

2. This writ petition is preferred under Article 226 of Constitution of India inter-alia with following reliefs:-

"(i). Issue a writ order or direction in the nature of certiorari to quash the impugned orders dated 07.10.2023 and 16.12.2023 passed by respondent no.4, whereby the petitioner/ victim has been ordered to undergone medical examination in respect of case crime no. 34 of 2023, Under Section 498A, 323, 354, 504, 420 IPC and 3/4 D.P. Act, Police Station- Mahila Thana, District Moradabad.

(ii) Issue a writ order or direction in the nature of mandamus commanding the respondent nos. 2 & 3 to take necessary action for conducting potency test/medical examination of respondent no.5 in K.G.M.U. Lucknow as advised by the board of the doctors of District Hospital Moradabad in place of L.L.R.M. Medical College, Meerut.

(iii) Issue a writ order or direction in the nature of mandamus commanding the respondent nos. 2 & 3 to conduct fair and impartial investigation of case crime no. 34 of 2023, Under Section 498A, 323, 354, 504, 420 IPC and 3/4 D.P. Act, Police Station- Mahila Thana, District Moradabad within stipulated period."

3. The brief facts as per prosecution case are that the marriage of the petitioner was solemnized with 5th respondent (husband) on 26.01.2023 with Hindu rites and rituals but the marriage could not be consummated on account of impotency of her husband. Consequently, a written report dated 01.07.2023 was submitted by the petitioner at Police Station Mahila Thana, District Moradabad, alleging that the respondent nos.5 to 8 had inflicted cruelty on her and concealed the fact of impotency of her husband by birth with the petitioner. The aforesaid case was registered as Case Crime No.34 of 2023 under Sections 498A, 323, 354, 504, 420 IPC and 3/4 D.P. Act, Police Station Mahila Thana, District Moradabad.

4. Learned counsel for the petitioner submits that the petitioner herself is a victim of offence under Sections 498A, 323, 354, 504, 420 IPC and 3/4 D.P. Act and therefore, there was no reason to advise the petitioner to undergo medical examination (Gynecology Examination). She herself had raised a question of impotency of her husband/accused and demanded his potency test. Further, it is contended that her husband was medically examined by the Doctor of T.M.U. Hospital, Moradabad on her request and according to the supplementary report of the doctor dated 01.08.2023, petitioner's husband was found suffering from phimosis disease, which is the main cause for impotency.

5. It is also contended that her husband was well aware that he was not in a position to perform sexual intercourse and in fact, he is an impotent person. Without divulging the said fact, the marriage has been solemnized. It is also alleged that during the investigation, in most arbitrary manner, the Investigating Officer had deleted Sections 354 and 420 I.P.C. as the case had been made out against the accused persons under Sections 354 and 420 IPC. Therefore, it is pressed that the impugned orders are illegal, arbitrary and against the provisions of law, wherein the respondents had no authority to compel the petitioner to undergo the medical examination. In case of marriage, physical relationship or mental relationship is a condition, which is persistent and regular to make the consummation of marriage essential. Non-consummation of marriage was the sore point of the wife (petitioner) due to which she lodged the FIR against the respondent nos.5 to 8. Moreover, once the petitioner alleged that her husband is impotent and cannot cohabit, then in such situation the petitioner cannot be asked to undergo medical examination. Hence, the impugned orders are illegal, arbitrary and the same are liable to be set aside.

6. Per contra, Mrs. Manju Thakur, learned A.G.A.-I has vehemently opposed the writ petition and submitted that the impugned orders (medical advises) were passed by the authority concerned after considering all the aspects of the matter. Moreover, once the petitioner's husband had raised an objection that the petitioner wife refused to cooperate with him in sexual intercourse, then in such situation one sided version cannot be accepted and the petitioner cannot refuse to get herself medically examined. Moreover, in the instant case, on the instance of the petitioner, once the husband had already undergone the medical examination then the refusal by the petitioner for medical examination is in fact interference in the ongoing investigation in the matter. In support of her submission, she has placed reliance on the judgment of High Court of Uttarakhand at Nainital in **Ameet Bhuvan vs. Smt. Bhaskar**[1]. She lastly submits that said disputed fact cannot be pressed under Article 226 of Constitution of India. The writ petition is devoid of merit and the same is liable to be dismissed.

7. Heard rival submissions and perused the record.

8. From perusal of the pleadings as well as Annexures available on record, it transpires that initially, the petitioner lodged an FIR against her husband as well as other in-laws (respondent nos.5 to 8) with the allegation of mental and physical cruelty regarding non-fulfillment of demand of dowry. The petitioner in addition to physical cruelty had also alleged that her husband was in fact impotent since birth and same had been concealed by the private respondents. On account of his impotency, the marriage could not have been consummated. In pursuance of the FIR the investigation was carried out. Even though, initially the charge sheet was forwarded to the Circle Officer concerned, to which the objection was raised by the petitioner that the respondents had not ensured to get the potency test of her husband and in collusion with the respondents, the investigating officer had forwarded the chargesheet.

9. It further reveals that on account of the protest of the petitioner, further investigation was carried out by the

concerned police authority in pursuance of which the medical examination of the petitioner's husband was conducted by the Medical Board at District Hospital Moradabad. Thereafter, the Board advised for reference to L.L.R.M. Medical College, Meerut or K.G.M.U. Medical College, Lucknow vide it's report dated 20.09.2023 for further specialised tests/medical examination i.e. Neurologist, Urologist, Psychiatrist, Endocologist, which can only be carried out at the super-speciality hospital and the same is not available at District Moradabad. Meanwhile, the petitioner approached this Court by means of Criminal Misc. Writ Petition No.12827 of 2023 (Upasna Kumari Vs. State of U.P. and 6 others) with a prayer for fair, impartial and proper investigation in respect of the aforesaid Case Crime, wherein, a Division Bench of this Court vide order dated 20.09.2023 had proceeded to dispose of the writ petition in the light of judgment in **Ajay Kumar Pandey vs. State of UP and others**[2], by granting liberty to the petitioner to invoke the power of the Magistrate concern under Section 156 (3) Cr.P.C.

10. Pursuant to the aforesaid order, the petitioner moved another application under Section 156 (3) Cr.P.C. before the concerned Magistrate. After hearing and perusal of the record, the Civil Judge (Junior Division), FTC, Moradabad (Crime Against Women) had asked a report from the investigating officer alognwith the case diary and passed an order dated 21.10.2023 with following effect:-

"सुना व अवलोकन किया।

प्रश्नगत मामले में- विवेचक के मौखिक व लिखित तथ्य व केस डायरी के अवलोकन से पाया जाता है कि याचिका द्वारा प्रार्थनापत्र में जिन तथ्यों को वर्णित करते हुए विवेचना कराये जाने का अनुरोध किया गया है उन सभी तथ्यों को ध्यान में रखते हुए विवेचक द्वारा विवेचना अग्रसारित की जा रही है। ऐसी स्थिति में विवेचक को विवेचना में अन्य कोई आदेश देना विवेचना में हस्तक्षेप किया जाना होगा। अतः अन्य कोई आदेश दिया जाने का कोई औचित्य नहीं है। प्रार्थनापत्र तद्नुसार निस्तारित। विवेचक को निर्देशित किया जाता है कि वह नियमानुसार सभी तथ्यों को ध्यान में रखते हुए विवेचना सुनिश्चित करे।"

11. The Chairman, Medical Committee, LLRM Medical College Meerut made a communication to the Principal LLRM Medical College, Meerut on 07.10.2023 that Mudit Kumar (petitioner's husband) may be directed to be present on 11.10.2023 at 01:00 p.m. before the surgery department as per advice given by Dr. Shivendu of Endocology Department and Dr. Tarun Pal of Psychiatric Department. In this backdrop, the members of the Medical Committee had unanimously resolved that as the complainant had made a complaint against her husband regarding his impotency and capacity to copulate, therefore, the petitioner may also be medically examined by the Gynecologist and CMO Moradabad and a report be submitted to the Committee in sealed cover. The petitioner is aggrieved with the said advise, specially for undergoing medical examination by the Gynecologist and the application was moved with the prayer that she does not want her medical/gynecology examination without the order by the Court.

12. In this backdrop, the Medical Committee again convened the meeting on 13.12.2023 and all the members of the said Committee were unanimous that for the sexual intercourse, the husband and wife both are actively involved. Therefore, the Committee opined that the petitioner/objector must go for gynecology examination by the Gynecologist so that it may be ensured that whether her genital organs are normal or there is any

malfunctioning specially for the purpose of active sexual intercourse. The said observation was made by the Committee, once the petitioner's husband had made an objection/statement before the Committee that his wife does not cooperate in sexual intercourse. Therefore, the communication was made to the petitioner by the Committee on 16.12.2023, which is impugned in the present matter. Being aggrieved by both the communications dated 7.10.2023 and 16.12.2023, the instant writ petition had been filed. It is apparent that no order had been passed by the authority rather the petitioner had been directed/advised to be medically examined by the Gynecologist so that comprehensive report regarding the potency test of the husband of the petitioner could be prepared and forwarded to the concerned investigation officer.

13. The main plank of the argument of the petitioner's counsel is that the petitioner is the victim in this case and she had levelled serious allegation of impotency against her husband. Therefore, her medical examination by the gynecologist is unwarranted and cannot be part of the investigation, said argument was resisted by learned AGA-I on the ground that at the initial stage of investigation, at the promptness of the petitioner, even though the potency test of her husband had been carried but the proper investigation could not be ensured unless the petitioner is also medically examined by the gynecologist as for the sexual intercourse the bodies of both the parties are involved, therefore, she also needs to be medically examined.

14. Impotence is defined as lack of ability to perform sexual act and sterility is defined as lack of ability to procreate children. Questions of impotence and sterility arise when divorce is sought (a) because, marriage cannot be consummated (i.e., one of the parties is incapable of complete sexual intercourse), (b) if incapacity for consummation cannot be surgically remedied, or, the defective party is unwilling to submit to a surgical operation; or (c) if the incapacity existed before marriage. Impotence is attributed to injury to head, neck, or loins. Potence in case of males means power of erection of the male organ "plus" discharge of healthy semen containing living spermatozoa and in the case of females means (1) development of external and internal genitals and (2) ovulation and menstruation.

15. Causes of impotence: (*Apply to males only. --*Apply to females only; those unmarked, apply to bothsexes):-

1. Organic: 1. "Nervous Lesions": Diseases of, or injury to, brain or cord. 2. "Malformation or absence of parts* male organ may be absent, non-developed, ill-developed, or two or more in number: adherent to scrotum or abdomen; fibrous or cartilaginous; hypospadias; congenital phimosis, anorchidisni, cryptorchidism; diseases of or accidents to or operations on the male organ, testicles or ducts (perinaeum).*

**Atersia or narrowness of vulva, absence of uterus, tough hymen or vagina. (Though according to law, a boy under 14 is impotent, in fact, he is not always so). Also -- Obesity, 3. "Inflammations or Cicatricial" contractions*. "Vaginismus". Krauroses vulvae; internal piles, tight stricture. 4. Tumorous*:--Elephantiasis; "hernia", big hydrocele.*

"Psychial 1. Absence of voluptuous thoughts. 2. "Repugnance"*

towards individuals, "fear", "timidity", "excessive passion". (For this reason, a man may be potent towards one woman and impotent towards another.

Atonic. (Therefore, often temporary impotence). 1. "From general diseases" and "conditions": -- Old age, too frequent coitus, wasting diseases (diabetes); anaemia; uraemia, cholaema, rhumatism, diptheria, Heart diseases, chronic nephrities, acute fevers, parotitis. 2, "From Over-indulgence in drugs": lead, potassium Iodide, opium, cannabis indica and other narcotics; alcohol, tobacco, thyroidin. 3. "From chronic irritation of genital passages -- due to gonorrhoea, stricture, masturbation vaginismus.*

16. This information can be gathered from standard text-books, English and Indian, on the subject like Glaister"s Medical Jurisprudence and Toxicology (1953), 9th Edn., Chapter XII, p. 358 ff; Taylor on Sexual Disorders (2nd Edn,), Chapter VIII, page 98ff, (atonic); Organic impotence, Chapter IX, p. 105 ff; Forel"s Sexual question and Psychic Impotence, pp. 85, 219; Mody"s Medical Jurisprudence and Toxicology (12th Edn.), Chapter XIII, p. 284ff; Ray"s Medical Jurisprudence and Treatment of poisoning (6th Edn.) page 23lff; Kanmth"s Medical Jurisprudence. (MLJ publication.)

17. So far as the legal position regarding the requirement of potency test, in cases where allegation has been made by the wife to the effect that marriage is not properly consummated and the husband is impotent and was incapable of consummating the marriage on account of his complete and total impotency is concerned, it may be pertinent to refer the judgment passed by this Court in the case of **Jagdish Lal vs. Smt. Shyama Madan And Ors.**[3] in which it has been held as under :-

"7. Impotency means incapacity for accomplishing the act of sexual intercourse and by sexual intercourse, in this context, is meant not an incipient, partial or imperfect but a normal and complete coitus. Impotency is to be distinguished from sterility which may in some cases accompany impotency but is not necessarily associated with it, the two expressions denoting lack of two different powers. A person may be incapable of accomplishing the sexual act and yet be capable of procreating and conversely too, a person may be incapable or procreating and yet be capable of accomplishing the sexual act. The cause of impotency may be in the malformation or structural defect in the parts; in the functions, resulting in imperfect erection or premature ejaculation; in diseases, whether local or general or in the mind, manifesting itself a repugnance for the sexual act, fear, lack of confidence etc. It may also happen that a person is capable of having sexual intercourse but incapable of performing it with a particular individual, and in such a case the person must be regarded as impotent in relation to that particular individual regardless of his potency in general. These matters are too well settled to need reference to any medico-legal or legal authorities."

18. In the aforesaid case, the medical examinations of both the parties were conducted and considered.

19. In **T. Rangaswami vs. T. Aravindammal**[4] it was observed:-

“21. In regard to proof of impotency, the rules of evidence are not

different in the case of impotency than elsewhere. Impotency that is physical unfitness for consummation, must be proved or there must be facts from which this can be inferred. The proof must be, as used to be expressed in the Ecdeciastical courts in England not suspicio probablis but has to be Vehetnens proesumptio.

22. There is no minimum standard of proof necessary. Even" uncorroborated testimony of the petitioner is sufficient if it can be believed. In cases of this nature, corrboration can only be obtained from the evidence "of the other party to the marriage. u/s 120 of the Evidence Act, the other party to the marriage is a competent witness.

23. The conduct of the parties subsequent to the marriage would be important. Did they peak lot the impotency to anybody? Was it mentioned to any friend or relation or to their parents? If, not, why not? Would it be natural not to do so? Or was there no opportunity? It would not be natural for everybody to speak these matters to another. A reserved or shy or a reticent person would not. On the other hand, other types almost certainly would. Whether the parties to the case fall within the one class or the other, it is for the trial, judge to discover: (AIR 1943 Nag 185) (L).

24. Impotency may be established by medical examination of the parties. The doctor who examined either party or both the parties, may be examined as witness.

Where the respondent relies on a doctor"s certificate that ho was able to have sexual intercourse and was potent that day, the certificate must be strictly proved by examining the doctor who issued it. Certificates like these, do not prove themselves. The doctor giving the certificate has to state what tests he carried out to arrive at his conclusions and must stand cross-examination and convince the Court that his conclusion about the potency is correct."

20. In the case of **Ameet Bhuvan vs. Smt. Swati Bhaskar (supra)** the question of impotency was also involved, wherein it has been observed and held as under : -

"14. The Hon'ble Apex Court in its judgment rendered in AIR 2002 SC 2582, "Praveen Mehta v. Inderjit Mehta" although deals with a situation where a wife refuses to cooperate with her husband in sexual intercourse and also refuses to get herself medically examined or undergo medical treatment and that she has abused and misbehaved with the husband and friends and other relatives, thereby depriving of the husband to normal cohabitation, this will amount to be mental cruelty.

15. In the instant case, it is the husband, who despite of the court's order avoid to undergo the medical test, this avoidance to undergo the medical test will amount to the refusal for medical test. Such a refusal will amount to be a mental cruelty. In the said judgment while dealing with the concept of mental cruelty it has been held that it is a state of mind and feeling, thus the cruelty for the purpose of Section 13 (1) (i-a) is to be taken as a behaviour towards the spouse and one another. In the same judgment, Hon'ble Apex Court has held that a wife of non cooperative attitude to have sex and refusing for a medical treatment, abusing and misbehaving with the husband even with his friends would be a mental cruelty. Para 19, 20 and 21 of the said judgment are reproduced herein below:-

"19. Clause (ia) of sub-Section (1) of Section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm

or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that if will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts (Mulla Hindu Law, 17th Edition, Volume II, page 91).

20. In the case in hand the foundation of the case of 'cruelty' as a matrimonial offence is based on the allegations made by the husband that right from the day one after marriage the wife was not prepared to cooperate with him in having sexual intercourse on account of which the marriage could not be consummated.

When the husband offered to have the wife treated medically she refused. As the condition of her health deteriorated she became irritating and unreasonable in her behavior towards the husband. She misbehaved with his friends and relations. She even abused him, scolded him and caught hold of his shirt collar in presence of elderly persons like Shri S.K. Jain. This Court in the case of Dr. N.G. Dastane v. Mrs. S. Dastana (supra), observed : "Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment".

21. Cruelty for the purpose of Section 13 (1) (ia) is to be taken as a behavior by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

21. In the cases of marriage, physical relationship or mental relationship is a condition which is persistent and regular to make the consummation of marriage essential. The practical incapability has to be seen by the court below although when such type of issue crops up in litigation, there is no yardstick provided, which could determine the standard of proof to determine the potency or impotency. Thus issue has to be settled on the basis of incorporated testimony or medical inputs and by the conduct of the parties which has to be pleaded in the

absence of their being in denial of the said fact.

24. In a judgment rendered by Hon'ble Rajasthan High Court at Jaipur in the case of Renuka vs. Rajendra Hada in its para 12 and 13 has held as under :

"12. The questions for consideration in the instant appeal are:-

(i) Whether a matrimonial court had power to order appellant to undergo medical test?

(ii) If despite the order of the Court, the appellant refused to submit herself to medical examination whether the court could draw adverse inference against her?

(iii) Whether the respondent has succeeded in satisfactorily establishing that the appellant was impotent at the time of marriage and at the time of filing of the petition?

13. We find answer of these questions in two decisions rendered by the Hon'ble Supreme Court in Sharda v. Dharmpal, (2003) 4 SCC 493, wherein it was indicated that if despite an order passed by the Court a person refuses to submit himself to such medical examination, a strong case for drawing an adverse would be made out. Section 114 of the Evidence Act also enables a Court to draw an adverse inference if the party does not produce the relevant evidence in the power and possession. The conclusion drawn by the Apex Court are as under :-

(i) A matrimonial Court has the power to order a person to undergo medical test.

(ii) Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Constitution.

(iii) However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw an inference against him."

21. In **Yuvraj Digvijay Sinhji vs. Yuvrani PratapKumari**[5] Hon'ble Supreme Court while deciding the issue of impotency has observed as under:-

"A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

22. In the present case, the marriage between the parties was solemnised on 26th January, 2023 and the parties had lived together for a period of approximately five months. Meanwhile, the petitioner wife had also gone to her parental home for a short duration. The stand of the petitioner-wife is that despite efforts made by her to come close to the respondent, there was no cohabitation between them and there was no consummation of marriage. Consequently, the impugned FIR was lodged by the petitioner wife on 01.07.2023 with allegation of mental and physical cruelty regarding non-fulfillment of demand of dowry and concealment of fact of impotency of her husband by birth. The investigation was carried out, wherein the medical examination of the petitioner's

husband was also conducted by the Medical Board and the Committee advised that the petitioner must go for gynecology examination.

23. In view of the above, no comprehensive report regarding the potency test of the husband can be prepared and made without getting the petitioner medically examined along with the husband. In this case the Medical Inquiry Committee is of the opinion that the petitioner wife should also be medically examined as her husband has made a categorical statement before the Committee that his wife does not cooperate with him during sexual intercourse. There is no material available on record to substantiate the allegation made against the Inquiry Committee of LLRM Medical College necessitating the potency test/ medical examination of the respondent no.5 to be conducted by the Medical Board at KGMU Medical College, Lucknow.

24. As there is no need to issue any further direction regarding the prayer no.3 as the fair and impartial investigation is being carried out and the potency test of the husband had been conducted at the instance of the petitioner herself and this potency test was conducted at the stage of investigation as per Section 2(h) Cr.P.C. "investigation", which includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

25. Therefore, we do not find any illegality or impropriety in the impugned communications of the Medical Inquiry Committee dated 07.10.2023 and 16.12.2023 and no interference is required in the matter.

26. Accordingly, the writ petition stands **dismissed.**

(2024) 3 ILRA 1638
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Writ Petition No. 293 of 2024

Omprakash ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Anil Kumar Tiwari

Counsel for the Respondents:
G.A.

Criminal law – Uttar Pradesh Prevention of Cow Slaughter Act, 1955 – Sections 3/5-ka/5-kha/8 and Section 5-A(8) – Constitution of India,1950 - Article 227 – seizure and confiscation of vehicle- registered owner of vehicle – one calf recovered – pendency of confiscation proceedings – rejection of release application by District Magistrate – dismissal of revision and appeal – vehicle lying in open yard for long period – power under Sections 451 and 457 Cr.P.C. – no useful purpose served by keeping seized vehicle at police station – ownership not disputed – principles of natural justice – impugned orders not sustainable in the eye of law – confiscation orders set aside – direction to release vehicle on bank guarantee and bond .

W.P. allowed. (E-9)

Cases Cited:

1. Sunderbhai Ambalal Desai and C.M. Mudaliar v. State of Gujarat, AIR 2003 SC 638

2. Nand v. State of U.P., 1996 LawSuit (All) 423

3. Jai Prakash v. State of U.P., 1992 AWC 1744

4. Kamaljeet Singh v. State of U.P., 1986 U.P. Cri. Ruling 50 (All)

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

1. Heard Sri Anil Kumar Tiwari, learned counsel for the petitioner and Sri Ashok Kumar Singh, learned A.G.A.-I for the State and perused the record.

2. This petition under Article 227 of the Constitution of India has been filed with the following relief (s):

(i) Issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 04.12.2023 passed by Commissioner Ayodhya, in Case No. 2243 of 2023, "Omprakash Vs. State of U.P. through District Magistrate", Computerized Case No. C202304000002243, under Section 5-A(8) Uttar Pradesh Prevention of Cow Slaugher Act, 1955 (contained as annexure No. 6) as well as order dated 17.03.2023 passed by learned District Magistrate, Ayodhya, in Case No. 4705/2022 "State Vs. Omprakash" Computerized No. D202204230004705 under Section 5-A Uttar Pradesh Prevention of Cow Slaughter Act, 1955 as well as order dated 25.4.2023 passed by learned Session Judge, Faizabad in Criminal Revision No. 49/2023 related to Crime No. 322/2022, under Section 3/5ka/5kha/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955, pertaining to Police Station-Raunahi, District-Ayodhya/Faizabad as contained as Annexure no. 2 and 3 to this writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus to stay the operation and implementation of the impugned judgment and order dated 04.12.2023 passed by Commissioner Ayodhya, in Case No. 2243 of 2023, "Omprakash Vs. State of U.P. through District Magistrate", Computerized Case No. C202304000002243, under Section 5-A(8) Uttar Pradesh Prevention of Cow Slaugher Act, 1955 (contained as annexure No. 6) as well as order dated 17.03.2023 passed by learned District Magistrate, Ayodhya, in Case No. 4705/2022 "State Vs. Omprakash" Computerized No. D202204230004705 under Section 5-A Uttar Pradesh Prevention of Cow Slaughter Act, 1955 as well as order dated 25.4.2023 passed by learned Session Judge, Faizabad in Criminal Revision No. 49/2023 related to Crime No. 322/2022, under Section 3/5ka/5kha/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955, pertaining to Police Station-Raunahi, District-Ayodhya/Faizabad as contained as Annexure no. 2 and 3 and further the Hon'ble Court may kindly be pleased to release the confiscated vehicle bearing Registration No. U.P. 33 AT 3743 in favour of the petitioner, in the interest of justice."

3. Learned A.G.A. has already filed counter affidavit and in reply thereto learned counsel for the petitioner has already filed the rejoinder affidavit, the same are available on record.

4. Learned counsel for the petitioner submits that on 13.09.2022 police of Police Station Raunhai lodged an F.I.R. bearing Case Crime No. 322/2022 under Section 3/5/5kha/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955, Police Station Raunahi, District Faizabad/Ayodhya against two accused persons. As per prosecution case 01 calf was recovered from the vehicle of the petitioner i.e. UP33AT3743. The accused persons were

carrying the said calf for the purpose to sell and they could not show the papers of the vehicles.

5. Learned counsel for the petitioner further submits that the petitioner is the registered owner of the vehicle number UP 33 AT 3743 and the petitioner is plying his business by the said vehicle as a hire purchase, the same was seized by the police.

6. Learned counsel for the petitioner further submits that the petitioner moved release application before the District Magistrate, Ayodhya and the learned Magistrate rejected the application of the petitioner vide order dated 17.03.2023 on the basis of the report submitted by the police and further directed to the police authorities to make the public auction of the confiscated vehicle in an arbitrary manner. Thereafter, the petitioner filed Criminal Revision No. 49/2023 against the order dated 17.03.2023 before the learned District and Session Judge, Faizabad, who vide order dated 25.04.2023 dismissed the said revision affirming the order dated 17.03.2023 passed by the District Magistrate, Ayodhya.

7. Learned counsel for the petitioner further submits that against the impugned orders dated 17.03.2023 passed by learned District Magistrate, Ayodhya as well as order dated 25.4.2023 passed by learned Session Judge, Faizabad, the petitioner had filed Criminal Misc. Writ Petition No. 4425 of 2023: Omprakash Vs. State of U.P. before this Hon'ble Court and this Hon'ble Court vide order dated 18.09.2023 dismissed the petition of the petitioner with liberty to file appeal before the Commissioner. The order dated 18.9.2023 is being quoted herein below:

"Heard learned counsel for the petitioner and learned A.G.A. for the State.

By this petition, the petitioner has prayed for quashing of the impugned order dated 17.03.2023 passed by the learned District Magistrate Ayodhya in case crime No. 4705/2022 "State Vs. Omprakash", under Section 5-A of Uttar Pradesh Prevention of Cow Slaughter Act, 1955 and consequential judgment and order dated 25.04.2023 passed by the Sessions Judge, Faizabad (Ayodhya) in criminal revision No. 49/2023 related to crime No. 322/2022, under Sections 3/5ka/5kha/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955, P.S. Raunahi, District Ayodhya/Faizabad.

Learned A.G.A., at the outset, has submitted that against the impugned order dated 17.03.2023, the appeal lies before the Commissionerate in view of the government order dated 14.02.2021.

Learned counsel for the petitioner does not dispute the fact that against the impugned order dated 17.03.2023, the appeal lies before the Commissionerate.

In view of the above, the petition is dismissed on the ground of availability of alternative remedy.

In case, the appeal is filed within a period of 15 days from today, the same shall be decided on merits by the Commissioner within a further period of one month.

Learned counsel for the petitioner undertakes that he will not seek any adjournment before the Appellate Court. "

8. Learned counsel for the petitioner further submits that thereafter the petitioner against the order dated 17.03.2023 passed by learned District Magistrate, Ayodhya moved an appeal before the Commissioner Mandal Ayodhya, which has been registered as Case No. 2243 of 2023:

Omprakash Vs. State of U.P. through District Magistrate", Computerized Case No. C202304000002243, under Section 5-A(8) Uttar Pradesh Prevention of Cow Slaugher Act, 1955, but the same has been rejected vide order dated 04.12.2023.

9. Learned counsel for the petitioner further submits that the impugned order dated 17.03.2023 passed by the District Magistrate, Ayodhya is totally illegal. He further submits that the learned Magistrate by exceeding its jurisdiction has passed the impugned order on a wrong finding that the confiscated vehicle was used in cow slaughtering or in transportation of cow or its progeny which is totally perverse and the learned Magistrate has not considered the evidence adduced by the petitioner.

10. Learned counsel for the petitioner further submits that no such activities of transportation of the aforesaid cow species were done as per the allegations made by the prosecution but the vehicle in question of the petitioner has been seized in an arbitrary manner.

11. Learned counsel for the petitioner further submits that the petitioner is facing great jeopardize due to confiscated of vehicle by learned District Magistrate, Ayodhya and his livelihood is depend upon the said vehicle and the petitioner was not able to give the installments of the said vehicle because that was purchased on loan and the said vehicle is the main source of earning and now his family has come at the verge of starvation.

12. Learned counsel for the petitioner further submits that the vehicle is standing in open yard in the police station for more than nine months and with the passage of time ultimately it will become junk and after sometime it is not useful for any purpose. Reliance has been placed on the law laid down by the Hon'ble Apex Court in the case of **Sunderbhai Ambalal Desai and C.M. Mudaliar Vs. State of Gujrat, AIR 2003 SC 638.**

13. Learned counsel for the petitioner has further drawn the attention of the Court regarding the provisions of Sections 451 and 457 of Cr.P.C., which is quoted as under:-

"451. Order for custody and disposal of property pending trial in certain cases.-When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section," property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

457. Procedure by police upon seizure of property.-(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person

entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

14. Learned counsel for the petitioner further submits that the petitioner is ready to comply with all the conditions, which the lower court will impose while releasing the vehicle. Undisputedly, petitioner is the rightful owner of the vehicle, therefore, the vehicle be released in his favour and the impugned order be quashed.

15. Per contra, learned A.G.A. submits that the vehicle in question was being used for transportation of bulls illegally at the time of alleged offence and the vehicle in question was correctly seized by the District Magistrate, Ayodhya, vide its impugned order dated 17.03.2023. Thus, the District Magistrate, Ayodhya has rightly passed the impugned order dated 17.03.2023 and there is no illegality and the appeal was rightly dismissed, no interference is required.

16. I have heard the learned counsel for the parties and carefully gone through the relevant legal provisions and the judgments rendered by the Hon'ble Apex Court in the case of **Sunderbhai Ambalal Desai (supra)** and the judgment passed by this court in various cases.

17. The Hon'ble Apex Court in the case of **Sunderbhai Ambalal Desai, AIR 2003 SC 638 (supra)** in para 17 and 21 has been pleased to held as under:-

"17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of application for return of such vehicles.

21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. Are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This Object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

18. In **Nand Vs. State of U.P., 1996 Law Suit (All) 423** this Court has observed that pendency of the confiscation proceedings under Section 72 of the U. P. Excise Act is not a bar for release of the vehicle which is required for the trial under Section 60 of the U.P. Excise Act. It has been clearly observed by this Court in para 7 that:-

"I think it is not proper to allow the truck to be damaged by remaining stationed at police station. Admittedly, the ownership of the truck is not disputed. The State of Uttar Pradesh does not claim its ownership. Therefore, I think it will be proper and in the larger interest of public as well as the revisionist that the revisionist gives a Bank guarantee of Rs. 2 lakhs before the C.J.M., Kanpur Dehat and files a bond that he shall be producing the truck as and when needed by the criminal courts or the District Magistrate, Kanpur Dehat, and he shall not make any changes nor any variation in the truck."

19. This Court further has held in the case of **Jai Prakash Vs. State of U.P., 1992 AWC 1744** that mere pendency of confiscation proceedings before the Collector is no bar to release the vehicle.

20. In **Kamaljeet Singh Vs. State of U.P., 1986 U.P. Cri. Ruling 50 (Alld)**, the same view was taken by this court that pendency of confiscation proceedings shall not operate as bar against the release of vehicle seized u/s 60 of Excise Act.

21. In the opinion of this Court, it is not disputed that the power under Section 451 of Cr.P.C. is not properly and widely used by the court below while passing the orders. The power conferred under Section 451 of Cr.P.C. be exercised by the court below with judicious mind and without any unnecessarily delay. So that the litigant may not suffer, merely keeping the article in the custody of the police in the open yard will not fulfil any purpose and ultimately it result the damage of the said property. The owner of the property be allowed to enjoy the fruits of the said property for the remaining period for which the property is being made.

22. Further in the opinion of this Court, the procedure as contemplated under Section 457 of Cr.P.C. be also followed promptly, so that the concerned Magistrate may take prompt decision for disposal of such properties and be released in favour of the entitled person of the said property, keeping the said property in the custody will not solve any purpose and that gives a mental and financial torture to the owner of the said property which is also against the law and against the principles of natural justice.

23. As per the legal propositions mentioned above and keeping in view this fact that undisputedly the petitioner is the registered owner of the seized vehicle and the ownership of the vehicle is not in dispute neither the State or any other person has claimed their ownership over the vehicle, therefore, no useful purpose will be served in keeping the vehicle stationed at the police station in the open yard for a long period allowing it to be damaged with the passage of time.

24. In view of the above facts and circumstances of the case, the impugned orders is not sustainable in the eye of law and requires interference by this court.

25. Accordingly, the present petition under Article 227 of the Constitution of India is **allowed** and the impugned order dated 04.12.2023 passed by Commissioner Ayodhya, in Case No. 2243 of 2023, “Omprakash Vs. State of U.P. through District Magistrate”, Computerized Case No. C202304000002243, under Section 5-A(8) Uttar Pradesh Prevention of Cow Slaugher Act, 1955 as well as order dated 17.03.2023 passed by learned District Magistrate, Ayodhya, in Case No. 4705/2022 “State Vs. Omprakash”

Computerized No. D202204230004705 under Section 5-A Uttar Pradesh Prevention of Cow Slaughter Act, 1955 as well as order dated 25.4.2023 passed by learned Session Judge, Faizabad in Criminal Revision No. 49/2023 related to Crime No. 322/2022, under Section 3/5ka/5kha/8 of Uttar Pradesh Prevention of Cow Slaughter Act, 1955, pertaining to Police Station-Raunahi, District-Ayodhya/Faizabad are set aside and reversed.

26. The District Magistrate, Ayodhya is directed to release the vehicle in question forthwith in favour of the petitioner. The petitioner is directed to give a bank guarantee of Rs. 50,000/- before the Chief Judicial Magistrate, Ayodhya and file a bond that he shall be producing the vehicle as and when needed by the criminal courts or the District Magistrate, Ayodhya, and he shall not make any changes nor any variation in the vehicle.

27. No order as to costs.

28. Let the copy of this order be sent to the court concerned for its compliance.

(2024) 3 ILRA 1644
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.03.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Misc. Writ Petition No. 909 of 2024

Mukta Srivastava & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rajesh Chandra Mishra

Counsel for the Respondents:
G.A., Pranjal Krishna

Criminal law – FIR – quashing – Article 226 – territorial jurisdiction – Sections 156, 177, 178, 179, 181(4) Cr.P.C. – forgery and fabrication of Board Resolution – execution of sale deeds on basis of forged resolution – criminal breach of trust – misappropriation of sale consideration – proceeds of crime deposited in bank accounts at Lucknow – part cause of action within territorial jurisdiction – consequence ensued at Lucknow – FIR not liable to be quashed – civil/commercial dispute coupled with criminal culpability – defence pleas not to be examined at investigation stage .

W.P. dismissed. (E-9)

Cases Cited:

1. Lee Kun Hee & Ors. v. State of U.P. & Ors., (2012) 3 SCC 132

2. Rasiklal Dalpatram Thakkar v. State of Gujarat & Ors., (2010) 1 SCC 1

3. Satvinder Kaur v. State (Govt. of NCT of Delhi) & Anr., (1999) 8 SCC 728

4. Kushal Kumar Gupta & Anr. v. Mala Gupta, (2011) 12 SCC 434

5. P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24

6. Central Bureau of Investigation v. Vikash Mishra @ Vikash Mishra, (2023) 6 SCC 49

7. Asit Bhattacharjee v. Hanuman Prasad Ojha & Ors., (2007) 5 SCC 786

(Delivered by Hon'ble Rajan Roy, J.)

1. Shri S. C. Mishra, learned Senior Counsel along with Shri Rajesh Chandra Mishra, learned counsel for the petitioners, Shri Jaideep Narian Mathur, learned Senior Counsel along with Shri Pranjal Krishna,

Shri Manan Batra, Ms. Aishvarya Mathur and Shri Suhaib Ashraf, learned counsel for the opposite party no. 4- informant and Shri S.P. Singh, learned A.G.A. for the State.

2. By means of this writ petition the petitioners have challenged F.I.R. dated 26.01.2024 bearing Case Crime No. 0034 of 2024 under Sections 381, 409, 419, 420, 467, 468, 471, 506 IPC, Police Station- Sarojni Nagar, District- Lucknow and they have also sought a writ of mandamus that they may not be arrested in connection of the aforesaid F.I.R.

3. The informant has filed short counter affidavit which was taken on record when the hearing was concluded and the learned counsel for the petitioners did not propose to file any response as is mentioned in the order by which orders were reserved.

4. On a reading of the impugned F.I.R. we find that it has been lodged by the opposite party no. 4 against eight accused including the petitioners. The petitioner no. 2 is a Director of Radiant Buildcon Private Ltd. (hereinafter referred as to 'the Company') having its registered Office at Chandigarh. The opposite party no. 4- the informant is also one of the Directors. In fact, the informant is also a major share holder along with his family members in the said Company. The parent holding company is Avadh Rail Infra Ltd. in which both petitioner no. 1 and the informant are Directors along with other Directors. In fact, the said holding company has as many as six subsidiary companies, details of which are given in Para 10 of the writ petition. The petitioners are not share holders in any of the companies, though, the petitioner no. 2 is a Director in most of them.

5. The Company has a housing project on 1.75 acres of land i.e. Marina Heights at SAS Nagar, Punjab. Four Towers have been built comprising of 18 Flats each i.e. total 72 Flats. 21 Flats were sold during 2014-21, as claimed, with sale consideration 33 lacs to 35 lacs per Flats. Since 1996, the petitioner no. 2- Rohit Srivastava was working in the holding company Avadh Rail Infra Ltd. whose registered headquarter is at Lucknow. He was inducted as a Director in the Company. As the aforesaid housing project had not been registered with RERA, therefore, Flats were not to be sold and status quo was to be maintained. The Company was not in a position to sell the same. For these reasons the informant and his father who is also a Director in the Company, namely, Subhash Sarraf did not pay much attention to the activities of the aforesaid Company. Taking advantage of this the accused, especially, Petitioner no. 2 and accused no. 2 in the F.I.R. who is an Accountant in the Company, forged and fabricated a Board Resolution dated 01.10.2022 by which it was claimed that petitioner no. 2 had been authorized to sell the Flats on behalf of the Company and based on the aforesaid forged and fabricated Resolution 11 sale deeds were executed by petitioner no. 2 after 01.10.2022.

6. At this stage, it may be mentioned that during the course of argument Shri Jaideep Narain Mathur, learned Senior Counsel appearing for the informant submitted that initially they were aware about 11 sale deeds only, but, now, it appears that there are many more sale deeds which have been fraudulently executed by the petitioner no. 2 based on the aforesaid Resolution of the Board of Directors dated 01.10.2022.

7. It is also alleged in the F.I.R. that the informant and his father was not even present at SAS Nagar, Punjab when the Resolution is said to have been passed at the said place which will prove that the petitioner no. 2 has resorted to forgery, fabrication/manipulation of documents and based thereon has fraudulently executed sale deeds in respect of Flats owned by the Company to the purchasers in connivance with some of them and in this process he has misappropriated substantial part of the sale consideration, as, it has come to knowledge of the informant, on inquiry made subsequently, that only part of sale consideration was deposited in the account of the Company. The remaining sale consideration was deposited in the account of petitioner no. 2 or his wife petitioner no. 1 either by online transaction or cash and this ill gotten money i.e. proceeds of crime, was deposited by the petitioner no. 1 and 2 in their accounts at Lucknow, thereby, giving part cause of action at Lucknow where the F.I.R. has been lodged. Details of the accounts in name of the petitioners at Lucknow have been mentioned in the F.I.R. with the allegation that substantial part of the sale consideration received on the basis of fraudulent sale transaction based on the forged Board Resolution dated 01.10.2022, have been deposited by the petitioners in their personal accounts at Lucknow and not that of the Company. It is said that the informant and his father could not come to know about the illegal transactions because status quo was to be maintained with regard to the housing project on account of absence of registration with RERA. Theft of sale deeds from the Office of Avadh Rail Infra Ltd. at Lucknow by the petitioner no. 2 is also alleged. It is alleged that the accused have conspired to commit breach of trust and the offence as has been mentioned in the F.I.R.

8. Challenging the said F.I.R. it was contended by Shri S.C. Mishra, learned Senior Counsel appearing for the petitioners that first and foremost the Police Station- Sarojni Nagar under Lucknow Commissionerate lacked territorial jurisdiction in the matter, therefore, lodging of the F.I.R. and the investigation in respect thereof is without jurisdiction. He referred to Sections 177, 178, 179, 181 Cr.P.C. in this regard. He also submitted that the F.I.R. had been deliberately lodged at Lucknow as, the petitioner no. 2 was a Member of the Aam Aadmi Party in Punjab, as such, there is a political malice also behind lodging of the F.I.R. at Lucknow so that the informant may, with the help of the powers that be, victimize and harass the petitioners. He also submitted that wife of the petitioner no. 2, who has nothing to do with the running of the Company, has also been made an accused which itself goes to show malafide. His next submission was that there is concealment of the facts by the informant. Various proceedings were going on between the parties but they have not been disclosed in the first information report which is evidence of their malice. In this regard he referred to proceedings initiated by the informant before the NCLT at Kolkata on 26.09.2023 in respect of Tirupati Polysacks Pvt. Ltd. wherein petitioner no. 2 as also the informant and his father are Directors as dispute had arisen between them and the petitioner no. 2 was being pressurized to sell off his 50% shares in the said company and as the informant and his father were indulging in other nefarious activities relating to the said Company. He also referred to a Suit filed by the petitioner no. 2 at Chennai. He referred to a Suit for permanent injunction filed by the petitioner no. 2 at Chandigarh against the informant on 11.01.2024. He

also referred to proceedings initiated by the petitioner no. 2 under Section 241 of the Companies Act before the NCLT, Chandigarh against his proposed removal as a Director as also revocation of authority given to him for various activities relating to the Company i.e. Radiant Buildcon Pvt. Ltd. He submitted that had these facts been disclosed in the F.I.R., Police would have got to know that it is purely a civil/commercial dispute between Directors of the Company which has been given a colour of criminality so as to harass and victimize the petitioners. He submitted that the dispute was essentially of a civil/commercial nature and there was no criminality involved therein. In this context he referred to decisions of Hon'ble Supreme Court rendered in the case of ***Mithilesh Kumar J. Sha Vs. State of Karnataka and Ors.*** reported in ***(2022) 14 SCC 572, Criminal Appeal No. 932 of 2021; Randheer Singh Vs. State of U.P. and Ors., Criminal Appeal No. 5866 of 2022; Usha Chakraborty and Anr. Vs. State of West Bengal and Anr. reported in 2323 LiveLaw (SC)67, Criminal Appeal No. 2024 arising out of SLP (Crl.) No. 3337 of 2023 and Sachin Garg Vs. State of U.P. and Anr. arising out of SLP (Crl.) No. 4415 of 2023.***

9. He also invited the Court's attention to a complaint dated 09.01.2024 filed by the petitioner no. 2 at Chandigarh alleging that the father of the informant along with several musclemen entered the office of the Company and took away all relevant documents including the authorization letter/ Board Resolution dated 01.10.2022 and thereafter, lodged the impugned F.I.R. alleging that the Resolution was forged and fabricated. He also submitted that the petitioner no. 2 has sold as many as 33 Flats but the objection is being raised only with regard to 11 Flats. All this was within the knowledge of the informant and his father and no objection was raised at any point of time but only when a dispute arose in September, 2023 between them, a story has been cooked up with ulterior motives. He also submitted that the petitioner no. 2 has not received any remuneration for the services rendered by him and the understanding was that once the Flats at Marina Heights were sold out he would be given profit therefrom. He submitted that the deposit made by one of the purchasers of Flats Shri Gurjant Singh Dhillon who is also an accused in the F.I.R., in the account of the petitioner no. 2, is in fact, a loan of Rs.25 lacs extended to the petitioner by the former, therefore, there is no truth in the allegations in this regard. The allegation of theft having taken place the registered Headquarters of Avadh Rail Infra Ltd. at Lucknow is also a concocted one because the allegation is of theft of original sale deeds, whereas, the original sale deeds would be in the possession of purchasers and not Avadh Rail Infra Ltd. There was no occasion to keep the said sale deeds at the registered Headquarters of Avadh Rail Infra Ltd. at Lucknow, as, they pertained to the activities of the subsidiary Company i.e. Radiant Buildcon Private Ltd. This has been done only to make out the jurisdiction at Lucknow for lodging of the F.I.R. and harassing the petitioners. The assertion in the F.I.R. that the informant and his father were not aware about these activities is also incorrect, as, the purchasers of Flats had been arrayed as accused in the F.I.R. For all these reasons, according to him, the F.I.R. was liable to be quashed, as, essentially it was a civil/commercial dispute. Lack of jurisdiction in this regard was also emphasized by him.

10. Shri Jaideep Narian Mathur, learned Senior Counsel appearing for the

opposite party no. 4- informant submitted that part cause of action had arisen within the territorial jurisdiction of the Police Station- Sarojni Nagar, District- Lucknow and legal position is settled that it being so the F.I.R. could be lodged in such a police station. He referred to the provisions of Section 156(2), Chapter 13, 177, 179, 181(3) and 181(4) Cr.P.C. to drive home his point. He invited our attention to the allegations in the F.I.R., according to which, a theft had taken place at Lucknow in which the petitioner no. 2 was involved, therefore, in view of Section 181(3) Cr.P.C. and other provisions referred herein the cause of action for the same occurred at Lucknow as the crime was committed at Lucknow. Secondly, based on the forged Board Resolution dated 01.10.2022 sale deeds were executed in favour of the purchasers fraudulently and the proceeds of sale were substantially deposited in the bank account of petitioners no. 1 and 2 at Lucknow, therefore, in view of Section 181(4) Cr.P.C. also F.I.R. could be lodged at Lucknow. As regards concealment of facts he submitted that whatever was relevant has been stated in the F.I.R. and proceedings which are said to be pending between the parties have nothing to do with the fabrication of the Board Resolution dated 01.10.2022 and misappropriation of money of the Company by the petitioners and other accused as also the criminal breach of trust and conspiracy in this regard. This is not a case where the dispute is purely of civil/ commercial nature which can be settled by resort to mediation, arbitration or civil remedies. There is an element of criminality involved as Board Resolution of the Company has been forged and fabricated. Based thereon fraudulent sale transactions have taken place and the Company has been deprived of its money by siphoning of substantial amount of the sale consideration to personal accounts of the petitioners. The allegations contained in the F.I.R. clearly spell out the criminality involved as also the guilt of the petitioners. The petitioner no. 1 the wife of the petitioner no. 2 has been made an accused because some of the sale proceeds from the crime committed have been deposited in her account at Lucknow. It is not a case where ingredients of Sections in which the F.I.R. has been lodged were not made out. Neither there is lack of jurisdiction nor any valid ground for interference under Article 226 of the Constitution of India.

11. He submitted that based on the aforesaid Resolution dated 01.10.2022 fraudulent sale transactions were done from May, 2023 to November, 2023. The informant and his father came to know about 11 such fraudulent sale transactions and registeries on 01.01.2024, however, by then, they were not aware about the forging and fabrication of Board Resolution dated 01.10.2022. Accordingly, on 04.01.2024 a public notice was published to the effect that the petitioners were not authorized to sell the Flats of Marina Heights. On 08.01.2024 a Whatsapp message was received from one of the brokers about the Board Resolution dated 01.10.2022 in favour of the petitioner no. 2. Once, the petitioner no. 2 came to know that fraud committed by him had been revealed, in order to save himself, he gave a complaint to the Police at Chandigarh on 09.01.2024 alleging that the father of the informant, who is 78 years old, along with musclemen went to the office and took away relevant papers including the authorization letter i.e. Board Resolution. This complaint was lodged by petitioner no. 2 only to enable him to take the plea that he did not have the Board Resolution so that the forgery may not be established but, even after this

complaint at least one sale deed was executed by petitioner no. 2 on 11.01.2024 which could not have been done without showing the Registrar the Board Resolution referred above. The aforesaid complaint is nothing but an attempt to cover up the forgery. This sale deed dated 11.01.2024 is mentioned at serial no. 32 in the list of deeds annexed by the petitioners as page 159 but, conveniently, while mentioning the same, date of the deed has been omitted for obvious reasons as mentioned hereinabove. He submitted that in some of the sale deeds entire consideration had been received at Lucknow in the accounts of the petitioners. He invited attention of the Court to Annexure No. SA-2 to the short counter affidavit filed in the matter. Shri Mathur has also submitted that custodial interrogation was necessary for recovery of the Board Resolution regarding which a false story has been set up in the complaint dated 09.01.2024. He also invited our attention to the copy of the Board Resolution filed by the petitioners as Annexure No. 9 to the writ petition for a perusal of the same which is alleged to contain the signatures of the father of the informant and informant. He then invited our attention to see the signatures of the informant at Page 161 and that of his father at Page 165. He submitted that on a bare perusal from naked eyes the difference in the signatures is apparent and it does not require an expert opinion to arrive at a conclusion that the signatures on the alleged Board Resolution dated 01.10.2022 are forged and fabricated. He also asserted that in fact presence of the informant at Chandigarh on 01.10.2022 has falsely been shown as they were in Kolkata. The story set up by the petitioners that amount of Rs.25 lacs deposited by the other purchasers and accused Dhillon in the account of the petitioners was loan, is unacceptable and is nothing but an after thought, once this fact was mentioned by him during hearing. In support of his contentions he referred to decisions of Hon'ble the Supreme Court reported in ***(2012) 3 SCC 132; Lee Kun Hee, President, Samsung Corporation, South Korea and Ors. Vs. State of Uttar Pradesh and Ors.(Paragraph 32 -42), (2010) 1 SCC1; Rasiklal Dalpatram Thakkar Vs. State of Gujarat and Ors. (Paragraph 24-29), (2011) 12 SCC 434; Kushal Kumar Gupta and Anr. Vs. Mala Gupta (Paragraph 5-7), (2007) 5 SCC 786; Asit Bhattacharjee Vs. Hanuman Prasad Ojha and Ors. (Paragraph 19-22).***

12. As regards requirement of custodial interrogation he referred two judgments reported in ***(2019) 9 SCC 24; P. Chidambaram Vs. Directorate of Enforcement, 2017 SCC OnLine Del 9265; Prakash Gupta Vs. State of Delhi and (2023) 6 SCC 49; Central Bureau of Investigation Vs. Vikash Mishra @ Vikash Mishra.***

13. Shri S.P. Singh, learned A.G.A. appearing for the State submitted that prima facie, on a bare reading of the F.I.R. it can not be said that cognizable offence is not made out. Theft of documents has taken place at Lucknow and the petitioners are alleged to have committed the same. Proceeds of crime have been deposited at Lucknow which has not been denied in the writ petition at all. He has referred to Section 179, 180, 181(4) Cr.P.C. to drive home the point that the F.I.R. could be lodged at Police Station- Sarojni Nagar, Lucknow. The petitioner no. 2 has a criminal history of three cases including the case at hand, whereas, the petitioner no. 1 has a criminal history of two cases which has not been disclosed. He also informed

the Court that he has instructions from the Economic Offences Wing of the police department which was investigating the matter that custodial interrogation was necessary for investigating the crime.

14. So far as the first contention of Sri S.C. Mishra, learned Senior Counsel for the petitioners regarding lack of jurisdiction for lodging of the FIR impugned herein and for investigation, Section 156(1) Cr.P.C. provides that - any officer in-charge of a Police Station may, without the order of Magistrate, investigate any cognizable case, which a Court having jurisdiction over the local area within the limits of said station would have power to inquire into or try under the provisions of Chapter- XIII. Sub Section-2 thereof provides that no proceeding of a police officer in any such case, shall, at any stage, be called into question, on the ground that the case was one in which such officer was not empowered under this Section to investigate. We may in this context refer to Section 177 Cr.P.C. which is part of Chapter-XIII referred in Section 156(1) Cr.P.C., as, the jurisdiction of the Investigating Officer to investigate any cognizable case is interlinked with the jurisdiction of the Court to inquire into or try such cases. Section 177 Cr.P.C. provides that - every offence shall ordinarily be inquired into and tried by Court within whose local jurisdiction it was committed. Thus, it is the commission of the offence which gives jurisdiction to the Courts and correspondingly to the Investigating Officer to investigate it. In this context Section 178 Cr.P.C. is relevant which provides- a) when it is uncertain in which of several local areas an offence was committed, or b) where an offence is committed partly in one local area and partly in another, or c) where an offence is a continuing one, and continues to be committed in more local areas than one, or d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

15. We may in this very context refer to Section 179 Cr.P.C., according to which, when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued. Thus, consequence ensuing from the commission of an offence can also give territorial jurisdiction to a Court to inquire or try an offence. Section 181 (4) Cr.P.C. is relevant in the context of any offence of criminal mis-appropriation or criminal breach of trust as is alleged herein and according to said provisions such an offence may be inquired into or tried by a court within whose local jurisdiction the offence was committed or any part of the property which is subject to the offence was received or retained, or was required to be returned or accounted for by the accused persons.

16. Keeping in mind the aforesaid provisions when we go through the contents of the FIR, as territorial jurisdiction in the context of Section 156 Cr.P.C. read with provisions of Chapter-XIII is to be determined on a reading of the FIR itself and this Court cannot, at this stage, when the FIR has been lodged barely a few days ago i.e., on 26.01.2024 and investigation is still pending, enter into the material/evidence collected for determining the aforesaid issue, we find that the allegation is of forgery and fabricating a board resolution dated 01.10.2022, which

was drawn at Chandigarh, Punjab. Based on the said resolution, it is alleged that the petitioner no.1 along with other accused executed 11 sale deeds in favour of several persons some of whom are also accused and the proceeds of such sale deeds were not deposited wholly in the account of the company, namely, Radiant Buildcon Pvt. Ltd., instead a substantial part thereof was misappropriated and the same was deposited either by online transaction/cheques or in cash in various accounts of the petitioners at Lucknow, meaning thereby, the proceeds of crime as alleged were transferred and retained at Lucknow in the accounts held by the petitioners. We are not concerned as to whether the allegations are correct or not. These questions cannot be gone into under Article 226 of the Constitution of India, at this stage, therefore, we have to determine the issue of territorial jurisdiction on the plain and simple reading of the FIR. In the FIR, we find details of such accounts where the sale considerations were deposited and which, as alleged, belong to the petitioners, have been given. Thus, not only there is allegation of theft of sale deeds at Lucknow which on a query being put to the counsel for the informant though referred as original sale deeds, is in fact a reference to certified copies of such sale deeds but, apart from it, the money received by the petitioner and the other accused from the sale deeds executed and registered by them at Chandigarh, Punjab, allegedly on the basis of forged and fabricated resolution of the Board of Directors, was transferred to the accounts of the petitioners and deposited at Lucknow. Therefore, it is very difficult to accept at this stage the contention of Shri S. C. Mishra, learned Senior Counsel that the FIR could not have been lodged at P.S. Sarojni Nagar, Lucknow, nor the Investigating Officer of the said police station could inquire the crime. Not only theft has been alleged at Lucknow but the proceeds of crime based on the forged and fabricated board resolution dated 01.12.2022 have also been deposited in the bank accounts of the petitioners at Lucknow including the bank of petitioner no.2, who is the wife of petitioner no.1, though, not a director or employee of the company referred here-in-above, in which the petitioner no.1 was a director. As of now, it cannot be said that the offence or the consequence ensuing therefrom has not occurred within the territorial jurisdiction of Police Station-Sarojni Nagar, Lucknow and/or that the same was not amenable to inquiry or trial by the Court of competent criminal jurisdiction in the District Court at Lucknow having jurisdiction in respect of the said police Station. Based on bare reading of the FIR and the details contained therein this argument is liable to be rejected.

17. In arriving at this conclusion we, inter alia, rely upon the decision rendered by Hon'ble the Supreme Court in the case of ***Lee Kun Hee & Ors vs State Of U.P.& Ors.*** reported in ***(2012) 3 SCC 132*** wherein their Lordships had the occasion to consider the provisions of Section 179 Cr.P.C. Their Lordships have held that use of the words "anything which has been done" and "consequence which has ensued" in Section 179 Cr.P.C. substantially enlarges and magnifies the scope of jurisdiction contemplated under Section 179 Cr.P.C. so as to extend the same over areas contemplated by the two phrases. Under Section 179 Cr.P.C. even the places (wherein the consequence of the criminal act) "ensues" would be relevant to determine the Court of competent Jurisdiction. Therefore, even the Courts

within whose local jurisdiction the repercussion/effect of the criminal act occurs would have jurisdiction in the matter. In the said case a complainant was holding the bill of exchange at Ghaziabad in India, therefore, the Supreme Court opined *"that the consequence emerging out of the denial of encashment of the bill of exchange could be deemed to ensue at Ghaziabad in India. As such the competent Court at Ghaziabad India would have jurisdiction in the matter under Section 179 Cr.P.C."* In this very context, Supreme Court considered the provisions of Section 181 (4) Cr.P.C., which in its opinion left no room for any doubt that culpability is relatable even to the place at which consideration is required to be returned or accounted for. In the case at hand, as already stated, the proceeds of the alleged crime were transferred and deposited in the bank accounts of the petitioner at Lucknow and were retained therein, therefore, Section 181(4) Cr.P.C., according to which any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the evidence was received or retained, or was required to be returned or account for by the accused persons, gets attracted. Initial crime in this case, as alleged, is the fabrication of board resolution dated 01.12.2022 at Chandigarh, based thereon the execution and registration of sale deeds, by which flats constructed by Radiant Buildcon Pvt. Ltd. were sold off by the petitioners unauthorisedly in criminal breach of trust and the proceeds therefrom were not deposited in the company's account, instead they were wholly or substantially or partly deposited in their personal accounts at Lucknow. This of course, is coupled with the allegation of theft of the sale deeds at Lucknow. The latter gives a cause of action wholly at P.S.- Sarojni Nagar, whereas the former would be covered under Section 179 Cr.P.C. and Section 181(4) Cr.P.C. at least at this stage.

18. Thus, on a perusal of FIR it cannot be said that no part of cause of action has arisen within the territorial jurisdiction of P.S. Sarojni Nagar commissionerate of Lucknow. We may in this context also refer to decision of Hon'ble Apex Court in the case of ***Kushal Kumar Gupta and another Vs. Mala Gupta reported in (2011) 12 SCC 434.***

19. This apart we may once again refer to Section 156 (2) which categorically provides that no proceeding of a police officer, which obviously means proceeding of investigation referred therein in sub-section 1, in any such case shall at any stage be called in question on the ground that the case was one in which such officer was not empowered under this Section to investigate. We may in this context refer to decision of Hon'ble Apex Court in the case of ***Rasiklal Dalpatram Thakkar vs State Of Gujarat & Ors.*** reported in ***(2010) 1 SCC 1***, wherein their Lordships of the Supreme Court of India considered the said provisions and opined that sub Section 2 of Section 156 Cr.P.C. ensures that once an investigation is commenced under sub Section (1), the same is uninterrupted on the ground that the police officer was not empowered under the Section to investigate. It is in the nature of "savings clause" in respect of investigation undertaken in respect of cognizable offences. We may also refer to the decision of Hon'ble Supreme Court in the case of ***Satvinder Kaur vs State (Govt. Of N.C.T. Of Delhi) And Anr.*** reported in ***(1999) 8***

SCC 728, wherein considering the same provision it was inter-alia opined that sub-section 2 of Section 156 makes the position clear by providing that no proceeding of a police officer in any such case shall at any such stage be called in question on the ground that the case was one in which such officer was not empowered to investigate. After investigation is completed, the result of such investigation is required to be submitted as provided under Sections 168, 169 and 170 Cr.P.C. Section 170 Cr.P.C. specifically provides that if, upon investigation, it appears to the officer in charge of the police station that there is a sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate, such officer shall forward the accused under custody to a magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit for trial. Further, if the investigating officer arrives at the conclusion that the crime was not committed within the territorial jurisdiction of the police station, then FIR can be forwarded to the police station having jurisdiction over the area in which the crime is committed. But this would not mean that in a case which requires investigation, the police officer can refuse to record the FIR and/or investigate it. In view of the above, Section 156 (2) Cr.P.C. also comes in the way of the petitioner in succeeding on the aforesaid account.

20. For all these reasons, the first submission regarding lack of jurisdiction is rejected, subject to what has already been held by the Hon'ble the Supreme Court in the case of ***Satvinder Kaur (supra)***, as noticed above.

21. This is not a case where FIR has been lodged against a company, but a case where the FIR has been lodged against individuals, one of whom is the Director.

22. As regards the second submission that dispute is essentially of civil/commercial nature, therefore, action under criminal law is unwarranted, we do not find any merit in this submission also as allegations against the petitioner no.1 is of having fabricating and forging a board's resolution dated 01.10.2022 and based thereon to have executed and registered several sale deeds and thereby committing offence of criminal breach of trust, as the sale deed were in respect of flats which had been constructed by the company namely Radiant Buildcon Pvt. Ltd. and there was no authorization by the company in favour of petitioner no.1 for selling of the said flats. Moreover, it is also the allegation that the proceeds of said crime were misappropriated by the petitioner no.1 by transferring and depositing the same in his bank account and that of his wife at Lucknow.

23. Now, whether the allegations are correct or not cannot be seen under Article 226 of the Constitution of India at this stage as this is a matter of investigation, unless, of course it was a case where it was apparently incorrect and there could be no two views about it. The contention of Shri S.C. Mishra, learned Senior Counsel in this context that the petitioner no.1 had not been paid the remuneration for quite some time and there was a understanding between the company and the petitioner no.1 that he would be paid from the sale receipts by sale of the aforesaid flats.

24. As regards the contention of Shri S.C. Mishra, learned Senior Counsel that the company and the informants were all along aware of the transactions being made

by the petitioner no.1 on behalf of the company but no objection were raised and the FIR has been lodged only on 26.01.2024, belatedly, merely because of initiation of various proceedings by the petitioner no.1 against the company and its directors, as noticed here-in-above, therefore, it is a mala-fide action, Shri J.N. Mathur, learned counsel for the informant submitted that they came to know about the board resolution dated 01.10.2022 only on 08.01.2024 and thereafter they issued another public notice on 11.01.2024 and also approached the police authorities concerned who opined that a detailed application would be required, setting out in detail the events which had taken place, constituting a crime whereupon a written complaint was made and FIR was lodged on 26.01.2024 and no advantage can be taken by the petitioners merely on the aforesaid ground. He submitted that even after coming to know of the public notice issued by the company the petitioner no.1 executed and got registered a sale deed as is evident from the list of sale deeds annexed with the writ petition but he has cleverly not mentioned the date of execution of such sale deed in favour of Ms. Shalini Chaudhary which, in fact, appears to have been executed on 11.01.2024. In our opinion ground raised by Shri S. C. Mishra, learned Senior Counsel by itself cannot be the basis for its quashing. This is a defence of the accused petitioners and it is not for this Court under Article 226 of the Constitution of India to go into these factual issues. We have gone through the material on record relating to the proceedings initiated by the petitioner no.1 as already noticed in the earlier part of the judgment but even these documents do not persuade us to hold that it is a purely civil or commercial dispute, considering the allegations made in the FIR. We may in this context refer to the decision of the Hon'ble Supreme Court in the case of ***Lee Kun Hee (supra)*** (para 73). We are of the opinion that considering the nature of the offence alleged to have been committed by the petitioners, there can be civil liability coupled with criminal culpability. Moreover, considering the allegations regarding forging and fabrication of board resolution dated 01.10.2022 and also mis-appropriating the proceeds of sale deeds executed based thereon it can give rise to criminal culpability/liability also. Many of the proceedings referred by Shri S. C. Mishra, learned Senior Counsel are unrelated to the allegations in the FIR. To say that the aforesaid dispute is the background which has led to false implication does not cut much ice as of now, unless the allegations are found to be false during investigation. On a bare reading of the FIR it cannot be said that the offences alleged are not cognizable or are not made out, at least at this stage. The proceedings challenging the decision of Board of Directors proposing to remove him through petitioner no.1 from the post of Director of the company would not involve an inquiry or investigation into the allegations of forgery and fabrication of the board resolution or at least it would not preclude an investigation by the police as, if proved, this may amount to a criminal offence. We, therefore, reject the second submission also.

25. The third submission is with regard to concealment of proceedings referred by Shri S.C. Mishra, learned Senior Counsel, which according to him, were the background for filing of the FIR. We do not find any substance in this submission also. None of the said proceedings relied by Shri S. C. Mishra, learned Senior Counsel and as recorded by

us while noticing his arguments, have any direct bearing on the allegations in the FIR so as to preclude a criminal investigation into such allegations or a judicial review of validity of the FIR under challenge before us. From a bare reading of the FIR it cannot be said that no cognizable offence is made out.

26. The explanation offered by Shri S.C. Mishra, learned Senior Counsel with regard to deposit of one of the amounts in the account of one of the purchasers who is also an accused, i.e., Mr. Dhillon to the effect that it was a loan extended by said Mr. Dhillon to the petitioner no.1, is a plea of defence and we cannot go into this plea at this stage under Article 226 of the Constitution of India. We must put it on record that Shri J. N. Mathur, learned counsel appearing for the informant submitted that this was a fantastic plea which no prudent person could accept but we say no more in this regard.

27. Shri Mathur also invited our attention to the signatures on the board resolution dated 01.10.2022, which according to the FIR is forged and fabricated, conjointly with another resolution bearing the signatures of some of the signatories of the forged resolution to contend that on a perusal from naked eyes itself the forgery and fabrication was apparent, however, we do not express any opinion in this regard also.

28. Having gone through the contents of the FIR and even at the cost of repetition we may say that this is not a case where the FIR should be quashed under Article 226 of the Constitution of India.

29. We accordingly do not find any merit in the case. This, of course, is without prejudice to the rights of the petitioners in the pending investigation and also to avail such other remedies as may be prescribed in law.

30. Subject to above, we **dismiss** this writ petition.

(2024) 3 ILRA 1655
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Criminal Misc. Writ Petition No. 1049 of 2024

Dharmendra @ Bheema & Anr. **...Petitioners**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Sri Mohit Singh, Sri Anil Kumar

Counsel for the Respondents:
G.A., Sri J.K. Upadhyay

U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 – Sections 2(b), 3 – U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021 – Rules 5, 8, 10, 16, 17, 22 & 60 – quashing of FIR – gang-chart – false and unconfirmed information – charge-sheet not submitted before Court – certified copy of charge-sheet – violation of mandatory Rules – independent application of mind – joint meeting – undated approval – hurried preparation and approval – Rule 22 exception not applicable – Rule 5(3)(c) read with Rule 10 mandatory – FIR under Section 3 sufficient at registration stage – no requirement to mention Section 2(b) in FIR – disagreement with coordinate Bench – reference to Larger Bench on interpretation of Rules 5, 10, 22 and 60 and requirement of mentioning Section 2(b) .

Interim protection to petitioners continued. (E-9)

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1. Shraddha Gupta v. State of U.P., 2022 SCC OnLine SC 514.

2. Manoj Maurya v. State of U.P., Criminal Misc. Writ Petition No. 5202 of 2023.

3. Binni Lala @ Vinod Kumar Jain v. State of U.P., Criminal Misc. Writ Petition No. 19638 of 2022.

4. Rahul Saxena @ Bhola/Bholu v. State of U.P., Criminal Misc. Writ Petition No. 12808 of 2023.

5. Central India Spinning and Weaving Manufacturing Co. v. Municipal Committee, Wardha, AIR 1958 SC 341.

6. Girdhari Lal & Sons v. Balbir Nath Mathur, (1986) 2 SCC 237.

7. K.P. Varghese v. ITO, (1981) 4 SCC 173.

8. State Bank of Travancore v. Mohd. M. Khan, (1981) 4 SCC 82.

9. Som Prakash Rekhi v. Union of India, (1981) 1 SCC 449.

10. Ravula Subba Rao v. CIT, AIR 1956 SC 604.

11. Govindlal v. Agricultural Produce Market Committee, (1975) 2 SCC 482.

12. Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd., (1984) 2 SCC 50.

13. Utkal Contractors & Joinery Pvt. Ltd. v. State of Orissa, (1987) 3 SCC 279.

14. Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi), (2017) 15 SCC 133.

15. Swedish Match AB v. SEBI, (2004) 11 SCC 641.

16. Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424.

17. S. Gopal Reddy v. State of A.P., (1996) 4 SCC 596.

18. Prakash Kumar @ Prakash Bhutto v. State of Gujarat, (2005) 2 SCC 409.

19. Anwar Hasan Khan v. Mohd. Shafi, (2001) 8 SCC 540.

20. Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277.

21. N.K. Jain v. C.K. Shah, (1991) 2 SCC 495.

22. Asim @ Hassim v. State of U.P., 2024 (1) ADJ 125 (DB).

23. Farhana v. State of U.P., Criminal Appeal arising out of SLP (Crl.) No. 437 of 2023 (SC).

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Mohit Singh, learned counsel for the petitioners, Shri P.C. Srivastava, learned Additional Advocate General assisted by Shri J.K. Upadhyay, learned A.G.A. for the State-respondents and perused the record.

2. The instant writ petition has been preferred with the prayer to quash the First Information Report dated 01.01.2024, registered as Case Crime No.0001 of 2024, under Sections 2/3 of the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to 'the Act of 1986'), Police Station-Bilari, District Moradabad with a further prayer to direct the respondents not to take any coercive action against the petitioners pursuant to the aforesaid F.I.R.

FACTS OF THE CASE

3. The respondent No.5 lodged the aforesaid F.I.R. alleging that the accused

persons named therein are indulged in anti-social activities and are operating a gang; that the investigation in relation to the aforesaid case crime is still pending and that no charge-sheet has been submitted against the petitioners. As regards the gang-chart dated 25.11.2023, it is pleaded that incorrect details of criminal cases pending against the petitioners were furnished to the Authorities by the Station House Officer of Police Station concerned recommending prosecution of the petitioners under the Act of 1986. It is stated that in relation to Case Crime No.417 of 2023, under Sections 147, 148, 149, 323, 307/34 IPC read with Section 3/25/27 Arms Act, mentioned at serial No. 1 in the gang chart, it is mentioned that charge-sheet has been submitted before the court on 11.11.2023 whereas the charge-sheet has not been submitted in the court. Regarding Case Crime No.334 of 2016, under Sections 441, 447, 504, 506 IPC read with Section 3 of Prevention of Damage to Public Property Act, 1984, mentioned at Serial No.2 in the gang chart, it has been shown to be pending against the petitioners vide charge-sheet No.199/2016 dated 08.08.2016, information pertaining whereto has been pleaded as "incorrect" stating that challenging the proceedings arising out of the said charge-sheet, Application U/S 482 Cr.P.C. No.5191 of 2017 (Dharmendra Kumar and 3 others vs. State of U.P. and another) was filed, in which, an interim order has been passed on 16.02.2017 by this Court and Application U/S 482 Cr.P.C. is still pending but this fact has not been mentioned in the Gang chart.

GROUNDS OF CHALLENGE

4. The F.I.R. has been challenged mainly on the grounds that while preparing the gang-chart, the respondents have violated the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 (hereinafter referred to as 'the Rules'), inasmuch as, incorrect and incomplete information was furnished before the Authorities by the Station House Officer concerned; that the gang-chart has been approved by the Competent Authority without application of mind; that the details of criminal history of accused on dossier do not reflect any discussion of District Magistrate and the Senior Superintendent of Police in a joint meeting which is contrary to Rule 5(3)(a) of the Rules; that as per the gang chart, proceedings in pursuance of charge-sheet dated 08.08.2016 filed in Case Crime No.334 of 2016 are stated to be pending whereas there is an interim order dated 16.02.2017 passed by this Court, which has not been mentioned in the gang chart and the same has been approved on the basis of unconfirmed details of cases without verifying the status which is in violation of Rule 8(3) of the Rules; that the procedure prescribed under Rules 16 and 17 has not been followed and the gang-chart has been approved by using the language provided in the proforma without application of mind; and that no date is mentioned alongwith signatures of the District Magistrate and the Senior Superintendent Police, Moradabad on the gang chart. Much emphasis has been laid on the aspect that in relation to Case Crime No.417 of 2023, under Sections 147, 148, 149, 323, 307/34 IPC read with Section 3/25/27 Arms Act, gang chart mentions that charge-sheet has been submitted before the court on 11.11.2023 whereas, infact, the charge-sheet has not been submitted in the court, rather it is lying with the Police Authorities. In sum and substance, violation of Rules 5(3)(a), 8(3), 10, 16 and 17 has been pressed into service and it is contended that the gang-chart does not

conform to the guidelines laid down by this Court vide judgement dated 13.12.2023 passed in **Criminal Misc. Writ Petition No.16258 of 2023 (Sanni Mishra @ Sanjayan Kumar Mishra vs. State of U.P. and 2 others).**

5. Another submission was made by learned counsel for the petitioner that the impugned F.I.R. has been registered under Section 2/3 of the Act of 1986, however, though sub-clause (b) of Section 2 describes various offences from (i) to (xxv), it is not clear from the F.I.R. as to under which sub-clause of Section 2, the F.I.R. has been registered and, therefore, the F.I.R. is liable to be quashed on this ground too.

PREVIOUS PROCEEDINGS IN THIS CASE

6. This Court, after noting down certain infirmities in preparation of gang-chart, by order dated 01.02.2024, directed filing of personal affidavit of Senior Superintendent of Police Moradabad as well as Station House Officer, Police Station-Bilari and also ordered for their personal appearance fixing 08.02.2024, on which date, Shri Sandeep Kumar Meena, Superintendent of Police, Rural, Moradabad and Shri Ravindra Pratap Singh, Station House Officer, Bilari, District Moradabad appeared in-person and also filed affidavits. An application for exemption from personal appearance of Senior Superintendent of Police Moradabad was allowed on the same day.

STAND TAKEN IN PERSONAL AFFIDAVITS

7. Shri Ravindra Pratap Singh, Station House Officer, Police Station-Bilari, Moradabad, in his personal affidavit states that the gang-chart was prepared ensuring strict compliance of Rules 5(3)(c) and 8(3) of the Rules, making true disclosure of criminal history of the petitioners. Further stand is that as per Rules 16 and 17, the Inspector Incharge prepared the gang-chart and presented the same before the Nodal Officer/Circle Officer, whereafter, the same was forwarded by Nodal Officer/Circle Officer to the Superintendent of Police, Rural, Moradabad, who further forwarded the same to Senior Superintendent of Police Moradabad, thereafter, the Senior Superintendent of Police, Moradabad recommended and forwarded the same to the District Magistrate, Moradabad and then, after due discussion in a joint meeting between the Senior Superintendent of Police and District Magistrate, Moradabad, it was approved. The affidavit is accompanied by voluminous documents which shall be discussed in the later part of this judgement. Similar stand has been taken in the affidavit of Senior Superintendent of Police, Moradabad and arguments on the same line have been advanced before this Court from the State side.

QUESTIONS ARISING FOR CONSIDERATION

8. After perusing the writ petition and the affidavits and having heard learned counsel for the parties at length, the questions that arise for consideration by this Court are as to whether, in the present case, the State/ Police Authorities have ensured compliance of the provisions of Act of 1986 and the Rules of 2021 and whether non-compliance, if any, would vitiate the proceedings undertaken by the officers or would create sufficient grounds for quashing the impugned F.I.R.

9. Another question that arises before us is whether registration of an F.I.R. only under Section 3 of the Act of 1986, without mentioning any one or the other offences mentioned in sub-clause (b) of Section 2, would vitiate the F.I.R itself. In order to consider the said issues and the said questions, it is necessary to refer certain relevant provisions of the Act of 1986 and the Rules of 2021.

STATUTORY PROVISIONS

10. The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 (U.P. Act No.7 of 1986) was passed by the U.P. Legislature as an Act to make special provisions for prevention of and for coping with gangster and anti-social elements and for matters connected therewith or incidental thereto. In exercise of powers conferred by Section 23 of the Act of 1986, the State Government framed the 'Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 (for short 'the Rules of 2021') with a view to provide for a speedy and transparent procedure to punish gangsters to establish efficient recovery system in respect of property of gangster and incidental benefits acquired through crimes and acts related therewith.

11. Section 20 of the Act describes the "OVERRIDING EFFECT" of the Act of 1986 and Rules of 2021 over any other enactment in the following words:-

"20. Overriding effect. - The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment."

12. Section 2(f) of the Act provides that words and phrases used but not defined in the Act but defined in Code of Criminal Procedure, 1973 or Indian Penal Code, 1860 shall have the meanings respectively assigned to them in such Codes. It, therefore, follows that if certain words are described in the Act itself, the meaning assigned to them would be understood as it is but, in other eventuality, aid of I.P.C. and Cr.P.C. would be taken. Further, any provision of the Act or any Rule made thereunder would be given precedence and supremacy over anything inconsistent therewith contained in any other enactment, including I.P.C. and Cr.P.C.

13. Since, in the present case, violation of various Rules of the Rules of 2021 has been alleged by the petitioners, certain rules relevant to the present case are being reproduced as under :-

"5. General Rules.- (1) To initiate proceedings under this Act, the concerned Incharge of Police Station/Station House Officer/Inspector shall prepare a gang-chart mentioning the details of criminal activities of the gang.

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation to all the persons of the said gang.

(3) The following provisions shall be complied with in respect of gang-charts:

(a) The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/ Senior Superintendent of Police/ Superintendent of Police.

(b) There may be no gang of one person but there may be a gang of known

and other unknown persons and in that form the gang-chart may be approved as per these rules.

(c) The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.

(d) Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.

(e) A separate list of criminal history, as given in Form No.-4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those cases or even where final report has been submitted in the absence of evidence.

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members mentioned in the gang-chart will also be updated on Interoperable Criminal Justice System (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

8. Stating unconfirmed or false information is prohibited.-(1) The Incharge of Police Station/Station House Officer/Inspector shall not mention the cases as Part Trial or Partial Trial (PT) without ascertaining the up-to- date status of the cases in the gang-chart.

(2) No unconfirmed or false information shall be entered in the gang-chart.

(3) The latest status of the cases against the gang, which are being shown in he gang-chart, regarding their pendency in the Special Court, the convictions or the stage at which they are in the Court, must be clearly mentioned.

(4) The responsibility of recording the correct and true information shall lie on the concerned Incharge of Police Station/Station House Officer/Inspector.

(5) On discovering an adverse situation, the Incharge of Police Station/Station House Officer/Inspector shall be held liable for negligence under departmental and criminal proceedings.

"10. Records of Base Cases.- (1) Alongwith gang chart, the certified copy of the charge-sheet and recovery memo shall be attached compulsorily.

(2) Where the accused is not named in the First Information Report and document discloses the way in which his name came to light and if something has been recovered, a certified copy of the recovery memo shall be attached."

16. Forwarding of Gang-Chart.-The following manner shall be followed in the forwarding of Gang-Chart :

(1) Forwarding of the gang-chart by the Additional Superintendent of Police. The Additional Superintendent of Police will not only take a quick forwarding action in the case but he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and satisfactory basis to pursue the case, only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police / Senior Superintendent of Police.

"Thoroughly studied the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act 1986 exists. Accordingly, forwarded with recommendation."

(2) **Forwarding of the gang-chart by the district police in-charge.-** When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also thoroughly analyze all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal basis for taking action in the case, then he should forward the gang-chart to the Commissioner of Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act 1986. Accordingly, approved."

(3) **Resolution of the Commissioner of Police/District Magistrate.**- When the gang-chart is sent to the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/District Magistrate and when he is satisfied that the basis of action exists in the case, then he will approve the gang-chart stating therein that: "I duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang- chart is approved accordingly."

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked.

17. Use of independent mind.- (1) The Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.
(2). A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same shall tantamount to the fact that the Competent Authority has not exercised its free mind."

14. Apart from the aforesaid provisions of the Act of 1986 and Rules framed thereunder, certain other provisions of penal law have also to be looked into before arriving at a conclusion as to whether there is compliance or non-compliance of the provisions of law by the respondents while preparing and approving the gang-chart in the present case. The same shall be referred to at appropriate place in this judgement.

15. Learned counsel for the petitioners, referring to the gang-chart and other documents attached thereto, has vehemently argued that though it is mentioned therein that charge-sheet in relation to Case Crime No.417 of 2023 has been sent to the court on 11.11.2023, the said fact is patently false and incorrect in the light of 'Annexure No.9' to the writ petition. He submits that when progress report qua investigation was sought from the Court of Judicial Magistrate Moradabad, vide application dated 06.01.2024, the said court, through its office, has issued a certified copy of an

application dated 07.01.2024, sent by Shri Pradeep Kumar, Sub-Inspector of Police Station-Bilari, Moradabad, annexed at 'page 151' of the paper-book of the petition, wherein he has stated that after completing the investigation in Case Crime No.417 of 2023, Charge-sheet No.410 of 2023 has been sent on 11.11.2023 to Circle Officer, Bilari. It is, therefore, contended that once the Sub Inspector has himself on 07.01.2024 mentioned that charge-sheet has been sent to the Circle Officer, Bilari, it shows that by the time the gang-chart was approved in the last week of December 2023, charge-sheet was not submitted before the court. Hence, it is clear that absolutely false and incorrect information was incorporated in the gang-chart which, being in teeth of Rule 8(3) of the Rules, would vitiate the proceedings and would suffice quashing of the impugned F.I.R.

16. Learned counsel for the petitioners has also argued that Rule 10 of the Rules makes it mandatory to attach certified copy of the charge-sheet alongwith the gang-chart, however, once charge-sheet has not been submitted in the court in relation to Case Crime No.417 of 2023, there is no question of issuance of certified copy thereof and, hence, no occasion ever arose to attach certified copy of the charge-sheet alongwith the gang-chart, as a consequence whereof, the impugned action is wholly unsustainable.

MEANING AND IMPORT OF 'CERTIFIED COPY OF CHARGE SHEET'

17. At this stage, the Court deems it appropriate to explain the requirement of attaching certified copy of the charge-sheet as per Rule 10. To appreciate this, Rule 60 of the Rules of 2021 needs thoughtful consideration and is quoted hereinbelow:-

"60. Certified copies shall be primary evidence- Notwithstanding anything to the contrary contained in any other Act, in the trial of cases under this Act the criminal cases included in the gang-chart and the FIRs mentioned in the list can be proved by the Officer certifying the certified copy of the charge-sheet. No original form shall be required for the same and the facts contained in the Forms so proved shall be deemed to be proved unless it is rebutted by any evidence to the contrary."

18. Significantly, Rule 60 finds place in Chapter-8 of the Rules with a heading- GENERAL RULES OF TRIAL. The Rule clearly reflects that certification of a charge-sheet is associated with the police officer, however, it clearly and unambiguously relates to trial of cases under the Act and the role of the officer has been assigned only to prove the certified copy of the charge sheet during the course of trial itself. Therefore, proving certified copy of the charge-sheet has nothing to do with preparation or approval of the gang-chart at the initial stage of proceedings, rather Rule 60 would come into application during the course of trial and that would certainly begin when the charge-sheet is submitted before the court concerned and cognizance is taken thereon, otherwise, trial cannot begin. The language used in Rule 60 is clear and unambiguous, i.e., "CERTIFYING THE CERTIFIED COPY OF THE CHARGE-SHEET and "NOT CERTIFYING THE CHARGE-SHEET ITSELF". Therefore, Rule 60 would come into play at that stage when gang-chart alongwith certified copy issued by the competent Court is already filed before the Trial Court and the police officer is called upon during the course of trial to certify that certified copy of the charge-sheet.

Hence, it cannot be said that Rule 60 would empower the police officer to certify the charge-sheet itself during the course of investigation so as to satisfy the requirement of Rule 10 which casts mandatory duty upon police officer to compulsorily attach the certified copy of the charge-sheet alongwith gang-chart.

19. Here, certain provisions of Cr.P.C. also need a glance. Though, in common parlance, we frequently use the word "charge-sheet", surprisingly, Cr.P.C. does not define "charge-sheet". What it defines in relation to completion of investigation is a "police report" as per Section 2(r) in the following words:-

"(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173;"

20. Therefore, a police report is referable to the one which the Incharge of the police station forwards to a Magistrate after completion of investigation. Section 173(2) of Cr.P.C. needs reference here and is reproduced as below:-

Section 173

(1)……

(2)(i) As soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating -

.....

21. The police report can either be in the form of a charge-sheet containing the conclusion drawn by the Investigating Officer that the accused persons should be tried after being summoned before the court or it can be a final report disclosing that accusation made through FIR has been found to be false giving rise to no occasion for trial of accused persons. In both the cases it will be a "police report" only.

22. Insofar as the word "charge" is concerned, Chapter XVII Cr.P.C. is titled as "THE CHARGE" and contains various provisions in relation to framing of charge, its alteration etc. etc. Therefore, the word "charge" has been used in relation to competence of the court concerned for trial of offenders and has nothing to do with the power of police officers in relation to accusation. As a matter of fact, the police officers have no right to frame the charge which is the sole prerogative of the Trial Court concerned after it takes cognizance of the police report submitted under Section 173(2) Cr.P.C.

23. When aforesaid is the situation, then what would be the meaning and significance of words "charge sheet" used in Rule 10 of the Rules. Since the words "charge sheet" have not been defined either in the Act of 1986 or the Rules of 2021 or even in Cr.P.C., these words used in common parlance would be understood as they are but certainly in the light of same words used in the Act of 1986.

24. The Court has got the occasion to go through certain judgements pronounced by esteemed co-ordinate benches of our Court where necessity of attaching certified copy of the charge-sheet has been discussed. In the judgements dated 31.05.2023, 02.05.2023 and 28.08.2023 passed in Criminal Misc. Writ Petition Nos.5202 of 2023 (Manoj Maurya vs. State of U.P. and another), 19638 of 2022 (Binni Lala @ Vinod Kumar Jain vs. State of U.P. and 3 others) and 12808 of 2023 (Rahul Saxena @ Bhola/Bholu vs. State of U.P.

and 3 others) respectively, the Co-ordinate Benches of this Court have dealt with Section 76 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Act of 1872') and have observed that it is not the requirement of law, particularly, Rule 10 of the Rules of 2021, to attach certified copy of the charge-sheet obtained from the court concerned, rather the certification made by the public officer in whose custody of public document remains, would suffice, provided requirements of Section 76 are satisfied. For a ready reference, Section 76 of the Act of 1872 needs reproduction as follows:-

"76. Certified copies of public documents.- Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies."

Explanation.-Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

25. The Court is conscious of the fact that Section 76 finds place in Chapter V of the Act of 1872 which is titled as "OF DOCUMENTARY EVIDENCE". The Chapter contains provisions in relation to proof of documents and contents thereof by way of primary and secondary evidence, their admissibility, rules as to notice to produce, attestation, admission and many other related provisions. The Scheme of the Act of 1872 is clear and, therefore, Section 76 has to be read in relation to the proceedings during the course of trial before the court of law where stage of proving or disproving a document reaches and it cannot be associated with the stage when trial has not even commenced in cases arising out of Act of 1986. Therefore, Section 76 cannot be associated with preparation or approval of gang-chart where charge-sheet has not been filed in the base cases, subject to contingencies mentioned in Rule 22 discussed later. Rule 2(b) of the Rules 2021 defines "base cases" as the cases on the basis of which a gang-chart has been prepared with the intention of taking action against the gang under the Act.

26. We may emphasize that since the issue involved in this case is as to whether without completion of investigation and without submission of charge-sheet by the police in the base case(s), a person can be made an accused under the Act of 1986, it is also necessary to refer to Rule 22 of the Rules of 2021, as quoted below:-

"22. Criminal history not mandatory and sections of the Act can be imposed in the course of investigation – (1) A single act/omission will also constitute an offence under the Act, and First Information Report may be registered on the basis of a single case i.e., it is not mandatory that any criminal history must be recorded and alleged before registering an offence under the Act.

(2) The Act may also come into force on a single prosecution in certain class of cases, such as -

if it appears that the gang has committed a single offence mentioned in Sections 302, 376D, 395, 396 or 397 of the Penal Code out of the offences mentioned in sub-clause (i) of clause (b) of Section 2 of the Act or sub-clauses (ii), (iii), (v), (vii), (x), (xii), (xiv), (xv), (xvii), (xviii), (xix), (xx) or (xxi) of clause(b) of Section 2 of the Act, which is presently under investigation, and the offence under this Act is being proved by collected evidence, then along with the criminal act under consideration, the gang-chart should also be approved by the concerned Commissioner of Police/District Magistrate involved in the investigation of the said offence and the provisions of the Act can be imposed while investigating both the offences together in accordance with the provisions of the Act. Further, the charge-sheet can be sent to the Special Court constituted under the Act."

27. It is apparently clear from Rule 22(1) that a single act/omission can also constitute an offence under the Act of 1986 and First Information Report may be registered on the basis of a single case. This Rule has already been interpreted by the Supreme Court in the case of **Shraddha Gupta vs. State of U.P**. decided on 26.04.2022 in **Criminal Appeal No.569-570 of 2022** reported in 2022 SCCOnline SC 514 and, hence, needs no further deliberation. However, sub-rule (2) of Rule 22 is of quite significance in the present case which, infact, is an exception to Rule 5(3)(c) in the sense that whereas Rule 5(3)(c) provides that the gang-chart shall not be approved without completion of investigation of the base case(s), sub-rule (2) of Rule 22 mentions various sub-sections of Section 2 of the Act of 1986 and the sub-rule implies that after the gang has committed a single offence mentioned under Sections 302, 376D, 395, 396 or 397 of the Penal Code out of the offences mentioned in sub-clause (i) of clause (b) of Section 2 of the Act or sub-clauses (ii), (iii), (v), (vii), (x), (xii), (xiv), (xv), (xvii), (xviii), (xix), (xx) or (xxi) of clause (b) of Section 2 of the Act, which offences are under investigation, then alongwith criminal act under consideration, the gang-chart should be approved by the concerned Commissioner of Police/District Magistrate involved in investigation of the said offence and the provisions of the Act can be imposed while investigating both the offences altogether in accordance with the provisions of the Act. Rule 22(2) of the Rules of 2021, as such, carves out an exception to the requirement of completion of investigation before the gang-chart is approved, however, it can be done only when the First Information Report in the base case(s) is registered under any of the penal provisions mentioned under sub-rule (2) of Rule 22, otherwise, Rule 5(3)(c) shall, generally, be read with Rule 10 and understood in absolute terms and before approving the gang-chart, not only the investigation must be completed but a charge-sheet also must be submitted before the Competent Court and the certified copy must have been issued by the said Court so as to compulsorily form part of the gang-chart as per Rule 10(1).

28. In the present case, the base case covered by Case Crime No. 417 of 2023 is not covered by Rule 22(2) of the Rules 2021 in the sense that it is not an offence mentioned in sections 302, 376D, 395, 396 or 397 of the Penal Code out of the offences mentioned in sub-clause (i) of clause (b) of Section 2 of the Act or sub-clauses (ii), (iii), (v), (vii), (x), (xii), (xiv), (xv), (xvii), (xviii), (xix), (xx) or (xxi) of clause (b) of Section 2 of the Act, and, therefore, the present case is not the one

which falls within exception to the general Rules 5 and 10 and, hence, in the facts of the present case, the Court is of the considered view that without completion of investigation and without forwarding the charge-sheet in Case Crime No.417 of 2023 to the Court, the gang-chart, could not be approved.

29. Now coming to the aspect as to whether in view of Rules 5(3)(a), 8(3), 16 and 17, the preparation/approval of the gang-chart in the present case, is according to law, the Court has carefully gone through the record of proceedings and it finds that in every document including gang-chart, its format, charts and tables describing criminal history etc., the factum of submission of charge-sheet No. 410 of 2023 on 11.11.2023 in the Court and pendency of proceedings before the Judicial Magistrate has been written down and described. Surprisingly, the current status column too contains the same disclosure in all the tables and charts filed alongwith personal affidavit of the Station House Officer.

30. During the course of arguments, learned State Counsel could not dispute the submission advanced on behalf of the petitioners that the Sub-Inspector of Police Station Bilari himself, on 07.01.2024, submitted an application before the Judicial Magistrate that charge-sheet No.410 of 2023 had been forwarded on 11.11.2023 to the Circle Officer, Bilari. The said report forms part of the record of the Court of Judicial Magistrate where the case number has not been mentioned which is normally allotted after cognizance is taken on the charge sheet, but the report has been issued by mentioning crime number and the relevant sections only. This, in itself, suggests that charge-sheet has not been filed in the Court of Judicial Magistrate and the trial is not pending based thereupon and, therefore, the information entered into in the gang-chart and other charts that proceedings are pending before the Judicial Magistrate and that charge-sheet has been forwarded to the Magistrate is incorrect and incomplete disclosure of true and factual position. Therefore, preparation of gang-chart in the present case is clearly in teeth of Rule 8 (2) of the Rules.

31. The Court has already discussed that unconfirmed or false information shall not be entered in the gang-chart as mandated under Rule 8(2) and now this Court is inclined to make the officers understand the seriousness of furnishing false and unconfirmed information as, in such event, the statutory responsibility is fastened on the Incharge of police station concerned as per sub-rules (4) and (5) of Rule 8 reproduced as such:-

"(4) The responsibility of recording the correct and true information shall lie on the concerned Incharge of Police Station/Station House Officer/Inspector.

(5) On discovering an adverse situation, the Incharge of Police Station/Station House Officer/Inspector shall be held liable for negligence under departmental and criminal proceedings."

32. As far as compliance of Rules 16 and 17 is concerned, though the State has made attempts to support the gang-chart and the approval granted to it by referring to the documents annexed to the personal affidavit, a careful scrutiny of the documents would reveal that the Nodal Officer/Regional Officer Moradabad forwarded the gang chart for approval on 27.12.2023, the Superintendent of Police,

Rural, Moradabad forwarded the gang-chart for approval on 28.12.2023 and the joint meeting of Senior Superintendent of Police and District Magistrate, Moradabad has been shown to have been held on 01.01.2024. It is not clear from the gang-chart as to on what date the Senior Superintendent of Police forwarded the gang-chart for approval and as to on which date the District Magistrate approved the gang-chart. Clearly and visibly the columns and signatures of Senior Superintendent of Police and District Magistrate are "undated". No minutes of joint meeting have been annexed. It is not clear as to where was this joint meeting held and who were present therein. In any case, there are chances of doing only paper work as regards holding a joint meeting without actually holding it. In that event, the entire scheme of the Rules would frustrate.

33. Rule 17 of the Rules casts a mandatory duty on the Competent Authority to exercise its own independent mind while forwarding the gang-chart, however, the dates referred to hereinabove i.e. 27.12.2023, 28.12.2023 and 01.01.2024 and the 'undated signatures' made by the District Magistrate and the Senior Superintendent of Police, particularly considering the fact that charge-sheet has not at all been submitted in the case covered by Case Crime No.417 of 2023, are sufficient to convince this Court that gang-chart has been hurriedly prepared, forwarded and approved without application of independent mind and, therefore, there is a clear violation of Rule 17 of the Rules of 2021.

34. At this stage, it is apposite to refer to a latest circular dated 21.01.2024 whereby the State Government has directed the Deputy Inspector General, U.P., Lucknow, Additional Commissioners of Police, Prosecution Directorate, Lucknow, all the Commissioners, all the District Magistrates, all the Police Commissioners, Senior Superintendents of Police, Superintendents of Police in the State of U.P. to ensure strict compliance of Rules 2021 by referring to Rules 5(3), 8, 16, 17, 20 and 26, 36 and 64. The Circular, surprisingly, does not refer to Rule 10 which casts a compulsory and mandatory duty of attaching certified copy of the charge-sheet alongwith the gang-chart. This Court has already interpreted the said provision in detail, hereinabove.

35. The Court also finds that significance of Rule 64 of the Rules of 2021 contained in Chapter 10 has seldom been noticed by the highest police officials as well as the District Magistrate. For the sake of convenience, Rule 64 is reproduced as follows:-

64. Supervision by three-tier Committees. -The following three-tier Committees shall be constituted in relation to the regular supervision and review of any proceedings under the Act and the disposal and management of their ancillary matters:

(1) District Level Supervision Committee-

(a) Every quarter, the action taken under this Act, including the proceedings under Section 14 of the Act and the cases decided, shall be compulsorily reviewed by the District Level Supervision Committee;

(b) Essentially, the police officers who have filed a case under the Act and who are doing the investigation will be present with all the case diaries and information.

(c) The said District Level Supervision Committee will be constituted as under:

(i) Commissioner of Police/District Magistrate-Chairman

(ii) District Police In-charge, Senior Superintendent of Police/ Superintendent of Police-Vice President

(iii) Additional Superintendent of Police/Circle Officer-Nodal Officer

(iv) Joint Director Prosecution-Member Secretary

(v) Public Prosecutor of the Gangster Act-Member;

(d) Minutes of the decisions taken and the review made in the said District Level Supervision Committee will be prepared by the Judicial Assistant/Confidential Assistant and sent to the Divisional Level Supervision Committee and the Home Department of the Government as soon as possible with the signature of the Chairman;

(e) In addition to the above, the said Committee shall have the authority to get the properties of any gang or criminals investigated by any appropriate institution and to issue all such orders so that such gangs or criminals cannot get the benefit of any government services, business, contracts, leases, State schemes, etc. and if such benefit has been received by them, then the same should be recovered. The compliance of the Witness Protection Scheme, 2018 and the instructions related to witness protection in force for the time being shall also be ensured by this Committee.

(2) Divisional Level Supervision Committee-

(a) The Divisional Level Supervision Committee shall consider the quarterly review report of the District Level Supervision Committee and the action taken by it under this Act, including the proceedings under Section 14 of the Act;

(b) The cases decided by the District Level Supervision Committee will be compulsorily reviewed by the Divisional Level Supervision Committee in every six months;

(c) In the review meeting of the said Committee, the Nodal Officer of the concerned district will necessarily be present with relevant information;

(d) The said Divisional Level Supervision Committee will be constituted as under:

(i) Divisional Commissioner-Chairman

(ii) Inspector General of Police/Joint Commissioner of Police (Crime)-Vice President/ Nodal Officer

(iii) Additional Director Prosecution-Member Secretary

(iv) Officer of the local body of the Divisional Headquarters (Municipal Commissioner /Executive Officer)-Member

(v) Regional Lead Branch Manager of National and Private Bank-Member

(vi) Senior most officer of Income Tax Department-Member

(vii) Senior most officer of the GST/Sales Tax Business Tax Department-Member;

(e) In addition to reviewing the criminal cases, the said Committee will provide proper information to the Investigating Officers regarding the activities related to the property acquired by the gangster under the Act and share the relevant information with all the concerned at the divisional level;

(f) Minutes of the decisions taken and the review done in the Divisional Level Supervision Committee will be prepared and sent to the Home Department of the

Government as soon as possible with the signature of the Chairman;

(g) In addition to the above, the said Committee shall have the authority to get the properties of any gang or criminals investigated by any appropriate institution and to issue all such orders so that such gangs or criminals cannot get the benefit of any government services, business, contracts, leases, State schemes, etc. and if such benefit has been received by them, the same should be recovered. The compliance of the Witness Protection Scheme, 2018 and the instructions related to witness protection in force for the time being shall also be ensured by this Committee.

(3) State Level Supervision Committee-

(a) The State Level Supervision Committee shall supervise the Divisional Level Supervision Committee and District Level Committees half-yearly and make policy after considering their reports regarding punishment of criminals and disposal of their illegal properties in favour of the State;

(b) The State Level Supervision Committee will be constituted at the State level to take appropriate action as follows:

(i) Additional Chief Secretary, Home-Chairman

(ii) Principal Secretary, Justice/Legal Adviser-Vice President

(iii) Director General of Police-Vice President

(iv) Director General, Prosecution-Member Secretary

(v) Head of State of National and Private Bank-Member

(vi) Senior most officer of Income Tax Department-Member

(vii) Senior most officer of GST/Sales Tax Business Tax Department-Member;

(c) In addition to the above, the said Committee shall have the authority to get the properties of any gang or criminals investigated by any appropriate institution and issue all such orders so that such gangs or criminals cannot get the benefit of any government services, business, contracts, leases, State schemes, etc. and if such benefit has been received by them, the same should be recovered. The compliance of the Witness Protection Scheme, 2018 and the instructions related to witness protection in force for the time being shall also be ensured by this Committee."

36. The afore-quoted Rule 64 describes three-tier system where the Committee, namely District Level Supervision Committee, shall be constituted in relation to the regular supervision and review of any proceedings under the Act and disposal and management of their ancillary matters. The importance of Rule 64 is that every action under the Act, right from the beginning till end, has to be under regular supervision and review of such Committees but what the Court finds in almost all the cases, including the present one, that the gang-charts are hurriedly prepared containing various infirmities and irregularities which are altogether ignored by the members of the said Committee and taking advantage of the technical shortfalls, even a hard core criminal easily escapes from the stringent action under the Act.

37. It is now necessary to give reference to certain judicial pronouncements on purposive interpretation of a statute.

38. Jurisprudence of statutory interpretation has moved from "literal interpretation" to "purposive

interpretation", which advances the purpose and object of a legislation. The Supreme Court, in catena of judgments, has dealt with the issue of literal interpretation vis-a-vis purposive interpretation.

39. The Apex Court, in **Central India Spinning and Weaving Manufacturing Comp. versus Municipal Committee, Wardha, AIR 1958 SC 341**, has held that it is a recognised principle of construction that general words and phrases, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

40. The Supreme Court, in **Girdhari Lal & Sons versus Balbir Nath Mathur; 1986(2) SCC 237**, has held that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning and there need no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary. It went to observe that ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices, or absurdities, vide **K.P. Varghese v. ITO, (1981) 4 SCC 173, State Bank of Travancore v. Mohd. M. Khan, (1981) 4 SCC 82, Som Prakash Rekhi v. Union of India (1981) 1 SCC 449, Ravula Subba Rao v. CIT, AIR 1956 SC 604, Govindlal V Agricultural Produce Market Committee, (1975) 2 SCC 482 and Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd. (1984) 2 SCC 50.**

41. The Supreme Court, in **Utkal Contractors & Joinery Pvt. Ltd. versus State of Orissa; 1987 (3) SCC 279**, has observed that a statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also

not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. [See-Eera (through **Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr 2017(15) SCC 133].**

42. The more stringent the Law, the less is the discretion of the Court. Stringent laws are made for the purpose to achieve its objectives. This being the intendment of the legislature, the duty of the court is to see that the intention of the legislature is not frustrated. If there is any doubt or ambiguity in the statutes, the rule of purposive construction should be taken recourse to, to achieve the objectives. (See **Swedish Match AB & Anr. Securities & Exchange Board, India & Anr., (2004) 11 SCC 641).**

43. The Apex Court, in **Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Ors. (1987) 1 SCC 424,** held that Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

44. Same view has been reiterated in **S. Gopal Reddy Vs. State of Andhra Pradesh, (1996) 4 SCC 596, Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat, (2005) 2 SCC 409, Anwar Hasan Khan Vs. Mohd. Shafi & Ors. (2001) 8 SCC 540, Union of India & Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277, Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424: (AIR 1987 SC 1023) and N. K. Jain v. C. K. Shah (1991) 2 SCC 495: (AIR 1991 SC1289).**

REFERENCE TO A LARGER BENCH

45. This Court is satisfied in the present case that preparation/forwarding as well as approval of the gang-chart is in teeth of Rules 5, 8, 10, 16 and 17 of the Rules, but since our esteemed Co-ordinate Benches of this Court, in above-noted judgments, have interpreted Rule 10 contrary to the view taken by this Court in this judgment, the question on interpretation of Rules 5, 10, 22 and 60 needs to be referred to the larger Bench.

46. As regards second limb of argument of learned counsel for the petitioner regarding validity of an F.I.R.

under section 3 of the Act only, without mentioning any other offences described it section 2(b) thereof, learned counsel for the petitioner placed reliance on a recent decision of this Court in **Criminal Misc. Writ Petition No.18729 of 2023 (Asim @ Hassim vs. State of U.P. and another)** decided on 02.12.2023 and reported in 2024 (1) ADJ 125(DB).

47. The Court has perused the said judgment wherein an F.I.R. lodged under Section 3(1) of the Act of 1986 was quashed by the Court on the ground that apart from Section 3(1) of the Act, no corresponding provision mentioning anti-social activities, in which the accused was allegedly involved and was named as gangster as per one or the other sub-section of Section 2, was there in the F.I.R.

48. This Court, having gone through the Scheme of the Act read with general penal law covered by Indian Penal Code, 1860 is of the view that First Information Report is always lodged under the provision inflicting penalty of imprisonment and/or fine against the accused and not under the provision where the offence itself is defined. For example, 'cheating' is defined under Section 415 of Indian Penal Code, 1860, whereas F.I.R. in relation to commission of 'offence of cheating' is lodged under Section 420 I.P.C. which is a penal provision. Similarly, 'criminal breach of trust' is defined under Section 405 but FIR is registered under Section 406 IPC; 'forgery' is defined under Section 463 IPC but F.I.R. is lodged under Section 465/467/468/471 IPC, murder is defined under Section 300 but F.I.R. is lodged under Section 302, so on and so forth.

49. Admittedly, Section 3 is the penal provision under the Act, 1986 in relation to the offences described under various sub-sections of Section 2 of the Act and, hence, this Court is of the view that it is not necessary to mention any one or the other clause of Section 2 while registering F.I.R. under the Act of 1986, for which, mentioning of Section 3 is sufficient. Therefore, this Court is in respectful disagreement with the judgment of our esteemed Co-ordinate Bench in **Criminal Misc. Writ Petition No.18729 of 2023 (Asim @ Hassim vs. State of U.P. and another)** decided on 02.12.2023 and reported in 2024 (1) ADJ 125(DB) and reference on this point is also required to be made and is being made.

50. In connection to the aforesaid, we may take aid to a very recent decision dated 19.02.2024 pronounced by the Hon'ble Supreme Court in **Criminal Appeal Nos(s).... of 2024 (arising out of SLP (Crl.) No(s). 437 of 2023 (Farhana vs. State of U.P. and others)** connected with another case can be taken. The Supreme Court was dealing with a case where the accused had been exonerated/acquitted in the base case, however, the acquittal was not taken note of while preparing the gang-chart and, hence, the Supreme Court quashed the FIR and also reversed the decision of this Court, by which, this Court had declined quashing of the FIR by placing reliance upon judgement in the case of **Shraddha Gupta** (supra) and. In 'paragraph 13' of the judgement in the case of Farhana (supra), the Supreme Court observed as follows:-

"13. Needless to say that for framing a charge for the offence under the Gangsters Act and for continuing the prosecution of the accused under the above

provisions, the prosecution would be required to clearly state that the appellants are being prosecuted for any one or more offences covered by anti-social activities as defined under Section 2(b)."

51. It is clear from a bare reading of paragraph 13 of the said judgement that the prosecution would be under an obligation to clearly state that the accused persons are being prosecuted for any one of the offences covered by anti-social activities as defined under Section 2(b), however, that stage would come while framing the charge for the offence under the Gangster Act. It is, thus, apparent that there is no such requirement at the time of bare registration of FIR and, therefore, mentioning Section 3 of the Act, 1860 only would suffice at that stage.

52. Therefore, the judicial propriety demands that the aforesaid aspects should also to be referred for being answered by a Larger Bench.

53. The Registry is, accordingly, directed to place this matter before Hon'ble the Chief Justice for constituting Larger Bench to answer the following questions:-

(A) Whether, in the light of Rule 60 of the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 the words "certified copy of the charge-sheet" used in Rule 10(1) mean certified copy issued from the trial Court after submission of police report by the Investigating Agency before the trial Court and after the Court takes cognizance thereupon, or a certification made on the charge sheet by the police officer involved in investigation prior to its submission before the trial Court is sufficient as per section 76 of the Evidence Act, 1872, where the offences are not covered by those specified under Rule 22(2)?

(B). Whether in view of the scheme of penal law covered by Indian Penal Code, 1860 and/or the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986, is it necessary at all to mention in the F.I.R. any one or more of the offences described under Section 2(b) of the Act?

54. Till the aforesaid questions are answered by the Larger Bench, interim protection granted to the petitioners under the order dated 08.02.2024 shall remain in operation.

55. Although we have referred the above-noted questions for being answered by the Larger Bench, it is made clear that in the peculiar facts and circumstances of the present case, the protection granted to the petitioners or reference made to the Larger Bench would, under no circumstances, be treated as a judgment/order in rem so as to install any proceedings in any other case pending in the State of U.P. under the Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 before any Authority or Court, including this Court.

(2024) 3 ILRA 1673
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.03.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Writ Petition No. 2067 of 2024

Kashif Ahmed ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Ajmal Khan, Javed Khan

Counsel for the Respondents:
A.S.G.G.A.

Passport Act, 1967-Passport was issued to the petitioner -expired-application was filed for grant of permission for renewal of passport-rejected -is a member of political party-five cases were lodged against the petitioner-charge has not been fixed till date- Notification dated 25.08.1993 as well as Office Memorandum dated 10.10.2019 issued by the Ministry of External Affairs, Government of India, New Delhi-ignored while passing the impugned order -rejected the application –impugned order quashed,

Writ Petition allowed.(E-9)

Cases Cited:

1. Maneka Gandhi Vs. Union of India (1978) AIR SC 597

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

1. Heard Sri Ajmal Khan, learned counsel for the petitioner and Sri Surya Bhan Pandey, learned Sr. Advocate and Deputy Solicitor General of India assisted by Sri Varun Pandey, learned counsel for the Union of India as well as perused the record.

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

"I. Issue a writ, order or direction in the nature of Certiorari quashing the order dated 17.01.2024 passed by learned Additional Chief Judicial Magistrate-V, Room No.29, Lucknow, by means of which application for renewal of passport of petitioner was rejected."

3. Learned counsel for the petitioner submits that a Passport No. H8600780 was issued to the petitioner by the Passport Office, Lucknow for the period of 01.12.2009 to 30.11.2019, which has been expired. The petitioner has visited six times to Kingdom of Saudi Arab and lastly he visited in the Month of February, 2019. He further submits that petitioner's brother-in-law's marriage is schedule on 30.04.2024 in the Kingdom of Saudi Arab and petitioner is willing to attend the same.

4. Learned counsel for the petitioner further submits that an application was filed by the petitioner before the learned Additional Chief Judicial Magistrate-V, Room No.29, Lucknow for grant of permission for renewal of passport, which was rejected by means of order dated 17.01.2024 observing therein that this Court has no jurisdiction for granting the permission of renewal of passport. He further submits that the petitioner is a member of political party, therefore, in the month of December, 2019, five cases were lodged against the petitioner, which are related to protest against CAA/NRC. In any of the case, charge has not been fixed by the learned trial court till date.

5. In support of his argument, learned counsel for the petitioner has relied upon the notification of Ministry of External Affairs, New Delhi dated 25.08.1993, which is being quoted hereunder:-

"G.S.R. 570(E).--In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against

whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to be issued to every such citizen shall be issued -

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed fr one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis f a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued."

6. Thus, learned counsel for the petitioner submits that the impugned order dated 17.01.2024 is totally illegal, perverse and arbitrary as the same is passed without application of judicial mind and also without considering the notification of Ministry of External Affairs, Government of India, New Delhi, therefore, the same is liable to be quashed.

7. On the other hand, learned counsel for the Union of India has placed a notification of the Government of India dated 25.08.1993 (which has already been quoted above) and an Office Memorandum dated 10.10.2019 (which is being quoted hereunder) issued by the Ministry of External Affairs, Government of India, New Delhi. He has also placed an order passed by co-ordinate Bench of this Court dated 02.02.2024 passed in Application under Section 482 Cr.P.C. No.839 of 2024 and submits that there is no restriction to the learned trial court to direct for grant of permission for renewal of passport. He further submits that as per aforesaid notification and order passed by the co-ordinate Bench of this Court, the impugned order dated 17.01.2024 passed by learned Additional Chief Judicial Magistrate-V, Room No.29, Lucknow, on its face appears to be passed without application of judicial mind and without considering the aforesaid notification. Thus, the impugned order is liable to be quashed and matter be remanded back to the concerned Magistrate for giving permission to the petitioner for renewal of his passport.

***

Office Memorandum dated 10.10.2019 issued by the Ministry of External Affairs, Government of India, New Delhi:-

No. VI/401/1/5/2019
Government of India
Ministry of External Affairs
PSP Division

Patiala House Annexe, Tilak Marg
New Delhi, the l0th October 2019

OFFICE MEMORANDUM

Subject: Issue of passports to applicants against whom criminal cases are pending before a court of law in India.

Reference is invited to Notification No. GSR 570(E) dated 25.8.1993 regarding issuance of passports to applicants who have criminal proceedings pending against them and whose applications would attract the provisions of clause (f) of sub-section (2) of Section 6 of the Passports Act, 1967.

2. GSR 570(E) dated 25.8.1993 is reproduced below for reference:

"G.S.R. 570(E).--In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to be issued to every such citizen shall be issued -

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed fr one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis f a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued."

3. It may be noted that applicants may be refused passports only on grounds mentioned under Section 6(2) of the Passports Act, 1967. Section 6(2)(f) of the Act states that the passport authority shall refuse to issue a passport or travel document to an applicant on the ground that proceedings in respect of an offence alleged to have been committed by the applicant arc pending before a criminal court in India. GSR 570(E) dated 25.8.1993 was introduced to give relief to such applicants against whom criminal proceedings are pending before any Court of law in India but who may need to travel abroad for some urgent business. With an undertaking under GSR 570(E) and an order from the Court, an applicant could be issued a short validity passport of one year validity for the period specified by the Court.

4. It has been noticed that there are an increasing number of references being received regarding passport applications attracting Section 6(2)(f). It has also been brought to Ministry's notice that there are a number of complex issues involved while processing such applications. During the proceedings in a recent court case, the Hon'ble High Court of Delhi in W.P. (CRL) No. 2844/2018 /CRL.M.A. 48674/2018 has directed that guidelines be issued by the Ministry reiterating the procedure for processing of such applications and emphasizing that such applications need to be processed with due care and diligence.

5. In view of the above, the following instructions may be adopted while processing the passport applications in respect of those applicants who may have criminal proceedings pending before a criminal court in India:

(i) The provisions of GSR 570 (E) may be strictly applied in all case. GSR 570 (E) is a statutory notification and hence, forms part of the Rules. It is to be noted that as per Section 5 (2) of the Passports Act, 1967, the passport authority shall be order in writing take a decision whether to issue or refuse a passport, after making such inquiry, if any, as it may consider necessary. Moreover, Section 7 of the Passports Act, provides that a passport or travel document may be issued for a shorter period than the prescribed period if the passport authority, for reasons to be communicated in writing to the applicant, considers in any case that the passport or travel document should be issued for a shorter period. Rule 12 of the Passport Rules, 1980 only states that an ordinary passport shall be in force for a period of 10 years which implies that an ordinary passport cannot be issued beyond a period of 10 years.

(ii) Whenever an applicant is submitting a 'No Objection Certificate' (NOC) from a Court of law in India, the applicant should be advised that undertaking as per GSR 570(E) should be complete in all respects and should mention all the pending criminal cases against the applicant. The undertaking will have a not clearly stating that if any false or incomplete information is submitted by an applicant, then his passport application is liable to be rejected.

(iii) Extant instructions clearly lay down that such applications should be processed on pre- Police Verification (PV) mode. "Pre-PV" would be mandatory in all cases of applications submitted with GSR 570(E) to ensure that the undertaking submitted by the applicant is properly matched with the criminal cases mentioned in the Police Verification Report (PVR). Hence, such applications should not be accepted under Tatkaal nor such applications be moved to "post-PV" mode

or "No-PV" mode without proper justification and approval to be recorded in writing.

(iv) If an undertaking is incomplete or misleading and the applicant is found to have suppressed details of other criminal cases against the applicant, a Show Cause Notice should be issued to the applicant and action initiated against that applicant as per provisions of Section 12 of the Passports Act, 1967. If information that an applicant has obtained a passport by making a false submission or by suppressing material facts comes to light after the passport has been issued, the passport may be impounded or revoked as per provision of Section 10 (3) (b) of the Passports Act, 1967 after following the due procedure.

(v) In case where the first police verification (PV) is 'Adverse', secondary police verification may be generated. While a secondary PV is generated, it should be accompanied by a detailed letter seeking clarification regarding the pending criminal cases against the applicant and the status of these cases. Apart from generating secondary PVR, the passport officers may, if considered necessary, call for discreet enquiry through the police authorities by sending the court order submitted by the applicant or even seek verification from other government agencies/departments, as the case may be.

(vi) In case where the secondary Police Verification is also 'Adverse', it may be examined whether the details brought out in the police report match the undertaking submitted by the applicant. It may be noted that mere filing of FIRs and cases under investigation do not come under the purview of Section 6(2)(f) and that criminal proceedings would only be considered pending against an applicant if a case has been registered before any Court of law and the court has taken cognizance of the same.

(vii) If the details given in the police report and the undertaking submitted by the applicant are matching, then the 'No Objection Certificate' issued by a Court of law submitted by the applicant would take precedence over any 'Adverse' report submitted by the police. In such cases, the 'Adverse' report may be overruled with the written approval of the Passport Officer.

(viii) If the details given in the PVR and the undertaking submitted by the applicant are at variance, then a notice may be issued to the applicant calling for clarification and advising the applicant to submit details of all pending criminal cases as well as to submit a revised No Objection Certificate (NOC).

(ix) If it is brought to the notice of the authority that an applicant has criminal proceedings arrayed against applicant before several courts of law, then the applicant may be advised to get NOC from all the concerned court (s). Normally, the Court Order would make a mention of the cases pending against the applicant as well as the prayer made by the applicant. This may be examined along with the undertaking submitted by the applicant and complaints or other court orders, if any, that have been received against the applicant.

(x) It may noted that GSR 570(E) only exempts and applicant from the operation of Section 6 (2)(f) and none of the other sub-sections of Section 6(2) of the Passports Act, 1967.

(xi) A revised Undertaking under GSR 570(E) is attached at Annexure 'A'.

(xii) Passport Officers may issue an internal SOP along the above lines so that there is no confusion in handling of applications that would attract provisions of section 6(2)(f) of the Passports Act, 1967.

6. The above instructions may be noted for strict compliance with immediate effect.

Annexure 'A' UNDERTAKING (to be submitted on plain paper as per provisions of GSR-570(E) dated 25.08.1993)

I am applying/have applied for passport with the following details:-

(a) Name :.....

(b) Date of Birth :.....

(c)Father's Name :.....

(d)Mother's Name :.....

(e) Present Address :.....

(f) File No./ARN No. :..... Date:.....

2. The Criminal case(s) with following details is/are pending against me:

(if more than one case is pending, details of all cases may be provided. Additional sheet giving complete information may be attached)

(a) Case No. :.....

(b) Name of Court :.....

(c) Details of Investigating Agency (Please provide details of Police station Investigating Officer, etc.) :.....

(d)Last date of hearing :.....

(e)Next date of hearing :.....

3. I hereby undertake that I shall, if required by the Court concerned, appear before it at any time during the continuance in force of the passport so issued.

4. I am aware that it is an offence under the Passports Act, 1967 to furnish any false information or to suppress any material information with a view to obtaining a passport or any other travel document.

5. The above information given by me in this undertaking and enclosures is true and I am solely responsible for its accuracy.

(Signature of the Passport applicant)

Name.....

Mobile No.....

Date:.....

Place:.....

***

8. After considering the arguments as advanced by learned counsel for the parties as well as after perusal of record, this Court finds that Under Article 19(1)(d) and Article 21 of the Constitution of India, the citizens of the country are entitled for passport. In **Maneka Gandhi Vs. Union of India (1978) AIR SC 597**, the Apex Court has held that having passport is a fundamental right of the citizen of India and a citizen can not be deprived of such fundamental right.

9. This Court further observes that for issuance of passport a declaration has to be made by the applicant that the applicant has not been convicted by any Court of Law in India for any criminal offence and has not been sentenced to imprisonment for two years or more than two years with other relevant information.

10. A careful reading of provisions of the Passport Act and the Notification dated 25.08.1993 alongwith the Office Memorandum dated 10.10.2019 in the light of it's legislative backgrounds as mentioned

above, it is clear that passport or travel document of a person, who is facing trial can be refused by the authority concerned during pendency of his criminal case, but there is no statutory bar for giving no objection by the court concerned. No hard and fast straight jacket formula can be laid down regarding issuance of permission or giving no objection by the court concerned for issuance of passport. It is always discretion of the court concerned and depend upon the facts and circumstances of each case, act and conduct of the accused as well as nature of alleged offence committed by him and stage of trial, etc. Some time on account of enmity or ill will one party enmesh the other party in a frivolous criminal case to settle his personal score, therefore, in the interest of justice, it is necessary to consider all aspects of the matter and surrounding circumstances while granting or refusing the no objection for renewal or reissue of passport or travel documents by the court concerned.

11. Thus, this Court after considering the aforesaid judgment of Hon'ble the Supreme Court in the case of **Maneka Gandhi (Supra)**, is of the view that the learned trial court had completely ignored the Notification dated 25.08.1993 as well as Office Memorandum dated 10.10.2019 issued by the Ministry of External Affairs, Government of India, New Delhi (referred above) while passing the impugned order and had rejected the application of the petitioner for grant of permission for renewal of application for passport, thus, the impugned order is not sustainable in the eyes of law, therefore, the same is liable to be quashed and the matter is liable to be remanded back to the learned trial court concerned.

12. In view of above, the impugned order dated 17.01.2024 passed by learned Additional Chief Judicial Magistrate-V, Room No.29, Lucknow, by means of which application for renewal of passport of petitioner was rejected, is hereby **quashed** and the matter is being remanded back to the learned trial court concerned for passing an order afresh in light of the Notification dated 25.08.1993 and the Office Memorandum dated 10.10.2019 as well as the judgment passed by Hon'ble the Supreme Court in the case of **Maneka Gandhi (Supra).**

13. Accordingly, the instant writ petition is **allowed** with direction to the learned trial court i.e. Additional Chief Judicial Magistrate-V, Room No.29, Lucknow that if the petitioner moves a fresh application for grant of permission for renewal of passport within ten days from today, the same may be decided expeditiously i.e. within fifteen days from its filing in view of the above observations.

(2024) 3 ILRA 1680
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 3277 of 2024

Ravi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashwani Kumar Pathak

Counsel for the Respondents:
G.A.

Criminal Law - U.P. Control of Goondas Act, 1970 - Sections 2(b) & 3(1) - Notice Validity Petitioner, enlarged on bail (20.06.2023), claimed consensual relationship with the victim, who confirmed in her Section 164 Cr.P.C. St.ment that she married him willingly and was major. Court held that a solitary case does not establish habitual criminality required for "goonda" classification under Section 2(b). Notice lacked general nature of material allegations, violating mandatory requirements under Section 3(1), as per Ramji Pandey Vs St. of U.P., 1981 Cri LJ 1083 and Bhim Sen Tyagi Vs St. of U.P., 1999 (2) JIC 192 (All) (FB). Notice deemed defective, unsupported by evidence of habitual offences, and contrary to victim's St.ment. Presumption of lawful official acts under Section 114(e), Evidence Act rebutted. Notice quashed for gross violation of law. St. directed to ensure public servants act within legal bounds, with potential disciplinary action for violations. Writ allowed with Rs. 20,000/- costs payable by St. within two months. Compliance to be reported within ten weeks. (Paras 9-20)

Writ Petition Allowed.

Case Law Cited:

1. Shankar Ji Shukla Vs Ayukt Allahabad Mandal, 2005 (52) ACC 638 (Para 11)

2. Lalani Pandey @ Vijay Shankar Vs St. of U.P., 2011 (1) ACrJ 207 (Para 11)

3. Idu Ali Vs St. of U.P., Criminal Misc. Writ Petition No. 2895/2023 (Para 12)

4. Ramji Pandey Vs St. of U.P., 1981 Cri LJ 1083 (Para 12)

5. Bhim Sen Tyagi Vs St. of U.P., 1999 (2) JIC 192 (All) (FB) (Para 12)

(Delivered by Hon'ble Siddharth, J. & Vinod Diwakar, J.)

1. Heard learned counsel for the petitioner, learned counsel for the informant and learned A.G.A. for the State respondents.

2. The present writ petition has been preferred with the prayer to quash the impugned **Notice dated 31.01.2024** issued by Additional District Magistrate-Administration, **District- Gorakhpur, in case no.- D 202305310002546, under Section 3/4 of U.P. Control of Goondas Act,(State Vs. Ravi), Police Station-Khajni, District- Gorakhpur.**

3. The petitioner has been implicated in this case under section 3/4 of U.P. Control of Goondas Act because of his implication in case crime no. 340 of 2022, under sections- 363, 366, 376, 120-B IPC and 3/4 POCSO Act, Police Station-Khajni, District- Gorakhpur.

4. Learned counsel for petitioner has submitted that the above case was registered against the petitioner when he had consenting relationship with the victim. She left her house on her own and married the petitioner at Mumbai. In her statements recorded under Sections 161 Cr.P.C. and 164 Cr.P.C., she claimed herself to be major and clearly stated that the petitioner never used any force against her. She has stated that she wanted to live with the petitioner. Petitioner was enlarged on bail by this Court on 20.06.2023 in the aforesaid case.

5. Apart from the above implication, there is no case registered against the petitioner.

6. Learned counsel for petitioner has further submitted that the notice dated 31.01.2024 issued by the respondent no. 2 is bad in law. It does not contains the general nature of material allegations.

7. Learned AGA has opposed the submissions and has stated that the petitioner has opportunity of making representation before the respondent no. 2 and therefore his writ petition does not deserves to be entertained by this Court. Petitioner has criminal history of one case and one beat report is also against him as mentioned in the notice.

8. There are no disputed facts warranting call of counter-affidavit from the respondents.

9. After hearing the rival contentions a look at the definition of "Goonda" is required to be made as defined under section 2(b) of U.P. Control of Goondas Act, 170 which is as follows:-

" 2[(b) 'Goonda' means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;

Explanation.- 'Tout' means a person who-

(a) accepts or obtains, or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means any public servant or member of Government, Parliament or of State Legislature, to do or forbear to do anything or to show favour or, disfavour to any person or to render or attempt to render any service or disservice to any person, with the Central or State Government, Parliament or State Legislature, any local authority, Corporation, Government Company or public servant; or

(b) procures, in consideration of any remuneration moving from any legal practitioner interested in any legal business, or proposes to any legal practitioner or to any person interested in legal business to procure, in consideration of any remuneration moving from either of them, the employment of legal practitioner in such business; or

(c) for the purposes mentioned in explanation (a) or (b), frequents the precincts of civil, criminal or revenue Courts, revenue or other offices, residential colonies or residences or vicinity of the aforesaid or railway or bus stations, landing stages, lodging places or other places of public resort; or

(vii) is a house-grabber.

Explanation. - 'House-grabber' means a person who takes or attempts to take or aids or abets in taking unauthorised possession or having lawfully entered unlawfully remains in possession, of a building including land, garden, garages or out-houses appurtenant to a building.]

(viii) is involved in offences punishable under the Regulation of Money Lending Act, 1976;

(ix) is involved in offences punishable under the Unlawful Activities(Prevention) Act, 1966 and the Indian Forest Act, 1927;

(x) is involved in illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of cow Slaughter Act, 1955 and the Prevention of Cruelty of Animals Act, 1960;

(xi) is involved in human trafficking for purposes of commercial exploitation, forced labour, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and like activities.]

10. This Court finds that the petitioner is not alleged to be leader of or member of any gang or he himself habitually commits or attempts to commit or abets the commission of offences mentioned in the definition clause quoted above.

11. There is a solitary case registered against him and he was not found to be habitual of abduction of women or girls. This Court in the case of **Shankar Ji Shukla Vs. Ayukt Allahabad Mandal and others reported in 2005 (52) ACC** 638 and in the case of **Lalani Pandey @ Vijay Shankar Vs. State of U.P. and others, 2011(1) ACrJ 207** has held that a person cannot be held to be 'goonda' only on the basis of one or two acts. He can be held to be 'goonda' only when he is in the habit of committing repeated offences.

12. The Division Bench of this Court in the case of **Idu Ali Vs. State of U.P.** (Criminal Misc. Writ Petition No. 2895 of 2023) and others has held that where general nature of material allegations have not been mentioned in the notice issued under section 3 of the Act, notice will not be considered to be in accordance with mandatory provision of law as follows:-

"Learned counsel for the petitioner drew our attention to two Full Bench decisions in Ramji Pandey Vs. State of U.P. and others; 1981 Cri LJ 1083 and Bhim Sen Tyagi v. State of U.P. through D.M. Mahamaya Nagar, 1999 (2) JIG 192 (All) (FB).

In Ramji Pandey's case (supra), it has specifically been observed in paragraph 7 of the judgment that although the expression "material allegations" has not been defined by that Act, according to the dictionary meanings, the word "material" means "important and essential", "of significance". The word "allegation" means statement or assertion of facts. Thus, the notice under Section 3(1) should contain the essential assertions of facts in relation to the matters set out in clauses (a), (b) and (c) of sub-section (1) of Section 3 of the Act. It needs not refer to any evidence or other particulars or details. The names of witnesses, and persons who may have made the complaint against the person against whom action is proposed to be taken or the time, date and place of the offence committed by the person needs not be mentioned in the notice. There is a distinction between the "general nature of material allegations" and "particulars of allegations". In accordance with the former expression, the notice needs not give any details of the allegations, instead the requirement of law would be satisfied if the notice contains a general statement of facts which need not contain any details or particulars. In Ram Pandey's case, where there were allegations that, (a) the petitioner was a

goonda, (b) his movements were causing alarm, danger and harm to the lives and properties of the persons within the circle of P.S.-Sikandarpur and there was reasonable ground for believing that he was engaged in the commission and abetment of offences punishable under Chapters XI, XII and XXII of the Indian Penal Code, and (c) the witnesses were not willing to give evidence against him by reason of apprehension on their part as regards their safety and danger to their persons and personal property. Regarding the aforesaid sub-paragraphs (a), (b) and (c), the material allegations of general nature were that there were various cases pending against the petitioner and the crime numbers and sections of those cases had been given in the notice and it was mentioned therein whether the petitioner had been convicted or acquitted in the cases or they were pending. In spite of mention of the crime numbers and sections and status of those cases, the notice in Ramji Pandey's case (supra) was held not to contain the general nature of material allegations and it was struck down.

In the present case also, nothing more than mention of the crime number and sections is all that we find, instead of the general nature of material allegations. A list of case crimes/first information reports/beat report registered against the petitioner does not satisfy the test of a valid notice under Section 3(1) carrying the "general nature of material allegations". Truly, the notice, on the foundation of which the order impugned has been made, is strictly in the teeth of the law laid down consistently by this Court; particularly, the Full Bench decision in Ramji Pandey (supra) and reiterated in Bhim Sain Tyagi (supra). A notice under Section 3(1) of the kind that is the foundation of proceedings here has been held in Bhim Sain Tyagi (supra) and in earlier decisions also, to violate the minimum guarantee of the opportunity that the Statute envisages for a person proceeded with/against under the Act of 1970. Thus, in this case, the impugned order, founded as it is, on a notice under Section 3(1) of the Act, stands vitiated by defects that go to the root of the matter."

13. In view of the above consideration, it is clear that the respondent no. 2 has issued the impugned notice without considering the provisions of law only on the basis of implication of the petitioner in a single case and on the basis of a beat report. The implication of the petitioner in the case crime no. 340/2022 was not supported by victim herself in her statement recorded under section 164 Cr.P.C., and she had married the applicant as well. Therefore, the recital in the notice that the petitioner is a goonda and habitually commits the offences under Chapter XVI, XVII and XXII of the Indian Penal Code and witnesses are not willing to give evidence against him by reason of apprehension on their part regarding their safety etc., are absolutely false.

14. There is presumption in favour of performance of official acts under section 114, illustrations (e) of Evidence Act that they have been regularly performed. This Court finds that the presumption in favour of respondent no.2 of performance of his official acts in accordance with law stands rebutted by the undisputed facts of this case and relevant provisions of law.

15. This is a case where the respondent no. 2, Additional District Magistrate-Administration, District-Gorakhpur, has issued the impugned notice in gross violation of law and acting against

presumption of fairness in due discharge of his official duties.

16. This Court restraints itself from passing any further remarks against the respondent no. 2 but a direction is being issued to the respondent no.1, Principal Secretary, Department of Home, Government of U.P., Lucknow that he should ensure that the public servants exercising powers of the State should remain within the bounds of law and violation of law may entail disciplinary proceedings against them.

17. The impugned notice is hereby **quashed**.

18. The writ petition is, accordingly, **allowed** with cost of Rs. 20,000/- payable to the petitioner by the State within two months.

19. Registrar(Compliance) is directed to communicate this order to respondent nos. 1 and 2 within a week.

20. Respondent no. 1 will report compliance of this order to the Registrar(Compliance) of this Court within ten weeks.

(2024) 3 ILRA 1685
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Misc. Writ Petition No. 9505 of 2013

Irfan Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Agrawal

Counsel for the Respondents:
G.A., Sri Anurag Pathak, Sri Swetashwa Agarwal, Sri Srijan Pandey

Criminal Procedure Code, 1973 – Sections 145 & 146 – Constitution of India,1950 – Article 227 –dispute relating to possession – attachment of property – revisional court setting aside order of Executive Magistrate – claim of ownership based on sale deeds – title based on Land Acquisition Reference alleged to be forged – pendency of civil suit – no effective interim order of civil court indicating possession – apprehension of breach of peace – Magistrate concerned with maintenance of peace and tranquillity – revisional court not powerless to set aside findings ignoring apparent facts and evidence – no manifest or patent violation of law – no interference required .

Writ petition dismissed. (E-9)

Cases Cited:

1. Radhey Shyam and Another v. Chhabi Nath and Others, (2015) 5 SCC 423.

2. Mahar Jahan and Others v. State of Delhi and Others, (2004) 13 SCC 421.

3. Ram Sumer Puri Mahant v. State of U.P. and Others, AIR 1985 SC 472.

4. Smt. Prema Devi v. State of U.P. and Another, 2007 (10) ADJ 227.

5. Aman Deep Singh Shishya v. State of U.P. and Another, 2023:AHC:241628.

6. Sanjai Kumar and Another v. VIth Additional District Judge, Bareilly and Others, 1996 Cri LJ 2413.

7. Abdul Gafoor v. State of U.P., 1992 JIC 35.

8. Raj Bahadur and Others v. State of U.P. and Another, Criminal Revision No. 1032 of 1994 (decided on 25 July 1994).

9. Prakash Chand Sachdeva v. State and Another, AIR 1994 SC 1436.

10. Amresh Tiwari v. Lalta Prasad Dubey, 2000 (4) Supreme 665.

11. Mahant Govind Sharan Ji Maharaj v. State of U.P. and Others, 2023:AHC:196973.

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

1. Heard Sri Ashish Agrawal, learned counsel for the petitioner, Sri Srijan Pandey, learned Advocate holding brief for Sri Swetashwa Agarwal, learned counsel for the private respondents and Sri R.K. Gupta, learned AGA for the State.

2. This writ petition has been filed by the petitioner-Irfan Ali against opposite party no. 2-Rajeev Gupta and 4 others, challenging the order passed by the Court of Session in Criminal Revision No. 286 of 2012 (Rajeev Gupta Vs. Irfan Ali and others), whereby an order passed by the Court of Additional City Magistrate dated 29.08.2012 passed under sections 145 and 146 Cr.P.C. was set-aside.

3. The submissions of the petitioner are as below:-

• The opposite party no. 2-Rajeev Gupta filed an application before the Executive Magistrate which gave rise to a proceeding under sections 145/146 Cr.P.C. with regard to plot no. A-13, Gandhi Nagar, Moradabad and the learned Court of Additional City Magistrate, after hearing both the sides and perusal of papers on record, dropped the proceedings and released the plot in favour of the petitioner-Irfan Ali. However, the order rightly passed by the Additional City Magistrate was set-aside by the Court of revision.

• The case of the petitioner is that he acquired the ownership and possession of the disputed plot on the basis of two registered sale deeds of 03.06.2011, from previous owners namely, Mohd. Furkaan, Mohd. Gurfaan and Mohd. Rizwan, all sons of Late Mohd. Jaan; this property was released in favour of aforesaid Mohd. Jaan in a Land Acquisition Reference No. 70 of 1956 by an order dated 24.03.1960.

• The then S.O., Thana Galshaheed, Moradabad filed a chalani report on 10.06.2011, requesting the City Magistrate for attatchment of disputed property i.e., plot no. A-13 part of gata no. 124, area 381.51 square meters; The Additional City Magistrate issued notice against them i.e., Irfan Ali and 3 others under section 145(1) Cr.P.C. by order dated 15.06.2011; the court concerned passed another order the same day under section 146(1) Cr.P.C., directing for attachment and for handing over the possession to a receiver.

• Earlier, the opposite party no. 2 had filed an Original Suit no. 506 of 2011, challenging the two sale deed dated 03.06.2011 executed in favour of the petitioner, which is pending.

• Though the plaintiff opposite party no. 2-Rajeev Gupta also made a prayer for injunction, but no injunction had been granted to him;

• The petitioner filed objections against the proceedings under sections 145 and 146 Cr.P.C.

• During the pendency of the proceedings, the opposite party no. 2 had filed an application under section 145(5) Cr.P.C. expressing that no longer any apprehension of breach of peace existed, therefore the proceedings may be dropped and the property may be released; this application was moved on 22.06.2011;

• The contention is that the claim of the opposite party no. 2 having been based on unregistered, unstamped title deed dated 27.08.1957, allegedly executed

by the Moradabad Cooperative Housing Society in favour of father of opposite party no. 2, no reliance could be placed on the same and therefore opposite party no. 2 has no rights from such documents.

• The Additional City Magistrate, after considering all the material, rightly dropped the proceeding and released the same in favour of the petitioner; the property was attached and handed over to a receiver from possession of Irfan Ali (the petitioner), therefore rightly released to him.

• Another ground which has been taken in this writ petition is that the court of revision had stayed the operation of impugned order dated 15.06.2011, which was being extended from time to time but was not extended after 12.07.2012, hence the finding of the revisional court on this point is not sustainable.

• The parties were asserting that there existed no longer any apprehension of breach of peace; the High Court in an Application u/s 482 No. 40653 of 2011, directed the Magistrate to decide the proceeding pending before it, within a period of three months, therefore the Magistrate decided and dropped the same by order dated 29.08.2012.

• The revisional court has wrongly held that the Magistrate is not competent to drop the proceeding and that it had no jurisdiction to go into the questions of facts, as regard Land Acquisition Reference No. 70 of 1956; the application moved under section 145(5) Cr.P.C. was pending and not dismissed.

• A civil suit no. 506 of 2011 was also pending, therefore the learned trial court/SDM rightly released the same in favour of the petitioner.

• The revisional court is not at all justified in setting aside the order passed by the learned Magistrate and gave contrary finding which are perverse.

• Had the revisional court of a different view, it could have remanded the matter to the Magistrate for fresh consideration; the argument of the petitioner is that the proceeding under section 145 Cr.P.C. continued for about two years, but later on lost its significance in view of civil suits and non-existence of apprehension of breach of peace.

4. The submissions, on the other hand, of opposite party no. 2 (the main contesting party) in nutshell are as below:-

• The petitioner's claims title and ownership of plot no. A-13 part of Gata no. 124 on the basis of copy of an order of Land Acquisition Reference No. 70 of 1956 dated 24.03.1960 which is patently a forged and fabricated document, a fact which is revealed from perusal of the paper i.e., a certified copy obtained by the answering opposite party no. 1, which is annexed with the counter affidavit, therefore he lodged an FIR case crime no. 156 of 2011 under sections 147, 420, 468, 504, 506 IPC, in which the investigating officer, after collection of evidence, filed a chargesheet against several persons including the petitioner-Irfan Ali.

• During the investigation, it was found that plot no. A-13 has been falsely shown after manipulation in the order; the criminal case is pending against the accused persons.

• In the above circumstances, two sale deed dated 03.06.2011 do not convey any right, title or possession to the petitioner as no such right, title or possession could be conveyed on the basis of non-existent title deed.

• The opposite party no. 2 filed Original Suit no. 506 of 2011 for

cancellation of sale deeds; neither the vendor nor the purchaser-Irfan Ali have ever been in actual physical possession of the disputed plot;

• On the other hand, the facts are that the Governor of Uttar Pradesh gave the land to the Moradabad Cooperative Housing Society, which included Gata no. 124 and one of the plots namely, plot no. A-13 was transferred on 27.08.1957 to the father of answering opposite party no. 2. The sale deed dated 27.08.1957 is duly registered in Sub-Registrar Office;

• Though the application under section 145(5) Cr.P.C. moved on 22.06.2011 was pending but he had moved a subsequent application on 24.08.2012, for withdrawal of the aforesaid application and no order was passed by the Court of SDM on his subsequent application.

• The Additional City Magistrate passed the order in haste and ignored number of facts and circumstances. It did not let the opposite party no. 2 file objections, though he had applied for a week's time.

• The basis on which the orders were passed, had no legs to stand; it cannot be said that the revisional court cannot take note of the fabrication of order dated 24.03.1960 passed in land acquisition reference of the suit no. 95 of 2007.

• The police acted in collusion with the petitioner; the impugned orders suffers from no illegality of the nature as my be taken note of or may be corrected in this writ petition.

5. I went through all the material on record, including the order passed by the Executive Magistrate as well as the impugned order passed by the court of revision. A few things attract attention of this Court.

(i) very first objection from the opposite side is that the petitioner has filed Misc. Writ Petition under Article 226 of the Constitution, instead he should have filed Misc. Writ Petition under Article 227 of the Constitution. On the above issue, I prefer to place reliance on the judgment of the Supreme Court in ***Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423***. In the above noted case, the Supreme Court has clearly laid down that order of judicial court could be challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India. In my opinion, there is no legal hindrance in converting the petition under Article 226 to one under Article 227 of the Constitution. I, therefore, treat this petition as one under Article 227 of the Constitution. ***The registry shall assign appropriate number accordingly.***

(ii) the petitioner claims of ownership and possession over the property is based on two sale deeds dated 03.06.2011, executed by the heirs of Late Mohd. Jaan and the title of said Mohd. Jaan is based on Land Acquisition Reference No. 70 of 1956 order dated 24.03.1960; the petitioner has filed a copy of order dated 24.03.1960, which is Annexure no. 3. On the other hand, the opposite party no. 2-Rajeev Gupta has filed certified copy of the same order (paper no. 30 annexed to the counter affidavit) which clearly shows that this order was passed in respect of land in plot no. 59, Khata Khewat no. 33 at Prince Road, Mauza Bhadaura (which according to respondent is 800 meters away from the disputed plot) and this paper conspicuously does not mention disputed plot A-13 of Gata no. 124.

(iii) it may also be noted at this juncture that the opposite party no. 2 had taken this plea before the revisional court

as well, that the document which formed the basis of claim of the petitioner is forged one and that sufficient evidence has been found by the investigating officer during the investigation of FIR case crime no. 156 of 2011 under sections 147, 420, 468, 504, 506 IPC, lodged by him and that the chargesheet has also been submitted against him and several others.

(iv) the learned court of revision observed in para no. 14 that even before the initiation of present proceeding under section 145 Cr.P.C., the petitioner's side made earlier attempt to obtain possession of the dispute and property in an Original Suit no. 95 of 2007 on the basis of same document of Land Acquisition Reference No. 70 of 1956 order dated 24.03.1960 and how the learned Magistrate ignored the evidence with regard to very doubtful title and possession of Irfan Ali and instead gave a finding on the basis of mere police report and further observed that had those documents and evidence considered by the Magistrate, the finding would have been different.

(v) In my view, the aforesaid inference and observation of the learned revisional court are logical, well founded and based on evidence which was available on record. The observation by the revisional court that the learned Magistrate had ignored some apparent facts and evidence does not appear to be unfounded. In my opinion, where some discrepancies are apparent and ignored by the trial court, the revisional court is not powerless to set-aside the findings given on such basis. All these observations need not be disturbed by the court in exercise of powers under Article 226/227 of the Constitution.

6. Perusal of the impugned order shows that the revisional court took note of the fact that the order passed under section 145(1) Cr.P.C. had been stayed by the revisional court in Revision No. 250 of 2011, impleading both Rajiv Gupta and Irfan Ali, as opposite parties. This revision was admittedly filed by the instant opposite party no. 4, challenging both the orders dated 15.06.2011 passed under section 145(1) and 146(1) Cr.P.C. and undisputedly there was an interim stay passed by the revisional court in that revision (para nos. 6 and 7 of impugned order).

Further another observation in para no. 8 of the impugned order is that the Magistrate wrongly treated the Revision No. 250 of 2011, challenging the order under section 145(1) Cr.P.C., as a proceeding parallel to the proceeding under section 145 Cr.P.C. and the view taken by the revisional court in para nos. 9 and 10 that in Original Suit No. 95 of 2007, which was admittedly dismissed in default at initial stages, could not form basis of dropping of the proceedings, is not liable to be interfered at. It may also be mentioned that the revisional court expressed surprise over a fact that though earlier the opposite party no. 2 had moved an application for withdrawal of proceedings under section 145 Cr.P.C., but subsequently he had given an application for withdrawal of withdrawal application, a fact conveniently ignored by the Magistrate.

7. The next important debatable issue involved in this case is that admittedly an Original Suit No. 506 of 2011 has been filed by the opposite party, therefore a parallel proceeding under section 145 Cr.P.C. is bad in law. It may be noted that the instant petitioner in support of his contention relies upon the judgments i.e., ***Mahar Jahan and Others vs. State of Delhi and Others, 2004 13 SCC 421; Ram***

Sumer Puri Mahant vs. State of U.P. and Others, 1984 0 Supreme(SC) 361; Smt. Prema Devi vs. State of U.P. and Another, 2007 10 ADJ 227; Aman Deep Singh Shishya vs. State of U.P. and Another, 2023:AHC:241628.

The Supreme Court in ***Mahar Jahan and Others (supra)***, in a peculiar facts and circumstances of the matter before it, took a view that there was no such emergency so as to justify invocation of powers under section 146(1) Cr.P.C. to attach the property and set-aside the order passed by the S.D.M. and the High Court. In this case before the Supreme Court, the civil court has been seized of the matter since before the initiation of proceeding under section 146(1) Cr.P.C.

In ***Smt. Prema Devi case (supra),*** the application under section 482 Cr.P.C. was allowed and the proceedings under section 145 Cr.P.C. were quashed in a case where the applicant was a recorded tenure-holder and was in possession and her title was not under cloud and a civil suit was pending.

In ***Aman Deep Singh Shishya case (supra),*** the Allahabad High Court found following peculiar facts and circumstances that when a preliminary order under section 145(1) Cr.P.C. was passed an interim order passed by the High Court was in existence and a civil suit was also pending, in which the possession of one of the parties was shown, therefore the court took a view that a parallel criminal proceedings under section 145 Cr.P.C. was not justified and therefore preliminary order under section 145(1) Cr.P.C. was quashed.

8. It may be noted that there is no absolute bar for initiating or for continuing the proceedings under section 145 Cr.P.C. where circumstances do call for some urgent action on the part of the State, so that the ugly situations could be averted and that public peace and tranquillity may be maintained.

9. In ***Sanjai Kumar and Another vs. VIth Additional District Judge, Bareilly and Others, 1996 CriLJ 2413***, a question arose before the Allahabad High Court, whether in cases, where there is no effective interim order recording that a particular party was in possession, passed by any civil court, the proceedings under section 145 Cr.P.C. shall be dropped? The Court considered that question; the relevant part of the judgement is as below:-

"4. The only material question for decision was as to whether in the absence of an effective interim order indicating possession by the civil Court in the aforesaid civil suit in favour of either of the parties to the dispute, the proceedings under Section 145, Cr. P. C. had become liable to be dropped?

5. Learned counsel for the parties relied upon a few decisions of various Courts for and against on the aforesaid question and after going through the same I find that the decision which applied to the facts of the instant case was a decision of this Court reported in ***1992 JIC 35, Abdul Gafoor v. State of U.P.*** *wherein it was held that the criminal Court continued to exercise the jurisdiction under Section 145, Cr.P.C., if no effective interim order was passed in the suit pending before the competent civil or revenue Court. This Court before laying down the aforesaid proposition of law, had considered some other decisions also."*

10. The Allahabad High Court also dealt with the question of applicability of

the law laid down by Supreme Court in ***Ram Sumer Puri Mahant vs. State of U.P. and Others; AIR 1985 SC 472*** in following manner [as differentiated in ***Abdul Gafoor case (supra)***].

"In the case of Ram Sumer Puri, Mahant, the question of title and possession over the subject- matter had already been adjudicated and the suit had been dismissed by the Civil Judge. An appeal against the judgment and order of the Civil Judge was still pending. It was in this background that the Supreme Court did not approve the parallel proceedings under Section 145, Cr. P. C. in respect of the same subject-matter between the same parties. Thus, Sumer's case is not an authority on the question that proceedings under Section 145, Cr. P. C, must be dropped in all cases whenever a civil suit is pending in respect of the same subject-matter between the same parties or between the parties through whom the panics are claiming their rights. Of course, parallel proceedings should not be allowed to continue, if a party under Section 145, Cr. P. C.,can seek an effective remedy/declaration from the Civil Court. Even in such a case, the proceedings under Section 145, Cr.P.C. should be dropped only when the Civil Court has passed some effective order indicating as to which of the parties was entitled to possession. In some cases, the proceedings should also be dropped when the Civil Court has appointed a receiver or has made some arrangement for the maintenance of such property. But, when the Civil Court does not clarify the position regarding the possession of the contesting parties by passing an effective order and simply passes an innocuous order like maintenance of status quo, the criminal proceedings are not to be dropped because in that case both the parties may stake their claim for possession and the situation may lead to the breach of peace. In such cases, even the proceeding under Sections 107/116, Cr.P.C. may not prove to be effective and the subject-matter may have to be attached by the Criminal Court. Of course, orders passed by the Criminal Court in such cases shall be subject to the decision of the Civil Court. Thus, the Magistrate is not bound to drop the proceedings pending in his Court in all cases under Section 145, Cr. P. C. for the simple reason that a civil suit is pending in the Civil Court in respect of the same matter between the same parties or through whom they are claiming.

6. In the instant case, Civil Court even did not pass order directing the parties to maintain status quo although the same would have been of no help as it would not have indicated the actual possession of either party. Thus, it is not a case in which any help would have been available to the Magistrate from the mere pendency of the civil suit between the parties for maintaining peace. The Magistrate was duty bound to maintain peace and, therefore, had got no alternative except to proceed further with the proceedings under Section 145, Cr.P.C. and the impugned attachment order thus appealed to be perfectly legal and valid. The proceedings under Section 145, Cr.P.C., therefore, continued to be maintainable and the Magistrate could not be directed by this Court to drop the same."

11. A similar situation arose before the Allahabad High Court in ***Raj Bahadur and Others vs. State of U.P. and Another, decided on 25 July, 1994 in Criminal Revision No.1032 of 1994***. In that case, the civil court had passed orders directing the

parties to maintain status-quo. The S.D.M. Court had dropped the proceeding under section 145 Cr.P.C. on the ground that the dispute between the parties is pending before civil court and revenue court and interim orders were in operation between them. In revision, the learned Sessions Judge disagreed with the assertions on the ground that the orders passed by the revenue and civil court for maintaining status-quo did not and could not effectively prevent the parties from fighting for the land and property in dispute and therefore the apprehension of breach of peace remained. The High Court observed in para- 3 and 4 as below:-

"3. It is not disputed that the orders passed are only for maintaining status quo. The order passed by the civil court has already expired, as it was not extended further. The purpose and objects of the proceedings under section 145 Cr.P.C. is to maintain the law and order and to prevent the parties from taking law in their own hands which may create breach of peace. The order passed by the civil court or revenue court should be such which may effectively prevent either of the parties from entering into dispute for taking possession of the property by force. In case of an order for maintaining status quo position about possession remains vague and the parties are still left to get it decided by themselves by use of disputed property on the date the order of status quo was passed. If the proceedings under Section 145 Cr.P.C. are allowed to be dropped in such state of affairs, the objects of the preventive provisions contained in original procedure code may be defeated.

4. For the reasons stated above, I do not find it proper to make any interference in this revision. It is being left open to the parties to make an application before civil court or revenue court as the parties are advised and to pray for passing a definite order with regard to possession of the parties during pendency of the suit. If such an application is filed, same shall be considered and decided in accordance with law. After a fresh order is passed by the civil court or revenue court, it shall be open to the Magistrate to pass a fresh order. Subject to aforesaid observation/directions, this revision is rejected."

12. This view finds strength from several judgments that it is not always that proceeding under section- 145 Cr.P.C. shall not be maintainable, if civil suits are pending.

The Supreme Court in ***Prakash Chand Sachdeva vs. State and Another, AIR 1994 SC 1436***, held that where the dispute is on the question of possession, the Magistrate is empowered to take cognizance under section 145 Cr.P.C.

The Supreme Court in ***Amresh Tiwari vs. Lalta Prasas Dubey, 2000 (4) Supreme 665***, has clarified that it will not be right to say that a proceeding under section 145 Cr.P.C. would never lie in a case where a civil suit has been filed.

13. The Allahabad High Court in ***Mahant Govind Sharan Ji Maharaj vs. State Of U.P. And 2 Others; 2023:AHC:196973*** has observed in para no. 25 as below:-

"25. In my firm view, the jurisdiction which a Magistrate is supposed to exercise, is quite different from the jurisdiction which a Civil Judge may exercise. In both the cases, the question of possession is important but the aim and objective, is different. The civil court is

concerned with the righteousness of once claim whereas the Magistrate is concerned with the maintenance of peace and tranquillity between the parties as well as for the society. In my view wherever there is an apprehension with regard to breach of peace and no effective order is in existence or has already been passed or may be passed by the civil court, interim or otherwise, the utility of the provisions like section 145 Cr.P.C. cannot be undermined. ***There may be instances where exigencies of a situation may require the authorities to interfere immediately and that may precisely the case where section 145 Cr.P.C. will come into play, notwithstanding the pendency of any civil suit."***

14. In the instant case, the question of de-facto possession of opposite party no. 2, at the time of initiation of proceeding or two months prior to that is quite important. The admitted factual position is that the proceeding under section 145 Cr.P.C. commenced on 10.06.2011 and preliminary order under section 145(1) Cr.P.C. and order of attachment under section 146(1) Cr.P.C., as regard the attachment of subject of dispute, appointment and delivery of possession to the receiver was passed on 15.06.2011. Very forceful and vehement contention of opposite party no. 2 is that this measure was taken by the authorities in collusion with the petitioner-Irfan Ali, who had no basis for the claim, as regard possession and entitlement. The false and spurious claim of the petitioner was acted upon by the authorities and his bonafide pleas and papers were discarded. Further in such circumstances, he was compelled and had no option but to file a civil suit for cancellation of sham sale deeds. This civil suit was filed about two weeks after commencement of the proceedings under section 145 Cr.P.C. Admittedly, there has not been any interim order of any civil court, restraining any party from interfering in any others possession or to maintain status quo or showing factual position of the de-facto possession of either of the parties.

In the above senerio and in my opinion whether any apprehension of breach of peace exist and there is no need for taking any urgent action, the aggrieved person has to depend on the Executive authorities for redressal by taking recourse to proceeding under sections 145 and 146 Cr.P.C. It may be noted, as held and referred to above in ***Mahant Govind Sharan Ji Maharaj case (supra)***, **a civil court is concerned with the righteousness of one's claim whereas the Magistrate while exercising powers under the provisions of sections 145/146 Cr.P.C. is concerned with the maintenance of peace and tranquillity between the parties as well as in the society. And whenever there is an apprehension of breach of peace and there no effective order passed by a civil court is in existence,** the utility of provisions under sections 145/146 Cr.P.C., cannot be underestimated. **In a civil case as well as in a case of the nature of sections 145 and 146 Cr.P.C. the question of de-facto possession is important but the aim and objective is different.** It may also be significantly be noted that it is for the authorities to take stock of the situation and give a finding whether there existed any apprehension of breach of peace and then take a decision for dropping the proceeding. ***The Executive Magistrate cannot depend upon a mere assertion of any of the parties.***

In my opinion, the revisional court rightly set-aside the order passed by

the Additional City Magistrate. Moreover, the petitioner has, in my view, not able to convince this Court that there existed manifest and patent violation of law which should be corrected by this High Court in exercise of its powers under Article 226/227 of the Constitution. In my opinion, no case for interference in the impugned order is made out and this petition is liable to be dismissed and is **dismissed** accordingly.

15. **The interim order is hereby vacated.**

16. As the matter is quite old, therefore learned trial court/Executive Magistrate concerned is directed to take up the matter expeditiously and comply with the order of the revisional court dated 08.05.2013.

(2024) 3 ILRA 1694
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 9949 of 2021

Ms. Baba Beti ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udai Chandani, Sri Vivek Srivastava, Sri Gyanendra Kumar Mishra

Counsel for the Respondents:
G.A., Sri R.P.S. Chauhan, Sri Satish Chaturvedi, Sri Kuldeep Srivastava, Sri Gyan Prakash (Sr. Advocate), Sri Sanjay Kumar Yadav, Sri G.S. Chaturvedi (Sr. Advocate), Sri Aditya Gupta

Fair investigation-Initially the petitioner approached this Court -seeking a fair investigation in the impugned FIR- prayer was modified to request the transfer of the investigation to the CBI- petitioner became aware of corporate fraud allegedly committed by SKS Power Generation Limited-and its holding companies through a newspaper publication-the investigation was entrusted to Economic Offences Wing, Varanasi Division-Following the investigation the police filed the closure report- Economic Offences Wing (EOW), Varanasi Division, has conducted the investigation with a predetermined in collusion with the accused persons-such actions have far-reaching implications for the integrity of the criminal justice system-and raise serious questions about the functioning of the police-CBI, New Delhi is directed to investigate a case against SKSPGL and its affiliated companies-which were involved in the illicit transfer of substantial funds -the Serious Fraud Investigation Office (SFIO), the Enforcement Directorate, and regulatory bodies like the Securities and Exchange Board of India (SEBI) may also be consulted in appropriate cases of financial crime-and suitable and adequate direction be issued in this regard by the Chief Secretary, Government of Uttar Pradesh, at the earliest.

Writ Petition allowed. (E-9)

Case Law Cited

1. State of Punjab v. CBI, (2011) 9 SCC 182.

2. State of West Bengal and others v. Committee for the Protection of Democratic Rights, West Bengal and others, (2010) 3 SCC 571.

3. Minor Irrigation & Rural Engg. Services, U.P. v. Sahngoo Ram Arya, (2002) 5 SCC 521.

4. Air India Stationery Corpn. v. United Labour Union, (1997) 9 SCC 377.

5. K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai, (2013) 12 SCC 480.

6.Himanshu Kumar and others v. State of Chhattisgarh and others, (2022) SCC OnLine SC 884.

7.Romila Thapar v. Union of India, (2018) 10 SCC 753.

8.Narmada Bai v. State of Gujarat, (2011) 5 SCC 79.

9.Sanjiv Rajendra Bhatt v. Union of India, (2016) 1 SCC 1.

10.E. Sivakumar v. Union of India, (2018) 7 SCC 365.

11.Divine Retreat Centre v. State of Kerala, (2008) 3 SCC 542.

12.CBI v. Rajesh Gandhi, 1997 Cri LJ 63.

13.H.N. Rishbud v. State of Delhi, (1954) 2 SCC 934.

14. Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762.

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Gyanendra Kumar Mishra, holding brief of Shri Vivek Srivastava, learned counsel for the petitioner through Video Conferencing, Shri R.P.S. Chauhan, learned counsel for the Union of India, Shri Kuldeep Srivastava, learned counsel for the Enforcement Directorate, Shri Satish Chaturvedi, learned counsel for the State Bank of India, Shri M.C. Chaturvedi, learned Additional Advocate General assisted by Shri G.P. Singh, learned A.G.A. for the State-respondents, Shri Gyan Prakash, learned Senior Counsel assisted by Shri Sanjay Kumar Yadav, learned counsel for the CBI, Shri G.S. Chaturvedi, learned Senior Counsel assisted by Shri Aditya Gupta, learned counsel for SKS Ispat and Power Ltd., and perused the record.

2. Initially, the petitioner approached this Court seeking a fair investigation in the impugned FIR1. However, through an amended application, the prayer was modified to request the transfer of the investigation to the CBI. For clarity, the amended prayer is reproduced herein after:

"Issue a suitable writ, order or direction in the nature of mandamus transferring the investigation to the Central Bureau of Investigation relating to First Information Report No.0115 of 2021 dated 26.9.2021, u/s 120B, 420, 467, 468, 471, 474, 476, 506, 507, 511 IPC, P.S. Zafrabad, District Jaunpur."

3. The petitioner, a teacher and social worker, became aware of corporate fraud allegedly committed by SKS Power Generation Limited (hereinafter referred to as "SKSPGL") and its holding companies through a newspaper publication. The incident unfolded on March 17, 2021, when she visited the State Bank of India in Jaunpur to inquire about certain transactions involving the accused, Anil Gupta. There, she was asked to submit specific papers related to the reports upon which she was basing her claims of serious corporate fraud. Shortly afterward, unidentified individuals forcibly entered her residence and warned her against pursuing the case, threatening dire consequences. Subsequently, individuals in police uniform, purportedly from Chhattisgarh, Madhya Pradesh, Maharashtra, and Uttar Pradesh, visited her home, pressurizing her to withdraw the complaint dated August 13, 2021, pending before the court of the learned Chief Judicial Magistrate in District Jaunpur, Uttar Pradesh.

4. On the direction of Chief Judicial Magistrate, Jaunpur, the FIR1 was registered, and the investigation was entrusted to Economic Offences Wing, Varanasi Division, after approval from the Home Department. Following the investigation the police filed the closure report, primarily citing two reasons; firstly, the petitioner was not found available at the provided address, and secondly, the alleged incident of assault mentioned in the complaint was not substantiated.

5. While the investigation was ongoing, the petitioner filed the present petition seeking a fair investigation. Subsequently, through an amended writ petition, the petitioner requested the transfer of the investigation to the Central Bureau of Investigation (hereinafter referred to as CBI) for a thorough and impartial investigation. This prayer was made on various grounds, inter-alia:

5.1 M/s SKSPGL operates in the electricity generation and distribution sector within the State of Chhattisgarh. The company has established a coal-based thermal power plant situated in Villages Binjkote & Durramuda, Raigarh District, Chhattisgarh. Additionally, in 2008, the company was allotted two coal blocks for the construction of a proposed third plant.

5.2 Between the financial years 2010-11 and September 2017-18, SKSPGL obtained a loan amounting to Rs.6170 crore from a consortium of banks, including the State Bank of India, L&T Infrastructure Finance Limited, PTC India Finance Limited, and State Bank of Bikaner and Jaipur. Specifically, State Bank of India granted Rs.5170 crore, L&T Infrastructure Finance Limited granted Rs.500 crore, PTC India Finance Limited granted Rs.400 crore, and State Bank of Bikaner and Jaipur granted Rs.100 crore.

5.3 Subsequent to acquiring the loan for the construction and development of the third project, SKSPGL allegedly engaged in misappropriating the loan funds through systematic corporate fraud. This misappropriation involved various methods, including transferring a significant portion of the loan amount to British Virgin Islands and British Overseas Territories of Bermuda through fictitious companies. These funds were then allegedly used to purchase SKSPGL's assets in collaboration with bank officials, violating RBI guidelines through group holding companies registered in aforementioned off - shore locations. Additionally, some loan funds were purportedly utilized in the stock market and the issuance of fraudulent Compulsorily Convertible Debentures (CCDs) for unlawful gains. As a result of these activities, SKSPGL, in conspiracy with 46 fictitious companies and public fund institutions, is claimed to have caused substantial losses to the government totalling Rs.5000 crore.

5.4 Furthermore, SKSPGL purposefully initiated significant losses deliberately and stopped repayments to its lenders. Consequently, the lead banker, SBI, seized the company's assets and conducted a bidding process for their sale. Agritrade Resources Limited emerged as the successful bidder, agreeing to acquire ownership of SKSPGL through its subsidiary, Entwickeln India Energy Private Limited, and assume the entire loan debt of Rs.5717 crore for a nominal sum plus an additional cash margin. It's noteworthy that Entwickeln India Energy Pvt. Ltd.'s holding company, Agritrade

Power Venture Pvt. Ltd., and its subsequent holding company, Fair Thermal Power Ltd., are incorporated in British Virgin Islands (Tax heaven), with Agritrade Resources Ltd. being incorporated in Hamilton, Bermuda, and listed on the Singapore Stock Exchange.

5.5 Entwickeln India Energy Private Limited acquired all shares from SBI Trust at a significantly reduced price, with the bank allegedly waiving the interest rate on the loan and even reversing the entire interest amount of Rs.820 crore, considering it as deemed capital contribution from the holding company. Consequently, SKSPGL became the holding company of Entwickeln India Energy Private Limited, allegedly resulting in an illicit loss to the bank amounting to Rs.5717 crore.

5.6 Moreover, 46 fictitious companies were purportedly incorporated at the behest of SKS Group Entities' directors, engaging in round-tripping funds through bogus share transactions, further resulting in a huge profit in thousand of crores for SKSPGL group companies.

5.7 SKSPGL and its affiliated companies, including Berrio Mauritius, allegedly acquired 1,370,000 Compulsorily Convertible Debentures ("CCDs") from Entwickeln India Energy Pvt. Ltd. at a significantly undervalued price, resulting in an unlawful gain of Rs.589 crore. Additionally, SKS group companies purportedly made an investment through Asia Power FDI Ltd., a Mauritius-based company, into SKS group company, Labheshwari Agencies Limited, at a substantially reduced rate, ultimately leading to the unauthorized misappropriation of public funds amounting to Rs.524 crore.

5.8 Furthermore, certain entities, such as Shree Krishan, Citywings, Compact Agencies, and Labheshwari Agencies Ltd., allegedly engaged in high-value fraudulent share transactions, earning an illicit amount of Rs.400 crore without any genuine production.

5.9 SKSPGL reportedly granted interest-free unsecured advances totalling Rs.173 crore to nine companies, which were later reduced to Rs.50 crores in 2020. However, no substantial evidence of receipt against these advances was recorded.

5.10 Mahabir Gupta and Premlata Gupta, upon assuming directorship of Labheshwari Agencies Ltd. (hereinafter referred to as ‘LAL’), purportedly took over investments made by Asia Power FDI Ltd. into SKSPGL at significantly reduced rates. This included the acquisition of 14,18,51,264 equity shares of Rs.10 each, 1,370,000 CCDs of Rs.1000 each, and 29,646 NCDs of Rs.10,000 each.

5.11 Additionally, Entwickeln India Energy Pvt. Ltd., a subsidiary of Agritrade Resources Ltd., allegedly paid Rs.400 crore, alongside SKS Ispat and Power Ltd., both registered at the same address. Subsequently, Entwickeln India Energy Pvt. Ltd. purportedly merged into SKS Ispat and Power Ltd. in 2019, indicating unauthorized actions even after investment by Agritrade Power Venture Pvt Ltd., resulting in SKS Ispat and Power Ltd. becoming the holding company of SKSPGL. Both SKSPGL and SKS Ispat and Power Ltd. are registered at 501-B, Elegant Business Park, Kurla Road, J.B. Nagar, Andheri East, Mumbai- 400059.

5.12 Moreover, the lead banker, SBI, through SBI Trusteeship, conducted a bid process for the auction of SKSPGL's assets, with Agritrade Resources Ltd. being selected as the successful bidder. Lenders agreed that Agritrade Power Venture Ltd. would implement the Resolution Plan through Entwickeln India Energy Private Limited by acquiring 100% equity shares of the company for Rs.300 crore and assuming the existing fund-based debt of Rs.57,34,87,84,874 for Rs.1720 crore. Out of this amount, Rs.1600 crore was borrowed by Agritrade Power Venture Ltd. from Bank of Baroda.

5.13 Additionally, the State Bank of India (SBI) purportedly under- write the complete debt of Rs.5170 crore for the project in December 2011, without conducting proper valuation or due diligence as per RBI guidelines.

5.14 Furthermore, all companies incorporated in British Virgin Islands, British Overseas Territories of Bermuda, Singapore, and Mauritius are allegedly operated, directly or indirectly, by owners/directors of SKS group companies. Additionally, SKS Ispat and Power Limited, River View Securities Pvt. Ltd., Ranbhumi Securities Pvt. Ltd., Evernew Securities Pvt. Ltd., ACACIA Suppliers Pvt. Ltd., Labheshwari Agencies Ltd., Shree Krishna Structures Ltd., Citywings Agencies Pvt. Ltd., North West Coal Co. Ltd., Sugouri Distributors Pvt. Ltd., Gabaria Dealers Pvt. Ltd., Ambition Commosales Pvt. Ltd. and Compact Agencies Pvt. Ltd. besides other sham companies.

6. The present petition was initially listed on 2.12.2021, following which learned counsel for CBI, SBI, ED, and the State Government filed their respective counter affidavits in response to the Court's order, which were duly taken on record. The operative part of the order dated 2.12.2021 is extracted herein below:

".....We further direct that even if needful is not done by the petitioner or she does not appear, in view of the allegations in the FIR, the respondent no. 2, Director General of Police, Lucknow, Uttar Pradesh shall look into the matter and pass appropriate orders in the national interest.

Respondent no. 1, State of Uttar Pradesh Through Principal Secretary (Home) Govt. of Uttar Pradesh is also directed to look into all such aspects in the light of the allegations levelled in the first information report as well as in the present petition.

On the next date, learned A.G.A. apart from report/ decision of the Director General of Police, Lucknow, Uttar Pradesh, he shall also place on record the instructions from the respondent no. 1, State of Uttar Pradesh Through Principal Secretary (Home) Govt. of Uttar Pradesh.

In view of the allegations levelled in the FIR and the magnitude of the fraud in terms of money, this would certainly a case where national interest would be involved. Therefore, at this stage, without directing for impleadment of Union of India or the concerned Ministries which may include Home as well as Finance, we direct the learned counsel for the petitioner to serve a copy of the petition to learned Additional Solicitor General of India for sending the same to the concerned authority/ Ministry through appropriate Secretary/ Authority for taking note of the same and file instructions of such authority on the next date fixed. The concerned Ministry/ Authority shall be at liberty to

seek impleadment in the petition or they may direct their impleadment if thought appropriate.

Put up this case as fresh on 17.01.2022."

(emphasis supplied)

7. Learned counsel for the petitioner states inter alia; (i) the entire investigation by the EOW Varanasi has been conducted in casual manner and nothing significant was investigated by the police, (ii) the police did not investigate the allegations made in the complaint rather was conducted investigation about the conduct and place of residence of the complainant, which has nothing to do with the offence committed by the accused company, (iii) there are serious allegations against the transfer of the fund through sham companies abroad and thereafter, writing off the loan amount to the tune of Rs.2446 crore by the SBI officials in connivance with the accused persons, (iv) the KYC of the Agritrade Power Venture Ltd. has not been verified, (v) the nature of business, the amount involved, the loss to the national treasury has been eye-washed by the Investigating Officer, (vi) it is beyond the capacity and expertise of State police to investigate the alleged offence, and expertise required for the investigation are insufficient, (vii) it is the duty of the court to ensure effective and unbiased investigation for conducting fair trial, (viii) deficiency in investigation is visible on the part of the U.P. Police, it is apparently reflected that it's an eye washed investigation to benefit the accused persons, if the investigation is not transferred to the CBI, it would be a miscarriage of justice to the State, because of the reason that the police hurriedly botched up investigation and filed the closure report for the reasons best known to them, (ix) likewise, by adopting the similar modus operandi through various sham companies besides sending huge amount to the off shore holding companies of SKSPGL, the accused persons have caused a loss of Rs.5000 crore in connivance with the bank officials, and other unknown accused. There are serious allegations against the bank officials which is apparently reflected from the facts outlined in preceding paragraphs.

8. Shri Satish Chaturvedi, learned counsel for the State Bank of India has filed counter affidavit stating inter-alia: (i) that the petition is not maintainable as the petitioner could seek an equally efficacious remedy before the Magistrate by filling an appropriate application, and the writ petition is not maintainable and is liable to be dismissed on this sole ground alone and has relied upon Satya Prakash v. State of U.P. in Criminal Misc. Writ Petition No.23 of 2022, which states that the power of Magistrate to monitor the investigation in exercise of his power under section 156(3) Cr.P.C. has been recognized in series of decisions by the Supreme Court, therefore, the Court of Magistrate is the competent Court to look into the grievances of the petitioner, (ii) the petitioner has also filed a similar writ petition before the Lucknow Bench of this Court bearing Misc. Bench No.21453 of 2021 and the fate of that petition is not known to the respondent, besides the petitioner has also filed similar petition before the High Court of Orissa at Cuttack bearing CRLMP No.2069 of 2021, (iii) no transaction done by the bank officers within the territorial jurisdiction of this Court, therefore, this Court does not have any territorial jurisdiction to decide the fate of the instant petition.

9. In addition to the preliminary objections, the SBI has also addressed the allegations on their merits, which are summarized as follows: (i) the SKS Power Generation (Chhattisgarh) Limited (in short SKSPGL), which is engaged in the business of generation and distribution of electricity intending to set up a coal based Thermal Power Plant located at Binjkote and Durramunda in District-Raigarh, State of Chhattisgarh approached State Bank of India, PFSBU, Mumbai Branch for availing the financial assistance for setting up a thermal power project at Village - Durramud, Binjkot, Tehsil - Kharsia District- Raigarh at Chhattisgarh. The SKSPGL was promoted by SKS Ispat & Power Ltd. (SKSIPL), (ii) the State Bank of India, PFSBU, Mumbai Branch sanctioned the Term Loan of Rs.5170 crore, thus, the credit facilities was enjoyed by the captioned unit from the State Bank of India PFSBU, Mumbai Branch, however, the Loan Agreement dated 19.12.2011 was executed at Raipur, Chhattisgarh, (iii) SKSPGL availed various credit facilities from other financial institutions, including Rs.500 crore from L&T, Rs.400 crore from PTC India Ltd, and Rs.100 crore from State Bank of Bikaner & Jaipur, (iv) the company failed to repay the dues in time and thus failed to maintain the financial discipline of the bank resulting the account was transferred to Stressed Assets Management Branch, Bhopal, (v) to resolve the stress in the Company a resolution plan was approved involving Change of Management in accordance with the applicable laws including RBI's Circular dated 12.2.2018 on Resolution of Stressed Assets Revised Framework and the same was acted upon by the SBI Corporate Centre, Mumbai, (vi) on 16.8.2018 the proposal for change in management based on the offer of Agritrade Resources Ltd. for acquiring 100% of equity in SKSPGL, was approved by Bank's Executive Credit Central Board (in short ECCB) and final Letter of Intent was issued to ARL on 11.10.2018, documentation for the transactions were executed on 12.11.2018 and the same was done at SBI Corporate Centre, Mumbai, (vii) in accordance with the approval, on 5.6.2018, the SKSPGL was put to auction and Final Letter of Intent was issued in favour of M/S Agritrade Resources Limited (ARL), a company listed on Hong Kong Stock Exchange, won the bid for acquiring management control of SKSPGL, and on 18.3.2019, the investor- Agritrade Resources Ltd. (ARL) remitted an amount of Rs.1,721 crore (approx.) to the account maintained at Bhopal Branch and remaining outstanding of Term Loan Rs.2,446 crore (approx.) was written-off. Thus, the all the accounts maintained at SAM branch, Bhopal were closed on 18.3.2019, (viii) all the consortium members comprising PTC Financial Services, L&T Infrastructure Finance, and State Bank of Bikaner & Jaipur merged with State Bank of India on 1.4.2017 which were of the view that the Forensic Audit report circulated by the Auditors, have addressed the consortium observations and there were no adverse remarks and in the meeting dated 19.12.2019 and the Consortium agreed to close the Forensic Audit Report.

10. On the other hand, S.P. Legal Cell, Headquarter, Lucknow has filed counter affidavit on 25.1.2022, stating inter-alia, (i) the State Government accorded approval and consequent upon the investigation was transferred to the Economic Offences Wing, Lucknow with a direction to conclude the investigation within three months, (ii) in compliance of

this Court's order dated 2.12.2021, the petitioner appeared before the DGP, Uttar Pradesh along with his Advocate Shri Udai Chandani on 8.12.2021 and apprised the DGP, Lucknow about her grievances and apprehensions, and in response to the meeting, the DGP Uttar Pradesh asked the S.P. Sultanpur to provide security to the petitioner, (iii) the petitioner stated in her representation dated 8.1.2022 that she is residing at Shivcity, Jarhara, New Indira Nagar, Lucknow, but she could not be found on the addressed mentioned in her application dated 8.1.2022, however, Commissioner of Police, Lucknow directed to provide security to the petitioner, (iv) on perusal of letter dated 23.12.2021 annexed with the counter affidavit, it transpires that the S.P. posted at the office of DGP Uttar Pradesh sought approval from the Secretary (Home) for entrusting the investigation to the EOW, and vide letter dated 11.1.2022, the Joint Secretary (Home), Government of Uttar Pradesh accorded approval to conduct the investigation from EOW, Varanasi Division.

11. Learned Additional Advocate General submits that (i) the EOW, CID, Varanasi on completion of the investigation, in the instant case, filed the Closure Report No.8/2022 dated 20.12.2022 on 25.1.2023 before the Court of Chief Judicial Magistrate, Jaunpur and the matter is pending consideration before the Court, (ii) the identity of the petitioner could not be established, and no person in the name of petitioner was found at the given address, (iii) the petitioner was also not found at the address of New Indira Nagar, Lucknow, (iv) the statement of the then Branch Manager, Cashier and other staff besides Security Guard posted at SBI Branch Jaunpur were recorded, none of them supported the contentions raised by the petitioner in the petition, (v) the allegations against the unknown persons who have allegedly threatened the petitioner, was also found to be incorrect, (vi) the statement of co-villagers and local Councillor were recorded and no truth was found with respect to the allegations made in the petition, (vii) the statement of suspect Deepak Gupta, Anil Mahaveer Gupta, Aneesh Gupta, Mahaveer Prasad Gupta, Smt. Premlata Gupta, Gopal Garg, and Rohit Prashar, AGM SBI Bhopal were recorded, balance sheet of the company was scrutinized, loan settlement agreement was looked into, but no illegality was observed during the investigation, (viii) Closure Report dated 20.12.2022 was approved and accepted by the Confidential Section-8 of the Home Department, Lucknow vide letter No.591/25-8-2022-25-8099/387/2021 dated 13.7.2022.

12. Even though, the Union of India was not arrayed as party in the writ petition, but keeping in view the magnitude of fraud and the complexity involved in the case, this Court vide order dated 2.12.2021, directed the learned Additional Solicitor General to take instructions from the Ministry of Home and Ministry of Finance, Government of India. In response to the direction of this Court, the Department of Enforcement Directorate filed a separate affidavit through Central Government Counsel. On perusal of the affidavits dated 5.4.2022 and 15.12.2023, it transpires that (i) vide letter dated 4.4.2022, the Under Secretary, Ministry of Finance requested the Director, Enforcement Directorate to file counter affidavit in the instant writ petition, (ii) after conducting preliminary inquiry, an ECIR bearing No.ECIR/ALSZO/01/2022 dated 10.2.2022 is registered at Allahabad Sub Zonal Office of Directorate of Enforcement with the

approval of competent authority, (iii) the Chennai Zonal Office of Directorate is already conducting investigation after recording ECIR dated 7.8.2019 against M/s Cethar Ltd. and the said ECIR was registered on the basis of FIR No.20/2018 dated 16.10.2018 by CBI, BSF Cell Banguluru against Cethar Ltd. and property worth Rs.9.08 crore was attached in 2022, which was subsequently confirmed by the adjudicating authority, PMLA, (iv) another Attachment Order of Rs.517.81 crore were also attached vide PAO Order No.3/2023 dated 27.6.2023 and certain properties of SKS Ispat and Power Ltd. are also attached since part of the proceeds of the crime committed by M/s Cethar Ltd.

13. Shri G.S. Chaturvedi, learned Senior Counsel appeared for the SKSPGL and submits that; (i) no such case for transfer the investigation to the CBI is made out as the investigation has already been concluded and closure report has been filed, (ii) it is always open for the complainant to file a protest petition before the court concerned and could raise her grievances there, (iii) the alleged accused is effected party, they may also be allowed to file counter affidavit in response to the allegations made in the instant petition, (iv) the complainant is contesting a proxy litigation at the behest of undesirable element, and therefore, has vested interest, (v) such litigants ordinarily should not be allowed to misuse the process of law to settle personal scores, (vi) no fruitful purpose would be achieved by transferring the investigation to the CBI.

14. Before delving into the merits of the case, it is prudent to discuss the law regarding the transfer of investigations to the Central Bureau of Investigation (CBI). In criminal jurisprudence, there is no universally applicable rule that can be rigidly applied to all similar facts and circumstances. Instead, various factors such as the modus operandi (intention) of the accused, the gravity of the offense, the manner in which the offense was committed, its societal impact, and the severity of potential punishment must be considered. Additionally, the possibility of the investigation being compromised by factors such as implicit biases, preconceived notions, personal interests, undue influence, selective evidence gathering, favoritism, or prejudiced treatment of suspects are pertinent considerations for Constitutional Courts when contemplating the transfer of investigations. Moreover, investigations may also be vulnerable to influence from individuals with political connections and significant financial resources. Equally, the decision to transfer an investigation to the CBI cannot be made routinely or solely based on the request of a party alleging wrongdoing. It requires careful examination and evaluation of the circumstances surrounding the case to ensure fairness, impartiality, and the preservation of justice.

15. The Supreme Court in **State of Punjab v. CBI**[2] has thus opined:

"the inherent power of the High Court under Article 226 of the Constitution to direct investigation by CBI for securing the ends of the justice must be exercised sparingly, cautiously, and in exceptional situations, where it becomes necessary to provide credibility and confidence in investigation, or where the incident may have national or international ramifications or where such an order may be necessary for doing the complete justice and enforcing fundamental rights."

16. The 5-judges bench of the Supreme Court in the celebrated judgment of **State of West Bengal and others v. Committee for the Protection of Democratic Rights, West Bengal and others**[3] has observed that while passing orders under Article 226 of the Constitution, the Constitutional Courts must bear in mind certain self-imposed restrictions on exercise of these powers and thus summarized as under:

"we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

17. In **Minor Irrigation & Rural Engg. Services, U.P. v. Sahngoo Ram Arya**[4] the Supreme Court observed that an order directing an enquiry by CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by CBI or any other similar agency. Again Supreme Court in **Air India Stationery Corpn. v. United Labour Union**[5], held that the founding fathers placed no limitation or fetters under Article 226 of the Constitution except self-imposed limitations, and observed that the arm of the Court is long enough to reach in justice, whenever it is found.

18. Further, in **KV Rajendran case**[6], the Supreme Court observed that it is a settled proposition that the transfer of investigation should only be done in rare and extra ordinary circumstances in order to ensure total justice between the parties and to instil public confidence.

19. The fair investigation in criminal law is essential for upholding rule of law, the principles of justice, protecting individual rights, and maintaining the integrity of the legal system. By adhearing to the principles of impartiality, due process, transparency, and commitment to such truth, investigating agencies ensure that criminal investigation are conducted fairly and effectively.

20. The Supreme Court in **Himanshu Kumar and others v. State of Chhattisgarh and others**[7], has held:

44. It is now settled law that if a citizen, who is a de facto complainant in a criminal case alleging commission of cognizable offence affecting violation of his legal or fundamental rights against high Government officials or influential persons, prays before a Court for a direction of investigation of the said alleged offence by the CBI, such prayer should not be granted on mere asking. A Constitution Bench of this Court, in the case of the State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal, reported in (2010) 3 SCC 571, has made the following observations pointing out the situations where the prayer for investigation by the CBI should be allowed:

"70.... In so far as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such powers should be exercised, but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. ***This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.*** *Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."*

(emphasis supplied)

45. In the above decision, it was also pointed out that the same court in Secretary, Minor Irrigation & Rural Engineering Services, U.P. v. Sahngoo Ram Arya, (2002) 5 SCC 521, had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to the conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency.

46. In an appropriate case when the Court feels that the investigation by the police authorities is not in a proper direction, and in order to do complete justice in the case and if high police officials are involved in the alleged crime, the Court may be justified in such circumstances to handover the investigation to an independent agency like the CBI. By now it is well-settled that even after the filing of the charge sheet the court is empowered in an appropriate case to handover the investigation to an independent agency like the CBI.

47. The extraordinary power of the Constitutional Courts under Articles 32 and 226 respectively of the Constitution of India qua the issuance of directions to the CBI to conduct investigation must be exercised with great caution as underlined by this Court in the case of Committee for Protection of Democratic Rights, West Bengal (supra) as adverted to herein above, observing that although no inflexible guidelines can be laid down in this regard, yet it was highlighted that such an order cannot be passed as a matter of routine or merely because the parties have levelled some allegations against the local police and can be invoked in exceptional situations where it becomes necessary to provide credibility and instil confidence in the investigation or where the incident may

have national or international ramifications or where such an order may be necessary for doing complete justice and for enforcing the fundamental rights. We are conscious of the fact that though a satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or re-investigation, submission of the charge sheet ipso facto or the pendency of the trial can, by no means, be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or re-investigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law should be to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

48. The above principle has been reiterated in K.V. Rajendran v. Superintendent of Police, CBCID South Zone, Chennai, (2013) 12 SCC 480. Dr. B.S. Chauhan, J. speaking for a three-Judge Bench of this Court held:

"13. ...This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies. ..."

49. Elaborating on this principle, this Court further observed:

"17. ... the Court could exercise its constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."

50. The Court reiterated that an investigation may be transferred to the CBI only in "rare and exceptional cases". One factor that courts may consider is that such transfer is "imperative" to retain "public confidence in the impartial working of the State agencies." This observation must be read with the observations made by the Constitution Bench in the case of Committee for Protection of Democratic Rights, West Bengal (supra), that mere allegations against the police do not constitute a sufficient basis to transfer the investigation.

51. In Romila Thapar v. Union of India, (2018) 10 SCC 753, one of us, A.M. Khanwilkar, J., speaking for a three-Judge Bench of this Court (Dr. D.Y. Chandrachud, J. dissenting) noted the dictum in a line of precedents laying down the principle that the accused "does not have a say in the matter of appointment of investigating agency". In reiterating this principle, this Court relied upon its earlier decisions in Narmada Bai v. State of Gujarat, (2011) 5

SCC 79, Sanjiv Rajendra Bhatt v. Union of India, (2016) 1 SCC 1. E. Sivakumar v. Union of India, (2018) 7 SCC 365, and Divine Retreat Centre v. State of Kerala, (2008) 3 SCC 542. This Court observed:

"30…the consistent view of this Court is that the accused cannot ask for changing the investigating agency or to do investigation in a particular manner including for court-monitored investigation."

52. It has been held by this Court in CBI v. Rajesh Gandhi, 1997 Cri LJ 63, that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

53. The principle of law that emerges from the precedents of this Court is that the power to transfer an investigation must be used "sparingly" and only "in exceptional circumstances". In assessing the plea urged by the petitioner that the investigation must be transferred to the CBI, we are guided by the parameters laid down by this Court for the exercise of that extraordinary power.

21. In cases of financial fraud, fair investigations are essential not only to safeguard financial institutions but also the nation's interest. Furthermore, fair investigations serve to uncover the truth behind complex financial transactions. Corporate fraud often involves intricate schemes, misleading accounting practices, and hidden agendas. A meticulous and unbiased investigation is necessary to untangle the web of deceit and reveal the extent of the crime. This not only facilitates the prosecution of the perpetrators but also helps prevent similar fraudulent activities in the future by exposing vulnerabilities within regulatory frameworks and corporate governance structures.

22. In the preceding paragraphs, the magnitude and gravity of the offenses have been discussed in two aspects: firstly, serious allegations of systematic fraud committed by the accused company resulting in a loss of Rs. 5000 crore to the government treasury. These actions not only undermine the financial health of the country but also its security. Secondly, the manner in which the investigation was conducted by the Economic Offences Wing of the Government of Uttar Pradesh, and subsequently, after approval from the confidential section of the Home Department, the police filed a closure report. This investigation, characterized by its botched nature, suggests malfeasance.

23. After assessment of closure report dated 20.12.2022 filed on 25.1.2023 before the Court of Chief Judicial Magistrate, Jaunpur, several shocking revelations have emerged from the manner in which the investigation was conducted, which are highlighted hereafter; (i) needlessly, the petitioner's both place of residence, first, at Bhuwala Patti, P.S. Zafrabad, District Jaunpur, and second, at Jarhara, Shivcity, Indira Nagar, Lucknow was inquired for no purpose, ostensibly to divert the scope of investigation, (ii) in this regard, the statement of Shri Bharat Bhushan s/o Shri Subedar, Shri Ram Shringar s/o Shri Pancham, Shri Rakesh Patel, Shri Ved Prakash, Shri Kapil s/o Shri Shamsher Bahadur, Smt. Kirtiwala w/o Dr. Tej Pratap, Shri Shailendra Kumar s/o Shri Kalpnath, Shri Lalji Patel s/o Shri Gajrat, Shri Hari Prasad, and Shri Sanjeev Bharti, the

Councillor, Nagar Palika Parishad Jaunpur were recorded; all the aforesaid persons showed ignorance about the petitioner, (iii) petitioner's whereabouts were also inquired from local resident of Shivcity Jarhara New India Nagar, P.S. Indira Ngar, Lucknow, they also showed ignorance, (iv) on 27.3.2022, the police recorded statement of accused Deepak Gupta, accused Anil Mahaveer Gupta, accused Aneesh Gupta, accused Mahaveer Prasad Gupta, accused Smt. Premlata Gupta and accused Gopal Garg for the reason best known to the Investigating Officer, which again was beyond the scope of investigation in the wake of allegations made in FIR, (v) on 4.4.2022, the police recorded the statement of accused Rohit Parashar, AGM, Bhopal and accused Hari Singh Dilodia, GM SBI, Bhopal, (vi) on 27.4.2022, the statement of Shri S.K. Srivastava, Branch Manager, SBI Main Branch Jaunpur along with 14 others- who were working with the Main Branch, Jaunpur at the relevant time. All the accused working at the branch also shown ignorance about the petitioner and denied happening of any such incident as alleged in the instant petition, (vii) besides statement of above stated persons, the I.O. has recorded the statement of Ct. Anoop Verma, Ct. Ajeet Kumar Kanojia, Ct. Manjeet Singh, L/Ct. Soni Singh Patel, Ct. Jitendra Kumar, S.I. Ramji Saini, HC Sanjay Kumar Yadav, HC Ajai Singh Yadav, Councillor Raj Kumar Verma of Indira Nagar Ward No.26, Lucknow, S.I. Ashish Pandey, (viii) and on 10.12.2022, recorded statement of Shri Subodh Kumar Srivastava, Chief Regional Manager, Varanasi. The averments made in the above referred statements have no connect to the allegations made in the FIR, which could justify the purpose and intent of the investigation. Apparently, the same was done to frustrate the investigation.

24. On examination of documents filed by the petitioner, counter affidavit by Directorate of Enforcement and State Bank of India, it's prima facie observed that; (i) the SKSPGL and its holding companies, in collusion with four private and public financial institutions, perpetrated a massive fraud against the government treasury. Initially, the corporate entity borrowed a substantial sum of public funds- Rs.6170 crore for installation of Thermal Power Project, which was subsequently siphoned off through a network of dummy/sham companies under false pretences. The substantial funds were illicitly transferred via illegal channels to British Virgin Islands and British Overseas Territories of Bermuda, camouflaged under the guise of another fraudulent off-shore company. Eventually, the companies associated with Anil Gupta and Family declared themselves as Non-Performing Assets (NPA). Astonishingly, premier banking institutions like the State Bank of India accepted the false claims without conducting any audits or verifications and settled for a mere fraction of the borrowed amount, mortgaging assets worth Rs.5000 crore for just Rs.1721 crore and remaining outstanding of Rs.2446 crore was written-off, (ii) shockingly, even the auction purchaser turned out to be the same British Virgin Islands company established by Anil Gupta & Family through proxies. Upon successfully acquiring the said company through the bid, the entire board of directors conveniently relinquished their positions, allowing Anil Gupta & Family to regain control of the company. This elaborate scheme orchestrated by the Gupta Brothers went unnoticed in the police investigation, (iii) on further scrutiny, it's revealed that M/s SKS Ispat and Power Ltd applied for coal blocks for their steel plants in Chhattisgarh and Jharkhand in 2008.

Following the awarding of the coal blocks, SKSPGL secured loans amounting to Rs.6170 crore from a consortium of banks for the project's construction and development. Blackstone PE firm invested in SKSPGL shares, and subsequently, the EPC contract was awarded to Cethar Ltd., which is facing investigation by Enforcement Directorate and CBI at Bengaluru Office, (iv) however, discrepancies soon emerged in the financial dealings of the involved parties. Advance payments were made without proper invoicing, loans were shuffled between subsidiary companies, and bogus expenses were recorded to manipulate financial statements. Furthermore, no interest was charged on the loans, resulting in significant losses for the lending institutions. Despite these irregularities, mortgages were executed without proper documentation, and asset valuations were grossly undervalued, (v) moreover, the intricate web of companies involved in the transactions extended to tax havens like British Virgin Islands and British Overseas Territories of Bermuda. Companies were formed with minimal disclosure requirements, facilitating the transfer of funds without scrutiny. Agritrade Power Venture Pvt. Ltd., a holding company based in Singapore, subsequently acquired by SKSPGL. Suspicious transactions, including gross undervaluation of assets and transfers to personal accounts, emerged, leading to complex entered entwined transactions.

25. The Investigating Officer concluded the investigation with the findings that SKSPGL is a thermal power generating company and the company has borrowed a loan of Rs.6170 crore from a consortium of banks led by SBI. On 9.12.2016, the company had total debt of Rs.5000 crore approximately and in accordance with the banking loss, the accused company was declared Non-Performing Assets. The proceedings of NPA was conducted by SBI Mumbai in accordance with RBI guidelines and the assets of the accused company was sold for Rs.2170 crore, and rest of the amount was written-off by the SBI bank. The I.O. has also examined the ITR Annual Report, balance sheet, ROC balance sheet, AOC-04 Form, MGT-07 Form and Form-23 SCA, and nothing incriminating was found during the investigation. The said conclusion is erroneously recorded because of the reason that none of the holding company- incorporated in India- of off-shore companies registered at British Virgin Islands and British Overseas Territories of Bermuda, was investigated by I.O., besides other sham and fictitious companies owned, operated- directly or indirectly- by the SKSPGL and its group companies.

26. Mr. Satish Chaturvedi, Counsel for the State Bank of India, has failed to provide any document/ order suggesting that this court lacks the authority and competence to issue orders when similar petitions are pending in other courts. On perusal of order dated 24.9.2021 passed in Misc. Bench No.21453 of 2021, it’s observed that the matter was last listed on 24.9.2021, and thereafter, did not see the light of the day. Whereas, on perusal of the CRLMP No.2069 of 2021, it’s again observed that no effective order was passed by the High Court of Orissa at Cuttack. Additionally, except by the SBI Bank, none of the other parties involved in the instant case object to the petition's maintainability on this ground, thus we reject the arguments put forth by the Bank.

27. It's judicious to take a reference from **H.N. Rishbud v. State of Delhi**[8] case in which the Supreme Court thus held that the Criminal Procedure consists generally of the following steps for carrying out investigation; (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of- (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

28. In cases of corporate fraud involving the siphoning of large sums through offshore sham companies, deceptive share transactions, and the issuance of bogus Compulsorily Convertible Debentures, the involvement of specialized investigative agencies is warranted. Therefore, the aid and assistance of regulatory bodies such as the Securities and Exchange Board of India (SEBI), along with the office of the Serious Fraud Investigation Office established under the Ministry of Corporate Affairs, comprising experts in forensic auditing, banking, law, information technology, investigation, company law, capital markets, and taxation, are required for detecting and prosecuting white-collar crimes/fraud in the interest of justice.

29. Regrettably, the Investigating Officer failed to determine the correct approach to investigate in such facts of massive scale of the fraud and loss to the state exchequer. Instead, the IO wasted time in locating the complainant, whose information initiated the FIR1, neglecting their duty to investigate the crime itself. It's settled law that after registration of the FIR, it becomes a state case, and in such cases where the allegation is against the state, the role of the complainant becomes insignificant. Otherwise, also, it is not a case that no man in the government department except the Investigating Officer was aware of the commission of the offence, it is evident from the records, that right from the top man in home department to the DGP, all were aware about the case. The petitioner's counsel appearing regularly in court, and there was a threat to the petitioner's life and property, resulting in the petitioner's unavailability at given addresses. Following the court's direction, the petitioner appeared before the Director General of Police, Uttar Pradesh, with counsel, expressing grievances, prompting the DGP's office to ensure the petitioner's safety through the Superintendent of Police, Jaunpur. Moreover, discussions at the government level in the Home Department at Lucknow, evidenced by correspondence between the Secretary (Home) and the SP posted at the DGP's office, reflects approval of investigation by the Economic Offences Wing. Frequent correspondence between the Inspector General of Police, EOW, Lucknow, and the Joint Secretary (Home) of the Uttar Pradesh Government, as well as the Commissioner of Lucknow, dated 15.12.2021, 23.12.2021, 11.1.2022, 28.12.2021, 7.1.2022, 8.1.2022, and 22.1.2022, forming part of the counter affidavit dated 25.1.2022 filed on behalf of

the State Government further substantiates that entire proceeding of investigation were conducted under command and control of home department.

30. On perusal of the note prepared by Inspector Sunil Kumar Verma, EOW, Sector Varanasi, it's reflected that the closure report dated 20.12.2022 was communicated to the Home Department and the same was approved and accepted by the Under Secretary, Confidential Section-8, U.P. Government vide letter no.591/25-8-2022-25-8099/387/2021 dated 13.7.2022.

31. The contents of the aforesaid letter are self-explanatory. The Home Department overlooked the directions passed by this Court and approved the closure report in a perfunctory manner, which is rare and exceptional and filing of closure report under the signature of an Inspector is in violation of Rule 523 of the Uttar Pradesh Police Regulations besides breach of provisions of Criminal Procedure Code, 1973. The closure report prima facie gives two impressions: (i) the highest office of the police department and officers of the Home Department lacks basic understanding of criminal investigation, in which there are allegations of massive corporate fraud, like the allegations made in the instant case, (ii) intentionally, as it appears, both the departments embolded themselves with the fraudulent activities of SKSPGL and its group companies for ulterior motive, best known to them. It has far-reaching consequences and undermines the public trust in the government institutions and erodes the public faith in administration.

32. It is also evident that there was a lack of coordination between the U.P. Police, Enforcement Directorate, and CBI. It has come to light that the CBI has already registered an RC against a company with business relations to the accused company, namely, Cethar Ltd., at its Bengaluru office. Apparently, the Cathar Ltd. is a different case based on distinct fact as had business dealings with SKSPGL. Furthermore, based on the predicate offence, the Enforcement Directorate has also registered an ECIR, which is currently under investigation. Surprisingly, the Uttar Pradesh police were unaware of these developments; intentionally or unintentionally- could not be ascertained at this stage, but definitely it undermines the working of police.

33. Additionally, the closure report was submitted by ignoring the directions issued by this Court vide order dated 2.12.2021, in the instant case, in which the learned Assistant Solicitor General was directed to file response from the office of Home and Finance Department, Government of India, through concerned Secretaries and as it was thus observed, *"We further direct that even if needful is not done by the petitioner or she does not appear, in view of the allegations in the FIR, the respondent no. 2, Director General of Police, Lucknow, Uttar Pradesh shall look into the matter and pass appropriate orders in the national interest.*

Respondent no. 1, State of Uttar Pradesh Through Principal Secretary (Home) Govt. of Uttar Pradesh is also directed to look into all such aspects in the light of the allegations levelled in the first information report as well as in the present petition.

.....in view of the allegations levelled in the FIR and the magnitude of the fraud in terms of money, this would

certainly a case where national interest would be involved." The police chose to file the closure report without waiting response from the Government of India, and without considering the aforesaid directions.

34. It is evident from the counter affidavit filed by the Enforcement Directorate, Department of Revenue, Government of India that the Zonal Office at Prayagraj has already registered an ECIR bearing No.ECIR/ALSZO/01/2022 dated 10.2.2022 with the approval of the competent authority. Consequently, we leave to the wisdom of Enforcement Directorate's officers, to trace the proceeds of the crime and proceed further in accordance with the law, expeditiously.

35. We are of the opinion that the Economic Offences Wing (EOW), Varanasi Division, has conducted the investigation with a predetermined in collusion with the accused persons. Such actions have far-reaching implications for the integrity of the criminal justice system, public trust, and raise serious questions about the functioning of the police. Therefore, in the fitness of the facts discussed hereinabove, a reference is made to the **Vinay Tyagi v. Irshad Ali**[9] case where the Supreme Court has set-fourth the parameters for reinvestigation/de novo investigation and thus held that an expression "fair and proper investigation" in criminal jurisprudence has a twin purpose: firstly, the investigation must be unbiased, honest, just and in accordance with law; secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such in investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency.

36. For the foregoing reasons, we direct that: (i) The Central Bureau of Investigation (CBI), New Delhi is directed to investigate a case against SKSPGL and its affiliated companies, which were involved in the illicit transfer of substantial funds to British Virgin Islands and British Overseas Territories of Bermuda through illegal channels, disguised under the facade of fraudulent offshore entities, (ii) the CBI is further directed to investigate the complicity of bank officials who facilitated the approval of loans and subsequent auction proceedings in favor of Agritrade Power Venture Pvt. Ltd., (iii) the Chairman of the State Bank of India (SBI) and the Principal Secretary of the Home Department, Uttar Pradesh, are instructed to safely maintain the original records and make them available to the investigating agency upon request, (iv) the Director of the Serious Fraud Investigation Office (SFIO) in New Delhi is tasked with conducting forensic audits and other necessary investigations pertaining to SKSPGL and its associated companies, including Agritrade Resources Limited, Entwickeln India Energy Private Limited, Agritrade Power Venture Pvt. Ltd., Fair Thermal Power Ltd., Shree Krishan, Citywings, Compact Agencies and Labheshwari Agencies Ltd., Asia Power FDI Ltd., SKS Ispat and Power Ltd., and any other relevant entities, (v) the Chairman of the Securities and Exchange Board of India (SEBI) is directed to provide all necessary assistance to the investigating agency and take necessary

action, if required within their jurisdiction, (vi) the Directors of the CBI, Enforcement Directorate, and SFIO in New Delhi are tasked with supervising the investigation process, (vii) the entire records of the FIR1 and the subsequent proceedings shall be handed over to the Central Bureau of Investigation at New Delhi, and the Director SFIO, New Delhi within fifteen days of receiving the copy of this order for further action and compliance.

37. The observations made above are provisional and are intended solely to dispose of the instant petition. The same shall not be construed to influence the investigations being conducted by the Central Bureau of Investigation (CBI), the Enforcement Directorate (ED), and the Serious Fraud Investigation Office (SFIO). These investigative agencies are expected to conduct their investigations professionally, in accordance with the law and the standard operating procedures established over a period of time, in the best interests of the state and the institutions involved.

38. The Registrar (Compliance) is directed to transmit a certified copy of this order to; (i) Chief Secretary, U.P. Government, (ii) Director, CBI, New Delhi (iii) Director, Enforcement Directorate, New Delhi, (iv) Director, SFIO New Delhi, (v) Chairman, SEBI, Mumbai, and (vi) Chairman SBI, Mumbai, forthwith for necessary compliance.

39. Parting with the judgment of this case, it is the need of the hour to frame policy and guidelines to prevent miscarriage of justice occasioned because of defective investigation in cases of corporate fraud where the volume of amount is excessively high and has a bearing on the functioning of the State's institution besides financial implications, if not made so far.

40. Corporate fraud causes a significant threat to the integrity of financial institutions and government functioning. When police conduct botched investigations in such fraud cases like corporate fraud, ponzi schemes, security fraud, accounting fraud, large scale tax evasion, kickbacks, embezzlement of government funds, cyber fraud including ransomware attacks and date theft, the implications are profound and multifaceted.

41. To combat large-scale fraud effectively, concerted efforts are needed from governments, regulatory authorities, law enforcement agencies, and private sector. Enhance regulatory oversight, stricter enforcement of laws and regulations, investment in Cyber Security Infrastructure at public awareness campaigns are essential components of a comprehensive anti fraud strategy.

42. The effective police training and regulatory reforms play pivotal roles in bolstering investigative capabilities and ensuing justice. The state government must invest in comprehensive training programmes tailored to address the complexities of financial crimes, including fraud, embezzlement, and money laundering. The training programme should encompass various aspects, including;

42.1 Financial Analysis: Officers need to understand financial documents, such as balance sheets, income statements, and cash flow statements, to identify irregularities indicative of fraudulent activities. Training in financial analysis equips investigators with the expertise to

follow the money trail and uncover fraudulent schemes.

42.2 Forensic Accounting: Knowledge of forensic accounting techniques is essential for scrutinizing financial records, tracing transactions, and detecting discrepancies or falsifications. Training in forensic accounting enables investigators to gather admissible evidence that withstands legal scrutiny in court proceedings.

42.3 Legal Training: Familiarity with relevant laws, regulations, and legal precedents pertaining to corporate fraud is indispensable for conducting investigations and building prosecutable cases. Police training should provide officers with a comprehensive understanding of special statutes.

42.4 Technological Know-How: In the digital age, technology plays a crucial role in investigating corporate fraud. Training should cover the use of digital forensic tools, data analysis software, and electronic surveillance techniques to gather evidence from digital sources and electronic communications.

42.5 Collaborative Partnerships: Facilitating collaboration between law enforcement agencies, regulatory bodies, and industry stakeholders is essential for sharing information, coordinating investigations, and pooling resources. Establishing formalized partnerships enhances the effectiveness of efforts to combat corporate fraud.

42.6 Transparency and Accountability: Regulatory reform should promote transparency in corporate governance practices, requiring companies to disclose relevant financial information and adhere to ethical standards. Holding corporate executives and board members accountable for fraudulent activities reinforces the deterrent effect of regulatory measures, besides police and officers of the civil administration.

43. In essence, police training and regulatory reform are indispensable strategies for enhancing the investigative capabilities of law enforcement agencies in combating corporate fraud. By investing in comprehensive training programs for officers and enacting regulatory reforms that strengthen oversight, promote transparency, and encourage collaboration, state governments can effectively deter fraudulent behaviour and uphold the integrity of government institutions.

44. The State Government may develop a mechanism to make the best use and expertise of the Central Economic Intelligence Bureau, a nodal agency for economic intelligence mandated to ensure effective interaction and coordination among all the concerned agencies in the area of economic offence for effective investigation in cases highlighted in the preceding paragraphs. The Serious Fraud Investigation Office (SFIO), the Enforcement Directorate, and regulatory bodies like the Securities and Exchange Board of India (SEBI) may also be consulted in appropriate cases of financial crime, and suitable and adequate direction be issued in this regard by the Chief Secretary, Government of Uttar Pradesh, at the earliest.

45. With the aforesaid directions, the instant petition is allowed.

(2024) 3 ILRA 1714
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 16248 of 2023

Keshav Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Seema Singh Jadaun, Sri Jitendra Pal Singh Jadaun, Sri Nitin Bhasin

Counsel for the Respondents:
G.A., Sri Ashok Kumar Singh Bais, Sri Vineet Singh Parmar

Indian Penal Code,1860. – Sections 420, 467, 468, 471, 504 & 506 – Drugs and Cosmetics Act, 1940 – Sections 16, 17, 17A, 17B, 32 & 32(3) – quashing of FIR – manufacture and sale of injections – allegations of substandard drugs – allegations of creation of forged and fabricated laboratory test reports – false impression of standard quality – FIR lodged by private person – offences under IPC distinct from offences under Chapter IV of the Act – Section 32 bars prosecution under the Act but not under any other law – no override effect of the Act – investigation under Cr.P.C. for IPC offences not barred – Section 32(3) permits prosecution under other law – registration of FIR mandatory if information discloses cognizable offence – investigation at nascent stage – allegations prima facie disclose cognizable offence – police competent to investigate forgery – case not covered by Ashok Kumar Sharma – no ground for quashing FIR – Bhajan Lal principles not attracted .

Writ Petition dismissed.(E-9)

Cases Cited:

1. Union of India v. Ashok Kumar Sharma and others, (2021) 12 SCC 674.

2. Chandan Singh v. State of Haryana, (2004) 4 RCR (Crl) 724.

3. Rajeev Kumar v. State of Punjab, 1997 (4) RCR 846.

4. Ashish Kumar v. State of Haryana, 2022 SCC OnLine P&H 2847.

5. Lalan Kumar Singh v. State of Maharashtra, 2022 SCC OnLine SC 1383.

6. State of Karnataka v. Shreekantiah, (1981) 2 SCC 335.

7. State of Haryana v. Brij Lal Mittal, (1998) 5 SCC 343.

8. Ashok Kumar Tyari v. State of H.P., (2015) 1 Drugs Cases DC 185.

9. Pankaj Kumar v. State, 2008 SCC OnLine Del 1384.

10. Hoechst Pharmaceuticals v. C.V.S. Mani, 1982 SCC OnLine Del 200.

11. Chimanlal Jagjivandas Sheth v. State of Maharashtra, AIR 1963 SC 665.

12. Indian Chemical and Pharmaceutical Works v. State of Andhra Pradesh, AIR 1966 SC 713.

13. Abhishek Kukreti v. State of U.P., Criminal Misc. Writ Petition No. 11966 of 2023.

14. Lalita Kumari v. State of U.P., (2014) 2 SCC 1.

15. State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335.

(Delivered by Hon'ble Vinod Diwakar, J.)

1. We have heard Shri Nitin Bhasin, holding the brief of Shri Jitendra Pal Singh Jadaun, learned counsel for the petitioners,

learned counsel for the informant, and Shri G.P. Singh, learned AGA for the State Respondents, and perused the record.

2. The present writ petition has been preferred to quash the impugned First Information Report dated 30.7.2023 as Case Crime No.419 of 2023, under Sections 420, 467, 468, 471, 504, 506 IPC, registered at P.S. Deoband, District Saharanpur, and for a direction to the respondent police not to arrest the petitioners till the pendency of the present petition. For clarity, the relevant portion of the prayer is underlined herein:

"(i) Issue a writ, order or direction in nature of certiorari quashing the impugned First Information Report dated 30.07.2023 registered as Case Crime No. 419 of 2023, under Sections 420, 467, 471, 504, 506 of IPC, P.S. Deoband, District Saharanpur.

(ii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to not to arrest the petitioners in pursuance of First Information Report dated 30.07.2023 registered as Case Crime No. 419 of 2023, under Sections 420, 467, 471, 504, 506 of IPC, P.S. Deoband, District Saharanpur."

3. The prosecution case is that the respondent no.4/complainant is in the health care business and had purchased 2000 injections from VADSP Pharmaceuticals, a third-party manufacturer company of the medicines. The said injections are used to develop antibiotics in children. After purchasing, the said injections were delivered for sale to Rastogi Hospital, Railway Road, Deoband, besides certain other medicines. After the use of the said injections, the doctor complained about the quality of the injections and stated that they are substandard and that if said injections are used, they could be injurious to the health of the children and pose a potential threat to their lives. The complainant immediately took back the entire stock from their distributors and hospitals and informed the accused-persons. The accused-persons/petitioners had clandestinely shown all parameters as correct in a certificate delivered along with the injections. The complainant also conducted a lab test from the Scientific Testing Lab, Roorki, Haridwar on 19.9.2022, which suggests the sample of the injections failed. The petitioners were again informed about the substandard quality of the injections through e-mail. The petitioners again sent a DN Laboratory Report dated 26.9.2022, showing the report as per standard. The test report of the complainant did not match the test report supplied by the petitioners to the complainant. The complainant has fraudulently prepared and managed a test report dated 26.9.2022 issued by DN Laboratory to justify the quality of the injections. The impugned FIR was registered against the petitioners on the preceding set of allegations.

4. Aggrieved by the registration of the impugned FIR bearing Case Crime No.19 of 2023, under Sections 420, 467, 468, 471, 504, 506 IPC at P.S. Deoband, District Saharanpur, the petitioners have preferred the instant petition.

5. Learned counsel for the petitioners submits that the petitioner nos.1 and 2 are partners in M/s Morgan Healthcare, situated at 1st Floor, Sam Building, Ratwara Sahib Gurudwara Road, Mullanpur, Kharar, Sas Nagar, who were granted license under the provisions of

Drugs and Cosmetics Act, 1940 by the State Drug Licensing Authority, Punjab, whereas the petitioner no.3 is a partner in M/s VADSP Pharmaceuticals, having its office at Plot No.124 EPIP, Phase-1, Jharmajri, Baddi, District Solan, Himachal Pradesh, which has been granted a license to manufacture drugs under the provisions of the Act. The manufacturing company, i.e., petitioner no.3 was manufacturing the third-party drug *"Meropenem Injection IP (Merofy-125 Injection)"* from its unit. In the month of September, 2022, the respondent/complainant telephonically requested to take back the drugs in question and stated that the doctor did not prescribe the drug/injection in an open market, being injurious to the health of the children. As per the petitioner's own test reports, the injections were found to be of standard quality, and accordingly, the DN Laboratory issued a test report. Therefore, registration of the impugned FIR is a misuse of the process of law and also, in the teeth of the ratio culled out in **Union of India v. Ashok Kumar Sharma and other**[1].

5.1 With oblique motive, the complainant malafidely filed an application under Section 156(3) Cr.P.C. before ld. A.C.J.M. Deoband, Saharanpur and secured an order for registration of the impugned FIR against the petitioners by concealing material facts from the court. He further contends that on perusal of the contents of the FIR, no offence under IPC is made out, and if at all any offence would attract then, the Drug Inspector is a competent person to initiate prosecutions against the petitioners; as no FIR could be registered under the IPC by the complainant, it is only the Drug Inspector who is authorized under Section 32 of the Act to initiate prosecution, if any. The Act specifically prohibits taking cognizance except on the complaint made by the Drug Inspector or other person authorised under the law, and to substantiate its argument the petitioners has relied upon Section 32 of the Act2. Section 32 of the said Act is reproduced below:

"32. Cognizance of offences—

[(1) No prosecution under this Chapter shall be instituted except by-

(a) an Inspector; or

(b) any gazetted officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government or by a general or special order made in this behalf by that Government; or

(c) the person aggrieved; or

(d) a recognised consumer association whether such person is a member of that association or not.

(2) Save as otherwise provided in this Act, no court inferior to that of a Court of Session shall try an offence punishable under this Chapter.]

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter."

5.2 The petitioner has placed reliance upon ***Chandan Singh v. State of Haryana***[3], ***Rajeev Kumar v. State of Punjab***[4], ***Ashish Kumar v. State of Haryana***[5]. He further relied upon ***Lalan Kumar Singh and another v. State of Maharashtra***[6] to substantiate that merely reproducing the ingredients of the penal provision without a clear statement of facts as to how and in what manner the Director of the company was responsible for the conduct of the business of the company would not ipso facto make the Director vicariously liable in a criminal case. He further contends that a person in charge of and responsible for the affairs of the

company for the day-to-day conduct of the business of the company, must be a person in overall control of the day-to-day business of the company or the firm. If a partner of a firm is not in such overall control, he cannot be liable to convicted merely because he had the right to participate in the business of the firm under the terms of the partnership deed7.

5.3 Simply because a person is the Director of the company, he does not vicariously become liable for the offence[8].

5.4. While considering Section 34 of the Act, it was held that offences by the company and non-compliance of the provisions thereof if no whisper in the entire complaint made against the petitioners whether they were in charge of and were responsible for the conduct of the business at the time of the commission of the offence and the mere fact that the petitioner happens to be one of the partners does not entitles the prosecution to prosecute him9.

5.5. On the basis of the impugned FIR, the Drug Inspector has also issued notice; therefore, it would be a case of double jeopardy. Thus, the prosecution is liable to be quashed. The FIR under Section 420, 467, 468, 471, 504, 506 IPC is defective else for the same offence the remedy lies under Section 18 (A) (i) of the Act.

6. *Per contra,* learned AGA submits that there are serious allegations of manufacturing spurious and substandard drugs by the petitioners. The petitioners have also created forged and managed test reports to give an impression that the injections are of standard quality as per the standards reflected in the test report. He further contends that the manufacturing of substandard drugs allegedly to boost the immunity of the children amounts to the life and safety of the children, and no one could be permitted to manufacture substandard and spurious drugs. He further contends that the investigation is at the initial stage, the role of the petitioners is yet to be ascertained, and the petitioners are not cooperating with the Investigating Officer. The Investigating Officer required cooperation from the petitioners to extract the truth of the allegation. He further contends that there are serious allegations of manufacturing substandard, spurious drugs and creating forged test reports to give an impression of valid and standard quality drugs.

7. Reverting back to the petitioners' counsel’s argument, who has heavily relied upon **Ashok Kumar Sharma case (supra)**, in which following issues were involved:

(i) what is interplay between the provisions of the Code of Criminal Procedure and the Drugs and Cosmetics Act, 1940?

(ii) whether in respect of offences falling under Chapter IV of the Drugs and Cosmetics Act, 1940, an FIR can be registered under Section 154 of the Cr.P.C. and the case investigated or whether Section 32 of the Drugs and Cosmetics Act, 1940 supplants the procedure for investigation of offences under Cr.P.C. and taking of cognizance of an offence under Section 190 Cr.P.C.?

(iii) whether the Drug Inspector has power or authority to arrest a person in connection with an offence under Chapter IV of the Drugs and Cosmetics Act, 1940?

8. Chapter IV of the Act2 deals with the manufacture, sale and distribution of drugs and cosmetics. Section 16 of the Act governs the expression (standard quality), whereas Sections 17, 17A and 17B govern

misbranded, adulterated, and spurious drugs. The definition for the sake of clarity, the relevant sections are reproduced as under:

"16. Standards of quality. -

[(1) For the purposes of this Chapter, the expression "standard quality" means—

(a) in relation to a drug, that the drug complies with the standard set out in [the Second Schedule], and

(b) in relation to a cosmetic, that the cosmetic complies with such stand ard as may be prescribed.]

(2) The [Central Government], after consultation with the Board and after giving by notification in the Official Gazette not less than three months ' notice of its intention so to do, may by a like notification add to or otherwise amend [the Second Schedule] for the purposes of this Chapter, and thereupon 5[the Second Schedule] shall be deemed to be amended accordingly.

***[17. Misbranded drugs.**—For the purposes of this Chapter, a drug shall be deemed to be misbranded,—*

(a) if it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is; or

(b) if it is not labelled in the prescribed manner; or

(c) if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular.

***17A. Adulterated drugs**— For the purposes of this Chapter, a drug shall be deemed to be adulterated—*

(a) if it consists in whole or in part, of any filthy, putrid or decomposed substance; or

(b) if it has been prepared, packed or stored under insanitary conditions whereby it may have been contaminated with filth or whereby it may have been rendered injurious to health; or

(c) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or

(d) if it bears or contains, for purposes of colouring only, a colour other than one which is prescribed; or

(e) if it contains any harmful or toxic substance which may render it injurious to health; or

(f) if any substance has been mixed therewith so as to reduce its quality or strength.

***17B. Spurious drugs.**—For the purposes of this Chapter, a drug shall be deemed to be spurious,—*

(a) if it is manufactured under a name which belongs to another drug; or

(b) if it is an imitation of, or is a substitute for, another drug or resembles another drug in a manner likely to deceive or bears upon it or upon its label or container the name of another drug unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug; or

(c) if the label or container bears the name of an individual or company purporting to be the manufacturer of the drug, which individual or company is fictitious or does not exist; or

(d) if it has been substituted wholly or in part by another drug or substance; or

(e) if it purports to be the product of a manufacturer of whom it is not truly a product."

9. Section 32 of the Act2 deals with conditions under which cognizance of the offences could be taken with respect to the offences committed within the purview of the Act, which says no prosecution under the Act shall be instituted except by- (a) an Inspector, or (b) any gazetted officer of the Central Government or a State Government authorised in writing on this behalf by the Central Government or a State Government or by a general or speaking order made on this behalf by that Government or (c) the person aggrieved or (d) a recognised consumer association, whether such a person is a member of that association or not.

10. Section 32(3) of the Act2 further clarifies that nothing contained in this chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence under this chapter.

11. **Ashok Kumar Sharma (supra)** case originated from an online complaint dated 22.2.2018 made by one Naushad Khan in which the Commissioner (Food Protection and Drug) initiated an inquiry and the Drug Inspector Mau, U.P. along with two others conducted an inspection at Sharda Narayan Clinic and Pharmacy and the person, who was present in the clinic, was directed to show papers in respect of medicines stored in the shop. The person stated that he did not have any license, though he was the owner of the medical store, and that he had stored the medicines without proper license. He committed an offence under Sections 18 and 27 of the Act2. On the basis of the recovery made, an FIR was lodged under Section 18 (a)(i) and Section 27 of the Act2 on the complaint of the Drug Inspector. Aggrieved by the same, the accused preferred a petition for quashing the FIR before this Court, and this Court allowed the writ petition and quashed the FIR on the reasoning that Section 32 of the Act2 disabled the police from registering an FIR, as Section 32 of the Act2 provides for the mechanism for prosecuting offences under the said Act. The said finding was challenged before the Supreme Court in **Ashok Kumar Sharma case (supra)**, and the Supreme Court culled out the directions, which are extracted below:

"THE CONCLUSIONS/DIRECTIONS

170. Thus, we may cull out our conclusions/directions as follows:

170.1. In regard to cognizable offences under Chapter IV of the Act, in view of Section 32 of the Act and also the scheme of the CrPC, the Police Officer cannot prosecute offenders in regard to such offences. Only the persons mentioned in Section 32 are entitled to do the same.

170.2. There is no bar to the Police Officer, however, to investigate and prosecute the person where he has committed an offence, as stated under Section 32(3) of the Act, i.e., if he has committed any cognizable offence under any other law.

170.3 Having regard to the scheme of the CrPC and also the mandate of Section 32 of the Act and on a conspectus of powers which are available with the Drugs Inspector under the Act and also his duties, a Police Officer cannot register a FIR under Section 154 of the CrPC, in regard to cognizable offences

under Chapter IV of the Act and he cannot investigate such offences under the provisions of the CrPC.

170.4. Having regard to the provisions of Section 22(1)(d) of the Act, we hold that an arrest can be made by the Drugs Inspector in regard to cognizable offences falling under Chapter IV of the Act without any warrant and otherwise treating it as a cognizable offence. He is, however, bound by the law as laid down in D.K. Basu (supra) and to follow the provisions of CrPC.

170.5. It would appear that on the understanding that the Police Officer can register a FIR, there are many cases where FIRs have been registered in regard to cognizable offences falling under Chapter IV of the Act. We find substance in the stand taken by learned Amicus Curiae and direct that they should be made over to the Drugs Inspectors, if not already made over, and it is for the Drugs Inspector to take action on the same in accordance with the law. We must record that we are resorting to our power under Article 142 of the Constitution of India in this regard.

170.6. Further, we would be inclined to believe that in a number of cases on the understanding of the law relating to the power of arrest as, in fact, evidenced by the facts of the present case, police officers would have made arrests in regard to offences under Chapter IV of the Act. Therefore, in regard to the power of arrest, we make it clear that our decision that Police Officers do not have power to arrest in respect of cognizable offences under Chapter IV of the Act, will operate with effect from the date of this Judgment.

170.7. We further direct that the Drugs Inspectors, who carry out the arrest, must not only report the arrests, as provided in Section 58 of the CrPC, but also immediately report the arrests to their superior Officers."

12. Nonetheless, the consumer does not know about the manufacturer or quality of the products. Many times, they are unaware of expired, degraded or substandard products, which ultimately results in treatment failure and, with antibiotics, leads to anti-bacterial resistance. This problem is very serious and rapidly growing, causing serious repercussions on the health of the citizens. The ingredients of Sections 16, 17, 17A, and 17B of the Act2 mandate poor quality drugs comprising misbranded drugs, spurious drugs and adulterated drugs, respectively, and there is no provision in the Act2 to deal with the offences related to the creation of forged documents and dishonestly uses as genuine.

13. The opening line of section 32 of the Act[2] states, *"No prosecution under this Chapter shall be instituted by -"* this means the offences under The Drugs and Cosmetics Act, 1940, and not under offence under the Indian Penal Code; therefore, the police can investigate the offences forming part of Penal Code. Sub-Section (3) of Section 32 further clarifies the position in unequivocal terms that nothing contained in Chapter IV of the Act2 shall be deemed to prevent any person from being prosecuted under any other law for any act or omission that constitutes an offence against Chapter IV of the Act2.

14. Section 2 of the Act[2] states that the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

At this juncture, it would be relevant to reproduce section 2 & 32(3) of

the Drugs and Cosmetics Act, 1940, which are extracted herein below:

"2. Application of other laws not barred. —The provisions of this Act shall be in addition to, and not in derogation of, the Dangerous Drugs Act, 1930 (2 of 1930), and any other law for the time being in force.

*****

32. Cognizance of offences—

1.....

2.....

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter"

15. The conjoint reading of both the provisions make it clear that the provisions of the Act2 do not have over ride effect on any other law in force. Its clear that the investigation under Code of Criminal Procedure for offences under IPC are not barred under the Drugs and Cosmetics Act, 1940.

16. The Delhi High Court in ***Pankaj Kumar v. State****10*, has held that the Code is the parent statute which provides for investigation, inquiry into, and trial of cases and unless there is specific provision in other statute to indicate a different procedure to be followed, the provisions of the Code cannot be displaced. The High Court has relied upon various judgments passed by the Supreme Court to come to the aforesaid conclusion. The relevant portion of para-18 of Pankaj Kumar's case (supra) is extracted herein below:

"That apart, how could the FIR be quashed if the investigating agency should have been different? By lodging FIR alone no investigation is conducted by the police. It is the first step towards starting investigation by the police. If High Court was of the opinion that investigation has to be conducted by the Bureau then also there was no need to quash the FIR Any way we take the view that as offences under the Penal Code, 1860 are also involved, efficacious investigation can be conducted by entrusting it to the police investigating agency. Inherent powers of the High Court as recognised in Section 482 of the Code are reserved to be used "to give effect to any orders under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." It is quite unfortunate that learned single Judge overlooked the reality that by quashing the FIR in the case the High Court did not achieve any one of the above factors. On the contrary, the result of quashing the FIR had rendered the allegations of offences made against a person to remain consigned in stupor perennially. Hence, instead of achieving ends of criminal justice, the impugned order would achieve the reverse of it." (Emphasis supplied)

17. The Delhi High Court in ***HOECHST PHARMACEUTICALS v. C.V.S. Mani***[11], has also held as under:

20. The Preamble of the Act, no doubt, says that it is an Act to regulate the import, manufacture, distribution and sale of drugs and cosmetics but the real object of this Act has been judicially examined on numerous occasions. In ***Chimanlal Jagjivandas Sheth v. State of Maharashtra****[12], while examining whether substances like absorbent cotton wool, roller bandages and gauze used for or in treatment of diseases fall within the ambit of the Act, it was observed that the*

Legislature designedly extended the definition of 'drug' so as to take in substances which are necessary aids for treating surgical or other cases. "The main object of the Act is to prevent sub-standards in drugs, presumably for maintaining high standards of medical treatment. That would certainly be defeated if the necessary concomitants of medical or surgical treatment were allowed to be diluted: the very same evil which the Act intends to eradicate would continue to subsist."

21. Again, in ***Indian Chemical and Pharmaceutical Works, Hyderabad v. The State of Andhra Pradesh***[13]*, a Constitution Bench of Supreme Court held, "The Drugs Act, 1940, which mainly concerned with standard and quality of drugs manufactured in this country and, therefore, controls the manufacture, sale, and distribution of drugs has nothing to do with duties of excise and with their imposition on narcotics and narcotic drugs."*

22. From the above two observations of Supreme Court it becomes obvious as to what is the real object of the Act and what is the legislative scheme and policy of this enactment. Indeed, the Act as Section 2 lays down, is in addition to and not in derogation of any other law and the real purpose of the enactment is to ensure quality and standards of drugs manufactured, imported, distributed and sold in the country. If that be correct, as indeed it must be held to be, we have to read Section 12 and Section 33, giving the rule making power in the above context and of the provisions of Chapter III and Chapter IV of the Act. We have also to see that no rule is made under the Act which is violative of any other law or impinges upon any other right recognised or conferred by any other law. If a rule impinges upon any other law or any other right, it must be held to be outside the rule making power of the Central Government. Section 2 on the one hand and Sections 12 and 33 of the Act on the other have all to be read together, being part of the same enactment and part of the same legislative scheme.

18. The coordinate bench in the case of **Abhishek Kukreti and others v. State of U.P. and others**[14] has rejected the plea to quash the FIR stemming from Case Crime No.85 of 2023, involving sections 379, 411 IPC along with section 4/21 of the Mines and Minerals (Development and Regulation) Act, 1957, registered at Police Station Nagina Dehat, District Bijnor. The key issue addressed was whether section 22 of the Mines and Minerals (Development and Regulation) Act, 1957 mandates FIR registration solely on the complaint of an authorized person or a private individual can also lodge an FIR when IPC offences are involved. The coordinate bench of this court clarified that there is no legal impediment under section 22 of the MMDR Act for a private individual to file an FIR for IPC offences related to transactions under the MMDR Act. It emphasized that the offences under both the Act's have distinct and different procedural investigative mechanisms.

19. We have very scrupulously gone through the material placed before us and are not persuaded to hold that the petitioner's case is covered by the **Ashok Kumar Sharma case (supra)**, and hence, the decision cited on this behalf can not be availed of. In Ashok Kumar's case, the FIR was registered on the complaint of the Drug Inspector with the police station for the offences mentioned in Chapter IV of the Act2; therefore, the court has held that the same is in the teeth section 32 of the Act2, but in the instance case, the complaint had

been registered by a private person on the complaint of a consumer for creation of forged and fabricated lab test report to prove drugs in the question of standard quality. In essence, the gist of the allegation is that the petitioner has procured a false and fabricated lab report to make the complainant believe that the drugs are of standard quality.

20. In our view, on a reading of the impugned FIR, where there are allegations of the creation of fake test reports to give an impression of drug being of standard quality, as it has been pointed out earlier, the entire matter is only at nascent stage, and the investigation is not proceeded with except the registration of the impugned FIR. The evidence has to be gathered after a thorough investigation and shall be placed before the Court on the basis of which alone the court can come to the conclusion one way or the other on the plea of right of the complainant to register the FIR. If the allegations are bereft of the truth and made with ulterior motives, we are sure the investigation will reflect so in the police report. At this stage, when there are only allegations of procuring false and fabricated test reports and investigation is at nascent stage, this Court cannot anticipate the result of the investigation and render a finding on the legality and correctness of the impugned FIR. Therefore, we are unable to see any force in the contentions raised by the petitioner's counsel based on the ratio culled out from **Ashok Kumar Sharma's case (supra)**. Needless to say, the question of malafide exercise of power will assume significance only if an authority acts for an unauthorized purpose. We are of the considered opinion that the principal purpose of the registration of the impugned FIR and the intended follow up action are only to investigate the allegations and present a case before the court. If sufficient evidence in support of those allegations is collected, and in case if no such evidence is collected, the police may file the police report, accordingly.

21. More precisely, in the instant case, the prosecution case is that the accused first delivered the substandard injections and, thereafter, to give an impression of standard quality, provided a fake lab report issued from DN Laboratory, therefore, there are allegations of the creation of forged laboratory reports. Albeit, on giving a bird's eye view of the ingredients of Sections 16, 17, 17A, and 17B of the Act2, it would safely be concluded that these sections deal with the definition of standard quality, misbranded, adulterated and spurious drugs, not with the creation of forged documents and using as genuine. Therefore, the element of forgery could only be investigated by the police under the provisions of Indian Penal Code and not under the Chapter IV of the Drugs and Cosmetics Act, 1940. Moreover, police must record every information related to the commission of cognizable offence in the register kept at police station; it ensures that the process is initiated promptly upon receipt of information regarding the commission of cognizable offence. It only brings the alleged offence to the notice of the police and sets in motion the machinery for the investigation of the case. The registration of an FIR is mandatory under Section 154 of Cr.P.C. if the information discloses a cognizable offence15.

22. In view of the fact that substandard drugs encounter a major stringent issue for the health system and cannot be ignored. The investigation is at the initial stage, and there are specific allegations of the creation of forged test lab

reports to claim substandard drugs of standard quality; therefore, on perusal of the contents of the impugned FIR, the ingredients of commission of cognizable offence are *prima- facie* made out.

23. The allegations made in the impugned FIR, in our considered opinion, do clearly constitute a cognizable offence justifying the registration of a case and the investigation thereon, and this does not fall under any of the categories of cases formulated by the Supreme Court in ***State of Haryana v. Bhajan Lal***[16], calling for the exercise of extraordinary or inherent powers of the High Court to quash the impugned FIR. Otherwise also, it is not the case of the petitioners that even if the allegations made in the FIR/complaint, is taken at their face value and-accepted in their entirety, do not prima facie constitute any offence or make out a case, against the accused. The petitioners have also not pleaded any express bar engrafted in any provisions of the Code or any other law, including the Drugs and Cosmetics Act, to the institutions and continuance of the proceedings.

24. Therefore, the petition is devoid of merits, and hence dismissed, at this stage.

(2024) 3 ILRA 1724
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Misc. Writ Petition No. 20280 of 2013

Amit Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ali Hasan, Sri Hariom Tiwari, Sri Ishtiyak Ahmad

Counsel for the Respondents:
G.A., Sri Ashok Singh, Sri B.N. Singh

Criminal Law -Code of Criminal Procedure, 1973 - Sections 200, 202(2) & 204 - Constitution of India,1950 - Article 227- Petitioner challenged the summoning order dated 24.05.2013 by Chief Judicial Magistrate, Orai, under Sections 307, 504, 506 IPC, and its affirmation by Sessions Judge, Jalaun, on 21.09.2013 in Criminal Revision No. 147/2013. FIR (Case Crime No. 1005/2002) alleged petitioner and two others attacked the complainant's brother, with one co-accused firing, causing a firearm injury. Final report deemed the incident doubtful, but the protest petition, treated as a complaint, led to summoning after examining the complainant (Section 200) and three witnesses (Section 202). Court held that Section 202(2) mandates examining all witnesses in sessions triable cases, and failure to summon the doctor who examined the injury was a violation, critical for assessing Section 307 IPC applicability. Magistrate's casual approach lacked "prima facie satisfaction" as per Fiona Shrikhande Vs St. of Maharashtra, (2013) 14 SCC 44, and Dr. Divya Nand Yadav Vs St. of U.P., 2023 AHC 9188. Impugned orders set aside; matter remanded for fresh order in compliance with Section 202(2). Petition treated under Article 227 per Radhey Shyam Vs Chhabi Nath, (2015) 5 SCC 423.

Petition Allowed.

Case Law Cited:

1. Radhey Shyam Vs Chhabi Nath, (2015) 5 SCC 423 (Para 4)

2. Fiona Shrikhande Vs St. of Maharashtra, (2013) 14 SCC 44 (Para 9)

3. Dr. Divya Nand Yadav Vs St. of U.P., Criminal Appeal No. 9188/2022, decided on 20.04.2023 (Paras 9, 10)

4. Smt. Gudiya Vs St. of U.P., 2023 AHC 238320 (Para 11)

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

1. Heard Sri Ishtiyak Ahmad, learned Advocate holding brief for Sri Ali Hasan, learned counsel for the petitioner and Sri S.C. Mishra, learned AGA for the State.

2. This writ petition has been filed by the petitioner-Amit Kumar with a prayer to issue a writ, order or direction in the nature of certiorari for quashing the judgment and order dated 21.09.2013 passed by learned Sessions Judge, Jalaun at Orai in Criminal Revision No. 147 of 2013 (Amit Kumar Vs State of U.P. and Another) by which the learned Judge has rejected the revision of the petitioner, which was preferred against the order dated 24.05.2013, passed by learned Chief Judicial Magistrate, Orai in Criminal Case No. 1277 of 2013 (Shatrughan Singh Vs. Ajay Kumar and Others) under Sections 307, 504, 506 IPC, Police Station Kotwali Orai, District Jalaun.

3. Relevant facts are as below:-

• An FIR case crime no. 1005 of 2002 under sections 307, 504 and 506 IPC, naming three persons including the petitioner-Amit Kumar was lodged by Shatrughan Singh, alleging that three persons lay in wait and attacked his brother Satyabhan Singh when he went to attend call of the nature at about 3:15 am on 28.11.2001; all the three were holding firearms, one of them Ajai Kumar Sharma fired at him which hit on his right side below the shoulder; seriously injured he fell down; on his cries, the first informant and other members of his family reached the spot to save him but the accused persons escaped, extending threats to his life.

• After the investigation, the investigating officer submitted a final report with the opinion that the incident was doubtful and that the accused persons were falsely named.

• The first informant moved a protest petition which was treated as complaint; the informant/the complainant was examined under section 200 Cr.P.C.; certain witnesses namely, the injured-Satyabhan as PW-1, Ranbir Singh as PW-2 and Mohit as PW-3, were examined under section 202 Cr.P.C.

• The C.J.M. thereafter proceeded to summon Amit Kumar and Arvind Kumar Sharma for offence under Sections 307, 504, 506 IPC by an order dated 24.05.2013.

• The accused preferred Criminal Revision No. 147 of 2013, which was decided by the Session Judge, Jalaun at Orai by on order dated 21.09.2013, whereby the order passed by the Court of C.J.M. was affirmed and revision rejected.

• Now one of the accused Amit Kumar is before this Court, invoking writ jurisdiction under Article 226 of the Constitution and has challenged both the aforesaid orders.

4. Very first objection from the opposite side is that the petitioner has filed Misc. Writ Petition under Article 226 of the Constitution, instead he should have filed Misc. Writ Petition under Article 227 of the Constitution. On the above issue, I prefer to place reliance on the judgment of the Supreme Court in ***Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423***. In the above noted case, the Supreme Court has clearly laid down that order of judicial court could be

challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India. In my opinion, there is no legal hindrance in converting the petition under Article 226 to one under Article 227 of the Constitution. I, therefore, treat this petition as one under Article 227 of the Constitution. ***The registry shall assign appropriate number accordingly.***

5. The contention of the petitioner is that at the time of the incident, he was on duty and therefore the investigating officer submitted a final report on 17.01.2002; the allegation in the FIR is that at about 3:15 am on 28.11.2001, three persons attacked the injured and only one of them i.e., Ajai Kumar Sharma (who is not the petitioner in the instant petition) actually fired on Satyabhan; Admittedly, Satyabhan sustained a single firearm injury, through and through over his right arm. The forceful contention of the petitioner is that his name has been dragged in the FIR falsely and that no case against him is made out in view of the facts that there was a single injury and the role of fire has been assigned to one Ajai Kumar Sharma only but said Ajai Kumar Sharma, who was named (and was assigned main role) was never summoned and the only other co-accused Arvind Kumar Sharma has died. Further submission is that in fact it is the first informant-Satrughan Singh @ Pappu Singh, who had murdered Arvind Kumar Sharma. And FIR case crime no. 641 of 2006 under sections 364 and 302 IPC has been registered against the first informant; he has also been chargesheeted. Argument is that the learned C.J.M. did not consider the evidence on record and passed an arbitrary order, which is not sustainable in the eyes of law. The learned Court of revision too, did not notice the relevant facts and circumstances and agreed with the view taken by the C.J.M., in a most mechanical way and declined to interfere, hence the petitioner has no remedy except to invoke powers under Article 226/227 of the Constitution.

6. Admittedly, the protest petition has been treated as a complaint. In the protest petition, the first informant named Ranbir Singh and Mohit Singh as the witnesses, who came on the spot and identified the accused persons. It is also alleged in the protest petition that the co-accused-Ajai Kumar Sharma did not pay the price of the articles transferred on his assurance, therefore there has been a dispute between him and the injured on this issue. The Court while treating the protest as complaint, called upon the complainant to produce his witness under section 202 Cr.P.C. The witnesses of fact i.e., PW1-Satyabhan (the injured), PW2-Ranbir Singh (the alleged eye-witness) and PW3-Mohit Singh (another eye-witness), were examined. The learned trial court took a view that at the stage of summoning only, a prima facie case has to be established and that there is no need to examine rest of the witnesses. And passed summoning order against Arvind Kumar and instant petitioner under sections 307, 504, 506 IPC.

7. In this session triable case only three witnesses of fact have been examined at the stage of inquiry before summoning. Admittedly, the doctor who examined the injured has not been summoned and examined under section 202 Cr.P.C. It is relevant to reproduce Section 202(2) Cr.P.C. here which is as below:-

"(2) In an inquiry under sub-section (1), the Magistrate may, if he

thinks fit, take evidence of witnesses on oath :

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath."

Section 202(2) Cr.P.C. enjoins the Magistrate to call upon the complainant to produce all of his witnesses and examine them on oath. It appears that the Magistrate did not find necessary to call upon the complainant to examine all his witnesses on a premise that for establishing a prima facie case, there is no need to examine all the witnesses.

8. A moot question is what is a prima facie case and when it can be said to have been made out before a Magistrate proceeds to summon an accused.

9. This Court in its judgment in **Criminal Appeal No. 9188 of 2022 (Dr. Divya Nand Yadav and Another vs. State of U.P. and Another) decided on 20.04.2023** observed in para no. 10 as below:-

"10. There cannot be two opinions on the settled legal position that the Magistrate has to decide whether prima facie any case is made out or not, before proceeding to summon the accused persons. The meaning of prima facie case must be understood in the right perspective. There may be cases where the Magistrate finds that in literal sense of the words occurring in the statements the ingredients of an offence are there but he feels not so satisfied with them. *The Hon'ble Supreme Court in para-11 of the judgment passed in* ***Fiona Shrikhande vs. State of Maharashtra and Another; (2013) 14 SCC 44****, observed as below:-*

"At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to "prima facie satisfy" whether there are "sufficient grounds to proceed" against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint."

The Supreme Court has used the pharse arriving at "prima facie satisfaction" whether there are "sufficient grounds to proceed"! ***Section 204 Cr.P.C. nowhere said that the Magistrate shall take cognizance and summon the accused if prima facie case is made out, instead Section 204 Cr.P.C. says that the Magistrate may take cognizance if there is sufficient ground for proceeding, hence in my view the prima facie case must be construed to mean "prima facie satisfaction" arrived at by the Magistrate.*** *In other words the Magistrate shall proceed only if he finds that there is sufficient ground for the same. This is not to say that the proposed accused shall have any right to be heard at that stage or that any evidence in defence can be considered. It merely means that the Magistrate shall assess all the material before it and apply its mind to find out whether time has come to proceed and take cognizance. In that view of the matter the Supreme Court in the case as aforesaid has instead of using the word "prima facie case" has found fit to use the phrase "prima facie satisfaction" and of course this satisfaction has to be arrived at*

while acting within the four corners of law i.e., by adopting the procedure as provided under Sections 200 and 202 Cr.P.C. ***In my view, the Magistrate is not powerless to examine the truth or falsehood of the case made in the complaint. And to fully utilize this power the Magistrate has to play its role of examining himself the complaint and his witnesses under Sections 200 Cr.P.C., and if required to further inquire into by calling more witnesses and examining them or even by ordering investigation.*** *The steering wheel of the inquiry cannot be left at the hands of the complainant. For the reason that at that stage, the accused has no say in the matter and the court has no opportunity to hear the other side, therefore he ought to remain very cautious, circumspect and alert. The broad probabilities or improbabilities of the story of course may be seen at this stage.*

The Court further observed in para no. 14 as below:-

"14. The fact of the matter is that the court shall not proceed in a mechanical or a routine manner. It shall apply its mind, which is called a judicial mind and discretion as well. The court/the Magistrate, though shall not go deep into the evidence given and shall not weigh the evidentiary value in a meticulous manner. Except this rider, there is no other obstacles before the court below for arriving at the "prima facie satisfaction" a word which can be equated with the word "prima facie case".

10. The purpose of holding inquiry as envisaged under section 202 Cr.P.C. is to look for sufficient ground to proceed. The words "prima facie satisfaction" stands in equilibrium with "sufficient ground to proceed" and the terms are broadly interchangeable, as far as summoning of the accused persons is concerned.

11. While considering the provisions of law under section 202(2) Cr.P.C., this Court in ***Smt. Gudiya vs. State Of U.P. And 5 Others 2023:AHC:238320***, held that ordinarily in a case exclusively triable by the Sessions Court, the complainant has to produce all the witnesses. In case he is unable to produce any of the witnesses on the premise that such witnesses are not under his command or are not his witnesses even then the Magistrate who is conducting the inquiry, may summon those witnesses for the purpose of recording his "prima facie satisfaction" with regard to summoning of the accused.

The Court in ***Smt. Gudiya case (supra)*** observed in para nos. 11 and 12 as below:-

"11. A question may arise that in case the complainant for some reason, whether justifiable or not so justifiable, either cannot produce its witness or deliberately withholds any of them, then what course is available to the Magistrate, who is conducting an 'inquiry'. Can he be left at the mercy of the complainant? There may be instances where a Magistrate may find that something more is required before he can record his 'prima facie satisfaction' with regard to summoning of the accused.

12. Moreover, a situation may arise where in a genuine case put before the court, the complainant is helpless in producing even 'his witness' for some extraneous reason. In such a situation definitely he has an option to apply to the court for summoning those witnesses, which he cannot produce himself."

12. The powers of the inquiry court are not fettered in any manner and it may call the witnesses, if in its view their evidence may prove useful for just decision in the matter for the purpose of summoning the accused persons.

13. In the instant matter, the learned trial court as well as the court of revision, ignored the important provisions of law under section 202(2) Cr.P.C. The approach of the Courts was casual and cavalier. Even the doctor who had examined the injured was not summoned. His examination was, quite important to draw an inference whether prima facie an offence under section 307 IPC is made out against the accused persons. Any summoning order passed ignoring the mandatory provisions of law is vulnerable and is liable to be set-aside.

14. In view of the above, the petition is ***allowed***. The impugned orders are ***set-aside***. The matter is remanded back to the trial court concerned for passing a fresh order in accordance with law.

(2024) 3 ILRA 1729
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

First Appeal from Order No. 226 of 2024
with
First Appeal from Order No. 227 of 2024

C/M Anjuman Intezamia Masajid Varanasi ...Appellant

Versus

Shailendra Kumar Pathak & Anr. ...Respondents

Counsel for the Appellants:
Sri Syed Ahmed Faizan, Sri Zaheer Asghar

Counsel for the Respondents:
Sri Prabhash Pandey, Sri Pradeep Kumar Sharma, Sri Vineet Sankalp

Civil Law - Civil Procedure Code, 1908 – Order XL Rule 1, Sections 151 & 152 – Appointment of Receiver – Interlocutory Mandatory Injunction – Appeals under Order XLIII Rule 1(s) challenging orders dated 17.01.2024 and 31.01.2024 appointing District Magistrate, Varanasi as Receiver for Vyas Ji Tehkhana (cellar) and directing worship/rituals – Held, appointment of Receiver justified as plaintiff established strong prima facie case of possession by Vyas family since 1551, supported by map in *Din Mohammad* case (1937) and Commissioner's report (1996) – No evidence of appellant's possession – Order dated 31.01.2024 correcting omission of relief (b) valid under Sections 151/152 CPC, rectifying accidental slip (*actus curiae neminem gravabit*) – Interlocutory mandatory injunction to restore worship (stopped in 1993) upheld, restoring status quo ante, not final relief – No clash of interest in District Magistrate's role as Receiver and ex-officio member of Kashi Vishwanath Trust Board – Pleas of limitation, res judicata, and non-joinder/mis-joinder premature without written St.ment or framed issues – *Dorab Cawasji Warden* guidelines satisfied . (Para 61-165)

Appeals dismissed.

List of Cases Cited:

1. Dorab Cawasji Warden Vs Coomi Sorab Warden, (1990) 2 SCC 117

2. T. Krishnaswamy Chetty Vs C. Thangavelu Chetty, AIR 1955 Mad 430

3. Dwaraka Das Vs St. of M.P., (1999) 3 SCC 500

4. Niyamat Ali Molla Vs Sonargon Housing Cooperative Society Ltd., (2007) 13 SCC 421

5. Vareed Jacob Vs Sosamma Geevarghese, (2004) 6 SCC 378

6. Satyanarayan Banerji Vs Kalyani Prosad Singh Deo Bahadur, AIR 1945 Cal 387

7. Jet Ply Wood (P) Ltd. Vs Madhukar Nowlakha, (2006) 3 SCC 699

8. Manohar Lal Chopra Vs Rai Bahadur Rao Raja Ji Seth Hira Lal, AIR 1962 SC 527

9. Balasaria Construction (P) Ltd. Vs Hanuman Sewa Trust, (2006) 5 SCC 658

10. Subramanian Swamy Vs St. of Tamil Nadu, (2014) 5 SCC 75

(Delivered by Hon'ble Hon'ble Rohit Ranjan Agarwal, J.)

1. These two appeals filed under Order XLIII Rule 1 (s) of Civil Procedure Code, 1908 (hereinafter called as 'CPC') arise out of order dated 17.01.2024 and order dated 31.01.2024 passed by the District Judge, Varanasi on application 9-C filed under Order XL Rule 1 CPC in Original Suit No. 34 of 2023 (Shailendra Kumar Pathak Vs. Committee of Management Anjuman Intezamia Maszid and another).

2. F.A.F.O. (Defective) No. 136 of 2024 (New Number 226 of 2024) was nominated to this Court by orders of Hon'ble Acting Chief Justice dated 01.02.2024. F.A.F.O. (Defective) No. 156 of 2024 (New Number 227 of 2024) was nominated to this Court by the orders of Hon'ble the Chief Justice dated 06.02.2024. F.A.F.O. No. 227 of 2024 arises out of order dated 17.01.2024, while F.A.F.O. No. 226 of 2024 arises out of order dated 31.01.2024 passed by the District Judge, Varanasi.

3. Both these appeals are heard together with the consent of both the parties and are being decided together by a common judgment and order.

FACTS

4. The facts leading to filing of these two appeals are, that plaintiff respondent no. 1, Shailendra Kumar Pathak 'Vyas' filed an Original Suit No. 844 of 2023 before the Court of Civil Judge (Senior Division), Varanasi against the appellant defendant no. 1 and Board of Trustees of Sri Kashi Vishwanath Temple as defendant no. 2 claiming following reliefs;

"(a) Decree the suit for declaration declaring that Plaintiff is entitled to perform all the rituals of Maa Sringar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within old temple complex and also within the cellar (Tehkhana) existing within temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) at Settlement Plot No. 9130 (Nine Thousand One Hundred Thirty) Ward and P.S. Chowk District Varanasi,

(b) Decree the suit for permanent injunction restraining the Defendants from creating any obstacle, hindrance or interference in performance of daily Pooja, Aarti, Bhog and observance of all the rituals of Maa Sringar Gauri, Lord Ganesh, Lord Hanuman and other visible and invisible deities within the cellar (Tehkhana) existing within old temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) existing at Settlement Plot No. 9130(Nine Thousand One Hundred Thirty) Ward and P.S. Chowk District Varanasi;

(c) Deerce the suit for permanent injunction restraining the Defendants from demolishing, damaging, destroying or causing any damage to the images of deities Goddess Maa Sringar Gauri at Asthan of Lord Adi Visheshwar along with Lord Ganesh, Lord Ganesh, Lord Hanuman, Nandiji and other visible and invisible deities within the cellar (Tehkhana) existing within old temple of Lord Adi Visheshwar (alleged Gyanvapi

Mosque) existing at Settlement Plot No. 9130(Nine Thousand One Hundred Thirty) Ward and P.S. Chowk District Varanasi;

(d) Decree the suit for mandatory injunction directing Shri Kashi Vishwanath Trust Board to allow the Plaintiff, co-Pujaris and the devotees to perform Pooja and rituals within the cellar (Tehkhana) within old temple of Lord Adi Visheshwar (alleged Gyanvapi Mosque) existing at Settlement Plot No.9130 (Ninety One Hundred and Thirty) within the area of P.S. Chowk, Varanasi after making suitable provisions and if required, making appropriate changes in the iron fencing for the said purpose within the time provided by the Hon'ble Court;

(e) Decree the suit for mandatory injunction directing the Shri Kashi Vishwanath Trust Board to act in accordance with Section 13 (Thirteen) and 14 (Fourteen) of Shri Kashi Vishwanath Temple Act, 1983 (Nineteen Hundred Eighty-Three) and to make provisions for pooja and worship within cellar (Tehkhana) existing within settlement plot No.9130 (Ninety-One Hundred and Thirty) of Shri Adi Visheshwar Temple Complex (alleged Gyanvapi mosque);

(f) Grant such other relief for which the Plaintiff may be found entitled to or which may be deem fit and necessary in the interest of justice; and

(g) Decree the suit with costs in favour of Plaintiff and against the Defendants;"

5. The plaint case is that there is a Jyotirlinga established by Lord Shiva himself in Kashi since time immemorial where stands temple of Lord Adi Visheshwar which was constructed, and is situated at settlement plot no. 9130. The said temple is called by the defendant appellant as Gyanwapi Mosque. There is a tehkhana (cellar) in the southern side of subject building which is the principal seat of hereditary pujari of Vyas family i.e. predecessors in interest of the plaintiff respondent no. 1 from time immemorial. According to them, plaintiff is entitled to perform puja and other rituals in the same manner which was being performed till the year 1993 within and outside the tehkhana (cellar). The suit was filed against the action of the State Government and district administration restricting the plaintiff to enter into the temple and fundamental right granted under Article 25 of the Constitution of India being infringed.

6. The plaintiff is hereditary pujari of Sri Vyaspeeth situated within the temple and has been in continuous possession over the same from time of his ancestors performing various puja, rituals, katha and other religious functions. The puja was abruptly stopped by oral orders in November and December 1993 and the temple complex was iron-fenced.

7. The family pedigree of Vyas family has been given in paragraph no. 4 of the plaint. The plaintiff by virtue of Will deed dated 28.02.2000 executed by Sri Somnath Vyas and Will deed dated 21.01.2014 executed by Pt. Chandra Nath Vyas is entitled to continue in hereditary office of pujari and perform the function at Vyaspeeth.

8. It is further averred that the temple of Sri Adi Visheshwar Jyotirlinga which stood from time immemorial was damaged/destroyed and defiled number of times by the invaders. Pt. Narayan Bhatt, the Guru of Raja Todarmal, got constructed and restored the temple which includes mandaps, subsidiary deities, shrines, peepal tree and several other objects of worship

including the creation of Vyaspeeth for due performance of rituals, puja and worship of deities. It was in pursuance of Farman issued by Aurangzeb in the year 1669 that Sri Adi Visheshwar temple complex was substantially damaged. The Muslims forcibly and without any authority of law occupied the first floor of building to use same as Mosque and since then it is called Gyanwapi Masjid. After demolition, the Hindus continued to worship over the major portion including lower portion which is called tehkhana (cellar) of the temple complex.

9. It was in the year 1780-1790 that Rani Ahilyabai Holkar of Indore constructed a temple of Lord Shiva and established a Shivalingam adjacent to old temple which is called new temple and Sri Adi Visheshwar temple as old temple.

10. In paragraph no. 16 of the plaint, it has been averred that Case No. 30 was decided in favour of predecessors-in-interest of plaintiff from the Court of Assistant Magistrate on 11.08.1843, which was contested between Jai Gopal 'Mukhtar' of Musammat Rukmin Vs. Amanat Ali and Wahid Ali. In paragraph no. 18 reference has been given of Case No. 04 of 1852 decided on 12.05.1852 between Mahadeo Beas (Vyas), Grandson of Musammat Rukmin Vs. Amanat Ali. Further, in paragraph no. 19 reference of Case No. 28 decided on 18.02.1886 by the District Magistrate between Mutawalli Gyanwapi Mosque and Laxmi Narayan Vyas in regard to opening of doors and setting up staircase, has been given. Paragraph no. 20 speaks about copy of order dated 02.05.1906 forming part of record of Misc. Case No. 3 has been given for complying the order dated 26.03.1906.

11. Paragraph no. 21 of the plaint discloses the order passed by the District Magistrate, Varanasi in Case No. 65 dated 10.06.1925 relating to tehkhana (cellar) possessed by Baba Raghunath Vyas and also regarding tehkhana (cellar) within northern side of the subject building. Paragraph no. 26 of the plaint defines Section 4 (9) of Sri Kashi Vishwanath Temple Act 1983 (hereinafter referred as the 'Temple Act of 1983'), which means Temple of Adi Vishweshwar popularly known as Sri Kashi Vishwanath Temple, situated in the city of Varanasi which is used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines, subshrines and the ashthan of all other images and deities, mandaps, wells, tanks and other necessary structures and land appurtenant thereto.

12. In paragraph no. 33, it has been alleged that in December 1993 the then Pujari Sri Somnath Vyas was directed by then District Magistrate not to enter into the premises. Having no option left he locked the door and tehkhana (cellar). It has been further alleged that in Civil Suit No. 637 of 1996, Civil Judge, Varanasi on 27.07.1996 had appointed an Advocate Commissioner to make survey. The survey was conducted on 30.07.1996 and a report was submitted in the Court. It was mentioned in the report that two locks were put on the western side of tehkhana (cellar), one by the district administration and another by Sri Somnath Vyas. The City Magistrate could not open the lock as there was no order of the Court to do so while Sri Somnath Vyas having one key opened the lock.

13. In paragraph no. 45 of the plaint it has been averred that the plaintiff and his brother had executed a registered Shebaitnama in favour of Mandir Trust on 25.02.2016 to the extent of half share of the temple. In paragraph no. 66 it has been stated that the cause of action arose on 17.09.2023, when the Muslim community threatened that as soon as ASI team goes they will capture the entire tehkhana (cellar) of southern side of old temple and would damage/destroy everything of Hindu worship lying there.

14. An application under Order XL Rule 1 CPC was filed by the plaintiff for appointing Receiver of tehkhana (cellar) in the southern side of building situated on settlement plot no. 9130 and also a direction was sought to direct the Receiver to allow the plaintiff, co-pujaris, nominee of Sri Kashi Vishwanath Trust Board and devotees to perform pooja and rituals within the same.

15. On 07.11.2023 an objection was filed by the appellant defendant no. 1 to application 9-C moved for appointing Receiver on the ground that Vyas family had never performed any puja in the said premises. Further, no question arises as to stopping them from performing their religious rights since December 1993. It was further averred that the tehkhana (cellar) was in possession of the appellant and there is no image of any God or Goddess in the said tehkhana (cellar). In paragraph no. 9 of the objection, it has been stated that a Mosque exists on settlement plot no. 9130 and is in possession of the appellant from thousands of years.

16. In paragraph no. 10, it has been stated that in the suit filed by one Din Mohammad in the year 1936 being Suit No. 62 of 1936 which was decided on 25.08.1937 by the Additional Civil Judge the property in dispute has been declared as Mosque and the courtyard with land underneath are Hanafi Muslim Waqf. The said decision exist till date and no question arises for appointing any Receiver. In paragraph no. 12, it has been stated that the plaintiff who succeeded the shebiatship in view of Will deed dated 28.02.2000 transferred their right in favour of temple trust on 08.07.2016, thus, have no locus standi to proceed with the matter. Moreover, in view of the decision rendered in the year 1937 in case of Din Mohammad no right of Vyas family survives over the property in dispute.

17. By the orders of 27.10.2023 the suit was transferred to the Court of District Judge, Varanasi as Civil Suit No. 34 of 2023. The District Judge vide order dated 17.01.2024 allowed the application 9-C and appointed District Magistrate, Varanasi as Receiver for tehkhana (cellar) situated on the southern side of the building on settlement plot no. 9130 with the direction that he will take the property in his custody and control, and preserve the same during pendency of suit without any change in the nature of property. By the order dated 31.01.2024 the relief (b) sought in application 9-C was added and the District Magistrate, Varanasi/Receiver was directed for arranging worship and rituals by priest appointed by plaintiff and Kashi Vishwanath Trust Board of the deities, in the cellar. Hence, these appeals.

ARGUMENTS FROM THE APPELLANT SIDE

18. Sri S.F.A. Naqvi, learned Senior Counsel appearing for the appellant, while laying challenge to both the appeals

submitted that final relief cannot be granted in a suit at initial stage, when neither issues have been framed, nor written statement has been filed and the evidences are yet to be led by the parties. Reliance has been placed upon the decision of Apex Court in case of **Bharat Sanchar Nigam Limited Vs. Prem Chandra Premi, 2005 (13) SCC 505.**

19. He next contended that the Court below could not have passed the order dated 17.01.2024 appointing Receiver under Order XL Rule 1 CPC as there was no cause of action at all for the plaintiff. According to him the order appointing Receiver was in teeth of orders dated 24.09.1993 passed in Writ Petition (Civil) No. 611 of 1993 and order dated 14.03.1997 passed by the Apex Court in Writ Petition (Civil) No. 131 of 1997 as well as the order dated 17.08.1995 passed in Writ Petition (Civil) No. 541 of 1995 (Mohd. Aslam @ Bhure Vs. Union of India & Others) 1997 (5) SCC 575.

20. According to him the matter relating to mosque and courtyard with the land underneath already stood settled as Hanafi Muslim Waqf in the judgment rendered in Civil Suit No. 62 of 1936 (Din Mohammad & Others Vs. The Secretary of State for India in Council) decided on 25.08.1937. Once the cellar has been declared as Hanafi Muslim Waqf, the application 9-C could not have been entertained and Receiver could not have been appointed. The question regarding cellar has already attained finality in view of the decision in case of **Din Mohammad (Supra)**. He further contended that the Order XL Rule 1 CPC does not apply in the present case. Reliance has been placed upon a decision of Madras High Court in case of T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty, AIR 1955 Mad 430.

21. He next contended that once the application 9-C was disposed off on 17.01.2024, appointing the District Magistrate, Varanasi as Receiver of the property in dispute, subsequent order dated 31.01.2024 passed by the Court below was illegal once application stood disposed off, and no application was moved by the plaintiff under Section 151 or 152 of CPC for amending the judgment, decree or order. Further, there was no clerical, arithmetical mistake in the order or errors arising therein from any accidental slip or omission which the Court could have corrected on its own motion. Reliance has been placed upon the decision of Apex Court in case of **Dwaraka Das Vs. State of M.P. & Another, 1999 (3) SCC 500**. Relevant paragraph no. 6 is extracted here as under;

"6. Section 152 C.P.C. provides for correction of clerical arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes

to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective order in the Us pending before them. No Court can under the cover of the aforesaid sections modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the trial court had specifically held the respondents-State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the court had rejected the claim of the appellant in so far as pendente lite interest was concerned. The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake as was wrongly done by the trial court vide order dated 30th November, 1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State."

22. Reliance has been placed upon the decision of Apex Court rendered in case of **My Palace Mutually Aided Copperative Vs. B. Mahesh, 2022 LiveLaw (SC) 698**, and upon decision in case of UPSRTC Vs. Imtiaz Hussain, 2006 (1) SCC 380, relevant paragraph nos. 7 and 8 are extracted here as under;

"7. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the Section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of Code even after passing of effective orders in the lis

pending before them. No Court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of Madhya Pradesh and Anr. (1999 (3) SCC 500 and Jayalakshmi Coelho v. Oswald Joseph Coelho (2001 (4) SCC 181).

8. The basis of the provision under Section 152 of the Code is founded on the maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law", said Cresswell J. in Freeman v. Tranah (12 C.B. 406). An unintentional mistake of the Court which may prejudice the cause of any party must and alone could be rectified. In Master Constitution Co. (P) Ltd. v. State of Orissa (AIR 1966 SC 1047) it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as to, in effect, pass an effective judicial order after the judgment in the case."

23. Reliance has also been placed upon a decision of Apex Court rendered in case of **Plasto Pack, Mumbai Vs. Ratnakar Bank Ltd. 2001 (6) SCC 683.** Relevant paragraph no. 12 is extracted here as under;

"12. By order dated 3.3.1995 relief (a) set out in the plaint was granted 'as it was', without specifying the exact decretal amount and the rate of interest allowed by the Court. Such of the prayers as were not granted by decree dated 3.3.1995 would be deemed to have been refused and to that extent the suit shall be deemed to have been dismissed. More than two years and eight months later the Court could not have, on a mere notice of motion, substituted almost a new decree in place of the old one by granting such reliefs as were not granted earlier and that too without noticing the defendant-appellants. As held in K. Rajamouli Vs. AVKN Swamy, (2001) 5 SCC 37 power to amend a decree cannot be exercised so as to add to or subtract from any relief granted earlier. A case for setting aside the decree was earlier made out. In the facts and circumstances of the case the Division Bench ought to have taken a liberal view of the events and entertained the appeal for consideration on merits by condoning the delay in filing the same. However, that was not done. We are satisfied that grave injustice has been done to the appellants by denying them an opportunity of hearing and contesting the suit on its merits. We are also of the opinion that the respondent-bank ought to have taken a reasonable stand and should have sympathetically considered the proposal of the appellants which was not lacking in bona fides and in the interest of avoiding litigation and early recovery of outstanding debts the respondent should have compromised the suit. Even if the

appellants' proposal was not acceptable to the respondent, at least a counter-proposal should have been made in which case across the table discussion between the parties with the assistance of their learned counsel would have brought out a mutually accepted resolution and an end to the litigation. We are constrained to observe that this litigation is being perpetuated because of the unreasonable and rigid attitude of the respondent-bank."

24. Reliance has been placed upon a decision of Apex Court rendered in case of **Metro Marines & Another Vs. Bonus Watch Co. (P) Ltd. & Others, 2004 (7) SCC 478**. Relevant paragraph no. 9 is extracted here as under;

"9. Having considered the arguments of the learned counsel for the parties and having perused the documents produced, we are satisfied that the impugned order of the Appellate Court cannot be sustained either on facts or in law. As noticed by this Court in the case of Dorab Cawasji Warden vs. Coomi Sorab Warden (supra) has held that an interim mandatory injunction can be granted only in exceptional cases coming within the exceptions noticed in the said judgment. In our opinion, the case of the respondent herein does not come under anyone of those exceptions and even on facts it is not such a case which calls for the issuance of an interim mandatory injunction directing the possession being handed over to the respondent. As observed by the learned Single Judge the issue whether the plaintiff is entitled for possession is yet to be decided in the Trial Court and granting of any interim order directing handing over of a possession would only mean decreeing the suit even before trial. Once the possession of the appellant either directly or through his agent (caretaker) is admitted then the fact that the appellant is not using the said property for commercial purpose or not using the same for any beneficial purpose or the appellant has to pay huge amount by way of damages in the event of he loosing the case or the fact that the litigation between the parties is a luxury litigation are all facts which are irrelevant for changing the status-quo in regard to possession during the pendency of the suit."

25. According to learned Senior Counsel the provisions of Section 152 CPC cannot be invoked to modify, alter or add to the terms of original order or decree as to in fact pass an effective order after the order or judgment in a case. Liberal use of Section 152 CPC is beyond the scope of and has been deprecated by the Apex Court in case of **Jayalakshmi Coelho v. Oswald Joseph Coelho 2001 (4) SCC 181**.

26. He then contended that appointment of District Magistrate, Varanasi, who being ex officio Member of Board of Trustees as per Section 6 (2) (i) of the Temple Act of 1983 creates clash of interest in between the office of District Magistrate, Varanasi, who hold overall control over the city being executive head as well as in-charge of revenue district. He also contended that executive committee is constituted under Section 19 (1) of the Temple Act of 1983 which is to work subject to direction of Board or the State Government and is responsible for the superintendence, direction and control of the affairs of the temple. Section 19 (2) provides for the Members of the Executive Committee and the District Magistrate, Varanasi is a Member of the Executive Committee.

27. Sri Naqvi then contended that once it is a settled position that mosque and courtyard with the land underneath are Hanafi Muslim 'Waqf' any claim seeking any relief regarding the land underneath has to be decided in a proper suit and not by the interim orders. According to him the present suit was entertained after a delay of 31 years without any explanation for such a long delay as provided under Order VII Rule 6 CPC and the Limitation Act.

28. The case set up by the plaintiff that State Government had removed them from disputed place by some oral order is a fact, which raises a question that since year 1993 the plaintiff sat tight over the matter and has not adjudicated the issue before any forum or Court of law. According to learned Senior Counsel the suit has been filed seeking relief of declaration and mandatory injunction for restoring an alleged right from which they were evicted in the year 1993 without seeking any exemption as provided under Order VII Rule 6 CPC. Once the Trial Court proceeds the first question will be that whether the suit is barred because it was filed beyond the limitation as provided under the Limitation Act. Reliance has been placed upon a decision of Madras High Court **AIR 1940 Madras 617 Subramania Gurukul Abhinav Poornpriya A. Sriniwas Rao Saheb** and the judgment of Apex Court in case of **M. Sadiq Vs. Suresh Das, 2020 (1) SCC 1**, relevant paragraph nos. 472, 473 and 479.

29. He next contended that the suit is liable to be dismissed for non-joinder of necessary party i.e. State of U.P. against whom reliefs were sought and also on the ground of joinder of unnecessary party i.e. appellant. According to him it is admitted that right of Shebaitship was transferred by the plaintiff to defendant no. 2 on 25.02.2016 and also by transfer of surrender deed dated 08.07.2016, hence plaintiff himself has voluntarily surrendered his rights to suit. The appellant has no role assigned in the alleged removal of Shebait from the place in question, in such circumstances any relief sought against the defendant no. 1 is nothing but a futile exercise and the suit itself is barred by unnecessary joinder of parties and also non-joinder of necessary party i.e. the State. Reliance has been placed upon a decision of Apex Court rendered in case of Kasturi Vs. Iyyamperumal, 2005 (6) SCC 733. Reliance has also been placed upon decision of Apex Court rendered in case of **Moreshar Yadaorao Mahajan Vs. Vyankatesh Sitaram Bhedi (D) throguh LRs & Others, 2022 Supreme (SC) 986.**

30. It was then contended that the suit is barred under Order VII Rule 11 (d) CPC by operation of law i.e. Section 4 of the Places of Worship (Special Provision) Act 1991. According to him the mosque and its underneath portion were always there and were never disturbed since time immemorial. On 15.08.1947 the mosque and its underneath portion alongwith appurtenant land were existing, hence, provisions of the Act No. 42 of 1991 are applicable and the suit is barred by operation of law. The application under Order VII Rule 11 (d) CPC has been filed on 30.01.2024. The Act No. 42 of 1991 in its opening statement defines the purpose of the Act, which prohibits conversion of any place of worship and to provide for the maintenance of religious character of any place of worship as it existed on the 15th date of August 1947. Thus, the present suit is barred by this Act and same cannot be proceeded. Reliance has been placed upon a decision of Apex Court rendered in case

of **Prem Kishore & Others Vs. Brahm Prakash & Others, 2023 LiveLaw (SC) 266**.

31. It was lastly contended that the order dated 17.01.2024 appointing Receiver was modified on 31.01.2024 i.e. last date of working of the Court concerned as he was going to superannuate on the said date, and such modification could not have been made by him on the last day of his working.

32. Sri Puneet Gupta, learned counsel, also appearing for the appellant, submitted that the order appointing Receiver dated 17.01.2024 and the order dated 31.01.2024 is in form of relief of interlocutory mandatory injunction which the Court could not have granted as it would amount to granting of final relief. According to him relief (e) in the plaint is for a decree of mandatory injunction directing Shri Kashi Vishwanath Trust Board to act in accordance with Section 13 and 14 of the Temple Act of 1983 and to make provisions of Puja and worship within tehkhana (cellar). The order dated 31.01.2024 is in form of interlocutory mandatory injunction which has provided for the worship and rituals under the custodianship of Receiver appointed on 17.01.2024, which is a final relief and cannot be granted.

33. According to him the grant of interlocutory mandatory injunction cannot be in a routine manner and unless and until the plaintiff make out a strong case only then it can be granted. Reliance has been placed upon the decision of Supreme Court in case of **Dorab Cawasji Warden Vs. Coomi Sorab Warden & Others, 1990 (2) SCC 117.** Reliance has also been placed upon another decision of Apex Court in case of **Gurunanak Dev University Vs. Parminder Kumar Bansal & Another, 1993 Supreme (SC) 458.** Relevant paragraph no. 6 is extracted here as under;

"6. Sri Gambhir is right in his submission. We are afraid that this kind of administration of interlocutory remedies, more guided by sympathy quite often wholly misplaced, does no service to anyone. From the series of orders that keep coming before us in academic matters, we find that loose, ill-conceived sympathy masquerades as interlocutory justice exposing judicial discretion to the criticism of degenerating into private benevolence. This is subversive of academic discipline, or whatever is left of it, leading to serious impasse in academic life. Admissions cannot be ordered without regard to the eligibility of the candidates. Decisions on matters relevant to be taken into account at the interlocutory stage cannot be deferred or decided later when serious complications might ensue from the interim order itself. In the present case, the High Court was apparently moved by sympathy for the candidates than by an accurate assessment of even the prima facie legal position. Such orders cannot be allowed to stand. The Courts should not embarrass academic authorities by itself taking over their functions."

34. Reliance has also been placed upon a decision of Supreme Court in case of **Samir Narain Bhojwani Vs. Aurora Properties and Investments & Another, 2018 (17) SCC 203**. Relevant paragraph nos. 24, 25 and 26 are extracted here as under;

"24. That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in

applying the principle of moulding of relief which could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The nature of order passed against the appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted. This Court in Dorab Cawasji Warden Versus Coomi Sorab Warden and Others,2 has had occasion to consider the circumstances warranting grant of interlocutory mandatory injunction. In paragraphs 16 & 17, after analysing the legal precedents on the point as noticed in paragraphs 11-15, the Court went on to observe as follows:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

25. The Court, amongst others, rested its exposition on the dictum in Halsbury"s Laws of England, 4th edition, Volume 24, paragraph 948, which reads thus:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is

completed, a mandatory injunction will be granted on an interlocutory application."

26. The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction."

35. Reliance has also been placed upon a decision of Supreme Court in case of State of **U.P. & Others Vs. Ram Sukhi Devi, 2005 (9) SCC 733**, relevant paragraph no. 8 is extracted here as under;

"8. To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations."

36. Learned Counsel heavily relied upon a decision of Apex Court in case of **Mohd. Mehtab Khan & Others Vs. Khushnuma Ibrahim Khan & Others, 2013 (9) SCC 221**. Relevant paragraph nos. 18 and 19 are extracted here as under;

"18. There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs. Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in Dorab Cawasji Warden vs. Coomi Sorab Warden and Others has come to be firmly embedded in our jurisprudence.

19. Paras 16 and 17 of the judgment in Dorab Cawasji Warden (supra), extracted below, may be usefully remembered in this regard:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish

his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

37. He next contended that after passing of the order impugned dated 17.01.2024 the Trial Court became functus officio as the purpose of jurisdiction of application 9-C has been completed and another relief claimed in application 9-C, which is not expressly granted, deemed to have been refused, hence, another order passed on 31.01.2024 is barred by Explanation II and V of Section 11 CPC. Reliance has been placed upon a decision of Apex Court in case of **Deputy Director Land Acquisition Vs. Malla Atchinaidu & Others, MANU/SC/0121/2006**. Relevant paragraph no. 45 is extracted here as under;

"45. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal, Section 189 of Civil Procedure Code of Ceylon, which embodies the provisions of Or 28 R. 11 of the English Rules of the Supreme Court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass. The Section does not take away any right of appeal which the parties may possess' it merely provides a simple and expeditious means of rectifying an obvious error. In the present case there was no clerical error or accidental omission in the decree and the case of the Appellants is based on an alleged variance between the Judgment of the Court and the decree based upon it. In such a case the variation should appear on a perusal of the Judgment and decree. No such variation is apparent in the present case."

SUBMISSIONS OF RESPONDENTS

38. Sri Hari Shanker Jain and Sri Vishnu Jain, learned counsel appearing for the plaintiff-respondent no.1 submitted that oral aspersions have been cast upon District Judge who passed the order impugned on 31.01.2024, as application 9-C stood decided on 17.01.2024, and omissions in

order dated 17.01.2024 could not have been corrected within the power conferred under Section 151 read with Section 152 CPC. According to them, the aspersions cast upon the Court below is ill-founded and without any basis. It has contemptuous and reckless remarks made by a party against the Presiding Judge without any basis.

39. A mention was made by the plaintiff to rectify the omissions exercising power under Sections 151 and 152 CPC before the Court on 29.01.2024. Application 9-C contained two prayers while allowing the application, no direction has been issued on prayer no.2. On 29.01.2024, the appellant counsel sought adjournment and the matter was fixed for 30.01.2024. On 30.01.2024, the defendant no.1-appellant argued the matter on merit, but no objection was raised to the effect that the Court cannot pass an order if there has been any omission. It was after hearing both the parties that the order was passed on 31.01.2024. Reliance has been placed upon catena of judgments of various Courts passed on the last date of the working, which are in the cases of **Manohar Lal Sharma Vs. Narendra Damodardas Modi, (2019) 3 SCC 25, Supreme Court of India Vs. Subhash Chandra Agrawal, (2020) 5 SCC 481, Rojer Mathew Vs. South Indian Bank Ltd., (2020) 6 SCC 1, Supriyo Vs. Union of India, (2023) SCC OnLine SC 1348, Aishat Shifa Vs. State of Karnataka and Others, (2022) LiveLaw SC 842, Maharao Sahib Shri Bhim Singhji Vs. Union of India, (1986) 4 SCC 615, Justice K.S. Puttaswamy (Retd.) Vs. Union of India, (2017) 10 SCC 1 and Kesavananda Bharati Sripadagalvaru and Ors Vs. State of Kerala and Another, AIR 1973 SC 1461.**

40. It was next contended that application under Order VII Rule 11 CPC was filed on 30.01.2024 after closing of the arguments for passing order on relief no.2 prayed in application 9-C. Once, the application under Order VII Rule 11 (d) CPC was filed after the appointment of the Receiver on 17.01.2024, the Court below could not be faulted for not deciding the said application on the first hand and proceeding to decide the application under Order XL Rule 1 CPC.

41. It was next contended that in the instant case, there was an accidental slip or omissions on the part of Court below while passing the order dated 17.01.2024 for appointing the Receiver, as the application 9-C was allowed intoto, but directions as prayed in prayer no.2 could not be issued. Section 152 CPC empowers the Court to correct its own error in a judgment, decree, or order from any accidental slip or omission. The principle behind the said provision is "Actus Curiae Neminim Gravabit" i.e. nobody shall be prejudiced by act of the Court. The Court has inherent power under Section 151 CPC to rectify any omission in any order suo motu. Reliance has been placed upon the decision of the Apex Court rendered in case of **Niyamat Ali Molla Vs. Sonargon Housing Cooperative Society Ltd. and Ors., 2007 (13) SCC 421**. Relevant paragraphs 18 and 19 are extracted here as under:-

"18. Section 152 of the Code of Civil Procedure empowers the Court to correct its own error in a judgment, decree or order from any accidental slip or omission. The principle behind the said provision is actus curiae nemenim gravabit, i.e., nobody shall be prejudiced by an act of court.

19. Civil Procedure Code recognises the inherent power of the court.

It is not only confined to the amendment of the judgment or decree as envisaged under Section 152 of the code but also inherent power in general. The courts also have duty to see that the records are true and present the correct state of affair. There cannot, however, be any doubt whatsoever that the court cannot exercise the said jurisdiction so as to review its judgment. It cannot also exercise its jurisdiction when no mistake or slip occurred in the decree or order. This provision, in our opinion, should, however, not be construed in a pedantic manner. A decree may, therefore, be corrected by the Court both in exercise of its power under Section 152 as also under Section 151 of the Code of Civil Procedure. Such a power of the court is well recognized."

42. He next contended that there is specific averment in the suit that worship was going on continuously till 1993 in Vyas Ji tehkhana (cellar). Defendant no.1-appellant have no right over tehkhana and they were never in possession over it. In the objection, filed to application under Order XL Rule 1 CPC by the defendants, there is no specific averment that any religious activity was being performed in the tehkhana (cellar) by the Muslim community. Only vague assertions are made to the effect that defendant no.1 is in possession of entire property. More than 120 days have passed, but defendant no.1 have not filed their written statement as envisaged in Order VIII Rule 1 CPC, and there is nothing on record to establish even remotely that the property in question is a Waqf property. By order impugned, no new right has been created by the plaintiff-respondent no.1 and the worship and rituals have taken place within the forecorners of tehkhana (cellar), and not beyond it.

43. It was further submitted that in Din Mohammad (supra), a map was filed on behalf of the Secretary to the State of India (the defendant of that suit). In the map so filed, there is clear mention of Vyas tehkhana, the map was exhibited in the suit. It was next contended that during the survey being made in Settlement Plot No.9130, pursuant to the order dated 21.07.2023 having been confirmed by Supreme Court of India on 24.08.2023 in Original Suit No.18 of 2022 (Rakhi Singh and Another Vs. State of U.P. and Ors.), it was revealed that doors of tehkhana (cellar) premises in question had been removed and number of articles for worship including idols were lying there.

44. The plaintiff apprehended that defendant no.1 might capture tehkhana (cellar) in question, or they could destroy the objects of worship lying there after exit of Archaeology Survey of India team. In these circumstances, the prayer for appointment of Receiver was made. Only a temporary arrangement was made for performing worship in Vyas Ji tehkhana during pendency of suit as it was going on till 1993 and was reduced to one day in a year after 1993 when the entire area was barricaded by iron-fence. The counsel through an application filed under Section 107 CPC has brought on record the documents from the year 2014 to 2023 to establish that 'navahan path' is being observed in Vyas Ji tehkhana every year. The documents have been signed by Jitendra Nath Vyas, Deputy Magistrate, C.O. Security, Duty Officer, CRPF, S.H.O. Chowk, I/c LIU also. The action of the State Government depriving the plaintiff and other priest to perform worship within the tehkhana (cellar) is in violation of Section 3(1) of the 1991 Act and also in

violation of the Article 25 of the Constitution of India.

45. Sri Jain, learned counsel then contended that there is no clash of interest of District Magistrate performing his duties as a Receiver and also as Member of Board of Trustees. According to him, the District Magistrate is also a Member of Executive Committee of the Trust under Section 19(2)(b) of the Temple Act, 1983. The Supreme Court on 17.05.2022 in Special Leave to Appeal (C) No.9388 of 2022 in the SLP filed by the appellant against the judgment and order dated 21.04.2022 of this Court in suit of Rakhi Singh had directed that the District Magistrate, Varanasi shall ensure that the area where the Shiva Linga is stated to have been found, as indicated in the order, shall be duly protected.

46. The Supreme Court further on 20.05.2022 while transferring the Civil Suit No.693 of 2021 which was pending before the Civil Judge (Senior Division), Varanasi to the Court of District Judge, Varanasi further directed the District Magistrate to make adequate arrangement for ensuring the due observance of Waju for religious observance.

47. According to him, the District Magistrate has been rightly appointed as Receiver of premises in question. He works in different capacities, namely, as Executive Member under the Act of 1983, as administrative head of the District, and Collector while discharging revenue duties. By appointing him Receiver, no harm will be caused to defendant no. 1-appellant and no new rights or obligations have been conferred to the District Magistrate by the order impugned. It is under Section 14 (a) of the Temple Act, 1983 that the Trust Board has to make arrangement for due and proper performance of worship, service and rituals, daily or periodically, general or special along with other deities of the temple in accordance with the Hindu Shastras and scriptures and usage.

48. It was lastly contended that a perusal of the suit would show that relief granted by impugned order are different from main relief claimed in the suit. It is noteworthy that no relief has been granted to the plaintiff, but direction has been issued to District Magistrate to make arrangement of worship within the tehkhana (cellar) prevalent till 1993 and thereafter in reduced form i.e. once in a year. According to him, if relief is prayed to direct the statutory authority to perform its duties cast upon it under law and by interim order, Court directs such statutory authority to carry out legal obligations under the statute, such an order cannot be questioned that it amounts to granting final relief.

49. Sri C.S. Vaidyanathan, learned Senior Counsel appearing for respondent no.2 confined his argument to the appointment of Receiver under Order XL Rule 1 of CPC. According to him, the Court is empowered to appoint a Receiver of any property whenever it is just and convenient to do so. The expressions “just and convenient” is a practical, non-technical standard that permits the Court to take into account the factual consideration of a particular case to farther the interest. Simply put the standard is of a varying nature, giving the Court a wide discretion in the appointment of a Receiver. Typically, it would be just for the Court to appoint a Receiver when the evidence, on the basis of which, the Court is to act is very clearly in favour of the plaintiff and

risk of eventual injury to the defendant is very small. In other words, if the plaintiff makes an application for the appointment of Receiver, the plaintiff must, prima facie, show that it has a very good chance for succeeding in the suit. In the instant case, based on the evidence on record, it is submitted that the standard for appointment of the Receiver stands satisfied.

50. The material on record, prima facie, demonstrates that tehkhana (cellar) has been under ownership of the Vyas Ji family. The evidence of ownership is established from the map that was filed by the State (Secretary of State), defendant no.1, in the suit registered as Original Suit No.62 of 1936 between **Din Mohammad and Others Vs. Secretary of State**, which describes the tehkhana (cellar), at issue, as the tehkhana owned by Vyas Ji. The map was exhibited as 'Ex-FF', and admitted against the plaintiff in that particular suit under the signature of IInd Additional Sub Judge of Varanasi. In the said suit, Vyas Ji was not impleaded as a party, nor plaintiff therein contested the map, demarcation of the structure related to the property in question. Thus, the issue of 'possession' of the structure known as tehkhana owned by Vyas Ji vis-a-vis, the plaintiff in Civil Suit No.844 of 2023 cannot be challenged in the current legal proceedings and stands settled against the appellant therein. The appellant, therefore, does not have any right to object the entry of the structure by the plaintiff consequently, prima facie, issue of possession of property in question dedicated to the deity stands established in favour of the plaintiff in the suit, out of which, the present appeal has arisen. This aspect not only negates the very basis of appellant's plea regarding its possession of the property in question, but also provide strong prima facie inaccessible evidence of possession in favour of the predecessors of the plaintiff in the present suit. This possession continued until the State denied access to the predecessor of the plaintiff to the property in question by means of placing a blockage or barricading. The predecessors of the plaintiff had locked the property in question prior to the barricading and the Commissioner's report dated 30.07.1996 filed in Civil Suit No.637 of 1996 before the Court of Civil Judge, Varanasi amply demonstrates the presence of the locked place by a predecessor of the plaintiff on the gate of the property in question and supports the appointment of a Receiver. Reliance has been placed upon the decision rendered in case of **Madan Lal Vs. Sneh Gupta, AIR 2001 Del 433**. Relevant paragraph nos. 5, 8, 12, 13 and 14.

51. It was then contended that appointment of Receiver in the instant case is also supported by social situation which is the worshipping of deities inside the tehkhana by the plaintiff and lakhs of worshippers, a social situation of this immense gravity is a relevant consideration to examine the justness and convenience under Order XL Rule 1 of the Code. Reliance has been placed upon the decision of the Bombay High Court in case of **Syed Khuwaja Syed Ahmed Vs. Maharashtra Housing and Area Development Authority, 1983 Mah LJ 120**.

52. Lastly, it was contended that there was no conflict in the function of District Magistrate, while performing the duty as Receiver as per the orders of the Court, being an Ex-officio Member of Board of Trustees under the Temple Act, 1983. As the Receiver, the Court had directed the District Magistrate to arrange for worship of deities present inside the tehkhana

(cellar), at issue, through a priest nominated by the Board of Trustees. The functions to be performed by the Receiver, the District Magistrate are consisting with the duties of the Board of Trustees under Section 13 and 14 of the Temple Act, 1983. Thus, in reality, the there is no conflict between the two. In any event, no malice in law or malice, in fact, can be, or has been imputed to the District Magistrate in the present case.

ANALYSIS

53. Having heard the respective counsel for the parties and after perusing the material on record, I proceed to analyse the submissions made from both the sides.

54. Primarily, through both the appeals the appellant had questioned the appointment of Receiver by the Court below on 17.01.2024 and subsequently by the order dated 31.01.2024 directing the Receiver for arranging worship and rituals of the deities by the priest appointed by plaintiff and Shri Kashi Vishwanath Trust Board in tehkhana (cellar). Besides this some other question has been raised by the appellant for consideration and determination by this Court.

55. I will first take up the issues in regard to the appointment of District Magistrate, Varanasi as Receiver of Vyas Ji tehkhana (cellar) by order dated 17.01.2024 and order dated 31.01.2024 directing the Receiver for arranging worship of deities situated in tehkhana (cellar) by the priest appointed by plaintiff and Shri Kashi Vishwanath Trust Board.

56. Plaintiff respondent no. 1 filed a civil suit seeking relief of declaration, permanent injunction, mandatory injunction for the property in dispute alleged as 'Vyas Ji Tehkhana' (cellar) situated in Settlement Plot No. 9130, arraying the appellant as defendant no. 1 and Shri Kashi Vishwanath Trust as defendant no. 2. Relief for mandatory injunction has been sought directing the defendant no. 2 to allow the plaintiff, co-pujaris and devotees to perform puja and rituals within the cellar and also a direction upon the defendant no. 2 to act in accordance with the Section 13 and 14 of the Temple Act of 1983 and make provision for worship within the cellar.

57. An application 9-C under Order XL Rule 1 CPC was also filed in the month of September 2023 for appointing Receiver, as plaintiff apprehended that post survey done by ASI, Receiver needs to be appointed to protect the property in dispute from being dissipated by defendant no. 1, and the worship, which was conducted by Vyas family till the month of December 1993, and stopped by the oral orders of State Government, should continue under the control and supervision of Receiver by a priest appointed by the plaintiff, co-pujaris, the nominee of defendant no. 2 Shri Kashi Vishwanath Trust Board. Both the prayers were made in the application as prayer (a) and (b).

58. Objections were filed by the defendant no. 1 alleging that averment made in the application were totally false and baseless and they are in possession over the disputed plot. Heavy reliance was placed upon the decision rendered in Suit No. 62 of 1936 decided in the year 1937. The Court below allowed the application 9-C on 17.01.2024 and appointed the District Magistrate, Varanasi as the Receiver. Pursuant to the order, the District Magistrate took over the charge as

Receiver on 24.01.2024. Thereafter, the Court below on 31.01.2024 granted relief (b) exercising power under Section 151/152 CPC.

59. The appellant has assailed both the orders appointing Receiver on 17.01.2024 and directing for worship in Vyas Ji tehkhana (cellar) on 31.01.2024 on the ground that the Court below could not have appointed Receiver under Order XL Rule 1 CPC as the property stood settled as Hanafi Muslim Waqf by the judgment dated 25.08.1937 in case of **Din Mohammad (Supra)**. Further, the right to worship could not have been granted under Section 151 or 152 CPC amending the judgment, decree or order as there stood no clerical, arithmetical mistake in the order or errors arising therein from any accidental slip or motion. The Court had become *functus officio* once application 9-C stood decided on 17.01.2024.

60. Both the questions of appointment of Receiver under Order XL Rule 1 CPC and order passed on 31.01.2024 under Section 151/152 CPC are inter twined and needs adjudication simultaneously.

61. Order XL Rule 1 CPC provides for appointment of Receiver where it appears to the Court to be just and convenient, the Court may by order :- (a) appoint a Receiver of any property, whether before or after the decree, (b) remove any person from the possession or custody of the property, (c) commit the same to the possession, custody or management of the Receiver; and (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such those powers as the Court thinks fit.

62. The object of appointing a Receiver is to protect, preserve and manage the property during the pendency of a suit. The words "to be just and convenient" have been substituted for the words "to be necessary for the realization, preservation or better custody, or management of any property, movable or immovable, subject of a suit or attachment". The effect of this amendment is that the Court may now appoint a Receiver not only in a particular case specified in the old section, but in every case in which it appears to the Court to be just and convenient to do so.

63. The power of the Court to appoint a Receiver under this order is subject to the controlling provision of Section 94 and is to be exercised for preventing the ends of justice from being defeated. Section 94 CPC reads as under;

"94. Supplemental Proceedings.-In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the

person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient."

64. The source of power of the Court to grant interim relief is under Section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter comes before the Court, the Court has to examine the facts of each case and ascertain whether the ingredients of Section 94 read with rules, in an order, are satisfied and accordingly grant an appropriate relief.

65. In **Vareed Jacob Vs. Sosamma Geevarghese and Ors., 2004 (6) SCC 378**, the Apex Court held that it is only in cases where circumstances do not fall under any of the rules prescribed that the Court can invoke its inherent power under Section 151 CPC.

66. In **Mulji Umershi Shah Vs. Paradisia Builders Private Limited, AIR 1998 Bombay 87**, Bombay High Court held that appointment of Receiver can be made on the application of either parties to the litigation as well as suo moto and therefore, absence of application shall not preclude the Court from passing such orders if it is just and convenient.

67. In **S.B. Industries Vs. United Bank of India, AIR 1978 189**, Division Bench of this Court while considering the appointment of Receiver held that in order to justify the appointment of Receiver , the plaintiff must establish a reasonable possibility that the plaintiff will ultimately succeeds in obtaining the relief claimed in the suit. The requirement, thus, is that he must establish a good prima facie case. The Court further held that appointment of a Receiver is, as a general rule, discretionary, and not a matter of right. The Court also observed that a Receiver has no power except such as are conferred upon him by the orders by which he is appointed.

68. In **Satyanarayan Banerji & Another Vs. Kalyani Prosad Singh Deo Bahadur & Others, AIR 1945 CAL 387,** the Court held that object and purpose of appointment of a Receiver may generally be stated to be the preservation of subject matter of the litigation pending, a judicial determination of the rights of the parties thereto. The Receiver is appointed for the benefit of all concerned, he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed. The appointment of a Receiver is an act of Court and made in the interest of justice. He is an officer or representative of the Court subject to its order. His possession is the possession of the Court.

69. In **T. Krishnaswamy Chetty (Supra)** Madras High Court had laid five principles which can be described as "panch sadachar" of our Courts exercising equity jurisdiction in appointing Receivers. Relevant paragraph no. 13 of the judgment is extracted here as under;

"13. The five principles which can be described as the 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is

not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding: — *'Mathusri v. Mathusri,'* 19 Mad 120 (PC) (Z5); — *'Sivagnanathammal v. Arunachallam Pillai'*, 21 *Mad LJ* 821 (Z6); — 'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (Z7); — *'Tirath Singh v. Shromani Gurudvvara Prabandhak Committee',* AIR 1931 Lah 688 (Z8); — '*Ghanasham v. Moraba*', 18 Bom 474 (Z9); — *'Jagat Tarini Dasi v. Nabagopal Chaki'*, 34 Cal 305 (Z10); — *'Sivaji Raja Sahib v. Aiswariyanandaji*', AIR 1915 Mad 926 (Z11); — *'Prasanno Moyi Devi v. Beni Madhab Rai*', 5 All 556 (Z12); — *'Sidheswari Dabi v. Abhayeswari Dabi'*, 15 Cal 818 (Z13); — *'Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das',* AIR 1925 Lah 349 (Z14); — '*Bhupendra Nath v. Manohar Mukerjee'*, AIR 1924 Cal 456 (Z15).

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the S. suit. — *'Dhumi v. Nawab Sajjad Ali Khan'*, AIR 1923 Lah 623 (Z16); — '*Firm of Raghubir Singh Jaswant v. Narinjan Singh*', AIR 1923 Lah 48 (Z17); — *'Siaram Das v. Mohabir Das*', 27 Cal 279 (Z18); — *'Muhammad Kasim v. Nagaraja Moopanar'*, AIR 1928 Mad 813 (Z19); — *'Banwarilal Chowdhury v. Motilal'*, AIR 1922 Pat 493 (Z20).

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. — 'Manghanmal Tarachand v. Mikanbai', AIR 1933 Sind 231 (Z21); — *'Bidurramji v. Keshoramji*', AIR 1939 Oudh 61 (Z22); — '*Sheoambar Ban v. Mohan Ban*', AIR 1941 Oudh 328 (Z23).

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. — 'Nilambar Das v. Mabal Behari', AIR 1927 Pat 220 (Z24); — 'Alkama Bibi v. Syed Istak Hussain', AIR 1925 Cal 970 (Z25);

— 'Mathuria Debya v. Shibdayal Singh', 14 Cal WN 252 (Z26); — 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc."

70. In the instant case the plaintiff claims to derive his title of Vyas Ji tehkhana (cellar) from his predecessors in interest. Vyas Ji tehkhana (cellar), according to family pedigree given in paragraph no. 4 of the plaint, is in possession of Vyas family since the year 1551 and the plaintiff succeeded through one Som Nath Vyas, who had executed a Will in his favour and his brother, on 28.02.2000 and also to the share of Pt. Chandra Nath Vyas, who had executed a Will on 21.01.2014 in favour of plaintiff and his brother. Both, Som Nath Vyas and Pt. Chandra Nath Vyas succeeded pursuant to the Will executed on 01.07.1968 by Baijnath Vyas.

71. Reliance placed by the appellant on the decision of **Din Mohammad (Supra)** does not help their case principally on the ground that in Suit No. 62 of 1936 a map was filed by the State (Secretary of State) defendant no. 1 of that suit, which was admitted by the Court against the plaintiff Din Mohammad on 14.05.1937 and exhibited as "Ex: FF", wherein the tehkhana owned by Vyas family has been shown, meaning thereby that Court in the year 1937 admitted the existence of Vyas family and the tehkhana (cellar) owned by them. The map filed by Secretary of State is part of record of the judgment of year 1937, heavily relied upon by the appellant.

72. The existence of Vyas tehkhana (cellar) owned by Vyas family in the year 1937 is a *prima facie* proof of the continues possession claimed by the plaintiff till the year 1993.

73. Five principles laid down in Chetty's case clearly provide that Court should not appoint a Receiver except upon proof by plaintiff that *prima facie* he has a very excellent chance of succeeding in suit. Further, it was held that appointing a Receiver will not be made where it has the effect of depriving a defendant 'de facto' possession since that might cause irreparable wrong. Here the appellant failed to make out a prima facie case, either through pleading or by document regarding their prima facie possession over the disputed property except bald assertions in the objections.

74. Neither appellant nor plaintiff were a party in the suit of Din Mohammad. The rights of appellant were never regarded by the Court, but on the other hand map filed by the State demonstrating tehkhana (cellar) owned by Vyas family have been admitted against Din Mohammad, makes out a strong case for the appointment of a Receiver. Moreover, the judgment in Din Mohammad's case takes note of various orders passed in cases of Vyas family right from 1852 to 1906.

75. Plaintiff's contention cannot be discarded at the stage of appointment of

Receiver in view of documents placed demonstrating worship being carried out in Vyas Ji tehkhana (cellar) by Vyas family since British era having been abruptly stopped in December 1993, when the disputed area of Settlement Plot No. 9130 was barricaded and iron-fenced subsequent to the demolition of Babri Mosque in the year 1992.

76. The argument of appellant, not questioning the action of the State after 1993 by plaintiff, has to be seen in the light of the fact that Som Nath Vyas, as next friend of Adi Visheshwar, from whom the plaintiff succeeded, had filed a Civil Suit No. 610 of 1991 in respect of Settlement Plot No. 9130, 9131 and 9132 claiming relief of declaration, prohibitory and mandatory injunction against the defendant therein. As the worship was going on, Som Nath Vyas never questioned the action of the State and the further proceedings of that suit was stayed by this Court in the year 1998. The right of Shebaitship was transferred in favour of plaintiff by Som Nath Vyas in the year 2000 and by Pt. Chandra Nath Vyas in the year 2014.

77. The Commissioner's report dated 30.07.1996 filed in Civil Suit No. 637 of 1996 before the Court of Civil Judge, Varanasi, amply demonstrate the presence of lock put by the predecessors of plaintiff on the gate of property in question, which again provides a strong prima facie evidence of possession in favour of plaintiff and supports the appointment of Receiver. Thus both, the map, part of Original Suit No. 62 of 1936, and Commissioner's report dated 30.07.1996 filed in Civil Suit No. 637 of 1996, not only negates the very basis of appellant's plea regarding possession of property in question, but also advances prima facie evidence of possession in favour of predecessors of plaintiff.

78. Now coming to the second aspect of the case, which is the order passed on application 9-C on 31.01.2024, alleged to have been passed by the Court below exercising power under Section 151/152 CPC.

79. It has been vehemently submitted by the appellant that only clerical and arithmetical mistakes in the order or error arising therein from any accidental slip or omission, could be corrected by the Court on its own motion or on the application made by a party and not otherwise.

80. Section 151 CPC is inherent power of Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court while Section 152 provides for the amendment of judgments, decree or orders. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either on its own motion or on the application of any of the parties.

81. As the Code of Civil Procedure is not exhaustive, the simple reason being that the Legislature is incapable of contemplating of all the possible circumstances which may arise in any future litigation and consequently, for providing the procedure for them. It is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the Court can come to its aid for doing real and substantial justice between the parties.

82. The basic principle of Section 151 is to act ex *debito justitiae*. In **Jet Ply Wood (P) Ltd. Vs. Madhukar Nowlakha, 2006 (3) SCC 699**, the Apex Court had the occasion to consider the scope of inherent power of the Court under Section 151 and held that in cases where the procedure has not been provided, inherent power of Court can come to its aid for doing real and substantial justice between the parties.

83. In **Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Ji Seth Hira Lal, AIR 1962 (SC) 527**, the Apex Court, while dealing with Sections 94, 151 and order XXXIX Rule 1 in regard to grant of temporary injunction, held that nothing in the Court shall be deemed to limit, or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. It was further held that Section 94 does not control Section 151, or the inherent power is limited. According to Apex Court, the inherent power under Section 151 has not been conferred upon the Court; it is power inherent in the Court by virtue of its duty to do justice between the parties before it.

84. Section 152 CPC is based on two principles, namely, that the act of Court should not prejudice any party and that the Courts have the duty to see that records are true and present the correct state of affairs. An arithmetical mistake is a mistake in calculation while a clerical mistake is a mistake of writing or typing error from an accidental slip or omission or an error due to careless mistake or omission may unintentionally and unknowingly also.

85. Those matter which require elaborate argument or evidence from question of fact or law for its discovery cannot be said to be an error arising out of accidental slip or omission to bring within the ambit of Section 152. The basis of provision under Section 152 CPC is founded on maxim *"actus curiae niminem gravabit"*, i.e. an act of Court shall not prejudice no man.

86. In **Freeman Vs. Tranah (12 CB 406) Cresswell J.** said that the *maxim* is founded upon justice and good sense which serves a safe and certain guide for the administration of law. An unintentional mistake of the Court which may prejudice cause of any party must and alone could be rectified.

87. In **Master Construction Company (P) Ltd. Vs. State of Orissa, AIR 1966 SC 1047**, Apex Court observed that arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate this point, it was said that in a case where the order contains which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the Court which may say something or omit to say something which it did not intend to say or omit.

88. The Division Bench of Bombay High Court in **Delta Products (P) Ltd. Vs. Industrial Credit & Investment Corporation of India Ltd. 1980 MLJ 156**, considering the provisions of Section 151 and 152 CPC held that while considering the principle on which the provisions of Section 151 and 152 CPC are based, a broad view must be taken of provisions of Section 151 and 152 CPC. The procedural laws are primarily meant to

do justice between the parties. If, therefore, there are mistakes that are capable of being rectified and they answer the description of mistakes in Section 152, the Court should normally be inclined to rectify the mistake and do justice between the parties. Mistakes can be corrected under Section 152 CPC with a view to bring about the real meaning and extent of the decree that was passed by the Court. For that purpose not only mistakes committed by the Court in its own proceedings but the mistakes having accidentally crept in the pleadings of the parties can also be corrected.

89. In **Sampuran Singh Vs. Nandu, AIR 2004 P&H 239**, the Court held that Section 152 CPC is based on a laudable principle that an act of the Court shall prejudice no party and that the Courts have a duty to see that their records are true and represent the correct state of affairs. It is well settled that power of the Court under Section 152 CPC is not restricted to correction of errors in decree drawn up by ministerial staff only, rather it can be exercised even to correct the judgments pronounced and signed by the Court. It cannot be overlooked that the procedural laws are primarily meant to do justice between the parties. If there are mistakes which are capable of being rectified and they answer the description of mistakes under Section 152 CPC, the Court should invariably rectify the mistakes and do justice between the parties.

90. In **Tulsipur Sugar Company Vs. State of U.P. AIR 1970 SC 70**, Apex Court held that the basis of the power to amend decrees and orders is on the principle that no party should suffer any detriment on account of a mistake or an error committed by adjudicating authority.

91. In **Mellor Vs. Swire (1885) 3030 ChD 239, 247**, it was held "it would be perfectly shocking if the Court could not rectify an error which is real the error of its own minister".

92. Lord Penzance in **Lawrie Vs. Lees (1881) 7 AppCas PP 34** said "I cannot doubt that under the original powers of the Court independent of any order i.e. made under the judicature act, every Court has the power to vary its own order which are drawn up mechanically in the registry or in the office of the Court, to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful to make it plain. I think that power is inherent in every Court".

93. Full Bench of this Court in **Ganesh Vs. Sri Ram Lalaji Mahraj Birajman Mandir, AIR 1973 All 116**, while dealing with Sections 151 and 152 CPC relying upon the earlier decision of this Court in case of **Aziz Ullah Khan Vs. Court of Wards, AIR 1932 All 587** held that power of the Court for correcting mistake are not restricted to Section 152, but can be exercised under Sections 151 and 153, where there is an accidental mistake occurring in the order of the Court.

94. In **State of Punjab Vs. Darshan Singh, 2004 (1) SCC 328,** the Apex Court while dealing with Section 152 held that power under the said section are neither to be equated with power of review, nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions or mistakes which might have

been committed by the Court while passing the judgment, decree or order. The Omissions sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which proper remedy for the aggrieved party if at all is to file an appeal or revision before higher forum. An unintentional mistake of Court which may prejudice the cause of any party must and alone could be rectified.

95. In the instant case application filed under Order XL Rule 1 CPC was with a combined prayer for appointment of Receiver as well as for direction to the Receiver to allow plaintiff, co-pujaris, nominees of Shri Kashi Vishwanath Trust Board and the devotees to perform worship and rituals within the cellar after making suitable provisions by making changes in the iron-fencing.

96. Prayer (a) made in the application was granted on 17.01.2024 while application 9-C was allowed. Noticing the accidental slip/omission of non mentioning relief (b) in the order, the Court was informed on 29.01.2024 and after hearing the appellant, who did not raise any objection as to relief (b), it was granted on 31.01.2024.

97. It was an omission on the part of Court below while allowing the application 9-C in entirety on 17.01.2024 that second relief was not mentioned. The order dated 31.01.2024 stands covered under the powers of Court given in Section 151 and 152 CPC, as it is neither reviewing the order, nor the Court under the guise of invoking Section 152 is granting any further relief after the result of the judgment was rendered earlier.

98. The omission/mistake, which was sought to be corrected does not affect the merit of the case, as application 9-C was allowed in entirety on 17.01.2024, where both the prayers were made by the plaintiff, and only first prayer finds mention in the order.

99. The maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man, shall be applicable in the instant case, as it is founded upon justice and good sense which serves a safe and certain guide for the administration of the law. Once the Court had allowed the application 9-C and appointed Receiver, the relief (b) which was part of that application, stood granted and only rectification was made on 31.01.2024.

100. Reliance placed upon the decision of Apex Court in case of **Dwaraka Das (Supra)** is not applicable in the instant case, as in that case an application was subsequently moved under Section 152 CPC after decree of the Trial Court for awarding of interest from the date of suit till the date of decree by correcting the judgment and the decree. In the instant case, application 9-C stood allowed on 17.01.2024 and only relief (b) was not incorporated in the order, which was subsequently done on 31.01.2024.

101. In **Imtiaz Hussain (Supra)** the award of Labour Court was modified subsequently, and the Apex Court while dealing with the power under Section 152 CPC found that the Court had become functus officio and the Labour Court was not justified in amending the award as was originally made. The said case is distinguishable in the present set of case.

102. Reliance placed upon **Plasto Pack (Supra)** by the appellant is distinguishable in the facts of present case, as in that case the decree passed by the learned Single Judge was modified on the motion moved by one of the party and the decree was amended without issuing notice to the other side. In the instant case the appellant had appeared and heard on 29.01.2024 and 30.01.2024 before the order was passed on 31.01.2024.

103. Argument raised from the appellant side that Section 152 CPC cannot be invoked to modify, alter or add to the term of original order or decree as to in fact pass an effective order after an order has been passed, has no legs to stand in view of the various decisions of the Apex Court as well as the other High Courts dealing with the power and scope of Section 152 CPC.

104. It has already been held that a broad view must be taken of provisions of Section 152 CPC as the procedural laws are primarily meant to do justice between the parties, thus, if any mistakes that have crept are capable of being rectified and answer the description of mistakes enumerated in Section 152 CPC. In Section 152 the Court should normally be inclined to rectify such mistakes and do justice between the parties.

105. It is not a case where an appeal or review lies, as application 9-C was allowed in entirety but omission in the order was in regard to relief (b) which was added later by another order. It is a case where two reliefs were sought by a common application which was granted by the Court but due to accidental slip or omission only relief (a) was incorporated, while relief (b) was left out. Perusal of the order dated 17.01.2024 clearly reflects the granting of relief in favour of plaintiff and there being no denial as to relief (b). It was by subsequent order that the second relief was made part of that order.

106. An attempt has been made from the appellant side that the order dated 31.01.2024 is not a suo moto exercise by the Court nor on any application by the plaintiff, thus Section 152 is not attracted.

107. Section 152 is an enabling provision for getting the judgment, decree or order corrected by the Court where a clerical or arithmetical mistake has arisen, or there are errors arising from any accidental slip or omission.

108. The word “either on its own motion” not only encompasses those cases which come to the notice of the Court on its own, but also includes cases brought to the notice of the Court. Once plaintiff on 29.01.2024 brought to the notice of the Court the omission which occurred in the order dated 17.01.2024, the Court below after hearing both the parties proceeded to incorporate relief (b).

109. Both the action of the Court appointing Receiver and adding relief subsequently by another order are the issues intertwined and are thus decided on the basis of reasons given above.

110. Thus, I find that there is no illegality or mistake committed by the Court below while appointing Receiver under Order XL Rule 1 CPC on 17.01.2024 and, thereafter, directing for arranging worship in Vyas Ji tehkhana (cellar) on 31.01.2024 in view of the application 9-C having been allowed earlier and forming part of the earlier order.

111. The appointment of Receiver in no way affects the right or title of any of the party during pendency of the suit as Receiver is appointed to protect the property being a representative of the Court and of all the parties interested in litigation. He being the officer or representative of the Court is subject to the orders of the Court, and his possession is the possession of the Court.

112. Failure of appellant to establish *prima facie* possession over the disputed property, and plaintiff succeeding in building up a strong prima facie case negating the stand of appellant, leads to undeniable situation that stopping worship and performance of rituals by the devotees in the cellar would be against their interest.

113. *Prima facie* I find that act of the State Government since year 1993 restraining Vyas family from performing religious worship and rituals and also by the devotees was a continues wrong being perpetuated.

114. The second ground of challenge to orders impugned rest on the ground that by way of interlocutory mandatory injunction, the Court below has permitted worship in the cellar under the supervision of Receiver, so appointed, which amounts to final relief.

115. Before adverting to decide this issue, a glance of some of the provisions of the Temple Act, 1983 are necessary for better appreciation of the case. Section 4 (9) defines "Temple" which is as under:-

"Temple" means the Temple of Adi Vishweshwar, popularly know as Sri Kashi Vishwanath Temple, situated in the City of Varanasi which is used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines subshrines and the asthan of all other images and deities, mandapas, wells, tanks and other necessary structures and land appurtenant thereto and additions which may be made thereto after the appointed date;"

116. Chapter II of the Temple Act, 1983 provides for the Board of Trustees. Section 5 deals with the vesting of Temple and its endowment. The ownership of the Temple and its endowment shall vest in the deity of Shri Kashi Vishwanath. Section 6 deals with the constitution of Board of Trustees. Section 6(1) provides that from the appointed date, the administration and governance of the Temple and its endowment shall vest in a Board to be called the Board of Trustees for Shri Kashi Vishwanath Temple. Sub-Section 2 of Section 6 enumerates the list of Board of Trustees. Section 6 (2) (i) provides the District Magistrate, Varanasi to be ex-officio Member of Board of Trustees.

117. Section 13 provides Board to be in possession of the Temple and its properties, while Section 14 details the duties of the Board. Sub-Section (a) of Section 14 provides that the Board shall arrange for due and proper performance of worship, service and rituals, daily or periodical, general or special, of Sri Kashi Vishwanath and others deities in the Temple, ceremonies and other religious observances in accordance with the Hindu Shastras and scriptures and usage. Thus, from the conjoint reading, it is clear that after the enforcement of the Temple Act, 1983 on 12.10.1983, a Board of Trustees was constituted for providing proper and

better administration of Sri Kashi Vishwanath Temple, Varanasi and its endowment and for matters connected therewith or incidental thereto.

118. The definition of Temple means the Temple of Adi Vishweshwar, popularly known as Shri Kashi Vishwanath Temple, situated in the City of Varanasi which is used as a place of public religious worship and dedicated to or for the benefit of or used as of right by Hindus, as a place of public religious worship of the Jyotirlinga and includes all subordinate temples, shrines, sub-shrines and the asthan of all other images of deities, mandapas, wells, tanks and other necessary structures and land appurtenant thereto.

119. Sub-Section (a) of Section 14 clearly spells out the duties of the Board of Trustees which has to arrange for due and proper performance of worship service and rituals, daily or periodically, general or special of Shri Kashi Vishwanath and other deities in the Temple according to Hindu Shastras and scriptures and usage.

120. Entire case of plaintiff hinges around the map filed in Suit No. 62 of 1936 by the Secretary of State, which was admitted against Din Mohammad on 14.05.1937 describing the cellar as Vyas tehkhana. Primarily, plaintiff succeeded from pleading and his documents regarding possession over the cellar since British era, till it was barricaded and iron-fenced.

121. On the contrary appellant miserably failed to demonstrate his prima facie possession over the cellar, and over reliance placed on **Din Mohammad's** case where they were deleted from the array of parties inevitably leads to *prima facie* conclusion regarding Vyas family possession over the cellar in dispute.

122. Appellant having not claimed the cellar at any point of time from Vyas family after 1937 till December 1993 leads to adverse inference against them as to possession over the cellar. Plaintiff has been successful in prima facie establishing their possession through Vyas family since 1551.

123. Apex Court in **Dorab Cawasji (surpa)** had laid down the parameters for the grant of equitable relief of interlocutory mandatory injunction. The Court proceeded to lay the guidelines for granting interim mandatory injunction that where; (a) the plaintiff has a strong case for trial i.e. it shall be a higher standard than a prima facie case i.e. normally required for a prohibitory injunction; (b) it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money; (c) the balance of convenience is in favour of one seeking such relief.

124. The Court further held that interlocutory mandatory injunctions are granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted, or to compel the undoing those acts that have been illegally done, or the restoration of that which was wrongfully taken from the party complaining.

125. Entire case of the plaintiff rest on the premise that the State Government illegally in 1993 stopped the worship and rituals in the cellar. The mandatory injunction sought as relief (e) in the suit is that Shri Kashi Vishwanath Trust Board to act in accordance with Sections 13 and 14.

By grant of permission to worship and carry out rituals in the cellar is only to restore the status quo of the last non-contested status, and does not amount to final relief.

126. Plaintiff has complained of the wrongful action of the State and for restoring the status quo ante. Map exhibited as "Ex-FF" in Suit No. 62 of 1936 and admitted against Din Mohammad on 14.05.1937, is a conclusive proof of the cellar owned and in possession of Vyas family in 1937. No litigation was brought by Din Mohammad or the present appellant challenging the status of plaintiff which leads to inevitable conclusion that Vyas family continued in possession of cellar since British era till 1993.

127. Judgment relied by the appellant actually helps the case of the plaintiff as not only a strong case for trial has been made out, but also the balance of convenience tilts in favour of the plaintiff. The worship and rituals which continued to be performed in the cellar by Vyas family till 1993 was stopped by illegal action of State without there being any order in writing. Submission that grant of interlocutory mandatory injunction amounts to granting of final relief is misplaced. Appellant could not establish prima facie possession over the property when area was iron-fenced and barricaded in 1993.

128. Article 25 of the Constitution of India grants freedom of religion. The Vyas family who continued performance of religious worship and rituals in the cellar could not be denied access by oral order. A citizen right guaranteed under Article 25 cannot be taken away by arbitrary action of State.

129. In the instant case grant of interlocutory mandatory injunction is not a final relief, and rights of appellant will not be prejudiced as they failed to prima facie establish their possession. Reliance placed on **Metro Marines (supra)** and **Mohd. Mehtab Khan (supra)** render no help to the appellant as these cases were decided on the basis of guidelines set out by the Apex Court in case of **Dorab Cawasji (surpa)**.

130. Considering the above, I find that allowing worship and rituals in the cellar under the supervision of Receiver appointed by the Court below requires no interference by this Court. The possession of cellar was already taken by the Receiver on 24.01.2024 and the worship and rituals have already started from 01.02.2024.

131. Next comes for consideration the argument regarding clash of interest in view of Section 6 (2) (i) and Section 19 (1) of the Temple Act, 1983 and the District Magistrate having been appointed as the Receiver.

132. Chapter II of the Temple Act, 1983 provides for the Board of Trustees. District Magistrate, Varanasi is in the list of Board of Trustees as an ex-officio Member. Sub-Section (2) (i) of Section 6 enlist the District Magistrate as ex-officio Member along with other Members given in sub-Section (2) of Section 6.

133. Further, Section 13 provides for the Board to be in possession of the Temple and its properties. Section 14 provides for the duties of the Board. Chapter III deals with the Temple establishment. An Executive Committee is constituted under Section 19 (1) which is to work under the direction of Board, or the State

Government and is responsible for the superintendence, direction and control of the affairs of the temple. District Magistrate, Varanasi is a Member of the Executive Committee under sub-Section (2) of Section 19 along with other officers of the district, and Commissioner being the Chairman.

134. A Receiver under Order XL Rule 1 CPC is appointed by the orders of the Court for preservation of the subject matter of litigation pending, judicial determination of the rights of the parties thereto. He is appointed for the benefit of all and is a representative of the Court and all the parties interested in litigation. His appointment has an act of Court made in the interest of justice. Being an officer or representative of the Court subject to its order, his possession is the possession of the Court.

135. Argument regarding clash of interest in between the office of the District Magistrate and the Receiver appointed by the Court is totally ill-founded. The Temple Act, 1983 clearly provides the District Magistrate who being the ex-officio Member of the Board of Trustees and also Member of the Executive Committee to act as per the duties of the Board and also to comply the directions of the Board and State Government being the Member of Executive Committee responsible for the superintendence, direction and control of the affairs of the Temple.

136. Once, the District Magistrate, Varanasi is performing his duties enumerated under the Temple Act, 1983, his appointment as Receiver by the Court who has to act on the direction and supervision of the Court would not lead to any clash of interest.

137. As in **Satyanarayan Banerji (supra)**, it has already been held that possession of a Receiver is the possession of the Court, and he acts as an officer of the Court subject to its order. The Receiver so appointed cannot act independently, and his appointment is purposely for the preservation of the subject matter of litigation.

138. In view of above, I find that there is no force in the argument led from the appellant side as to the appointment of the District Magistrate, Varanasi as a Receiver of the property in question pending litigation. Moreover, no malice in law or malice in fact, can be or has been imputed to the District Magistrate, Varanasi in the instant case.

139. Another ground raised in the appeal is that the suit is barred in view of Order VII Rule 6 CPC as it has been filed after a delay of 31 years without there being any ground of exemption from limitation law.

140. The issue of limitation is a mixed question of law and fact and the plaint cannot be rejected simplicitor. In the instant case the appellant till date has not filed his written statement and no issues till date have been framed under order XIV CPC.

141. In **Balasaria Construction (P) Ltd. Vs. Hanuman Sewa Trust & Others, 2006 (5) SCC 658** the Apex Court held question of limitation to be a mixed question of law and fact and without proper pleading, framing of an issue of limitation and taking of evidence the plaint cannot be rejected. Relevant paragraph no. 8 is extracted here as under;

"8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure."

142. In **Kamlesh Babu & Others Vs. Lajpat Rai Sharma, 2008 (12) SCC 577**, the Apex Court considering its earlier judgment in **Balasaria Constitution (Supra)** and **Narne Rama Murthy Vs. Ravula Somasundaram, 2005 (6) SCC 614** held that question of limitation is a mixed question of law and fact and can only be decided after the issues are framed.

143. In view of the above, I find that the question of limitation is a mixed question of law and fact, and once the appellant has not filed his written statement and issues have not been framed, this Court cannot go into the such question leaving it open to the appellant to raise such question when the issues are framed.

144. The question as to non-joinder of necessary party and mis-joinder of defendant no. 1 as a party in the suit has to be raised by the appellant by filing written statement and once the issues are settled under Order XIV the Court below will proceed to decide the same. At this stage, the plea taken by the appellant as to non-joinder of necessary party cannot be taken into consideration, and only after the issue in regard to the same is decided by the Court below, the same can be dealt with. Reliance placed upon the decision of Apex Court is distinguishable in the present set of case.

145. A feeble attempt has been made by the appellant's counsel that application under Order XL Rule 1 CPC has been decided by the Court below, while application under Order VII Rule 11 (d) is pending consideration.

146. This Court finds that application under Order VII Rule 11 (d) CPC was filed on 30.01.2024 when the orders were reserved on the application 9-C for amendment of the order passed on 17.01.2024. While the application under Order XL Rule 1 CPC was moved by the plaintiff on 25.09.2023 and was hotly contested by the appellant. I find that the argument raised has no merits as the application under Order VII Rule 11 (d) was filed subsequent to the reserving of the order by the Court below on 30.01.2024.

147. Argument of Sri Gupta that order dated 31.01.2224 is barred by *res judicata* has to be tested on the alter of explanation II and V of Section 11 CPC. The principle of res judicata is based on the need of giving finality to judicial decisions i.e. once a res judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation when a matter, whether on question of fact or on a question of law has been decided between two parties in one suit or proceeding and decision is final, either because no appeal

was taken to higher Court or because appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding to canvass the matter again.

148. In **Subramanian Swamy Vs. State Of Tamil Nadu, 2014 (5) SCC** 75, Supreme Court explained the doctrine of res judicata in the following words;

"The literal meaning of 'res' is 'everything that may form an object of rights and includes an object, subject-matter or status' and 'res judicata' literally means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments'. Res judicata pro veritate accipitur is the full maxim which has, over the years, shrunk to mere 'res judicata", which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence interest reipublicae ut sit finis litium (it concerns the State that there be an end to law suits) and partly on the maxim nemo A debet bis vexari pro una et eadem causa (no man should be vexed twice over for the same cause)."

149. The doctrine of res judicata rest on the premise that it is a plea available in civil proceedings in accordance with Section 11 of CPC. It is a doctrine applied to give finality to 'lis' in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over.

150. In **Escorts Farms Ltd. Vs. Commissioner, Kumauon Division, Nainital, 2004 (4) SCC 281**, Supreme Court held that the literal meaning of 'res' is 'everything that may form an object of rights and includes an object, subject-matter or status' and res judicata literally means 'a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment'.

151. Section 11 of CPC engrants this doctrine with a purpose that a final judgment rendered by a Court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

152. The leading case on res judicata is "**Duchess of Kingstone's case, 2 Smith's LC, 13th Edn, PP 644-45.** A classic passage from the judgment of Sir William de Grey is a statement of the leading principles of res judicata, which extracted as under:

"From the variety of cases relative of judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court, of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any

matter to be inferred by argument from the judgment."

153. In **Ghulam Abbas Vs. State of U.P. 1982 (1) SCC 71**, Supreme Court held that Section 11 is not exhaustive of the general doctrine of res judicata and that the rule of res judicata as enacted in Section 11 has some technical aspects, i.e. the general doctrine is founded on consideration of high public policy to achieve two objectives namely, that there must be a finality to litigation and that the individual should not be harassed twice over on account of the same litigation. Technical aspects of Section 11, as for instance, pecuniary or subject-wise competence or earlier form to adjudicate the subject matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res judicata is to be invoked.

154. In order to decide the question whether a subsequent proceeding is barred by res judicata, it is necessary to examine the question with reference to : (i) the form or a competence of the Court; (ii) the party and the representatives; (iii) matters in issue; (iv) matters which ought to have been made ground for defence or attack in the former suit and (v) the final decision. In order that a defence of res judicata may succeed, it is necessary to not only show that the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the subsequent proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of earlier suit or proceedings.

155. In **Jaswant Singh Vs. Custodian of Evacuee Property, 1985 (3) Scc 648**, Supreme Court held that the cause of action for a proceeding has no relation whatsoever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words, to the media upon which plaintiff or the applicant asked the court to arrive at a conclusion in his favour.

156. In **Deva Ram Vs. Ishwar Chand, 1995 (6) SCC 733,** the Apex Court explained that Section 11 contains the rule of the conclusiveness of the judgment based upon the maxim of Roman jurisprudence *'Interest reipublicae ut sit finis litium'* (it concerns the state that there be an end to law suits) and, partly on the maxim *'Nemo debet bis vexari pro una at eadam causa'* (no man should be vexed twice over for the same cause). The section does not effect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly or substantially in issue in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit.

157. In **Mahadeo Mahto Vs. Hira Lal Verma, AIR 1991 Patna 235**, the High Court held that principle of res judicata applies at different stages of the suit, but it is also well known that interlocutory orders do not operate as res judicata.

158. In **Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993**, Apex Court held that a decision or direction in an interlocutory proceedings of the type provided for by Order IX Rule 7 is not of

the kind which can operate as res judicata so as to bar the hearing on merits on an application under Order IX Rule 13.

159. In **S. Labbai Vs. Hanifa, AIR 1976 SC 1569,** Apex Court held that it is not every matter decided in a former suit that can be pleaded as res judicata in a subsequent suit. To constitute a matter res judicata the following conditions must concur:

Essentials of Res Judicata

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (explanation III) or constructively (explanation IV) in the former suit.

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation VI is to be read with this condition.

(iii) The parties as aforesaid must have litigated under the same title in the former suit.

iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Explanation II is to be read with this condition.

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Explanation V is to be read with this condition.

160. In the instant case, by order dated 17.01.2024 the composite prayer made in application filed under Order XL Rule 1 CPC was allowed, but only relief (a) was incorporated appointing Receiver. Relief (b) was added on 31.01.2024 after it was brought to the notice of the Court and order stood modified/amended in terms of Sections 151/152 CPC. The bar of Section 11, as pleaded, is not attracted in the instant case in view of doctrine of res judicata and the conditions having been laid down in catena of judgments by Apex Court and other High Courts. It was only an act of omission/mistake on the part of the Court that order appointing Receiver was amended/corrected by the Court exercising inherent power vested in it.

161. Thus, I find that the challenge made to the order dated 31.01.2024 on the plea of res judicata is totally unfounded as the relief prayed by the plaintiff was granted on 17.01.2024 but part of it was not incorporated in the order which was subsequently modified/amended.

162. Lastly, an attempt has been made to malign the image and impute motive to the order passed by the Court below on 31.01.2024 on the ground that the officer concerned had passed the order on last day of working.

163. This Court finds that application 9-C was allowed on 17.01.2024 and the District Magistrate, Varanasi had taken over the possession on 24.01.2024. It was on mention made by the plaintiff on 29.01.2024 that the matter was taken up and after hearing the appellant on 30.01.2024 that the order was passed on 31.01.2024 amending the order dated 17.01.2024 by inserting relief (b). The appellant had not filed any objection before the Court below and had contested the matter on merits only. It was the mistake/omission on the part of the Court when application 9-C was allowed on 17.01.2024, and relief (b) was not

incorporated in the order, which subsequently was added by the order dated 31.01.2024. The officer concerned had neither reviewed his order nor had granted any further relief in the garb of powers conferred under Section 151/152 CPC. It was only accidental slip/omission which was corrected to meet the ends of justice.

164. Considering the overall submissions advanced by the respective counsel of the parties and after analysing the material on record, I find that the appellant has not made out any case for interfering in the order dated 17.01.2024 and 31.01.2024 appointing the District Magistrate, Varanasi as Receiver and arranging to carry out worship and rituals in Vyas tehkhana (cellar) under his supervision by the priest, so appointed. Moreover, worship has already started in the cellar since 01.02.2024.

CONCLUSION

165. For the reasons given above, I find that both the appeal filed under Order XLIII Rule 1 (s) CPC fails which questions the order dated 17.01.2024 and 31.01.2024 passed by the District Judge, Varanasi on application 9-C filed under Order XL Rule 1 CPC appointing District Magistrate, Varanasi as Receiver of Vyas tehkhana (cellar) and arranging for worship and performance of rituals by the priest, nominated by the plaintiff and Shri Kashi Vishwanath Trust Board.

166. Thus, both the appeal are hereby **dismissed**.

167. However, no order as to cost.

(2024) 3 ILRA 1765
REVISIONAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 15.03.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Sales/Trade Tax Revision No. 40 of 2021
alongwith
Sales/Trade Tax Revision No. 39 of 2021

Durga Steel Rolling Mills ...Petitioner
Versus
Commissioner of Commercial Taxes U.P. Lko. ...Respondent

Counsel for the Petitioner:
Mudit Agarwal

Counsel for the Respondent:
C.S.C.

-Durga Steel Rolling Mills Thru. Partner Amit Arora vs. Commissioner of Commercial Taxes, U.P., Lko
Neutral Citation No. – 2024:AHC-LKO:22796

U.P. VAT Act, 2008 – Section 54(1)(2) – penalty – mens-rea – evasion of payment of tax – best judgement assessment under Section 28(2) – assessment based on reasonable guess or well grounded estimate – no finding of willful attempt to evade tax – mens-rea an essential pre-requisite condition – penalty cannot be imposed where assessment is made on the basis of best judgement assessment – imposition of penalty in excess of three times not sustainable – judgement and order of Commercial Tax Tribunal set aside

Revision allowed. (E-9)

Cases Cited:

1. M/s Moti Lal Jawahar Lal v. Commissioner of Sales Tax, U.P., Lucknow, 2003 NTN (Vol. 23) 590.

2. Commissioner, Sales Tax, U.P., Lucknow v. S/s Shanti Swarup Raj Kumar Katra Naj, Moradabad, STI 1998 Allahabad High Court 394.

3. Commissioner of Sales Tax, Uttar Pradesh v. Sanjiv Fabrics, (2010) 9 SCC 630.

4. S.S. Flabours v. State of U.P. and another, 2016 (61) NTN DX 100.

5. State of Kerala v. C. Velukutty, 1966 (60) ITR 239 (SC).

6. Commissioner of Income Tax, Calcutta v. Padamchand Ramgopal, (1970) 3 SCC 866.

7. M/s Joharmal Murlidhar and Co. v. Agricultural Income Tax Officer, Assam and others, (1970) 3 SCC 331.

8. Shri S. M. Hasan, S.T.O., Jhansi and another v. M/s New Gramophone House, Jhansi, (1976) 4 SCC 854.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Shri Mudit Agarwal, learned counsel for the revisionist and Shri Sanjay Sarin, learned Additional Chief Standing Counsel appearing for the respondent.

2. Learned counsels appearing for the parties contend that the issue involved in SALES/TRADE TAX REVISION No. - 40 of 2021 and SALES/TRADE TAX REVISION No. - 39 of 2021 are the same. As such, the Court proceeds to hear and decide both the revisions together. For convenience, facts of SALES/TRADE TAX REVISION No. - 40 of 2021 are being taken.

3. This Court vide the order dated 17.08.2021 had admitted the revision. However the questions of law were not framed.

4. Both the learned counsels state that the questions of law which would be relevant for deciding the controversy involved in the instant revision would be as follows:

"(I) Whether the men-rea on the part of the assessee is an essential pre-requisite condition for imposition of penalty under Section 54(1)(2) of the U.P. VAT Act, 2008?

(II) Whether penalty under Section 54(1)(2) of the Act can be imposed where the assessment is made on the basis of Best Judgement Assessment?

(IV) Whether imposition of penalty of 7 times the total tax imposed towards alleged concealed turnover was justified when the express provision of Section 54(1)(2) of the Act provides for imposition of a maximum penalty of 3 times of concealed turnover?"

5. Shri Mudit Agarwal, learned counsel for the revisionist states that although a counter affidavit has been filed in the revision but he does not intend to file any reply thereto and wants to argue the matter finally.

6. As such the Court proceeds to hear and decide the matter finally.

7. The instant revision has been filed challenging the judgement and order dated 06.04.2021 passed by the learned Commercial Tax Tribunal, Bench-2, Lucknow (hereinafter referred to as learned Tribunal) in Second Appeal No. 50 of 2017.

8. The case set forth by learned counsel for the revisionist is that a survey took place on the premises of the revisionist on 23.12.2008. The stock is alleged to have been noted by the surveyors on the basis of presumption. The stock was

found to be recorded more in the books of accounts of the revisionist vis a vis the physical stock. An assessment order dated 30.10.2010, a copy of which is annexure 1 to the revision, was passed against the revisionist under the provisions of Section 28(2) of the U.P. V.A.T. Act, 2008 (hereinafter referred to as the Act, 2008). By the said assessment order the disputed demand was indicated as Rs 12,44,653/-. Being aggrieved, the revisionist filed a first appeal. The learned appellate authority, vide the order dated 27.06.2012, a copy of which is annexure 2 to the revision, reduced the disputed demand by Rs 6,21,875/- and thus a demand of Rs 6,22,778/- remained. Still being aggrieved, the revisionist filed an appeal before the learned Tribunal and at the same time the Department also filed an appeal. Both the appeals were clubbed together and were decided vide common judgement and order dated 22.06.2016, a copy of which is annexure 3 to the revision, whereby the appeal of the revisionist was partly allowed while the appeal of the department was dismissed. While allowing the appeal, learned Tribunal gave a relief to the revisionist of Rs 3,25,625/- thus assessing the tax liable to be paid by the revisionist at Rs 2,46,250/- as stated by Shri Mudit Agarwal, learned counsel for the revisionist.

9. Shri Agarwal states that the judgement and order dated 22.06.2016 passed by the learned Tribunal attained finality as it was not challenged by the revisionist rather the revisionist acquiesced to the said order and has paid the aforesaid amount of Rs 2,46,250/-.

10. It is contended that during pendency of the aforesaid proceedings, a notice dated 30.01.2013 under Section 54(1)(2) of the Act, 2008, a copy of which is annexure 4 to the revision, had been issued to the revisionist. The revisionist filed his reply. Vide order dated 08.05.2013, a copy of which is annexure 5 to the revision, an order of penalty was passed whereby the revisionist has been required to pay an amount of Rs 18,65,625/- against the assessed tax of Rs 6,21,875/-. Being aggrieved the revisionist filed an appeal which was rejected vide the order dated 30.09.2016, a copy of which is annexure 7 to the petition. Still being aggrieved the revisionist filed a second appeal before the learned Tribunal which has also been dismissed vide the judgement and order dated 06.04.2021 as annexed to the revision. Being aggrieved the instant revision has been filed.

11. The argument of learned counsel for the revisionist is that a perusal of serial no. 2 of the table, as provided in Section 54(1) of the Act, 2008, would indicate that in order to attract the penalty, a finding has to be specifically recorded that the dealer has concealed the particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or has submitted a false tax return or has evaded payment of tax which he is liable to pay under the Act and only after such a finding has been recorded by the competent authority can the penalty be imposed.

12. The contention is that a perusal of the order impugned would indicate that no finding of the revisionist having deliberately concealed the particulars of his turnover or having deliberately furnished inaccurate particulars or having deliberately evaded payment of tax has been indicated and consequently the competent authority patently erred in imposing the penalty which aspect has not

been considered by the appellate authority as well as by the learned Tribunal while dismissing the second appeal filed by the revisionist vide the judgement and order dated 06.04.2021.

13. Learned counsel for the revisionist also states that the provisions of section 54(1) of the Act, 2008 are akin to the provisions of Section 15A of the UP Sales Tax Act, 1948 renamed as U.P. Trade Tax Act, 1948 with retrospective effect (now repealed).

14. In this regard reliance has been placed on the judgements of this Court in the case of **M/s Moti Lal Jawahar Lal vs The Commissioner of Sales Tax, U.P., Lucknow, 2003 NTN (Vol.23) 590, The Commissioner, Sales Tax, U.P., Lucknow vs S/s Shanti Swarup Raj Kumar Katra Naj, Moradabad, STI 1998 ALLAHABAD HIGH COURT 394, The Commissioner of Sales Tax, Uttar Pradesh vs Sanjiv Fabrics, 2010 (9) SCC 630.**

15. Placing reliance on the division bench judgement of this Court in the case of **S.S. Flabours vs State of U.P. and another, 2016 (61) NTN DX 100** the argument of learned counsel for the revisionist is that this Court, after considering the provisions of Section 15A of the Trade Tax Act, 1948 (hereinafter referred to as the Act, 1948) has held the said provisions to be akin to Section 54 of the Act, 2008 and has thereafter held that in order to impose penalty, specific finding of concealment or furnishing of wrong particulars of return has to be made and in absence thereto, the order of imposition of penalty cannot be said to be legally sustainable in the eyes of law meaning thereby that mens-rea is a necessary ingredient for imposition of penalty.

16. Reliance has also been placed on the definition of "Tax Evasion" as per Blacks' Law Dictionary, 8th Edition.

17. No other argument has been raised.

18. On the other hand, Shri Sanjay Sarin, learned Additional Chief Standing Counsel appearing for the respondent argues that none of the aforesaid judgements have considered the full purport of column no. 2 of the table of Section 54 (1) of the Act 2008 in as much as one of the wrong on which the penalty can be imposed, as provided in the table, is the evasion on the part of the dealer for payment of tax which he is liable to pay under the Act.

19. The argument of Shri Sarin is that when the judgement and order dated 22.06.2016 passed by learned Tribunal whereby the revisionist has been assessed for payment of tax of Rs 2,45,250/- has attained finality and the revisionist has also deposited the tax as such the said payment of tax by revisionist would fall within the ambit of being an evasion of payment of tax which the revisionist has been held liable to pay under the provisions of the Act, 2008 and consequently the penalty can validly be imposed on the revisionist which in fact has been been done by means of the order impugned dated 06.04.2021.

20. Shri Sarin however fairly submits that as the amount of tax has been reduced from one stage to another and finally stood at Rs 2,46,250/- consequently three times the aforesaid amount can validly be imposed on the revisionist but in the instant

case a still higher amount has been imposed.

21. So far as the judgements of this Court in the case of **M/s Moti Lal Jawahar Lal (supra), S/s Shanti Swarup Raj Kumar Katra Naj (supra), Sanjiv Fabrics (supra) and S.S. Flabours (supra)** are concerned more particularly the division bench judgement of this Court in the case of **S.S. Flabours (supra)** the argument of Shri Sarin is that the division bench, although has held that the provisions of Section 15A of the Act, 1948 are pari-materia to provisions of Section 54(1) of the Act 2008, yet the division bench has not considered that there was no provision under the Act 1948 which provided for imposition of penalty where the dealer has evaded payment of tax which he is liable to pay under the said Act and thus it is argued that the said judgement would not be applicable in the facts of the instant case.

22. Heard the counsels for the parties and perused the records.

23. From perusal of the record it emerges that a survey took place at the premises of the revisionist on 23.12.2008. An assessment order dated 30.10.2010 was passed against the revisionist under the provisions of section 28(2) of the Act, 2008 whereby disputed demand was indicated as Rs 12,44,653/-. The revisionist filed the first appeal and the appellate authority vide order dated 27.06.2012 reduced the disputed demand by Rs 6,21,875/- and thus a demand of Rs 6,22,778/- remained. The revisionist as well as the Revenue filed second appeals against the said order dated 27.06.2012. Both the appeals were clubbed together and decided vide judgement and order dated 22.06.2016 by the learned Tribunal whereby the appeal of the revisionist was partly allowed while the appeal of the Revenue was dismissed. While allowing the appeal of the revisionist learned Tribunal has given a relief of Rs 3,25,625/- thus assessing the tax liability to be paid by the revisionist at Rs 2,46,250/-. The said order has attained finality. The amount of tax has also been deposited by the revisionist.

24. During pendency of the aforesaid proceedings, a notice under Section 54(1)(2) of the Act, 2008 was issued to the revisionist. The revisionist filed his reply. Vide the order dated 08.05.2013 an order of penalty has been passed whereby the revisionists has been required to pay an amount of Rs 18,65,625/- against the assessed tax of Rs 6,21,875/-. Being aggrieved the revisionist filed an appeal which has been rejected vide the order dated 30.09.2016. Still being aggrieved, a second appeal was filed before the learned Tribunal which has been dismissed vide judgement and order dated 06.04.2021. Being aggrieved the instant revision has been filed.

25. The argument of learned counsel for the revisionist is that a perusal of serial no. 2 of table as provided in Section 54 (1) of the Act, 2008 would indicate that in order to levy a penalty, a finding has to be specifically recorded that the dealer, in this case the revisionist, has concealed particulars of turnover or has deliberately furnished inaccurate particulars of such turnover or has submitted a false tax return or has avoided payment of tax which he is liable to pay under the Act and only when a specific finding to the said effect has been recorded by the competent authority can the penalty be imposed.

26. The argument of learned counsel for the revisionist is that there has to be a

specific finding of mens-rea by the authorities concerned of a deliberate attempt to evade tax and only after such a finding has been recorded can a penalty be imposed and in the absence of such finding the penalty as imposed on the revisionist vide the order impugned dated 08.05.2013 cannot be said to be legal and valid in the eyes of law.

27. In order to consider the arguments of learned counsel for the revisionist as to whether mens-rea would be an essential ingredient in the levy of penalty under Section 54(1)(2) of the Act, 2008 the Court may refer to the provisions of Section 54 of the Act, 2008.

28. For the sake of convenience, the relevant extract of Section 54 of the Act 2008 is reproduced as under:

54. Penalties in certain cases

(1) The assessing authority, if he is satisfied that any dealer or other person, as the case may, has committed the wrong described in column (2) of the table below, it may, after such inquiry, if any, as it may deem necessary and after giving dealer or person reasonable opportunity of being heard, direct that such dealer or person shall, in addition to the tax, if any, payable by him, pay by way of penalty, a sum as provided in column (3) against the same serial no. of the said table:

Sl. No.	*Wrong*	*Amount of Penalty*
1.	.....	.....
2.	*The dealer has concealed particular of his turnover or has deliberately furnished inaccurate particulars of such turnover; or submits a false tax return under this Act or evades payment of tax which he is liable to pay under this Act*	*three times of amount of tax concealed or avoided*
3.	.....	.....

Explanation – For the purposes of this section -

(i) the assessing authority includes an officer not below the rank of an officer appointed and posted by the Commissioner at a check-post or an officer empowered to exercise powers under sections 45, 46, 47, 48, 50, 51 and 52 of this Act;

(ii) if the value of goods described or mentioned in tax invoice, sale invoice or any such other document is under valued to the extent of more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the transaction has taken place, the estimated value prevalent at the relevant time in such local market area shall be deemed to be the value of such goods,

(iii) if the value of goods is not described or mentioned in tax invoice, sale invoice or any such other document the estimated value prevalent at the relevant time in the local market area where the transaction has taken place, shall be deemed to be the value of such goods.".

29. From perusal of Section 54 of the Act, 2008, so far as it is relevant to the facts of the instant case, it emerges that in case the assessing authority is satisfied that any dealer or other person has committed the wrong described in Column (2) of the

table then it may direct such dealer or person to pay by way of penalty a sum as provided in column 3 against the same serial number.

30. Serial no. 2, with which the present controversy pertains to, describes the wrong committed by the dealer whereby where the dealer has concealed particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or submits a false tax return under the Act 2008 or evades the payment of tax which he is liable to pay under the Act, 2008 then three times of amount of tax concealed or avoided can be imposed as penalty.

31. So far as the present controversy is concerned, the wrong as has been attributed to the revisionist, is evasion of payment of tax which he is liable to pay under the Act, 2008. The evasion of payment of tax has been indicated to be on the basis of assessment order dated 30.10.2010 as passed under the provisions of Section 28(2) of the Act, 2008 further reduced by order dated 27.06.2012 and still reduced vide the judgement and order dated 22.06.2016 whereby learned Tribunal has assessed the tax liable to be paid at 2,46,250/-.

32. Here it would also be pertinent to refer to the provisions of Section 28 of the Act 2008 per which the initial assessment order dated 30.10.2010 had been passed.

33. For the sake of convenience, the provision of Section 28 of the Act, 2008 is reproduced below:

"28. Assessment of tax after examination of Records.-

(1) In following types of cases or dealers, the assessing authority, after detailed examination of books, accounts and documents kept by the dealer in relation to his business and other relevant records, if any, and after making such inquiry as it may deem fit, subject to provision of sub-section (9), shall pass an assessment order for an assessment year in the manner provided in this section:

(a) in cases of such dealers as are specified or selected for tax audit by the Commissioner or any other officer, not below the rank of a Joint Commissioner, authorized by the Commissioner in this behalf; in such manner and within such time as may be prescribed;

(b) in case of a dealer falling in any of the categories below,

(i) dealer who has not submitted annual return of turnover and tax within the time prescribed or extended; or

(ii) dealer by whom tax return for one or more tax periods of the assessment year have not been submitted; or

(iii) dealer in whose case assessing authority has passed provisional assessment order under section 25 in respect of one or more tax periods to the best of its judgment; or

(iv) dealer in whose case, on the basis of material available on records, if the assessing authority is satisfied that the turnover of sales or purchases or both, as the case may be, and amount of tax shown payable as disclosed by the dealer in annual return of turnover and tax are not worthy of credence or tax shown payable in the return has not been deposited by the dealer, or the amount of input tax credit claimed is wrong or the amount of tax payable shown is incorrect; or

(v) dealer who has prevented or obstructed an officer empowered to make

audit, survey, inspection, search or seizure under the provisions of this Act; or

(vi) [Omitted]

(2) Where after examination of books, accounts, documents and other records referred to in sub-section (1), -

(i) the assessing authority is satisfied about correctness of turnover of sale or purchase or both, as the case may be, disclosed by the dealer, it may assess the amount of tax payable by the dealer on such turnover and determine the amount of input tax credit admissible to the dealer or amount of reverse input tax credit payable by the dealer; and

(ii) where assessing authority is of the opinion that turnover of sale or purchase or both, as the case may be, disclosed by the dealer is not worthy of credence, it may determine to the best of its judgment the turnover of sale or purchase or both, as the case may be, and assess the tax payable on such turnover and determine admissible amount of input tax credit and reverse input tax credit payable by the dealer.

(3) Before making an assessment under sub-section (2), dealer shall -

(i) be required to furnish annual return of turnover and tax referred to in sub-section (7) of section 24, if he has not already submitted such return;

(ii) be given reasonable opportunity of being heard; and

(iii) be served with a notice to show cause, where determination of turnover, input tax credit or reverse input tax credit, or assessment of tax, all or any one of them, as the case may be, are to be made to the best of the judgment of the assessing authority.

(4) The show cause notice referred to in sub-section (3) shall contain all such reasons on which the assessing authority has formed its opinion about incorrectness of the turnover of sale or purchase or both, as the case may be, amount of tax, amount of input tax credit or amount of reverse input tax credit:

(5) Order of assessment shall be in writing and copy of assessment order along with prescribed notice of demand of the balance amount of tax, if any, to be deposited by the dealer, shall be served on the dealer.

(6) Dealer shall deposit amount of tax assessed in excess of amount of tax deposited by him for the assessment year, within a period of thirty days after the date of service of the assessment order and notice of demand.

(7) Where the amount of tax deposited by the dealer is found in excess of tax assessed, the same shall be refunded to the dealer according to the provisions of this Act.

(8) Assessing authority shall not be precluded from making assessment order under this section on the ground of passing of any provisional assessment order in respect of any tax period under section 25 and such provisional assessment order, if any, shall stand merged in the assessment order passed under this section.

[(9) Notwithstanding anything to the contrary in any other provision of this Act, where an unregistered dealer brings any taxable goods from outside the State more than once during an assessment year, separate assessment relating to goods brought on each occasion may be made for the same assessment year.]

(10) The provisions of this Act shall apply to each assessment order passed under sub-section (9) as they apply to an order passed under sub-section (2).

(11) Dealers under sub-section (9) shall not be required to furnish annual return of turnover and tax and in cases of such dealers assessment under sub-section

(9) may be made even before the expiry of the assessment year.

(12) Provisions of sub-sections (5), (6) and (7) shall, mutatis mutandis, apply to every assessment order passed under any provisions of this Act."

34. A perusal of Section 28(2) of the Act 2008 would indicate that where after examination of books, accounts and other records referred to in Section 28(1) of the Act, 2008 the assessing authority is satisfied about correctness of sale or purchase or both, it may the assess the amount of tax payable by the dealer. Where the assessing authority is of the opinion that turnover of sale or purchase or both, disclosed by the dealer is not worthy of credence, it may determine to the best of its judgement the turnover of sale or purchase or both and assess the tax payable on such turnover and determine the taxable amount of input tax credit and reverse input tax credit payable by the dealer.

35. A further perusal of Section 28(2) of the Act 2008 indicates that the power of assessment of the amount of tax payable by the dealer on such turnover and for determining the amount of input tax credit admissible to the dealer has been given to the assessing authority and further where the assessing authority is of the opinion that turnover of sale or purchase or both disclosed by the dealer is not worthy of credence it may determine to the **best of its judgement** the turnover of sale or purchase or both and assess the tax payable on such turnover. Exercising the power, as vested in the assessing authority, the order dated 30.10.2010 had been passed which upon further scrutiny after challenge at various levels, has resulted in judgement and order dated 22.06.2016 whereby the second appeal of the revisionist has been partly allowed and on the basis of the tax liable to be paid by the revisionist, the penalty as provided under Section 54 (1)(2) of the Act, 2008 has been imposed.

36. The assessment order dated 30.10.2010 would indicate that the same has been passed considering the provisions of Section 28(2) of the Act, 2008 on the basis of best of its judgement meaning thereby that it is an assessment which has been made by the assessing authority.

37. The jurisdiction of the assessing authority while taking recourse to the "best judgement assessment" is well settled. Hon'ble Supreme Court in the cases of **State of Kerala vs C. Velukutty 1966 (60) ITR 239 (SC), The Commissioner of Income Tax, Calcutta v. Padamchand Ramgopal, 1970 (3) SCC 866, M/s Joharmal Murlidhar and co. v. Agricultural Income Tax Officer, Assam and others, 1970 (3) SCC 331 and Shri S. M. Hasan, S.T.O. Jhansi and another v. M/s New Gramophone House, Jhansi, (1976) 4 SCC 854**, has categorically held that while assessing on the basis of "best judgement" the assessing authority has to make the assessment honestly and on the basis of intelligent well grounded **estimate** rather than pure surmises i.e. the assessment so made while taking recourse to the "best judgement assessment" should be on **reasonable guess** based upon the material available before the assessing authority.

38. Being armed with the aforesaid interpretation of "best judgement assessment" it can safely be presumed that the assessment order dated 30.10.2010 passed under Section 28(2) of the Act, 2008 was passed by the assessing authority

on a reasonable guess or well grounded estimate.

39. At the same time, the penalty which has been imposed on the revisionist in terms of Section 54(1)(2) of the Act, 2008 indicates that the same has been passed on the basis of the assessment order under Section 28(2) of the Act, 2008 on the ground of evasion of payment of tax which the revisionist was liable to pay under the Act.

40. "Tax evasion" has been defined in the Black Law Dictionary, 9th Edition as follows:

"tax evasion. *The willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability."*

41. From perusal of the aforesaid definition of 'tax evasion' it emerges that tax evasion has been defined as a **willful** attempt to defeat or circumvent the tax law in order to illegally reduce ones tax liability. The word "willful" would mean a deliberate attempt to circumvent the tax law.

42. As already indicated above, the order of penalty passed under Section 54(1)(2) of the Act, 2008 is based on the order of the assessing authority as passed under Section 28(2) of the Act, 2008. The assessment order under Section 28(2) of the Act, 2008 is on the basis of well grounded estimate or reasonable guess as held by Hon'ble Supreme Court meaning thereby that the said order does not indicate the willful attempt to defeat or circumvent the tax law to reduce the tax liability. Once the sine qua non to imposition of penalty is evasion of payment of tax and for evasion there has to be a willful act consequently the Court will have to examine as to whether there has been willful act on the part of the revisionist in evasion of tax.

43. For this, the Court will also have to consider as to whether mens-rea would be an essential ingredient or element in order to attract the offences under Section 54(1)(2) of the Act, 2008.

44. In this regard, Hon'ble Supreme Court in the case of **Sanjiv Fabrics (supra)** has held as under:

"24. Whether an offence can be said to have been committed without the necessary mens rea is a vexed question. However, the broad principle applied by the courts to answer the said question is that there is a presumption that mens rea is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered. (See: Sherras Vs. De Rutzen and State of Maharashtra vs Mayon Han George).

25. Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the language employed in the provision of the statute creating the offence. There is no gain saying that a penal provision has to be strictly construed on its own language.

26. In Nathulal vs State of Madhya Pradesh 11, while dealing with the question whether to constitute an offence under Section 7 of the Essential Commodities Act, 1955 which provides for levy of penalty for contravention of any

order made under Section 3 of the State Act mens rea is an essential ingredient, a three-Judge Bench of this Court observed as follows:

"Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof."

27. In Union of India & Ors Vs Dharamendra Textile Processors & ors 12 while examining the scope of Section 11-AC of the of the Central Excise Act, 1944, a three judge Bench of this Court, observed that:

A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

30. To put it succinctly, in examining whether mens rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors:

(i) the object and scheme of the statute;

(ii) the language of the section and;

(iii) the nature of penalty.

31. It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradistinction to "wrongly represents." Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.

32. According to the Black's Law Dictionary (6th Edition), the word "false" has two distinct and well-recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error.

33. Likewise, P. Ramanatha Aiyar in Advance Law Lexicon (3rd Edition, 2005) explains the word "false" as:

"In the more important uses in jurisprudence the word implies something more than a mere untruth; it is an untruth coupled with a lying intent.....or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context'."

36. In view of the above, we are of the considered opinion that the use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence."

(emphasis by the Court)

45. From perusal of the judgement of **Sanjiv Fabrics (supra)** it emerges that Hon'ble Apex Court has held that in examining whether the mens-rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors namely:

(i) the object and scheme of the statute;

(ii) the language of the section; and

(iii) the nature of penalty.

46. The object of Section 54 of the Act, 2008 is to impose penalty if any dealer or person has committed wrong described in column (2) of the table. So far as serial no. 2 of the table is concerned the same reads that where a dealer has concealed the particulars of his turnover or has deliberately furnished inaccurate particulars of such turnover or has submitted a false tax return under the Act or has evaded payment of tax which he is liable to pay under the Act then three times the amount of tax concealed or avoided is to be imposed as a penalty.

47. From the language of the Section it is thus clear that, so far as the present controversy is concerned, the dealer would be liable to pay penalty for evasion of tax. 'Evasion of tax' is a willful attempt to defeat or circumvent tax law as defined in Blacks Law Dictionary. The penalty is based on the assessment order under Section 28(2) of the Act, 2008. In turn the assessment order is based on "best judgement assessment" which has been held by the Hon'ble Supreme Court to be on well grounded estimate or reasonable guess based.

48. The revisionist has already paid the tax as assessed after modification by the learned Tribunal vide the order dated 22.06.2016. At no stage is there any finding of any willful evasion of tax by the revisionist or a finding of there being any deliberate attempt on the part of the revisionist in avoiding the payment of tax. It is for the authorities to specifically prove the evasion of payment of tax on the part of the revisionist where the evasion has been defined as a willful attempt i.e. the authorities would have to prove a willful attempt on the part of the revisionist to evade tax. In absence thereto the order imposing penalty on the revisionist based on the assessment order passed under Section 28(2) of 2008 cannot be said to fall within the ambit of any of the eventualities as provided under Section 54(1)(2) of the Act 2008 more particularly it cannot be considered to be an evasion of payment of tax by the dealer / revisionist so as to attract the penalty as has been imposed on the revisionist.

49. Keeping in view the aforesaid discussion, the questions of law stand decided as below:

Question of law	Decision
"(I) Whether the men-rea on the part of the assessee is an essential pre-requisite condition for imposition of penalty under Section 54(1)(2) of the U.P. VAT Act, 2008?	Yes
(II) Whether penalty under Section 54(1)(2) of the Act can be imposed where the assessment is made on the basis of Best Judgement Assessment?	No
(IV) Whether imposition of penalty of 7 times the total tax imposed towards alleged concealed turnover was justified when the express provision of Section 54(1)(2) of the Act provides for imposition of a maximum penalty of 3 times of concealed turnover?	Left open to be decided in appropriate proceedings

50. The revision is **allowed**. The judgement and order dated 06.04.2021 passed by learned Commercial Tax Tribunal, Lucknow in Second Appeal No. 50 of 2017 is set aside.

51. Consequences to follow.

(2024) 3 ILRA 1777
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2024 & 12.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 83 of 2024

VISIBLE ALPHA SOLUTIONS INDIA PVT. LTD. ...Petitioner
Versus
Commissioner CGST NOIDA & Anr. ...Respondents

Counsel for the Petitioner:
Sri Mohit Gupta, Sri Somnath Bhattacharya, Sri Zafar Ahmad Khan

Counsel for the Respondent:
Sri Amit Mahajan

The Central Goods & Services Tax Act, 2017 -– Section 107 – The Central Goods & Services Tax Rules, 2017 – Rule 108 – Appeal filed electronically in FORM GST APL-01 within limitation – rejection of appeal as time-barred on ground of non-submission of self-certified copy of order – applicability of provisos to Rule 108 – requirement of submitting self-certified copy arises only when order appealed against is not uploaded on common portal – where appeal is filed electronically and order is available on portal, provisos to Rule 108 not attracted – date of provisional acknowledgement to be treated as date of filing of appeal – appellate authority erred in dismissing appeals on technical ground – impugned order based on misinterpretation of Rule 108 – order rejecting appeals unsustainable in law – matter remanded for de novo consideration on merits – appellate authority directed to decide appeals within stipulated time.

Writ petition allowed. (E-9)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard Sri Mohit Gupta, learned counsel appearing on behalf of the petitioner and Sri Amit Mahajan, learned counsel appearing on behalf of the respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the

petitioner is aggrieved by the order dated October 18, 2023 passed by the respondent No.1/Commissioner, CGST (Appeals), NOIDA rejecting the two appeals filed by the petitioner on the ground that the same were time barred, as the self-certified copy of the decision or order was not made available within time as per proviso to Rule 108 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the Rules").

3. Learned counsel appearing on behalf of the petitioner has referred to Rule 108 of the Rules to indicate that when the appeal is filed electronically and uploaded on the common portal in FORM GST APL-01, there is no requirement to file self-certified copy of the decision. Both the proviso to Rule 108 of the Rules apply only in the case when the appeal is not uploaded on common portal. Rule 108 of the Rules is delineated below for clarification:

"108. Appeal to the Appellate Authority.- *(1) An appeal to the Appellate Authority under sub-section (1) of section 107 shall be filed in* ***FORM GST APL-01****, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.*

(2) The grounds of appeal and the form of verification as contained in FORM GST APL- 01 shall be signed in the manner specified in rule 26.

(3) Where the decision or order appealed against is uploaded on the common portal, a final acknowledgement, indicating appeal number shall be issued in FORM GST APL-02 by the Appellate Authority or an officer authorised by him in this behalf and the date of issue of the provisional acknowledgement shall be considered as the date of filing of appeal:

Provided *that where the decision or order appealed against is not uploaded on the common portal, the appellant shall submit a self-certified copy of the said decision or order within a period of seven days from the date of filing of* ***FORM GST APL-01*** *and a final acknowledgement, indicating appeal number, shall be issued in* ***FORM GST APL-02*** *by the Appellate Authority or an officer authorised by him in this behalf, and the date of issue of the provisional acknowledgement shall be considered as the date of filing of appeal:*

Provided *further that where the said self-certified copy of the decision or order is not submitted within a period of seven days from the date of filing of FORM GST APL-01, the date of* submission of such copy shall be considered as the date of filing of appeal."

4. Upon a perusal of the impugned order, it clearly appears that the appeal was electronically filed within the time permitted, that is, three months as per Section 107 of the Central Goods and Services Tax Act, 2017. Furthermore, the first and second proviso to Rule 108 of the Rules would not apply, as is clear from the literal interpretation of the first proviso itself.

5. In light of the above, the impugned order dated October 18, 2023 is quashed and set aside with a direction upon the appellate authority to de novo hear the appeals filed by the petitioner and pass a reasoned order on merits within a period of three months from date.

6. With the aforesaid directions, the writ petition is allowed.

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1. By judgment and order dated February 12, 2024, this Court had allowed this writ petition setting aside the impugned order dated October 18, 2023 and directed the appellate authority to de novo hear the appeal filed by the petitioner and pass a reasoned order on merits within a period of three months.

2. Upon reconsideration of the order passed, this Court, suo motu, is of the view that paragraph 4 of the judgment and order dated February 12, 2024 is required to be substituted with the following paragraphs:-

"4. Various High Courts have held that when an assessee files a memo of appeal in the GST Portal, non submission of certified copy would be treated as mere technical defect and the appeal should not be dismissed on the sole ground of non submission of certified copy within time. The Orissa High Court in the case of ***Atlas PVC Pipes Ltd. vs. State of Odisha*** reported in ***2022 (65) G.S.T.L. 45 (Ori.)*** held as follows:-

"6.13 On the altar of default in compliance of such a procedural requirement, merit of the matter in appeal should not have been sacrificed. Since the petitioner has enclosed the copy of impugned order as made available to it in the GST portal while filing Memo of Appeal, non-submission of certified copy, as has rightly been conceded by the Additional Standing Counsel appearing on behalf of CT&GST Organisation, is to be treated as mere technical defect."

4(i). Furthermore, the High Court of Madras in the case of ***PKV Agencies vs. Appellate Dy. Commissioner (GST) (Appeals), Vellore*** reported in ***2023 (73) G.S.T.L. 71 (Mad.)*** held as follows:-

"5. In the aforesaid decision of the Orissa High Court also, the petitioner assessee had filed an appal under Section 107 of the Odisha Goods and Services Tax Act, 2017, electronically on time, but did not furnish a certified copy of the impugned order, within seven days of filing of the appeal as prescribed under the proviso to Rule 108(3) of the OGST Rules. After giving due consideration to all the relevant provisions of the OGST Act/Rules, the Orissa High Court has held that since Rule 108(3) has not prescribed for condonation of delay in the event where the petitioner fails to submit the certified copy of the order impugned in the appeal nor is there any provision restricting application of Section 5 of the Limitation Act, 1963, in the context of supply of certified copy within the period stipulated in sub-rule (3) of Rule 108, the requirement to furnish certified copy of the impugned order within seven days of filing of appeal is only a procedural requirement, which can be condoned by exercising powers under Article 226 of the Constitution of India as it is only a technical defect."

4(ii) Keeping in mind the judgments passed by these High Courts and upon examination of Section 107 of the Central Goods and Services Tax Act, 2017 read with Rule 108 of the Central Goods and Service Tax Rules, 2017, I am of the view that mere non filing of the certified copy of the decision within a period of seven days, when the appeal has been filed electronically within the time frame prescribed, that is, three months, the authority should not dismiss the appeal on the ground that the certified copy of the decision was not filed within time."

3. Accordingly, paragraphs 4, 4(i) and 4(ii) of this order be read in place of paragraph 4 of the judgment and order

dated February 12, 2024 and this order be treated as part and partial of the said judgment and order.

4. The Registrar Compliance of this Court is directed to communicate this order to the parties.

(2024) 3 ILRA 1780
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Sale/Trade/ Tax Revision No. 110 of 2023

The Commissioner. Commercial Tax, U.P. Lko. ...Petitioner
Versus
S/s Soma Entp. Ltd. ...Respondent

Counsel for the Petitioner:
Sri Bipin Kumar Pandey (Addl. C.S.C.)

Counsel for the Respondent:
Sri Ved Prakash Singh

Uttar Pradesh Value Added Tax Act, 2008 – Section 58 – Input Tax Credit (I.T.C.) – burden of proof upon the assessee – Section 16 – mere production of invoices or payment made by cheques/RTGS not enough – genuineness of transactions – actual physical movement of goods – Tribunal granted I.T.C. merely on the basis of invoices and payment details – ratio contrary to the judgment of the Apex Court – nature of burden of proof pari materia – order of Tribunal quashed and set-aside – matter remanded – questions of law answered in favour of the Department and against the assessee .

Revision Petition allowed. (E-9)

Cases Cited:

1. State of Karnataka v. M/s Ecom Gill Coffee Trading Private Limited, 2023 SCC Online SC 248.

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is a revision petition filed under Section 58 of the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as 'the Act') wherein the following questions of law have been admitted by this Court:-

"1. Whether on the facts and circumstances of the case the Commercial Tax Tribunal as well as the 1st Appellate Authority was legally justified in dismissing the appeal filed by the department only on the basis of invoices and bank transactions inasmuch as the transactions have not been proved as a bonafide and genuine transactions otherwise establishing the actual transportation of goods?"

2. Whether on the facts and circumstances of the case the Commercial Tax Tribunal was legally justified in allowing the claim of I.T.C. especially when the finding of fact has been recorded against the dealer and the benefit has been allowed only on the basis of tax invoices and bank transactions?"

2. The primary issue in the present writ petition is with regard to availmentof Input Tax Credit (hereinafter referred to as "the I.T.C.") by the respondent/assessee.

3. Mr. Bipin Kumar Pandey, learned Additional Chief Standing Counsel appearing on behalf of the revisionist, has submitted that the burden of proof is upon the assessee to show the correctness of the claim of the I.T.C. He relies upon Section 16 of the Act to indicate that such burden is upon the assessee specially with matters,

which are within the knowledge of the assessee. Section 16 of the Act is delineated below for better reference:-

"16. Burden of proof

In any assessment proceedings where any fact is specially within the knowledge of the assessee, the burden of proving that fact shall lie upon him, and in particular, the burden of proving the existence of the circumstances bringing the case within any of the exemptions, exceptions or reliefs under any provisions of this Act including claim of any amount as input tax credit, shall lie upon him and assessing authority shall presume the absence of such circumstances."

5. He further relies upon paragraphs 23, 24 and 25 of the Apex Court judgment penned by Justice M.R. Shah in the case of the **State of Karnataka vs. M/s Ecom Gill Coffee Trading Private Limited** reported **in 2023 SCC Online SC 248**. The relevant paragraphs of the said judgment are set forth below:-

"23. Thus, the provisions of Section 70, quoted hereinabove, in its plain terms clearly stipulate that the burden of proving that the ITC claim is correct lies upon the purchasing dealer claiming such ITC. Burden of proof that the ITC claim is correct is squarely upon the assessee who has to discharge the said burden. Merely because the dealer claiming such ITC claims that he is a bona fide purchaser is not enough and sufficient. The burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Such a burden of proof cannot get shifted on the revenue. Mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under section 70 of the KVAT Act, 2003. The dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. The aforesaid information would be in addition to tax invoices, particulars of payment etc. In fact, if a dealer claims Input Tax Credit on purchases, such dealer/purchaser shall have to prove and establish the actual physical movement of goods, genuineness of transactions by furnishing the details referred above and mere production of tax invoices would not be sufficient to claim ITC. In fact, the genuineness of the transaction has to be proved as the burden to prove the genuineness of transaction as per section 70 of the KVAT Act, 2003 would be upon the purchasing dealer. At the cost of repetition, it is observed and held that mere production of the invoices and/or payment by cheque is not sufficient and cannot be said to be proving the burden as per section 70 of the Act, 2003.

24. Even considering the intent of section 70 of the Act, 2003, it can be seen that the ITC can be claimed only on the genuine transactions of the sale and purchase and even as per section 70(2) if a dealer knowingly issues or produces a false tax invoice, credit or debit note, declaration, certificate or other document with a view to support or make any claim that a transaction of sale or purchase effected by him or any other dealer, is not liable to be taxed, or liable to take at a lower rate, or that a deduction of input tax is available, such a dealer is liable to pay the penalty. Therefore, as observed hereinabove, for claiming ITC, genuineness of the transaction and actual physical

movement of the goods are the sine qua non and the aforesaid can be proved only by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. The purchasing dealers have to prove the actual physical movement of the goods, alleged to have been purchased from the respective dealers. If the purchasing dealer/s fails/fail to establish and prove the said important aspect of physical movement of the goods alleged to have been purchased by it/them from the concerned dealers and on which the ITC have been claimed, the Assessing Officer is absolutely justified in rejecting such ITC claim.

25. In the present case, the respective purchasing dealer/s has/have produced either the invoices or payment by cheques to claim ITC. The Assessing Officer has doubted the genuineness of the transactions by giving cogent reasons on the basis of the evidence and material on record. In some of the cases, the registration of the selling dealers have been cancelled or even the sale by the concerned dealers has been disputed and/or denied by the concerned dealer. In none of the cases, the concerned purchasing dealers have produced any further supporting material, such as, furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and therefore it can be said that the concerned purchasing dealers failed to discharge the burden cast upon them under Section 70 of the KVAT Act, 2003. At the cost of repetition, it is observed and held that unless and until the purchasing dealer discharges the burden cast under Section 70 of the KVAT Act, 2003 and proves the genuineness of the transaction/purchase and sale by producing the aforesaid materials, such purchasing dealer shall not be entitled to Input Tax Credit."

6. The relevant paragraphs of the impugned order of the Tribunal have also been placed before this Court by the learned counsel for the revisionist to indicate the contradictory stand taken by the Tribunal. It is to be noted that in paragraph 16 of the Tribunal's order the Tribunal has indicated that certain persons, who had sold the goods to the assessee were not entitled to issue tax invoice as they were following the compounding scheme. Furthermore, a few of the dealers' registration had been cancelled and in certain cases the dealers have not shown in the return any sale made to the present assessee. However, from perusal of paragraph 18 of the judgment of the Tribunal, it appears that the Tribunal taking note of the fact that these firms have not sold goods to the assessee went on to hold that since payment has been made via RTGS and invoices have been submitted by the assessee, these transactions were genuine and the assessee was rightful in claiming the I.T.C.

7. Counsel on behalf the assessee has vehemently argued that it was the Department that went up in appeal before the Tribunal and could not produce any documents that were detrimental to the assessee. In fact, the Tribunal records the same at paragraph 19 of the judgment. He further submits that the fact of payment having been made by him is undisputed and the fact that invoices were submitted is also undisputed. He submits that there was

nothing further for the assessee to show for claiming the I.T.C. He also submits that the assessee was carrying out the work on contract from the Government agency and all these purchases were used in the said work contract and verified by the independent evaluator appointed by the Government.

8. I have heard counsel appearing on behalf of the parties and perused the materials on record.

9. It is clear from the factual matrix that the respondent/assessee made payment and also submitted invoices. However, upon reading the judgment of the Apex Court in the case of M/s Ecom Gill Coffee Trading Private Limited (supra), it is clear that mere production of the invoices or the payment made by cheques/RTGS is not enough to discharge the burden of proof upon the assessee. Upon perusal of Section 17 of the Karnataka Value Added Tax Act, 2003, I find that the nature of burden of proof is pari materia to the Uttar Pradesh Value Added Tax, 2008, and accordingly, the judgment of the Apex Court would squarely apply in the present case. In the aforesaid judgment, the Apex Court has further gone on to state that the dealer claiming the I.T.C. has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment of particulars. The aforesaid information would be in addition to tax invoices, particulars of payment etc.

10. In the present case, counsel on behalf of the revisionist has submitted that the documents in relation to the transportation of goods were also provided to the authorities below. However, the same do not find reflection in the order passed by the first appellate authority and the Tribunal. It is also true that the Tribunal has recorded finding that the Department has not been able to show any adverse document against the revisionist. The ratio of the decision of the Tribunal is contrary to the judgment of the Apex Court in **M/s Ecom Gill Coffee Trading Private Limited (supra)** as the Tribunal has granted the I.T.C. merely on the basis of invoices and payment details.

11. In light of the above, I am of the view that the order passed by the Tribunal is required to be quashed and set-aside with a direction to the Tribunal to hear the matter afresh allowing the revisionist to produce documents in relation to the transactions including transportation documents and any other relevant document which the petitioner wishes to place. The Department may also be allowed to adduce further evidence, if it so desires.

12. Accordingly, the order of Tribunal dated May 18, 2023 is quashed and set-aside. The Tribunal to decide the matter afresh as directed above. The entire process should be concluded within a period of six months from date. The questions of law are answered in favour of the Department and against the assessee.

13. The revision petition is, accordingly, allowed.

14. I make it clear that the observations made above with regard to findings of the Tribunal are tentative in nature and the Tribunal shall not be influenced by the same while hearing the matter afresh.

(2024) 3 ILRA 1784
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 141 of 2023

M/s Globe Panel Indus. India Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agrawal

Counsel for the Respondent:
Sri Rishi Kumar,Addl. C.S.C.

The Goods and Services Tax (GST) Act, 2017 – Section 129(3) – Expired E-Way Bill – vehicle accompanied by two e-Invoices and two E-Way Bills – goods matched description, quantity and value – no dispute regarding consignor or consignee – only one E-Way Bill found expired at the time of detention – explanation of vehicle breakdown supported by mechanic's letter and FASTag movement records – documents not considered by authorities – no material to establish mens rea or intention to evade tax – technical violation by itself not sufficient to impose penalty – penalty cannot be levied merely for non-compliance with procedural requirements in absence of tax evasion – reliance placed on earlier High Court decisions holding mens rea to be essential for levy of penalty under Section 129(3) – orders passed on surmises and conjectures – penalty order and appellate order unsustainable in law – orders quashed – refund of tax and penalty directed**.**

Writ petition allowed. (E-9)

Cases Cited:

1. M/s Hindustan Herbal Cosmetics v. State of U.P. and Others, Writ Tax No. 1400 of 2019, decided on 02.01.2024 (Allahabad High Court).

2. M/s Falguni Steels v. State of U.P. and Others, Writ Tax No. 146 of 2023, decided on 25.01.2024 (Allahabad High Court).

3. M/s Pepsico India Holdings Limited, Lucknow v. Commissioner of Trade Tax, 2003 U.P.T.C. 856.

4. Jain Shudh Vanaspati Limited, Ghaziabad and Others v. State of U.P. and Others, 1983 U.P.T.C. 198.

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the penalty order dated January 16, 2023 passed by the respondent No.3/Assistant Commissioner, State Tax Department, Sector 1, Mobile Squad, Deoria under Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinfater referred to as "the Act") and the appellate order dated January 30, 2023 passed by the respondent No.2/Additional Commissioner, Grade-2 (Appeal)-I, State Tax, Judicial Division, Gorakhpur.

2. Learned counsel appearing on behalf of the petitioner submitted that the particular vehicle was accompanied by two e-Invoices and two E-Way Bills. He further submitted that the goods matched the description in the e-Invioices and the E-Way Bills. The only descrpency that was found at the time of detention was that one of the E-Way Bills had expired. Apart from this discrepancy, there is no other finding with regard to intention of the petitioner to evade tax. He relied upon the documents to indicate that the vehicle had broken down. The same is evidenced by the letter of the

mechanic, who had repaired the particular vehicle. Furthermore, the movement of the goods have been traced by way of the 'fast tag' chart. He further submits that none of these documents were considered by the authorities. He further relies upon the judgments in **M/s Pepsico India Holdings Limited Lucknow v. Commissioner of Trade Tax** reported in **2003 U.P.T.C. 856** and **Jain Shudh Vanaspati Limited Ghaziabad and Others v. State of U.P. and Others** reported in **1983 U.P.T.C. 198** to buttress his arguments that the penalty cannot be imposed merely for the reason that the said goods were not accompanied by requisite documents.

3. Learned Additional Chief Standing Counsel submitted that the E-Way Bill is the necessary part of the documents and the expired E-Way Bill does not fullfil the requirments of the Rules. He further submitted that the authorities have considered the arguments raised by the petitoner and the orders indicate that the E-Way Bill has expired ten days before the date of detention. He further submitted that the petitioner could not explain the reason for not issuing a fresh E-Way Bill even though it was obvious that the petitoner was aware of the said expiry. He thus submitted that the penalty was in order.

4. This Court in **M/s Hindustan Herbal Cosmetics v. State of U.P. and Others** (Writ Tax No.1400 of 2019 decided on January 2, 2024) and **M/s Falguni Steels v. State of U.P. and Others** (Writ Tax No.146 of 2023 decided on January 25, 2024) held that mens rea to evade tax is essential for imposition of penalty. The factual aspect in the present case did not indicate any intention whasoever to evade tax. Furthermore, the documents that have been relied upon by the petitioner have not been considered by the authorities. The authorities have dealt with the issue with regard to the expiry of the E-Way Bill and held that no explanaiton was offerred by the petitioner with regard to the fresh generation of the E-Way Bill, as the same had expired ten days before the detention. However, it is to be noted that the goods in the vehicle were for two e-Invoices and two E-Way Bills and only one E-Way Bill had expired. There is no dispute with regard to the consignor and consignee nor any dispute with regard to the description of the goods in the vehicle. In relation to the e-Invoices and the E-Way Bills, the authorities have not been able indicate any intention whatsoever on behalf of the petitioner to evade tax. Indubitably, there is a technical violation that has been committed by the petitioner. However, the authorities have not been able to indicate in any manner that the E-Way Bill had been used repeatedly nor have they made out any case with regard to an intention to evade tax by the petitioner. Accordingly, this Court is of the view that such a technical violation by itself without any intention to evade tax cannot lead to imposition of penalty under Section 129(3) of the Act. This view is fortified by a catena of judgments as indicated above.

5. In light of the same, this Court is unable to agree with the findings of the authorities, and accordingly, the impugned orders dated January 16, 2023 and January 30, 2023 are quashed and set aside.

6. This Court directs the respondents to refund the amount of tax and penalty deposited by the petitioner within a period of four weeks from date.

7. The instant writ petition is allowed in aforesaid terms. There shall be no order as to the costs.

(2024) 3 ILRA 1786
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 542 of 2023

M/s Genius Ortho. Indus., Ghaziabad ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hari Shanker Srivastava, Sri Nikhil Srivastava

Counsel for the Respondent:
Sri Sudharshan Singh, Sri Amit Mahajan

Constitution of India,1950 Article 226 – writ petition – cancellation of GST registration – physical verification – no business activity being carried out at the premises – show cause notice – appeal dismissed – new registration obtained subsequent to cancellation – suppression of material fact – no averment in the writ petition – Court hoodwinked – sheer wastage of time of the authorities – fraud – fraudulent concealment – doctrine of clean hands – suppression of material facts – discretionary jurisdiction – petitioner not acting in good faith – writ petition dismissed – liberty to approach any other forum.

Writ petition dismissed. (E-9)

Cases Cited:

1. Bhriguram De v. State of West Bengal and others, (2018) SCC OnLine Cal 8141.

2. S.J.S. Business Enterprises (P) Ltd. v. State of Bihar, (2004) 7 SCC 166.

3. S.P. Chengalvaraya Naidu (Dead) by LRs v. Jagannath (Dead) by LRs, (1994) 1 SCC 1.

4. Chittaranjan Das v. Durgapore Project Ltd., 99 C.W.N. 897.

5. Asiatic Engineering Co. v. Achhru Ram, AIR 1951 Allahabad 746 (FB).

6. Indian Bank v. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550.

7. The King v. Williams, (1914) 1 K.B. 608.

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard learned counsel appearing on behalf of the petitioner, Sri Sudarshan Singh, learned counsel appearing on behalf of respondent No.1 and Sri Amit Mahajan, learned counsel appearing on behalf of respondent Nos. 2 and 3.

2. Physical verification report filed by the learned counsel for the respondents in Court today be kept on record.

3. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the order dated February 27, 2023 passed by the Joint Commissioner, C.G.S.T. (Appeal), Meerut cancelling its GST registration.

4. The ground for cancelling the GST registration of the petitioner was that upon physical verification, it was found by the authorities that no business activity was being carried out at the said premises. Authorities also called the proprietor on several occasions but his phone was switched off and he did not picked up the calls. A show cause notice was issued by the Department, which was replied by the petitioner and subsequently the order cancelling the registration was passed. Against the order cancelling registration,

the petitioner went up in appeal and the said appeal was also dismissed after passing a detailed order.

5. Counsel appearing on behalf of the respondents submits that there has been suppression of material fact, as the petitioner has not revealed before this Court that a new registration was obtained by the petitioner subsequent to cancellation of the earlier registration.

6. The Court having heard the learned counsel appearing on behalf of the petitioner had directed for verification of the premises without having knowledge of the fact that a new registration has been obtained by the petitioner. In the verification, which was done pursuant to the order of this Court dated February 22, 2024, it was found that the factory was operational and the proprietor informed the authorities that he had obtained a new registration prior to filing of the writ petition.

7. I am of the view that having obtained a new registration was a material fact that should have been brought into the knowledge of this Court. In fact, the Court was hoodwinked by the petitioner in passing an order for verification of the premises by the authorities. The fact that neither was there any averment in the writ petition nor the counsel for the petitioner informed the Court that a new registration has been obtained resulted in sheer wastage of time of the authorities in carrying out the second verification.

8. I had the occasion to deal with the aspect of suppression of material facts in **Bhriguram De v. State of West Bengal and others reported in (2018) SCC OnLine Cal 8141** wherein I had examined the aspect of fraud, fraudulent concealment and doctrine of clean hands in great detail. One may delineate the relevant paragraphs of the said judgment below:

"13.'Fraud', according toBlack's law Dictionary, 10thEdition, is a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment; a reckless misrepresentation made without justified belief in its truth to induce another person to act; a tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment.

14."Fraudulent concealment" as defined inBlack's law Dictionary, 10thEdition, is the affirmative suppression or hiding, with the intent to deceive or defraud, of a material fact or circumstance that one is legally (or, sometimes, morally) bound to reveal.

15.According to theLaw Lexicon, Third Edition (2012), the Latin Maxim "Suppressio veri, suggestio falsi" defines that the suppression of the truth is equivalent to the suggestion of falsehood. The suppression or failure to disclose what one party is bound to disclose to another, may amount to fraud. Where a person is found to be guilty ofsuppressio veri suggestio falsifor having concealed material information from scrutiny of the Court, he is not entitled for any equitable relief under order 39 of CPC (5 of 1908). [Arbind Kumar Palv.Hazi Md. Faizullah Khan, AIR 2007 (NOC) 1035 (Pat) : (2006) 1 BLJR 430].

16.The maxim that one who comes to Court must come with "clean hands" is based on conscience and good faith. The maxim is confined to misconduct in regard to, or at all events connected with, the matter in litigation. "Clean

hands" means a clean record with respect to the transaction with the defendant, and not with respect to any third person.

17.As authored by Ruma Pal, J. inS.J.S. Business Enterprises (P) Ltd.v.State of Biharreported in(2004) 7 SCC 166[Coram: Ruma Pal and P. Venkatarama Reddi, J.J.], suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. The relevant portion is provided below:

"13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material from the consideration of the court, whatever view the court may have taken……."

18.InS.P. Chengalvaraya Naidu (Dead) by LRsv.Jagannath (Dead) by LRsreported in(1994) 1 SCC 1[Coram: Kuldip Singh and P.B. Sawant, J.J.], the Supreme Court came down heavily on petitioners filing cases based on falsehood and suppression and observed as follows:

"5. …….The Courts of law are meant for imparting justice between the parties. One, who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of litigation.

6. ……. A fraud is an act of deliberate deception with the design of securing something by taking advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage of another .... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

19.In a well-known Calcutta High Court case inChittaranjan Dasv.Durgapore Project Ltd.reported in 99 C.W.N. 897[Coram: Satya Brata Sinha and Basudeva Panigrahi, J.J.], the Court observed at paragraph 64 that "Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied with in such a situation. It is now well known that a fraud vitiates all solemn acts."

20.InAsiatic Engineering Co.v.Achhru Ramreported in AIR 1951 Allahabad 746 (Full Bench)[Coram: Malik, C.J., Sapru and V. Bhargava, J.J.], the Court observed that no relief can be granted in a writ petition under Article 226 which is based on misstatement or suppression of material facts. The Court observed in paragraph 51, at page 767 as follows:

"51. In our opinion, the salutary principle laid down in the cases quoted above should appropriately be applied by Courts in our country when parties seek the aid of the extraordinary powers granted to the Court under Art. 226 of the

Constitution. A person obtaining anex parteorder or arule nisiby means of a petition for exercise of the extraordinary powers under Art. 226 of the Constitution must come with clean hands, must not suppress any relevant facts from the Court, must refrain from making misleading statements and from giving incorrect information to the Court. Courts, for their own protection, should insist that persons invoking these extraordinary powers should not attempt, in any manner, to misuse this valuable right by obtainingex parteorders by suppression, misrepresentation or misstatement of facts."

21.InIndian Bankv.Satyam Fibres (India) Pvt. Ltd.reported in(1996) 5 SCC 550: J.T. 1996 (7) SC 135[Coram: Kuldip Singh & S. Saghir Ahmad, J.J.], the Apex Court further observed as follows:

"23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court, it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order."

22.Similar principles have been enunciated in English cases. InThe Kingv.Williamsreported in(1914) 1 K.B. 608[Coram: Channell, Rowlatt, Atkin, J.J.], the Court observed at page 614 as follows:

"……. In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ ex debito justitiae, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of certiorari. This special remedy will not be granted ex debito justitiae to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them."

23.As seen from the various judgments discussed above, the Indian and English Courts have consistently taken the view that one who approaches the Court must come with clean hands. It is the bounden duty of the Court to keep the stream of justice absolutely clean. Anyone who approaches must give full and fair disclosure of all the materials. The Courts must not allow anyone to abuse the court process. In case the petitioner conceals anything that is known to be material such an action would lead to an inference of fraud, and even if not fraud, definitely would lead to a presumption that the petitioner has not approached the court with clean hands."

9. Article 226 of the Constitution of India is a discretionary jurisdiction which is to be exercised for petitioners who are acting in a good faith. The principle of uberrima fides requires a party that comes to a Court to act in utmost good faith. The above principle is the genesis of the expectation of the Court to pass orders at the behest of the petitioner who has approached the Court with clean hands. The moment this trust is broken and it is discovered that there is suppression of material facts, the Court is bound to dismiss the said petition without granting any relief whatsoever to the petitioner.

10. In light of the same, this writ petition is dismissed on the ground of suppression of material facts. The petitioner

shall be at liberty to approach any other forum for appropriate relief.

(2024) 3 ILRA 1790
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 804 of 2022

Prakash Chandra ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Neeraj Sharma, Sri Abhishek Sharma, Ms. Manisha Sharma

Counsel for the Respondent:
C.S.C.

U.P. Excise Act, 1910 – Section 7 – foreign liquor license – adulterated liquor recovered from employee in conscious possession – statement admitting liquor taken out from licensed shop and diluted for sale – licensee liable for actions and omissions of salesman – vicarious liability – sale of liquor not a fundamental right – violation of provisions of the Act, Rules and terms of license – principles of natural justice duly adhered to – no error of fact .
Writ petition dismissed. (E-9)

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

Foreign liquor license of the petitioner was cancelled by order dated 22.06.2021. The said order of cancellation was carried in appeal and thereafter in revision with no better results. The petitioner is consequently aggrieved by the orders of appellate and revisioning authority dated 12.10.2021 and 13.04.2022 respectively.

Shri Neeraj Sharma, learned counsel assisted by Shri Abhishek Sharma, learned counsel for the petitioner submits as follows:

1. The liquor was not found from the possession of the licensee and nor from the premises of the liquor shop.

2. The adulterated liquor was recovered from an employee of the petitioner. The petitioner cannot be vicariously responsible for the action of his employees.

3. No FIR was got lodged which shows that the applicant had not committed any offence. The shop was closed on the date of search and seizure.

4. The cancellation of license is in excess of the powers conferred under Rule 18 of the U.P. Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer and Wine) Rules, 2001 (herein after referred to as 'the Rules'). As per Rules 18-ka, licenses can be cancelled only in case liquor bottles are found in the premises of the liquor shop.

Shri Ravi Shanker Pandey, learned Additional Chief Standing Counsel contends that the licensee had breached the conditions of the license. There is no fundamental right to trade any liquor. The licensee had breached the terms of the license. The liquor was found in the conscious possession of the sales person who was admittedly employed by the petitioner. The said liquor was adulterated and could not be accounted for. The principles of natural justice were duly observed in the proceedings. Licensees are expected to adhere strictly to the terms of the license and observe relevant

precautions otherwise it may result in public harm.

The petitioner was granted license for retail sale of foreign liquor on 15.04.2020. The license records the name of liquor salesman as Prakash Ranjan.

A show cause notice was issued to the petitioner on 15.04.2021 asserting that the empty liquor bottles, bottle caps of liquor bottles, bottles with their seals broken open which did not contain the prescribed quantity of liquor and liquor bottles were recovered in a rest house adjacent to the licensed premises. After the recovery, the said Prakash Ranjan in his statement admitted that the aforesaid liquor consignment was obtained from the licensed shop and was being diluted with water for sale. The petitioner had violated provisions of the U.P. Excise Act, 1910 read with the Rules and was asked to show cause as to why his license be not cancelled.

The petitioner responded to the show cause notice by denying his liability. The reply to the show cause notice asserted that the entire liquor stock was recovered from the salesman after the shop was closed. The petitioner cannot be held liable for the actions of his salesman.

The reply of the petitioner do not find favour with the licensing authority, the appellate authority as well as the revising authority. The following findings of fact have been returned concurrently by the aforesaid authorities:

1. The liquor bottles, bottle caps(in the manner descried earlier in the show cause notice) were recovered from a room adjacent to the liquor shop.

2. The salesman who was in possession of the aforesaid liquor bottles and other items gave a statement admitting that he had taken liquor bottles out from the licensed shop and was diluting them for purposes of sale.

3. The authorities below have referenced various provisions of the U.P. Excise Act, 1910 read with the Rules to hold that the applicant is liable for the actions of his sales persons in view of provisions of Section 7 of the U.P. Excise Act, 1910.

On this footing, the authorities concurrently found that the petitioner had contravened the provisions of the U.P. Excise Act, 1910 read with the Rules and that the authorities also found that the act of the petitioner not only caused loss to the revenue but could potentially cause public harm.

The Court finds that the principles of natural justice were duly adhered to. No ground regarding violation of principles of natural justice was taken before the authorities below or has been canvassed before this Court. The order has been passed after due application of mind to the materials and evidences in the record.

The question which now arises for consideration is whether the petitioner who is the liquor licensee can be made liable for the actions and omissions of his salesman.

Section 7 of the U.P. Excise Act, 1910 which govern the fate of this argument is extracted herein below:

"Section 7. Possession of intoxicant by wife, clerk or servant. -- When any [intoxicant] is in the possession of a person's wife, clerk or servant on

account of that person, it shall, for the purposes of this Act, be deemed to be in the possession of that person."

The statutory provision clearly makes the licensee liable for the actions of his servant (in this case the salesman). This case is an instance of vicarious liability where the licensee becomes liable for the actions of his employees.

The reasons for creating vicarious liability in the context of sale of liquor is not far to seek. Sale of liquor is not a fundamental right and is strictly regulated by the State. The licensee is strictly bound by the terms of the license. Sale of liquor in violation of regulations created by the State will result in public harm besides causing loss of revenue. Hence, it is the responsibility of the licensee to observe strict procedures and unbroken vigilance over the administration of his shop, the maintenance of the liquor stock therein, and ensure that no pilferage takes place. The licensee is required to observe due diligence in administration of his shop at all times. The licensee is responsible for the actions and omissions of his employees in regard to sale of liquour from the licensed shop made in contravention of the regulations of terms of license.

In the facts of this case, no such due diligence exercised on part of the licensee was disclosed either before the authorities or in this Court. The licensee was lax in the running and administration of the shop which led to pilferage of liquor. In fact, where the pilferage and adulteration of liquor happens due to maladministration of the licensee or his collusion with his employees is not relevant if pilferage and adulteration of liquour is established. The employee from whose possession the liquor was recovered, clearly was in conscious possession of the same. He has admitted that he had taken out the liquor from shop and was diluting it for sale in the market. The violation of the license terms is established.

In this wake, the authorities below committed no error of fact in concluding that the petitioner was liable for the acts of his employee whose name is duly recorded in the license and that there was violation of provisions of U.P. Excise Act, 1910 read with the Rules and the terms of the license.

Another aspect which has been brought to the Court's notice is that the laboratory report records that it was not possible to check the potency of the liquor samples as they were heavily diluted. This affirms the case of the department rather than supporting the submission of the petitioner.

The third submission that Section 7 of the U.P. Excise Act, 1910 was not referenced in the show cause notice which vitiates the proceedings will now be examined. The show cause notice in clear and specific terms describes the manner of the contravention of the provisions of U.P. Excise Act, 1910. Wrong recital or non-reference of a provision of law will not vitiate the show cause notice as long the contents disclose the contravention in no uncertain terms.

The writ petition is dismissed.

(2024) 3 ILRA 1793
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1031 of 2023

Hemant Taneja ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Praveen Kumar, Sri Damodar Singh

Counsel for the Respondent:
C.S.C.

The Goods and Services Tax (GST) Act, 2017– Section 129(3) – detention, seizure and penalty – registered trader – trading of taxable goods – goods in transit – vehicle intercepted – e-Invoice and e-Way Bill generated prior to interception – documents available in digital mode – digital copies produced by driver – hard copies produced by representative at the time of inspection – physical verification of goods – authenticity of documents not disputed – requirement of signature dispensed with in case of digital invoice – statutory duty of revenue authorities to verify documents from portal – failure of revenue authorities to verify – no intent to evade tax – no irregularity in bills – no cause for detention, seizure or imposition of penalty – payment of penalty to secure release does not disentitle assessee from filing appeal – appeal under Section 107 maintainable – penalty imposed under Section 129(3) not justified – orders passed by Mobile Squad and appellate authority liable to be quashed – amount deposited liable to be refunded .
Writ petition allowed. (E-9)

Cases Cited:
1. Hindustan Steel & Cement v. Asstt. State Tax Officer, State GST Department, Kozhikode, 2022 (65) G.S.T.L. 133 (Ker.).
2. M/s Galaxy Enterprises v. State of U.P. and 2 others, Writ Tax No. 1412 of 2022.

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

1. Heard Shri Praveen Kumar, learned counsel for the petitioner and Shri Rishi Kumar, learned Additional Chief Standing Counsel for the State.

2. The petitioner is aggrieved by the order dated 04.01.2023 whereby the Assistant Commissioner, Commercial Tax, Mobile Squad-VII, Ghaziabad in purported exercise of powers under Section 129 (3) of the GST Act has imposed a penalty of Rs.1,83,442/-. The order of the penalty was carried in appeal by the petitioner.

3. The appellate authority/Additional Commissioner, State Tax, Mobile Squad, Unit-7, Ghaziabad by the impugned order dated 09.05.2023 upheld the findings of the authority of first instance and confirmed the penalty so imposed upon the petitioner.

4. Being aggrieved by the order dated 09.05.2023 passed by the respondent No.3 / Additional Commissioner, State Tax, Mobile Squad, Unit-7, Ghaziabad and the order dated 04.01.2023, the petitioner has assailed the same in the writ petition.

5. The petitioner is a proprietor running under the name and style of 'M/s. J.S. Enterprises' in trading of taxable goods falling under Chapter-74 of the Goods and Service Tariff Act.

6. The petitioner is duly registered as a trader under the GST Act and has been issued a GST Identification Number i.e.

07AECPT6934N1ZU by the competent authority.

7. The petitioner received an order from one M/s. Vaishnavi Electronics, Ghaziabad for supply of Copper Clad Laminte, etc. Upon receipt of the said order the petitioner prepared an e-Invoice No.766/2022-23 dated 04.01.2023 at 10.10 a.m. The e-Way Bill bearing No.721309051066 dated 04.01.2023 was auto generated at 10.13 a.m. after the petitioner had got the aforesaid invoice registered on the common GST portal.

8. According to the petitioner, both the e-Invoice as well as e-Way Bill were provided to the vehicle driver in the digital mode. The vehicle proceeded to its destination after the goods were loaded and the driver was provided with the necessary documentation. When the vehicle was intercepted by the revenue authorities, the driver produced e-Invoice as well as e-Way Bill. However, the revenue authorities conducted the physical inspection of the goods under transportation. At the time of the physical verification of the goods the representative of the petitioner firm appeared before the revenue authorities and presented hard copies of the e-Invoice No.766/2022-23 dated 04.01.2023 and e-Way Bill No.721309051066 dated 04.01.2023. The representative of the petitioner firm sought to demonstrate that the goods being transported were fully supported by valid documentation contemplated under the GST Act. However, the revenue authorities passed a detention order detaining the vehicle and the goods.

9. Thereafter, the show cause notice was issued to the petitioner on 04.01.2023.

10. The show cause notice records that the vehicle driver had produced a tax invoice No.766/2022-23 dated 04.01.2023, but the said tax invoice did not bear the signatures of the authorized signatory. Further, the driver of the vehicle was failed to produce other valid documents. In this manner according to the show cause notice, the goods were transported without the valid and complete documentation in violation of relevant provisions of the GST Act. The show cause notice also records that at the time of inspection the representative of the petitioner was present and had duly produced e-Invoice No.766 dated 04.01.2023 and generated the same at 10.10 AM. and also e-Way Bill dated 04.01.2023 generated same at 10.13 AM. According to the show cause notice further enquiries revealed that the said e-Invoice and e-Way Bill so produced disclosed the goods which were being transported. However, in view of the fact that the said documents were not produced at the time of interception of the vehicle violation of provisions of Section 138 of the GST Rules was made out and appropriate action was liable to be taken.

11. The petitioner was keen to honour the business transaction and hence paid the penalty to get the goods released for onward transportation to the buyer. The order dated 04.01.2023 purportedly passed under Section 129(3) of the GST Act also finds that the petitioner had produced the said e-Invoice as well as e-Way Bill which clearly disclosed the goods which were being transported and were intercepted. However, since the driver of the vehicle had failed to produce the relevant documents at the time of interception, the violation of provisions of the GST Act read with Rules was established and penalty was liable to be imposed. The impugned order

thereafter imposes the aforesaid penalty in purported exercise of Section 129(1)(a) of the GST Act and penalty was imposed.

12. The petitioner carried the said order in appeal before the appellate authority by instituting an appeal under Section 107 of the GST Act.

"Section 107. Appeals to Appellate Authority

……..

(6) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent. of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed:

[PROVIDED that no appeal shall be filed against an order under sub-section (3) of section 129, unless a sum equal to twenty-five per cent of the penalty has been paid by the appellant.]

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed."

13. The consistent case of the petitioner before the appellate authority as well as this Court is that the driver had produced the e-Invoice as well as e-Way Bill which were stored in his mobile number. However, the authorities failed to verify the same and initiated the impugned proceedings. Further, it is an admitted case that the hard copies of the tax Invoice as well as e-Way Bill were duly produced when the representative of the petitioner appeared before the Mobile Squad of the Revenue Department during the proceedings.

14. The impugned order while upholding the order of penalty reiterates the reasoning in the order passed by the Mobile Squad of the revenue authorities of the first instance.

15. The appellate authority/respondent No.3 in the impugned order dated 09.05.2023 has recorded these findings. The petitioner had failed to generate and download the e-Way Bill before transporting the goods. The petitioner failed to produce any document apart from tax invoice at the time of the interception of the vehicle. The order further notices the submission of the appellant/petitioner that the e-Invoice as well as e-Way Bill were uploaded in the mobile of the driver of the vehicle. The e-challan was digitally signed by the petitioner. Hence, the appellate authority records his submission to the effect that since the digital documents were produced hard copies with signatures were not required to be presented to the officers.

16. On the footing of the aforesaid discussion, the appellate authority in the impugned order has found that the appellant/petitioner did not generate e-Way Bill with a view to evade tax and thus violated the provisions of the GST Act read with GST Rules and was liable to pay the penalty. The appeal was thus rejected.

17. Shri Praveen Kumar, learned counsel for the petitioner submits that:

I. The petitioner had generated the relevant documents, namely, e-Invoice and e-Way Bill as per the provisions of the GST Act.

II. The said documents were produced before the Revenue Authorities at the time of inspection of the vehicle.

III. The petitioner was not intent to evade tax.

18. Shri Rishi Kumar, learned Additional Chief Standing Counsel submits that:

I. The driver of the vehicle was not in a possession of the forms, and hence the production of the aforesaid forms at the time of inspection is of no avail.

II. The intent to evade tax is established.

19. For adjudicating the submissions made at the Bar, it would be apposite to reproduce and reflect some relevant provisions of the GST Act. The detention, seizure and release of goods is contemplated in Section 68 read with Section 129 of the GST Act which are reproduced heredunder:

"Section 68 – Inspection of goods in movement

(1) The Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as may be prescribed.

(2) The details of documents required to be carried under sub-section (1) shall be validated in such manner as may be prescribed.

(3) Where any conveyance referred to in sub-section (1) is intercepted by the proper officer at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices and also allow the inspection of goods.

Section 129 - Detention, seizure and release of goods and conveyances in transit

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,

(a) on payment of the applicable tax and penalty equal to two hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) The provisions of sub-section (6) of section 67 shall, mutatis mutandis, apply for detention and seizure of goods and conveyances.

(3) The proper officer detaining or seizing goods or conveyances shall issue a notice specifying the tax and penalty payable and thereafter, pass an order for payment of tax and penalty under clause (a) or clause (b) or clause (c).

(4) [No penalty], shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of the goods fails to pay the amount of tax and penalty as provided in sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the good or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) of one lakh rupees, whichever is less;

Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer."

20. The documents which are required to be carried by the persons incharge of the conveyance are set out in Rule 138A (1), (2) and (3). The provisions/Rules insofar as they are relevant to the controversy are reproduced as under:

"Rule 138A. Documents and devices to be carried by a person in charge of a conveyance.

(1) The person in charge of a conveyance shall carry-

(a) the invoice or bill of supply or delivery challan, as the case may be; and

(b) a copy of the e-way bill in physical form or the e-way bill number in electronic form or mapped to a Radio Frequency Identification Device embedded on to the conveyance in such manner as may be notified by the Commissioner:

Provided that nothing contained in clause (b) of this sub-rule shall apply in case of movement of goods by rail or by air or vessel.

Provided further that in case of imported goods, the person in charge of a conveyance shall also carry a copy of the bill of entry filed by the importer of such goods and shall indicate the number and date of the bill of entry in Part A of FORM GST EWB-01.

(2) In case, invoice is issued in the manner prescribed under sub-rule (4) of rule 48, the Quick Reference (QR) code having an embedded Invoice Reference Number (IRN) in it, may be produced electronically, for verification by the proper officer in lieu of the physical copy of such tax invoice.

(3) Where the registered person uploads the invoice under sub-rule (2), the information in Part A of FORM GST EWB-01 shall be auto-populated by the common portal on the basis of the information furnished in FORM GST INV-1.

(4) The Commissioner may, by notification, require a class of transporters to obtain a unique Radio Frequency

Identification Device and get the said device embedded on to the conveyance and map the e-way bill to the Radio Frequency Identification Device prior to the movement of goods.

(5) Notwithstanding anything contained in clause (b) of sub-rule (1), where circumstances so warrant, the Commissioner may, by notification, require the person-in-charge of the conveyance to carry the following documents instead of the e-way bill

(a) tax invoice or bill of supply or bill of entry; or

(b) a delivery challan, where the goods are transported for reasons other than by way of supply."

21. The verification of documents which provides for issuing invoices states thus:

"Rule 48 – Manner of issuing invoice

……...

(4) The invoice shall be prepared by such class of registered persons as may be notified by the Government, on the recommendations of the Council, by including such particulars contained in**FORM GST INV-01**after obtaining anInvoice Reference Numberby uploading information contained therein on the Common Goods and Services Tax Electronic Portal in such manner and subject to such conditions and restrictions as may be specified in the notification.

"Provided that the Commissioner may, on the recommendations of the Council, by notification, exempt a person or a class of registered persons from issuance of invoice under this sub-rule for a specified period, subject to such conditions and restrictions as may be specified in the said notification".

……...

(6) The provisions of sub-rules (1) and (2) shall not apply to an invoice prepared in the manner specified in sub-rule (4)."

22. The verification of documents and responsibilities of the revenue authorities are stated in Rule 138 (b) which is reproduced as under:

"Rule 138B. Verification of documents and conveyances-

(1) The Commissioner or an officer empowered by him in this behalf may authorise the proper officer to intercept any conveyance to verify the e-way bill or the e-way bill number in physical form for all interState and intraState movement of goods.

(2) The Commissioner shall get Radio Frequency Identification Device readers installed at places where the verification of movement of goods is required to be carried out and verification of movement of vehicles shall be done through such device readers where the eway bill has been mapped with the said device.

(3) The physical verification of conveyances shall be carried out by the proper officer as authorised by the Commissioner or an officer empowered by him in this behalf:

Provided that on receipt of specific information on evasion of tax, physical verification of a specific conveyance can also be carried out by any other carried out by any officer after obtaining necessary approval of the Commissioner or an officer authorised by him in this behalf."

23. The aforesaid statutory scheme discloses the following the requirements which are relevant to the controversy:

I. While transporting goods for purposes of trade, the driver and or the owner should be in possession of an e-Invoice as well as e-Way Bill.

II. The assessee has an option to produce physical or digital copies of the aforesaid documents.

III. The procedure for generating the digital documents is spelt out in the aforesaid provisions.

IV. The e-Invoice is to be generated in the manner provided under Rule 48(4)(6) of the GST Act.

24. The e-Invoice in Form GST Invoice-I is auto populated / generated on the common platform after e-Invoice is uploaded on the said portal in the manner prescribed in the said Rules. Further Part-B of the e-Way bill has been uploaded after filing up the relevant details of the vehicle transporting the goods. In the facts of this case it is not disputed that the e-Way Bill contained the complete details in Part-A and Part-B. Most importantly once these documents are produced, statutory duty is cast upon the revenue authorities to verify the authenticity of the said documents. All the documents (soft copies/e-invoices & e-way bills) are in the official reach of the department. Hence, the verification is a very simple procedure which is required to be executed by the revenue authorities. Evidently in this case they failed to do so.

25. Under Chapter VI of the C.G. & S.T. Rules, 2017 relevant parts of the Rule 46 which reads Tax invoice are extracted hereunder:

"Rule 46 (q). signature or digital signature of the supplier or his authorised representative."

26. From the preceding discussion, the following facts are established.

I. Firstly, even as per the case of the revenue the driver of the vehicle was in possession of a digital tax invoice without signatures of the authorised signatory. The objection is misconceived, inasmuch as, the requirement of signatures is dispensed with as regards digital invoice by virtue of operation of the 5th proviso to Rule 46 of the C.G. & S.T. Rules, 2017 quoted above.

II. Secondly, it is common ground between the parties that the petitioner had produced authentic tax invoice and e-Way Bill at the time of inspection of the goods. Incidentally the seizure of the goods, inspection of the e-Way Bill carrying the goods, production of requisite documents by the petitioner and the imposition of the penalty happened on the same day i.e. 04.01.2023.

III. Thirdly, once the authentic documents have been produced to the satisfaction of the authorities, there was no cause for imposition of penalty and no case for admit to evade tax is made out.

IV. The authenticity of the said documents is not disputed.

27. The case of the petitioner is consistent that the driver was carrying digital copies of the tax invoice as well as e-Way Bill on his mobile number. The Revenue did not verify the digital device of the driver. If the assessee always had relevant documents in his favour, it stands to reason that there was no cause for him not to provide the digital copy of the e-Way Bill to the driver when the goods were being transported. After the driver had

produced the digital copy of the tax invoice, it was the responsibility of the revenue to verify the same from the portal. The portal also contains the e-Way Bill which is auto populated after the e-Invoice uploaded. Evidently the Revenue failed to do so. The revenue cannot fasten the penalty upon the tax payers for its own default.

28. The argument on behalf of the revenue to the effect that once the demand raised on the assessee was satisfied by making of payment, the assessee could not carry the order of penalty in appeal and is liable to be rejected.

29. The assessee under Section 129(1) of the GST Act, 2017 has an option either to provide security or to make payment and satisfy the demand in full. However, the mere fact that the assessee has made payment will not disentitle him for carrying the order imposing the penalty in appeal.

30. The narrative can now be fortified by authorities in point. The Kerala High Court in **Hindustan Steel & Cement v. Asstt. State Tax Officer, State GST Department, Kozhikode**[1] while considering the same issue held as under:

"5. ….A reading of sub-section (3) of Section 129 of the CGST/SGST Acts, the provisions of Rule 142 referred to above and the provisions of the circular, cumulatively, compel me to hold that whether or not a person opts to make payment under section 129(1)(a) or to provide security under Section 129(1)(c), the responsibility of the officer to pass an order under sub-section (3) of Section 129 and to upload a summary of the order/demand in Form DRC-07 continues. The provisions of sub-section (5) or Section 129 which were pointed out by the learned Senior Government Pleader only contemplate that the procedure for detention on seizure of goods or documents or conveyances come to an end and it is always open to the person who suffers proceedings under 129 of the CGST/SGST Acts to challenge those proceedings if he feels that the demand has been illegally raised on him. This can be the only reasonable interpretation that can be placed on the provisions referred to above. Any other interpretation would clearly violate Article 265 of the Constitution of India. Further, Section 107 of the CGST Act is widely worded and provides that any person aggrieved by any decision, or order passed under the CGST/SGST Acts or Union Territory Goods and Services Tax Act, by an adjudicating authority, may appeal to such appellate authority as may be prescribed, within three months from the date on which such decision or order is communicated to such a person. It is obvious that the learned counsel for the petitioners in these cases is correct and contenting that whether or not a payment is made under Section 129(1)(a) or security is provided under Section 129 (1) (c), the person who is the subject matter of proceedings under section 129 of the CGST Act has the right to challenge those proceedings, culminating in an order under sub-section (3) of Section 129, before the duly constituted Appellate Authority under Section 107 of that Act. The fact that the culmination of proceedings in respect of a person who seeks to make payment of Tax and Penalty under Section 129(1)(a) does not result in the generation of a summary of an order under Form DRC-07 cannot result in the right of the person to file an appeal under Section 107 being deprived. The fact that the system does not generate a demand or that the system does not contemplate the

filing of an appeal without a demand does not mean that the intention of the legislature was different."

31. The aforesaid judgment squarely applicable to the facts of the case and the appeal is held to be maintainable.

32. This Court in **M/s Galaxy Enterprises v. State of U.P. and 2 others**[2] held that if rectified documents were produced before the authorities before the seizure order was passed, the same were liable to be considered.

33. The case of the petitioner stands on a better footing.

34. Since all the documents have been admittedly produced before the authorities at the time of inspection, there was no cause for detention, seizure or imposition of the penalty as has been done by the authorities in this case.

35. It is noteworthy that the revenue is not challenged the authenticity of the bills or the fact that they were not duly filled it or the details were absent in the said bills. No irregularity in the bills have been pointed out on behalf of the revenue.

36. The bills contained all relevant details of the goods and the tax are liable to be paid.

37. The impugned order dated 04.01.2023 whereby the Assistant Commissioner, Commercial Tax, Mobile Squad-VII, Ghaziabad as well as the order dated 09.05.2023 passed by the respondent No.3/learned appellate authority/Additional Commissioner, State Tax, Mobile Squad, Unit-7, Ghaziabad are liable to be quashed and are quashed.

38. The amount deposited shall be forthwith refunded to the petitioner in accordance with law.

39. The writ petition (tax) is allowed.

40. The case at hand reflects that not only the mobile squad had misdirected itself in law but the appellate authorities have failed to redeem the errors. The Court has no hesitation to observe that a honest tax payer in the facts of this case has been unnecessarily harassed by the revenue authorities. The Court will say no further. However, it is for the revenue authorities to ensure that the officers are properly trained and alerted to the relevant provisions of law.

41. It is open to the revenue authorities to conduct regular courses for upgrading the domain knowledge of the officers in the field and the appellate authorities also to circulate relevant judgments on a regular basis to the officials.

(2024) 3 ILRA 1801
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1034 of 2019

M/s Nokia Solutions & Networks India Pvt. Ltd. ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ninshant Mishra, Sri Tanmay Saadh

Counsel for the Respondent:

C.S.C.

The Goods and Services Tax (GST) Act, 2017– Sections 129 & 107 – E-Way Bill – Part-B not filled at the time of interception – goods accompanied by valid tax invoices and Part-A of e-way bill – Part-B subsequently updated before detention order – no discrepancy in goods, quantity or value – no material to show mens rea or intention to evade tax – mere presumption based on short distance of transportation not sufficient – levy of tax and penalty based on surmises and conjectures – authorities bound to record findings based on investigation indicating tax evasion – non-filling of Part-B alone, without intent to evade tax, does not attract penalty under Section 129(3) – reliance placed on Roli Enterprises, VSL Alloys and Citykart Retail cases – detention order and appellate order illegal – penalty and tax demand quashed – security directed to be refunded.

Writ petition allowed. (E-9)

Case Law Cited

1. M/s Roli Enterprises v. State of U.P. and others, Writ Tax No. 937 of 2022, decided on 16.01.2024 (Allahabad High Court).

2. VSL Alloys (India) Pvt. Ltd. v. State of U.P. and another, 2018 NTN (Vol. 67) – 1 (Allahabad High Court).

3. M/s Citykart Retail Private Limited through Authorized Representative v. Commissioner, Commercial Tax and another, 2023 U.P.T.C. (Vol. 113) – 173 (Allahabad High Court).

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard Sri Tanmay Sadh, learned counsel holding brief of Sri Nishant Mishra, learned counsel for the petitioner and Sri Ravi Shanker Pandey, learned Additional Chief Standing Counsel for the respondents.

2. This is a writ petiton under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the order levying penalty and the order of the Appellate Authority dated May 18, 2019 passed by respondent No.2/Additional Commissioner Grade-2 (Appeal)-II, Commercial Tax, Meerut under Section 107 of the Act.

3. Learned counsel appearing on behalf of the petitioner submits that the following facts are not in dispute :

a. Petitioner supplied goods to M/s Idea Cellular Limited, Mangal Pandey Nagar, Meerut vide tax invoices no. 5204046997 & 5204046998 dated 18.6.2018 of Rs 1,16,583.98/- and Rs 22,77,755.98/- respectively, after charging IGST @ 18%;

b. After preparing invoices dated 18.6.2018, Petitioner generated e-way bills no. 7710 1550 4255 & 7410 1550 4256 in respect of the two transactions, which were valid till 21.6.2018. However, since the vehicle number was not informed by the transporter, hence Part-B of e-way bills was not completed/filled up by the Petitioner while generating the e-way bills;

c. Even though the transporter was instructed to start movement of vehicles, only after updating Part B of e-way Bills, yet due to some miscommunication between transporter and the driver, the driver of the Vehicle No. DL1M-9583 started transportation from Delhi to Meerut, without updating Part-B of e-way bills;

d. On 19.6.2018, when the aforesaid vehicle was entering Meerut, the same was stopped by Respondent No. 3 at 06:50 AM. Upon interception, driver produced the papers available with him relating to the transaction in question. in question;

e. Immediately, after receiving the news of interception, transporter informed

the same to the Petitioner whereupon Petitioner generated e-way bills again by updating Part-B of e- way bills at 09:50 AM in the morning of 19.6.2018;

f. Even though, the deficiency, even if, in Part B of e-way bills was cured by Petitioner by updating by Part B of e-way bills on 19.6.2018 at 09:50 AM and the same was also produced before Respondent No. 3, yet Respondent No. 3 proceeded to pass detention order dated 20.6.2018 on the sole ground that at the time of interception, Part B of e-way bills was not updated. On the same date, Respondent No. 3 also issued notice under Section 20 of IGST Act directing the driver to appear and explain as to why not tax and penalty be demanded for release of goods and vehicle;

g. Upon receipt of the aforesaid notice, Petitioner submitted reply before Respondent No. 3 stating the circumstances in which Part B of e-way bills was not updated initially and that the same was updated prior to passing of the detention order;

h. Respondent No. 3 then passed order dated 26.6.2018, by rejecting the reply furnished by Petitioner and confirming demand of tax and penalty of Rs 3,65,274/- each, on the sole ground that Part B of e-way bills were not filled and thus the same was not a valid e-way bills for transportation of goods;

i. Aggrieved with the order dated 26.6.2018, Petitioner filed statutory appeal before Respondent No. 2 on various grounds mentioned in the memo of appeal; and

j. By impugned order dated 18.5.2019, Respondent No. 3 dismissed the appeal filed by Petitioner and confirmed the order dated 26.6.2018 (wrongly mentioned as 20.6.2018) passed by Respondent No. 3.

4. Learned counsel appearing on behalf of the petitioner relies upon a judgment of this Court in **M/s Roli Enterprises vs. State of U.P. and others** (Writ Tax No.937 of 2022 decided on January 16, 2024) wherein this Court had considered two judgements of the Allahabad High Court in **VSL Alloys (India) Pvt. Ltd v. State of U.P. and another** reported in **2018 NTN [Vol.67]-1 and M/s Citykart Retail Private Limited through Authorized Representative vs. Commissioner Commercial Tax and Another** reported in **2023 U.P.T.C. [Vol.113]-173** and held that non filling up of Part 'B' of the E-Way Bill by itself without any intention to evade tax would not lead to imposition of penalty under Section 129(3) of the Act.

5. In the present case, apart from the factual aspect that the Part B of E-Way Bills was not filled up, there is no material on record to show that the petitioner had any mens rea to evade tax. It is to be noted that the invoice, that was being carried, matched with the goods in the truck and the goods were not in variance with the invoice. Furthermore, the only reason upon which the presumption has been made by the authority concerned is that the tax may have been evaded as the distance between Delhi and Meerut is about 75 kilometers which would allow the petitioner to do multiple trips and evade tax.

6. The crux of the issue herein is that the petitioner explained the reason of non filling up of Part B of the E-Way Bills to the authorities. However, the authorities have not considered the explanation and

rejected the same on the basis of only the factual aspect that the distance between Delhi and Meerut is about 75 kilometers. The presumption that has been made by the authorities that there was intention to evade tax is based only on the factual matrix that the distance between Delhi and Meerut is only about 75 kilometers, which could have allowed the petitioner to carry out multiple trips. In my view, no other material has been brought on record by the authorities to indicate that there was any mens rea on the part of the petitioner to evade tax. Furthermore, it is to be noted that the other columns of the E-Way Bills such as description of the goods, quantity of the goods and value etc. were found to be the same as in the tax invoice accompanying the goods. Furthermore, there was no mismatch between the goods that was being carried out in the vehicle and the invoice.

7. In light of the above, the reason of presumption of evasion of tax is without any basis in law, and accordingly, the order of detention and subsequent appellate order are illegal and required to be set aside.

8. It is to be noted that it is upon the authorities to pass orders under Section 129 of the Act on the basis of some investigation that may indicate an intention to evade tax. The same cannot be solely on surmises and conjectures.

9. In light of the above, the order levying penalty and order dated May 18, 2019 are quashed and set-aside. The writ petition is allowed. Consequential reliefs to follow. The respondents are directed to return the security to the petitioner within four weeks from date.

(2024) 3 ILRA 1804

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1081 of 2019

M/s Jhansi Entp. Nandanpura, Jhansi ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agrawal

Counsel for the Respondent:
Sri Ravi Shankar Pandey, Addl. C.S.C.

The Goods and Services Tax (GST) Act, 2017– Section 129(3) – registered dealer – goods in transit – vehicle intercepted – neither invoice nor e-way bill were accompanying the goods at the time of interception – order for physical verification/inspection – e-way bill generated after the interception – documents produced subsequent to interception – contravention of the provisions of the Act and Rules – contravention cannot be treated as a mere common mistake – burden of proof shifts to the assessee – presumption may be raised that there is an intention to evade tax – petitioner not able to rebut the presumption of evasion of tax – absence of invoice and e-way bill not explained with proper and reasonable explanation – mere furnishing of documents subsequent to interception cannot absolve the petitioner from liability of penalty – purpose of imposing penalty is to act as a deterrent – if the goods had not been intercepted, the Government would have been out of its pocket with respect to the GST payable – application of Section 129(3) of the Act valid and just in law – no interference required .

Writ petition dismissed. (E-9)

Cases Cited:

1. M/s Akhilesh Traders v. State of U.P. and 3 others, Writ Tax No. 1109 of 2019, decided on February 20, 2024.

2. M/s Hawkins Cookers Limited v. State of U.P. and Others, Writ Tax No. 739 of 2020, decided on 12.02.2024.

3. M/s Century Rayon v. Union of India, 2018 UPTC 528.

4. M/s Bhumika Enterprises v. State of U.P., 2018 UPTC 536.

5. M/s Singh Tyres v. State of U.P., 2018 UPTC 539.

6. Mahaluxmi Traders v. State of U.P., 2018 UPTC 545.

7. M/s Shubham Fertilizers and Chemicals v. State of U.P., 2018 UPTC 546.

8. M/s Zebronics India Pvt. Ltd. v. State of U.P., 2017 UPTC 1207.

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is a writ petition under article 226 of the Constitution of India wherein the petitioner has prayed for the issuance of a writ of certiorari quashing the appellate order dated August 30, 2019 passed by Additional Commissioner Grade-2 (Appeal), Commercial Tax, Jhansi/the respondent No. 3 and the penalty order dated March 14, 2019 passed by Assistant Commissioner, Commercial Tax, (Mobile Squad) Unit Jalaun, Agra/the respondent No.2. Further, a mandamus has been sought directing the respondent authorities to refund the amount of tax and penalty deposited by the petitioner.

Facts

2. Factual matrix of the present case is delineated below:

a. The petitioner is a registered dealer under the provisions of Goods and Services Tax Act, 2017 (hereinafter referred to as 'the Act'). On March 10, 2019, the petitioner had sold a consignment of TMT Bars (sariya) to one M/s Sahai & sons, Orai vide Tax Invoice No. 167. A vehicle bearing No. MP 16H 1584 was mentioned in the tax invoice for the transportation of the goods.

b. On the same day i.e. March 10, 2019 at 01:11 P.M., the respondent No.2 intercepted the vehicle at Galla Mandi, Orai and subsequently at 03:59 P.M. issued an order for physical verification/inspection of the conveyance, goods & documents under section 68(3) of the Act on the ground that neither e-way bill nor any other document such as tax invoice, bill of supply, challan or bill of entry related to the goods in transit were produced before him at the time of interception.

c. After the issuance of order for physical verification/inspection of the conveyance, goods & documents, the documents related to the goods such as Tax Invoice and the e-way bill were produced before the respondent No. 2. The said e-way bill was not accepted by the respondent No. 2 because it was generated after the interception took place. As per the respondent authorities, the aforementioned e-way bill was generated with a delay of almost 4 hours after the commencement of transportation of the goods.

d. The show cause notice was issued to the petitioner under Section 129(3) of the Act stating that the movement of the goods was in contravention to the provisions of the Act.

e. In pursuance of the show cause notice, the petitioner appeared before the authority and duly submitted his written reply. In his reply, the petitioner stated that due to non availability of computer

operator, the e-way bill related to the goods in transit could not be generated at proper time but the same was generated later at 2:45 P.M. on March 10, 2019. He also stated that the invoice related to the goods could not be produced because it was handed over to the receiver firm before the interception took place.

f. Being dissatisfied with the reply of the petitioner, respondent no. 2 rejected his reply and passed the order of demand of tax and penalty dated March 14, 2019.

g. The petitioner thereafter deposited the amount of Rs.3,97,224/- towards tax and penalty, after which the respondent No. 2, released the goods in favor of the petitioner. Aggrieved by the order dated March 14, 2019 passed by the respondent No. 2, the petitioner preferred a statutory appeal before the respondent No. 3.

h. The respondent No. 3, vide its order dated August 30, 2019, dismissed the appeal and upheld the order dated March 14, 2019, passed by the Respondent No. 2.

i. Aggrieved by the order dated August 30, 2019 passed by the Respondent No. 3, the petitioner has preferred the instant writ petition before this Court.

CONTENTIONS OF THE PETITIONER

3. Sri Shubham Agrawal, learned counsel appearing on behalf of the petitioner has made the following submissions:

a. At the time of interception at 01:11 pm on March 10, 2019, the vehicle was parked at the godown for unloading.

b. The petitioner could not generate the e-way bill prior to the commencement of transportation because the computer operator, who was assigned the duty of generating the e-way bill, did not arrive earlier and the person looking after the dispatch inadvertently dispatched the goods on the belief that the e-way bill would be generated within a short while after the arrival of the computer operator who generates the e-way bill.

c. The petitioner had downloaded the e-way bill on March 10, 2019 at 02:42 P.M. and the respondent No. 2 had issued the interception memo on the same day at 03:59 pm. In this situation, the e-way bill had been generated prior to the issuance of interception memo and no intention to evade tax can be inferred in view of this fact.

d. Section 129 of the Act is applicable only when the consignment of goods are in transit and it does not apply to the present case since the vehicle was parked and was not in transit when it was intercepted by the respondent no. 2.

e. The petitioner had submitted all the documents relating to the consignment of goods before the authorities much prior to the passing of seizure order.

f. Since the petitioner had already deposited the tax on the consignment of seized goods and the relevant transaction had also been disclosed in the returns furnished by him, hence there was no intention to evade tax on his part and thus the impugned orders passed by the authorities are liable to be set aside.

g. It is a settled law that if the e-way bill is downloaded before seizure and tax is also charged then seizure and penalty are not justified. This position of law has been held by the Division Bench of this Court in **M/s Century Rayon V. Union of India** reported in **2018 UPTC 528, M/s Bhumika enterprises V. State of UP** reported in **2018 UPTC 536, M/s Singh Tyres V. State of UP** reported in **2018**

UPTC 539, Mahaluxmi traders V. State of UP reported in **2018 UPTC 545 and M/s Shubham fertilizers and chemicals V. State of UP** reported in **2018 UPTC 546.**

h. To buttress his argument, counsel for the petitioner further relies upon the judgment passed by the Division Bench of this court in **M/s Zebronics India pvt. Ltd. V. State of UP reported in 2017 UPTC 1207** wherein it was held that seizure of goods and penalty is not sustainable under section 129 of the Act, unless satisfaction is recorded about the existence of intention to evade tax.

CONTENTIONS OF THE RESPONDENTS

4. Sri Ravi Shankar Pandey, counsel appearing on behalf of the respondent has made the following submissions:

a. The provisions of Section 129 of the Act read with Rule 138 of the Uttar Pradesh Goods and Service Tax Rules, 2017 (hereinafter referred to as 'the Rules') required that where any person transports any goods or stores any goods, while they are in transit, in contravention of the provisions of the Act or Rules made there under, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and every registered person who causes movement of goods of consignment valuing exceeding fifty thousand rupees (i) in relation to supply or (ii) for reasons other than supply or (iii) due to inward supply from an unregistered person, shall before commencement of such movement, furnish information relating to the said goods as specified in Part 'A' of the e-way bill electronically on the common portal along with other information as may be required on the common portal.

b. In view of above provisions, the e-way bill is to be generated before the commencement of the transportation of goods, whether in respect of supply or otherwise. In the present case, the Assistant Commissioner, Commercial Tax, (Mobile Squad) Unit Jalaun, Agra has stopped the vehicle no. MP16H 1584 on 10.03.2019 at 01:11 P.M. At the time of interception of the vehicle, the documents such as e-way bill, invoice, bilty, etc. were not found regarding the goods loaded in the vehicle. In this way, the goods were being transported without valid documents.

c. The petitioner has submitted a vague reply of non availability of computer operator. In this regard, it is submitted that the generation of e-way bill is required as mentioned in Rule 138 of the Rules and therefore, it was obligatory on the petitioner to have generated the e-way bill which was not done and therefore, the provisions were not followed by the petitioner. It is further submitted that the petitioner has generated the e-way bill on 10.03.2019 at 02:42 P.M., which was actually after the time of interception of the vehicle.

d. As per language of Section 129 of the Act, the seizure and release of the goods depends on the infringement of the provisions and the word mens rea has not been specifically mentioned. The revenue has relied upon the judgment given by this Court in **M/s Hawkins Cookers Limited Vs State of U.P. and Others** (Writ Tax No. 739 of 2020 decided on 12.02.2024) where it has been held that "Now, such an intention to evade tax may be presumed by the department in cases where there is wholesome disregard of the Rules. For

example, in the event the goods are not accompanied by the invoice or the e-way bill is completely absent, a presumption may be raised that there is an intention to evade tax. Such a presumption of evasion of tax then becomes rebuttable by the materials to be provided by the owner/transporter of the goods."

e. The High Court of Calcutta in **Pushpa Devi Jain Vs Assistant Commissioner of Revenue** (WPA No. 178 of 2023 decided on 03.03.2023) and the Kerala High Court in **M/s EVM Passenger Cars India Pvt. Ltd. Vs State of Kerala** [W.P.(C) No. 10565 of 2018 decided on 23.08.2023] has held that the seizure and penalty order has been rightly upheld by the authority due to non-following of the provisions of the Act and Rules. In this regard, it may be submitted that such matter is related to year 2018-19. After 14th amendment of the Rule from 01.04.2018, a system has been well developed about e-way bill and it was obligatory on the part of the petitioner to have generated the e-way bill which was not complied with and the provisions were not followed by the petitioner. In view of these factual positions and legal provisions, the action taken by the Mobile Squad Authority and Appellate Authority is legally justified as the goods were not accompanied by the e-way bill which was regarded as a breach of the provisions contained under Section 129 of the Act read with Rule 138 and 138(A) of the Rules.

ANALYSIS AND CONCLUSION

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. Even though the petitioner failed to produce the e-way bill in time due to certain difficulties, the question which arises before me is whether or not there was any actual intention to evade tax on part of the petitioner.

7. It is a well settled position of law that if there is no intention to evade tax on the part of a person then imposition of tax and penalty is not proper and justified. But there must be some reasonable grounds to show that there was actually no intention to evade tax on the part of tax payer.

8. In the present case, it is an admitted fact that neither invoice nor e-way bill were accompanying the goods when it was intercepted by the authorities. This contravention of rules can not be treated as a mere common mistake. In this situation, burden of proof for establishing that there was no intention to evade tax shifts to the assessee.

9. This court in case of **M/s Akhilesh Traders V. State of U.P. and 3 others** (Writ Tax no. 1109 of 2019 decided on February 20, 2024) has held that in cases where the goods are not accompanied by the invoice and e-way bill, a presumption may be raised that there is an intention to evade tax. The relevant paragraphs of the aforesaid judgment read as under:

"7. This Court in umpteen cases where penalties were being imposed under Section 129 of the Act though held that an intention to evade tax should be present, however, in the event the goods are not accompanied by the invoice or the e-way bill, a presumption may be raised that there is an intention to evade tax. Such a presumption of evasion of tax then becomes

rebuttable by the materials to be provided by the owner/transporter of the goods.

8. In the present case, one comes to an inexorable conclusion that the petitioner has not been able to rebut the presumption of evasion of taxes, as he has not been able to explain the absence of invoice and the E-Way Bill. Production of these documents subsequent to the interception cannot absolve the petitioner from the liability of penalty as the very purpose of imposing penalty is to act as a deterrent to persons who intend to avoid paying taxes owed to the Government. It is clear that if the goods had not been intercepted, the Government would have been out of its pocket with respect to the GST payable on the said goods."

10. The petitioner, in the present case, could not explain the absence of invoice and e-way bill with a proper and reasonable explanation. Ergo, he has not been able to rebut the presumption of evasion of tax.

11. Mere furnishing of the documents subsequent to the interception can not be a valid ground to show that there was no intention to evade tax. There must be some reasonable grounds to justify the non-production of documents at the proper time.

12. Furthermore, the judgments upon which the petitioner is relying are prior to April 2018, when there were actually some difficulties with the generation of e-way bill. But after April, 2018 those difficulties have been resolved and now there is no difficulty in generating and downloading the e-way bill.

13. The argument raised by the counsel appearing on behalf of the petitioner that the vehicle was parked at the godown for unloading is not supported by the facts. The interception of the vehicle was in a place away from the godown and this entire argument is obviously an afterthought. Accordingly, the application of Section 129(3) of the Act by the authorities is valid and just in law.

14. In light of the above, I am of the view that the petitioner herein has not complied with the provisions of law, hence the steps taken by the respondent authorities are proper and in accordance with the law and require no interference by this court.

15. Accordingly the writ petition is dismissed.

(2024) 3 ILRA 1809
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1109 of 2019

M/s Akhilesh Traders Pratapgarh ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pranjal Shukla

Counsel for the Respondent:
C.S.C.

The Goods and Services Tax (GST) Act, 2017– Section 129(3) – goods were intercepted – no E-Way Bill, invoice and bility were present in the vehicle at the time of interception – documents were produced subsequent to interception – contravention of the Rules cannot be treated to be a mere technical or typographical mistake – when goods are not accompanied by invoice or E-Way

Bill, a presumption may be raised that there is an intention to evade tax – burden of proof shifts to the assessee – petitioner has not been able to rebut the presumption of evasion of taxes – absence of invoice and E-Way Bill not explained – production of documents subsequent to interception cannot absolve the petitioner from liability of penalty – purpose of imposing penalty is to act as a deterrent – if goods had not been intercepted, the Government would have been out of its pocket with respect to the GST payable – no interference required.

Writ Petition dismissed. (E-9)

Cases Cited:

1. M/s Axpress Logistics India Private Limited v. Union of India and others, Writ Tax No. 602 of 2018, decided on 09.04.2018 (Allahabad High Court, Division Bench).

2. M/s Modern Traders v. State of U.P. and others, Writ Tax No. 763 of 2018, decided on 09.05.2018 (Allahabad High Court, Division Bench).

3. M/s Falguni Steels v. State of U.P. and others, Writ Tax No. 146 of 2023, decided on 25.01.2024 (Allahabad High Court).

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard Sri Pranjal Shukla, learned counsel appearing on behalf of the petitioner and Sri Ravi Shanker Pandey, learned Additional Chief Standing Counsel appearing on behalf of the State.

2. This is a writ petition under Article 226 of the Constitution of India, wherein the petitioner is aggrieved by the order imposing penalty dated August 8, 2018 passed by respondent No.4/Assistant Commissioner, Commercial Tax, Mobile Squad Unit-4, Prayagraj under Section 129(3) of the Uttar Pradesh Goods and Services Act, 2017 (hereinafter referred to as "the Act") and the order dated August 20, 2019 passed in appeal by respondent No.3/Additional Commissioner, Grade-2 (Appeal) 3rd, Commercial Tax, Prayagraj.

3. The undisputed facts in the present case are that the goods were intercepted and upon interception, no E-Way Bill, invoice and bility were present in the vehicle carrying the goods. Subsequent to the interception, these documents were produced by the assessee.

4. Sri Pranjal Shukla has relied upon the Division Bench judgments of this Court rendered in M/s Axpress Logistics India Private Limited v. Union of India and others (Writ Tax No.602 of 2018 decided on April 9, 2018) and M/s Modern Traders v. State of U.P. and others (Writ Tax No.763 of 2018 decided on May 9, 2018) to argue that when the documents are produced after the interception and before the detention order is passed, no penalty is leviable under Section 129(3) of the Act. He further relies upon paragraph Nos.19 and 20 of the Single Bench judgment of this Court in M/s Falguni Steels v. State of U.P. and others (Writ Tax No.146 of 2023 decided on January 25, 2024) to buttress his argument that the intention to evade tax must be present and it is the duty of the Department to indicate such intention to evade tax.

5. Sri R.S. Pandey has submitted that the judgments relied upon by the learned counsel for the petitioner relate to the period where the detention of goods was prior to April 2018. He further submitted that in instances of detention that occurred subsequent to April 2018, the E-Way Bill is mandatory and is required to be carried along with the goods. In the present case, he submits that neither the E-Way Bill nor

even invoice and bility were accompanying the goods at the time of interception. He, accordingly, submits that the burden of proof with regard to intention to evade tax shifts from the Department to the assessee.

6. In the present case, the facts are undisputed that neither invoice nor E-Way Bill were accompanying the goods. Such a contravention to the Rules cannot be treated to be a mere technical or typographical mistake, and accordingly, in such cases, the burden of proof for establishing that there was no mens rea for evasion of taxes shifts to the assessee.

7. This Court in umpteen cases where penalties were being imposed under Section 129 of the Act though held that an intention to evade tax should be present, however, in the event the goods are not accompanied by the invoice or the e-way bill, a presumption may be raised that there is an intention to evade tax. Such a presumption of evasion of tax then becomes rebuttable by the materials to be provided by the owner/transporter of the goods.

8. In the present case, one comes to an inexorable conclusion that the petitioner has not been able to rebut the presumption of evasion of taxes, as he has not been able to explain the absence of invoice and the E-Way Bill. Production of these documents subsequent to the interception cannot absolve the petitioner from the liability of penalty as the very purpose of imposing penalty is to act as a deterrent to persons who intend to avoid paying taxes owed to the Government. It is clear that if the goods had not been intercepted, the Government would have been out of its pocket with respect to the GST payable on the said goods.

9. In light of the above findings, no interference is required with regard to the impugned orders. The writ petition is, accordingly, dismissed.

(2024) 3 ILRA 1811
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1136 of 2022

M/s DECO PLYWOOD INDUS. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agrawal

Counsel for the Respondent:
C.S.C.

The Goods and Services Tax (GST) Act, 2017– Section 129 – duly registered dealer – supplying plywood – transaction duly covered by a tax invoice, a bilty and e-way bill – goods in transit intercepted – seizure order passed on the ground that the document/invoice number has wrongly been mentioned in the e-way bill – no other infraction – no allegation of any attempt for evasion of tax – e-way bill, bilty and tax invoice were matching – consignee was also a registered dealer – typing of the document/invoice number – difference of four digits – typographical error – law is not to remain in a vacuum and has to be applied equitably – presence of mens rea for evasion of tax is a sine qua non for imposition of penalty – imposition of penalty under Section 129 of the Act is without jurisdiction and illegal in law – impugned orders quashed and set-aside **.**

Writ petition allowed. (E-9)

Cases Cited:

1. M/s. Varun Beverages Limited v. State of U.P. and 2 others, 2023 U.P.T.C. (113) 331.

2. Assistant Commissioner (ST) and others v. M/s. Satyam Shivam Papers Pvt. Ltd. and another, 2022 U.P.T.C. (110) 269 (SC).

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is an application under Article 226 of the Constitution of India wherein the petitioner assails the order passed by the Additional Commissioner Grade-2 (Appeal), Commercial Tax, Agra/respondent No.3 dated June 17, 2022 and the order of the imposition of the penalty dated February 1, 2021 passed by the Commercial Tax Officer-2 (Mobile Squad), Range-IV, Agra/respondent No.2.

2. The case of the petitioner is that the petitioner is a duly registered dealer under the Goods and Service Tax Act, 2017 (hereinafter referred to as ?the Act?) and is a seller of plywood and allies products. The petitioner was supplying plywood to another registered dealer, namely, M/s Mahalaxmi Associates, Mumbai and the transaction was duly covered by a tax invoice, a bilty and e-way bill, all dated January 27, 2021.

3. It is a contention of the petitioner that the consignment of goods was sent by the petitioner in Vehicle No.HR 58B 9542. DL1 AA 5332. When the vehicle was in transit, the same was intercepted on 30.1.2021 by the Goods and Service Tax authorities. The seizure order was passed on the ground that the document/invoice number has wrongly been mentioned in the e-way bill as the e-way bill showed the document/invoice No.2224 instead of 0401. Apart from the above factual position, it is clear that there was no other infraction on the part of the petitioner. Furthermore, the authorities have imposed penalty only on the ground that the document number was not mentioned correctly. There is no allegation of any attempt by the petitioner for evasion of tax as the e-way bill, bilty and the tax invoice were matching and the consignee was also a registered dealer.

4. Counsel on behalf of the petitioner has submitted that number 0401 was typed incorrectly as 2224, which is bilty number. He has submitted that this is so obviously a typographical error. He further relies upon a coordinate Bench judgment of this Court in M/s. Varun Beverages Limited v. State of U.P. and 2 others reported in 2023 U.P.T.C. (113) 331 and also upon the judgment of the Supreme Court in Assistant Commissioner (ST) and others v. M/s. Satyam Shivam Papers Pvt. Ltd. And another reported in 2022 U.P.T.C. (110) 269 (SC).

5. Per contra, Mr. Ravi Shanker Pandey, learned Additional Chief Standing Counsel has submitted that the Department via a circular has allowed non imposition of penalty in cases where there are mistake of two digits in the vehicle number and no further. He has further submitted that the judgment in M/s. Varun Beverages Limited (supra) would not apply as the same was a case of stock transfer and there was no question of any tax liability in that case. He has also attempted to distinguish the Supreme Court judgment on the ground that it was a case wherein the e-way bill had expired just before the vehicle was detained and seized.

Analysis and Conclusion

6. In the present case, one finds that there is definitely an error with regard to typing of the document/invoice number and there is a difference of four digits instead of the permitted two digits (as per the government circular) as submitted by the learned Additional Chief Standing Counsel. However, law is not to remain in a vacuum and has to be applied equitably in appropriate cases. The judgment in M/s. Varun Beverages Limited (supra) may be referred to for this purpose. The relevant paragraphs of the said judgment are delineated below:-

"7. The sole controversy engaging the attention of the Court is as to whether the wrong mention of number of Vehicle No. HR-73/6755 through which the goods were in transit and detained by the taxing authorities would be considered as a human error and will be covered under the circular No. 41/15/2018-GST dated 13.04.2018 and 49/23/2018-GST dated 21.06.2018, as the number mentioned in the e-way bill was UP-13T/6755 and the mistake is of only of HR-73 in place of U.P.-13T.

8. It is not in dispute that goods were being transported by the dealer through stock transfer from its unit at Gautam Buddha Nagar to its sale depot at Agra. The bilty which is the document of the transporter mentions the vehicle number as HR-73/6755. From perusal of the e-way bill which has been brought on record, it is clear that the vehicle number has been mentioned as UP-13T/6755. It is apparently clear that mistake is as far as the registration of the vehicle in a particular State and in place of HR-73, UP-13T has been mentioned in the e-way bill, while number of the vehicle 6755 is same.

9. As there is no dispute to the fact that it is a case of stock transfer and there is no intention on the part of dealer to evade any tax, the minor discrepancy as to the registration of vehicle in State in the e-way bill would not attract proceedings for penalty under Section 129 and the order passed by the detaining authority as well as first appellate authority cannot be sustained. Moreover, the Department has not placed before the Court any other material so as to bring on record that there was any intention on the part of the dealer to evade tax except the wrong mention of part of registration number of the vehicle in the e-way bill. The vehicle through which the goods were transported and the bilty showed the one and the same number while only there is a minor discrepancy in Part-B of the e-way bill where the description of the vehicle is entered by the dealer."

7. Furthermore, one may rely on the Supreme Court judgment in M/s. Satyam Shivam Papers (supra) wherein the Supreme Court has examined the applicability of the issue of mens rea under Section 129 of the Act. The relevant paragraphs of the said judgment are provided below:-

"6. The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, the amount of costs as awarded by the High Court in this matter is rather on the lower side. Considering the overall conduct of the petitioner No.2 and the corresponding harassment faced by the

writ petitioner we find it rather necessary to enhance the amount of costs.

7. Upon our having made these observations, learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the operation and effect of Section 129 of Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the part of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic."

8. Upon perusal of the judgments, the principle that emerges is that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty. A typographical error in the e-way bill without any further material to substantiate the intention to evade tax should not and cannot lead to imposition of penalty. In the case of M/s. Varun Beverages Limited (supra) there was a typographical error in the e-way bill of 4 letters (HR ? 73). In the present case, instead of ?0401?, ?2224? was incorrectly entered into the e-way bill which clearly appears to be a typographical error. In certain cases where lapses by the dealers are major, it may be deemed that there is an intention to evade tax but not so in every case. Typically when the error is a minor error of the nature found in this particular case, I am of the view that imposition of penalty under Section 129 of the Act is without jurisdiction and illegal in law.

9. In light of the above findings, the impugned orders dated 17.6.2022 and 1.2.2021 are quashed and set-aside. The consequential reliefs to be provided to the petitioner within the next four weeks.

10. The writ petition is allowed accordingly.

(2024) 3 ILRA 1814
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1307 of 2023

M/S K.K.R Industries ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Vishwas Pandey, Durga Shanker Shukla, Mahesh Dwivedi

Counsel for the Respondent:
A.S.G.I., C.S.C., Naveen Chandra Gupta

The Goods and Services Tax (GST) Act, 2017- petitioner is engaged in the business of sale of scrap items- obtained a GST registration under the GST Act- show cause notice was issued to the petitioner proposing to cancel the registration- as the principal place of business was not found/available at the time of field visit- petitioner could not tender his reply for various reasons beyond his control- impugned order cancelling the GST registration of the petitioner is not speaking order- authorities have adopted

procedure not known to law-impugned order and show cause notice set aside**.**

W.P. allowed. (E-9)

Cases cited:

1. M/s Chandra Sain, Sharda Nagar, Lucknow Thru. Its Proprietor Ms. Chandra Sain v. U.O.I . Thru. Secy. Ministry of Finance, New Delhi and 5 others, Writ Tax No.147 of 2022

2. M/s Viraj Polymers Private Ltd. v. State of U.P. and 3 others, Writ Tax No.300 of 2022

3. Drs. Wood Products Lucknow Thru. Its Partner Sh. Arun Jindal v. State of U.P. Thru. Prin. Secy. Tax and Registration Lko. And others, Writ-C No.21692 of 2021

4. Apparent Marketing Private Limited v. State of U.P. and 3 others, Writ Tax No.348 of 2021

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

1. Heard Shri Vishwas Pandey, learned counsel and Shri Mahesh Dwivedi, learned counsel for the petitioner, Shri Naveen Chandra Gupta, learned Central Counsel for the respondent Nos.1 and 2-Union of India and Shri Rishi Kumar, learned Additional Chief Standing Counsel for the State.

2. The petitioner in the writ petition is aggrieved by the impugned order ref. No.ZA090722077658X dated 13.07.2022 which cancels the GST registration under the GST Act.

3. The appeal of the petitioner has been rejected on grounds of limitation by the impugned order ref.No.ZD091023027190Y dated 06.10.2023 passed by the respondent No.4.

4. The petitioner is also aggrieved by the show cause notice ARNZA090622139048H dated 20.06.2022 passed by the respondent No.5.

5. Shri Vishwas Pandey, learned counsel and Shri Mahesh Dwivedi, learned counsel for the petitioner submit that :

I. The action of the authorities cancelling the GST registration of the petitioner is arbitrary and illegal.

II. The order of cancellation of GST registration virtually compels the petitioner to shut down his business.

III. The order is non-speaking and reflects non application of mind despite visit the petitioner with severe penalties.

6. Shri Rishi Kumar, learned Additional Chief Standing Counsel submits that :

I. The petitioner failed to submit a reply to the show cause notice. Hence, no speaking order is required.

II. The petitioner can continue his business only in accordance with law and cannot complain if the registration certificate has been cancelled in the manner aforesaid.

7. Heard learned counsel for the parties.

8. The petitioner is engaged in the business of sale of scrap items. He has obtained a GST registration under the GST Act. The show cause notice was issued to the petitioner proposing to cancel the registration of the petitioner dated 20.06.2023. The recitals in the show cause notice disclosed that the GST registration

of the petitioner was liable to be cancelled as the principal place of business was not found/available at the time of field visit. Admittedly, the petitioner could not tender his reply to the show cause notice for various reasons beyond his control.

9. The show cause notice is vague and lacks material particulars. The time and place of the field visit are not disclosed in the show cause notice nor the details of the officials who allegedly conducted the visit have been provided therein. The lack of material particulars in the show cause notice vitiates the same and the proceedings were liable to be dropped. The report of the officials who had allegedly visited the site of business has not been appended to the show cause notice nor was supplied to the petitioner.

10. Further, the petitioner was directed to appear for tendering his reply to the show cause notice dated 20.06.2022. Though the seven days time was granted for the reply, the matter was fixed before the authorities on 22.06.2022.

11. The time period is too short and is not sufficient for any noticee to tender an effective and complete defence of his case. On both these grounds the show cause notice is vitiated and the proceedings in pursuance thereof are also liable to be set aside on this ground alone. The cancellation order dated 13.07.2022 is a non speaking order. It does not reflect any application of mind. Both the grounds go to the route of the jurisdiction of the authorities.

12. The narrative shall now be fortified by good authorities in point. The issue has been settled by authoritative pronouncements of this Court. Pankaj Bhatia, J. in **M/s Chandra Sain, Sharda Nagar, Lucknow Thru. Its Proprietor Ms. Chandra Sain v. U.O.I . Thru. Secy. Ministry of Finance, New Delhi and 5 others**[1] while delineating the duties of the noticing authority and process to be followed prior to cancellation of a licence and also the consequences of such cancellation held as under:

"6. Learned counsel for the petitioner argues that although no fault can be found with the appellate order dismissing the appeal as Aappellate Authority does not have the power to condone the delay in terms of the scheme of the Act, however, he argues that the order cancelling the registration is without application of mind; he draws my attention to the impugned order dated 13.02.2020, which does not disclose any application of mind. He, thus, argues that the quasi judicial order which has an adverse effect on the right of the petitioner to run business as guaranteed under Article 19 of the Constitution of India, the same has been done without any application of mind which is neither the intent of the Act nor can it be held to be in compliance of the mandate of Article 14 of the Constitution of India. He further argues that as the appeal has not been decided on merit, the doctrine of merger will have no application and it is only the order dated 13.02.2020 which affects the petitioner and as the same is devoid of any reasons, the same can be challenged before this Court as decided by the Hon'ble Supreme Court in the case of Whirlpool Corporation v. Registrar of Trademarks, Mumbai and Ors.

7. He further places reliance on the judgment of this Court in the case of Om Prakash Mishra v. State of U.P. & Ors.; Writ Tax No.100 of 2022 decided on 06.09.2022 wherein this Court had

recorded that every administrative authority or a quasi judicial authority should necessarily indicate reasons as reasons are heart and soul of any judicial or administrative order.

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

13. The said judgement was followed in **M/s Viraj Polymers Private Ltd. v. State of U.P. and 3 others**[2].

14. Similarly the consequences of a vague show cause notice were also held by this Court in **Drs. Wood Products Lucknow Thru. Its Partner Sh. Arun Jindal v. State of U.P. Thru. Prin. Secy. Tax and Registration Lko. And others**[3] by holding as under:

"18. A perusal of the show-cause notice at the first instance, clearly depicts the opaqueness of the allegations levelled against the petitioner, which were only to the ground that "tax payer found non-functioning/non-existing at the principal place of business'. The said show-cause notice did not propose to rely upon any report or any inquiry conducted to form the opinion and on what basis was the allegation levelled that the tax payer was found non-functioning; it does not indicate as to when the inspection was carried. A vague show-cause notice without any allegation or proposed evidence against the petitioner, clearly is violative of principles of administrative justice. Cancellation of registration is a serious consequence affecting the fundamental rights of carrying business and in a casual manner in which the show-cause notice has been issued clearly demonstrates the need for the State to give the quasi-adjudicatory function to persons who have judicially trained mind, which on the face of it absent in the present case. The order of cancellation of the registration on the ground that no reply was given is equally lacking in terms of a quasi-judicial fervor as the same does not contain any reasoning whatsoever. The show-cause notice issued after the petitioner had filed an application for revoking the cancellation of registration also smacks of lack of judicial training by the quasi-adjudicatory authorities under the GST Act as it merely shows that no satisfactory explanation was received within the prescribed time.

19. The order rejecting the application for revocation of cancellation of registration takes the matter to the height of arbitrariness inasmuch as no reasons are recorded as to why the request for revocation of cancellation of registration could not be accepted and discloses absence of application of mind with regard to the averments contained in the application filed by the petitioner for revocation of cancellation of registration. It is also not clear as to why the request of the petitioner to adjourn the matter because of the marriage of his daughter was not even considered prior to passing of the rejection order dated 15.07.2020.

21. I have no hesitation in recording that the said authorities while passing the order impugned have miserably failed to act in the light of the spirit of the GST Act. The stand of the Central Government before this Court is equally not appreciable as on the one hand they are alleging that excess goods were found for

which the petitioner is liable to pay duty and on the other hand there is justification to the order passed and impugned in the present petition."

15. This Court in **Apparent Marketing Private Limited v. State of U.P. and 3 others**[4] had occasioned to consider the consequences of cancellation of registration and the manner in which the authorities are liable to proceed in such matter. S.D.Singh, J. speaking for this Court held as under:

"12. Having heard learned counsel for the parties and having perused the record, in the first place, cancellation of registration has serious consequences. It takes away the fundamental right of a citizen etc. to engage in a lawful business activity. In the present case, undisputedly, the registration claimed by the assessee had been granted by the respondent authority. Therefore, a presumption does exist as to such registration having been granted upon due verification of necessary facts. If the respondent proposed to cancel the registration thus granted, a heavy burden lay on the respondent authority to establish the existence of facts as may allow for such cancellation of registration. Section 29(2) of the Act reads as below :

"Section 29. Cancellation of suspension of registration

(1) …

(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,-

(a) a registered person has contravened such provisions of the Act or the rules made there under as may be prescribed; or

(b) a person paying tax under section 10 has not furnished returns for three consecutive tax periods; or

(c) any registered person, other than a person specified in clause (b), has not furnished returns for a continuous period of six months; or

(d) any person who has taken voluntary registration under sub-section (3) of section 25 has not commenced business within six months from the date of registration; or

(e) registration has been obtained by means of fraud, willful misstatement or suppression of facts:

Provided that the proper officer shall not cancel the registration without giving the person an opportunity of being heard.

[PROVIDED FURTHER, that during pendency of the proceedings relating to cancellation of registration, the proper officer may suspend the registration for such period and in such manner as may be prescribed.]"

13. Therefore, the registration once granted could be cancelled only if one of the five statutory conditions was found present. Per se, no registration may be cancelled by merely describing the firm that had obtained it, was "bogus". The word "bogus" has not been used by the statute. The only contingency to which such expression may relate may be one appearing under Clauses (c) and (d) of Section 29(2) of the Act being where a registered firm does not commence its business within six months of its registration. Other than that, the term "bogus" may also refer to a satisfaction contemplated by Section 29(2)(c) of the Act where registration may be cancelled if the registered firm has not furnished its return for continuous period of six months.

Those conditions have not been shown to exist in this case.

14. Yet, in case the authority wanted to cancel the existing registration, it ought to have mentioned (in the show cause notice), if it proposed to cancel the registration for violation of Section 29(2)(c) of the Act or for violation of Section 29(2)(d) of the Act. It cannot be a matter of contemplation or option either with the authority or the assessee to find out for itself by any guesswork or exploratory exercise, if the case fell in any of the conditions of Section 29(2) of the Act.

15. Registration having been granted earlier, the obligation existed on the authority to specify the exact reason/charge on which it proposed to cancel the registration. In the present case, unless the respondent authority had first specified the reason why it proposed to cancel the registration and unless the authority had specified the reason why it was attempting to treat the assessee firm "bogus" i.e. whether reference was being made to Section 29(2)(c) or Section 29(2)(d) of the Act - by specifically stating the facts as may give rise to that charge and unless the supporting material giving rise to that charge had been referred to in that notice, the notice itself remained defective in material aspect.

16. Though the notice for cancellation of registration may not be placed on a high pedestal of a jurisdictional notice, at the same time, unless the essential ingredients necessary for issuance of such notice had been specified therein at the initial stage itself, the authorities cannot be permitted to have margin or option to specify and/or improve the charge later.

17. In the present case, by merely describing the assessee firm "bogus", the respondent authority did not make known to the assessee the exact charge that was being levelled against the assessee. Correspondingly, the respondent authority deprived the assessee of the necessary opportunity to rebut the charge.

18. In view of the discussion made above, the charge levelled in the notice dated 22.07.2020 and as was reiterated in the order dated 13.08.2020 and the further notice dated 21.08.2020 are wholly, vague. Effectively, it prevented the assessee to rebut the same. The statute contemplates issuance of the notice in specified circumstances for specific grounds. Those could not be diluted or muddled or made vague by describing the assessee firm as "bogus". In absence of any specific charge, the respondent authority could not be permitted to proceed to cancel the assessee's registration. Though it may remain open to the Assessing Authority to issue a fresh notice with exact charge specification, the proceedings arising from the impugned notice is inherently defective.

16. The judgments of this Court are squarely applicable to the facts of this case. This Court finds that the show cause notice dated 20.06.2022 was vague and unsustainable in law.

17. The order dated 13.07.2022 cancelling the GST registration of the petitioner is not speaking order which reflects non application of mind by the authorities. The authorities have adopted procedure not known to law while cancelling the GST registration of the petitioner. Action of the authorities is not sustainable in law.

18. The show cause notice dated 20.06.2022 passed by the respondent No.5 is vague.

19. The order dated 13.07.2022 passed by the respondent No.3 and the order dated 06.10.2023 passed by the respondent No.4 as well as the show cause notice dated 20.06.2022 passed by the respondent No.5 are liable to be quashed and are quashed.

20. The writ petition is allowed.

21. It is open to the authorities to proceed afresh against the petitioner in accordance with law.

(2024) 3 ILRA 1820
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1544 of 2022

M/s K.J. Entp., Agra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pranjal Shukla

Counsel for the Respondent:
Sri Ravi Shankar Pandey, Addl. C.S.C.

The Uttar Pradesh Central Goods & Services Tax Act, 2017 – Sections 74 & 75(4) – Assessment and penalty proceedings – denial of personal hearing – statutory mandate of opportunity of hearing – interpretation of the word "or" in Section 75(4) – opportunity of hearing mandatory either on request of assessee or where adverse order is contemplated – no personal hearing granted before passing adverse order imposing tax, interest and penalty – gross violation of principles of natural justice -procedural illegality – availability of alternative remedy not a bar where order passed in breach of natural justice – impugned assessment and appellate orders unsustainable – orders quashed – matter remanded with direction to grant personal hearing and pass reasoned order in accordance with law**.**

Writ petition allowed. (E-9)

Cases Cited:

1. Commissioner of Sales Tax, Uttar Pradesh v. The Modi Sugar Mills Ltd., MANU/SC/0276/1960 (Supreme Court).
Bharat Mint and Allied Chemicals v. Commissioner, Commercial Tax and Others, 2022 SCC OnLine All 1088 (Allahabad High Court – Division Bench).

2. Mohini Traders v. State of U.P. and Others, MANU/UP/2440/2023 (Allahabad High Court – Division Bench).

3. M/s Primeone Work Force Pvt. Ltd. v. Union of India, 2024:AHC-LKO:3533-DB (Allahabad High Court – Division Bench).

4. Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Guwahati and Others, (2015) 8 SCC 519 (Supreme Court).

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard counsel appearing on behalf of the parties.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner M/S K.J. Enterprises is aggrieved by the order dated September 26, 2022, passed by the Additional Commissioner, Grade – 2, (Appeals – 1st), Commercial Tax, Agra (hereinafter referred to as the 'Respondent No. 2').

3. Factual matrix of the instant case is provided below:

a. Petitioner is a proprietorship firm carrying the business of job work of scrap, selling, and purchasing of iron machinery parts and hardware.

b. The petitioner, during the month of March 2018, purchased inputs from different registered firms, in which ITC claim was made as per the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as the 'UPGST Act, 2017').

c. The petitioner also made transactions in the year 2019-20 and in this regard, bills were issued, in which details of the goods were mentioned.

d. On July 24, 2019, an inspection was carried out at the premises of the petitioner and at the time of inspection, the authorities asked the petitioner to deposit the amount in DRC – 03.

e. Thereafter, a summon was issued to the petitioner under Section 70 of the UPGST Act, 2017 directing the petitioner to appear before the concerned authority on August 13, 2019, at 11:00 am along with stock register and other relevant documents for verification.

f. A show cause notice was also issued by the respondents on July 22, 2020, under Section 74 of the UPGST Act, 2017 for tax period 2019-20, alleging that the petitioner wrongly availed input tax credit amounting to INR 22,00,00,000/- against bogus tax invoices and utilized the same by fraud or misstatement, suppression of facts, etc.

g. Another notice was issued on September 17, 2020, directing the petitioner to furnish a reply on October 6, 2020. Petitioner thereafter furnished reply on October 1, 2020.

h. Deputy Commissioner, State Tax, Sector – 4 (hereinafter referred to as the 'Respondent No. 3') rejected the reply of the petitioner vide order dated August 10, 2021, passed under Section 74 of the UPGST Act, 2017 for the A.Y. 2019-20 and imposed tax and penalty, along with interest, upon the petitioner amounting to INR 6,78,12,667.92/-.

i. The petitioner preferred an appeal before the Respondent No. 2 against the aforesaid order passed by the Respondent No. 3. By an order dated September 26, 2022, the Respondent No. 2 upheld the order of Respondent No. 3, and imposed tax and penalty on the petitioner.

4. Without delving into the merits of the instant case, it is crystal clear that an opportunity of 'personal hearing' was not afforded to the petitioner which is a mandatory requirement under Section 75(4) of the UPGST Act, 2017 which has been extracted below:

"75(4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person."

(emphasis added)

5. Even if no request is received from the person chargeable with tax or penalty, an opportunity of personal hearing must be granted if any adverse decision is contemplated against such person.

6. When the word 'or' is used in a statute, it serves as a disjunctive conjunction, indicating two or more alternatives. Each option presented is to be considered independently. It is crucial to recognize that the disjunctive nature of "or"

precludes its interpretation as a conjunctive conjunction, such as “and”. Unlike, “and”, which implies a requirement for the simultaneous fulfilment of multiple conditions, “or” allows for flexibility and choice by permitting compliance with any one of the alternatives presented. Attempting to read “or” as “and” in a statute would fundamentally alter its meaning and undermine the legislative intent behind its use. Such an interpretation would impose stricter criteria or conditions than intended by the statute, potentially leading to absurd or unreasonable outcomes.

7. Courts have consistently upheld the disjunctive nature of “or” in statutory interpretation, adhering to the principle of giving effect to the plain and ordinary meaning of the language used in the statutes. This principle, known as the plain meaning rule or the literal rule of interpretation, emphasizes the importance of interpreting statutes based on their plain and ordinary meaning, as understood by the average person reading the text of the statute. Moreover, the disjunctive function of “or” in statutes is essential for upholding principles of fairness, equity, and access to justice. By offering alternative paths or options, statutes accommodate diverse individual needs and situations, promoting inclusivity and mitigating potential disparities or injustices. This is particularly significant in areas of law concerning rights, benefits, and entitlements, where the flexibility provided by “or” ensures that legal provisions can be applied in a manner that reflects the realities and complexities of human experiences.

8. In ***Commissioner of Sales Tax, Uttar Pradesh -v- The Modi Sugar Mills Ltd.***, reported in, **MANU/SC/0276/1960**, the Supreme Court affirmed that while interpreting taxing statutes, courts must look at the words used in the statute, and interpret a taxing statute considering what has been clearly expressed:

“….In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed : it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.”

9. The significance of the word “or" in Section 75(4) of the UPGST Act, 2017 cannot be underestimated. The usage of the word “or" extends beyond its disjunctive function; it serves as a pivotal indicator of legislative intent regarding the necessity of providing an opportunity for personal hearing. By incorporating “or" into the statutory language, lawmakers explicitly delineate two distinct scenarios in which the opportunity of personal hearing must be afforded: either upon application by the individual subject to penalty or tax imposition, or in the event of contemplation of an adverse order. Personal hearing represents a fundamental aspect of procedural fairness and natural justice, ensuring that individuals have the opportunity to present their case, respond to allegations, and address any concerns or mitigating factors directly to the decision-maker. It is a vital safeguard against arbitrary or unjust decisions. The inclusion of “or" in Section 75(4) of the UPGST Act, 2017, emphasizes the dual nature of the obligation to provide a personal hearing,

accommodating both proactive requests from individuals seeking to defend their interests and reactive responses to adverse orders contemplated by tax authorities. In either scenario, the statutory mandate remains clear: the individual must be afforded an opportunity for personal hearing before any final determination is made regarding tax or penalty imposition. Moreover, the statutory mandate for personal hearing reflects an acknowledgement of the complex and multifaceted nature of tax and penalty determinations, which often involve intricate legal and factual considerations. Personal hearing provides a forum for nuanced discussion and exploration of these complexities, enabling decision-makers to make well-informed and equitable decisions based on a comprehensive understanding of the circumstances at hand.

10. A Division Bench of this Court in Bharat Mint and Allied Chemicals v. Commissioner Commercial Tax and Others reported in 2022 SCC OnLine All 1088, underscored the significance of providing an opportunity for personal hearing as contemplated under Section 75(4) of the UPGST Act, 2017. Relevant paragraphs have been extracted below:

"9.From perusal of Section 75(4) of the Act, 2017 it is evident that opportunity of hearing has to be granted by authorities under the Act, 2017 where either a request is received from the person chargeable with tax or penalty for opportunity of hearing or where any adverse decision is contemplated against such person. Thus, where an adverse decision is contemplated against the person, such a person even need not to request for opportunity of personal hearing and it is mandatory for the authority concerned to afford opportunity of personal hearing before passing an order adverse to such person.

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12.It has also been admitted in the counter affidavit that except permitting the petitioner to reply to the show cause notice, opportunity of personal hearing has not been afforded to the petitioner. Thus the legislative mandate of Section 75(4) of the Act to the authorities to afford opportunity of hearing to the assessee i.e. to follow principles of natural justice, has been completely violated by the respondents while passing the impugned order.

13.The stand taken by the respondents in the counter affidavit that the writ petition is not maintainable as the petitioner has an alternative remedy of appeal under Section 107 of the Act, can also not be accepted inasmuch as it is settled law that availability of alternative remedy is not a complete bar to entertain a writ petition under Section 226 of the Constitution of India. Certain exceptions have been carved out by Hon'ble Supreme Court that a writ petition under Article 226 of the Constitution of India may be entertained even there is an alternative remedy. One of the principle in this regard is that if the order impugned has been passed in gross violation of principles of natural justice. It is admitted case of the respondents that no opportunity of personal hearing, as contemplated under Section 75(4) of the Act, 2017, was afforded to the petitioner before passing the impugned order.

14.During the course of hearing of this writ petition, learned standing counsel has produced before us a photo stat copy of the order of the Assessing Authority relating to the impugned order and perusal thereof shows that no opportunity of

hearing as contemplated under Section 75(4) of the Act, 2017 was not afforded to the petitioner. Thus, there being patent breach of principles of natural justice, the present writ petition is maintainable against the impugned order."

11. The view taken in **Bharat Mint and Allied Chemicals (supra)** was reiterated by another Division Bench of this Court in **Mohini Traders v. State of U.P. and Others** reported in **MANU/UP/2440/2023**. Relevant paragraphs have been extracted below:

"7. We find ourselves in complete agreement with the view taken by the coordinate bench in Bharat Mint & Allied Chemicals (supra). Once it has been laid down by way of a principle of law that a person/assessee is not required to request for "opportunity of personal hearing" and it remained mandatory upon the Assessing Authority to afford such opportunity before passing an adverse order, the fact that the petitioner may have signified 'No' in the column meant to mark the assessee's choice to avail personal hearing, would bear no legal consequence.

8. Even otherwise in the context of an assessment order creating heavy civil liability, observing such minimal opportunity of hearing is a must. Principle of natural justice would commend to this Court to bind the authorities to always ensure to provide such opportunity of hearing. It has to be ensured that such opportunity is granted in real terms. Here, we note, the impugned order itself has been passed on 25.11.2022, while reply to the show-cause-notice had been entertained on 14.11.2022. The stand of the assessee may remain unclear unless minimal opportunity of hearing is first granted. Only thereafter, the explanation furnished may be rejected and demand created.

9. Not only such opportunity would ensure observance of rules of natural of justice but it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice and allow a better appreciation to arise at the next/appeal stage, if required."

12. Recently, in **M/s Primeone Work Force Pvt. Ltd. v. Union of India**, reported in **2024:AHC-LKO:3533-DB**, the Division Bench of this Court, stated that an opportunity of hearing is mandatorily required to be given if tax and penalty are to be imposed:

"6. Section 75(4) of the Act of 2017 specifically states 'or where any adverse decision is contemplated against such person'.

7. Since in the present cases, both tax and penalty are imposed against the petitioners and admittedly, an adverse decision is contemplated against the petitioners, therefore, under Section 75(4) of the Act of 2017, an opportunity of hearing was mandatorily required to be given by the department to the petitioners and merely marking the same as "NO" in the option cannot entitle the department to pass an order without giving any opportunity or even without waiting for the petitioners to appear on the date fixed. This Court has already taken a similar view in M/s. Mohini Traders (supra). 8. In view thereof, all the writ petitions are allowed on the sole ground of opportunity of hearing and the orders impugned in all four writ petitions are quashed."

13. The Supreme Court in **Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Guhati**

and Others reported in **(2015) 8 SCC 519**, upheld the importance of personal hearing before making any decision. The Supreme Court stated that even in administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking decision is necessary. Relevant paragraphs have been extracted below:

"33.In his separate opinion, concurring on this fundamental issue, K. Ramaswamy, J. echoed the aforesaid sentiments in the following words : (ECIL case[(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] , SCC p. 773, para 61)

"61.It is now settled law that the proceedings must be just, fair and reasonable and negation thereof offends Articles 14 and 21. It is well-settled law that the principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an opportunity or supplying the material which is the basis for the decision. The enquiry report constitutes fresh material which has great persuasive force or effect on the mind of the disciplinary authority. The supply of the report along with the final order is like a post-mortem certificate with putrefying odour. The failure to supply copy thereof to the delinquent would be unfair procedure offending not only Articles 14, 21 and 311(2) of the Constitution, but also, the principles of natural justice."

34.Likewise, inC.B. Gautamv.Union of India[(1993) 1 SCC 78] , this Court once again held that principle of natural justice was applicable even though it was not statutorily required. The Court took the view that even in the absence of statutory provision to this effect, the authority was liable to give notice to the affected parties while purchasing their properties under Section 269-UD of the Income Tax Act, 1961. It was further observed that : (SCC p. 104, para 30)

"30.... The very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an imputation casts a slur on the parties to the agreement to sell lead to the conclusion that before such an imputation can be made against the parties concerned, they must be given an opportunity to show cause that the undervaluation in the agreement for sale was not with a view to evade tax."

It is, therefore, all the more necessary that an opportunity of hearing is provided.

35.From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed inA.K. Kraipak case[(1969) 2 SCC 262] that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. InManeka Gandhiv.Union of India[(1978) 1 SCC 248] also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. InMaharashtra State Financial Corpn.v.Suvarna Board Mills[(1994) 5 SCC 566] , this aspect was

explained in the following manner : (SCC p. 568, para 3)

"3.It has been contended before us by the learned counsel for the appellant that principles of natural justice were satisfied before taking action under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straitjacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take care of the lapse, because of which the action as made known is contemplated. No particular form of notice is the demand of law. All will depend on facts and circumstances of the case."

14. From a bare reading of the order dated August 10, 2021 passed by the Respondent No. 3 it is palpably clear that no opportunity of personal hearing was afforded by the Respondent No. 3 to the petitioner, which is a statutory obligation under Section 75(4) of the UPGST Act, 2017. Furthermore, the Respondent No. 2, while dismissing the appeal failed to correct this glaring impropriety in its order dated September 26, 2022. These orders cannot be allowed to pass through the legislative barriers of natural justice, erected to safeguard individual rights and prevent abuse of power.

15. In light of the aforesaid discussion, let there be a writ of certiorari issued against the order dated August 10, 2021 passed by the Respondent No. 3 and order dated September 26, 2022, passed by the Respondent No. 2. These orders are quashed and set aside. Consequential relief to follow. The Respondent No. 2 is directed to grant an opportunity of personal hearing to the petitioner and thereafter pass a reasoned order in accordance with the law within a period of two months from date.

16. This writ petition is, accordingly, allowed.

(2024) 3 ILRA 1826
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 200 of 2018

Suresh Chand & Ors. ...Petitioners
Versus
Commissioner, Aligarh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Deena Nath, Sri Deepak Kumar, Sri Shubham Yadav

Counsel for the Respondents:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-Mines and Minerals (Development of Regulation) Act,1957-Section 21-UP Minor Minerals(Concession) Rules,1963 amended 2014-Rule 3-the petitioners were accused of illegally mining 3689 cubic meters of soil from plot no. 139-a notice was issued to the petitioners demanding Rs. 2,83,230/- as royalty and penalty-The District Magistrate and the Commissioner upheld the penalty-The court dismissed the petition stating that the petitioners failed to prove the soil extraction was for permissible activities like brick-making or pottery-The court analyzed the Rule 3 including amendments and exceptions for

certain non-mining activities but the petitioners were unable to show that their activities met the exceptions provided under the rules.(Para 1 to 19)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Bharat Singh Vs St. of UP & ors.(2017) 2 ADJ 184

(Delivered by Hon'ble Anjani Kumar Mishra, J. & Hon'ble Jayant Banerji, J.)

1. Heard Shri Virendra Singh, learned counsel for the petitioner and learned Standing Counsel appearing for the State.

2. This petition has been filed challenging the order dated 18.06.2015 passed by the District Magistrate, Hathras in purported exercise of powers under Rule 3, 57, & 70 of the UP Minor Minerals (Concession) Rules, 19631. Also under challenge is the order dated 27.09.2017, passed by the commissioner, Aligarh Division, dismissing the appeal of the petitioners.

3. It appears from the record that a notice dated 01.05.2015 was issued to the petitioners in respect of plot No. 139 with the allegation that 3689 cubic meters of soil was illegally mined and an amount of Rs. 2,83,230/- was sought to be imposed. By that notice, a date was fixed before the District Magistrate to enable the petitioners to file their objections, if any.

4. From page 28 to page 30 of the paper book of this petition, a typed copy of the response dated 25.05.2015 submitted by the petitioner is enclosed, which is addressed to the District Magistrate/ Additional District Magistrate, Hathras, in which mining on plot No. 139 was emphatically denied and it was stated that provisions of Rules, 1963 were not applicable in respect of agricultural land. It was further stated that they cannot be subjected to any such imposition inasmuch as the petitioners was merely levelling their agricultural field and it cannot be held to be mining operation within the Rules, 1963. It has also been mentioned that the payment demanding royalty, etc. is illegal and the site plan is contrary to the actual situation existing at the site.

5. By the impugned order dated 18.06.2015, the contentions raised by the petitioners were narrated and the report of the Tehsildar stating that mining of 3689 cubic meters of soil was done, was considered. The objections of the petitioners that the soil of their agricultural land was levelled and they had neither sold the soil nor had mined the same, were considered. The District Magistrate considered the report of the Tehsildar and the Sub-Divisional Officer, Hathras and came to the conclusion that illegal mining of 3689 cubic meter of soil on plot No. 139 was done. Accordingly, royalty @ 14 per sq. meter was imposed, which was multiplied five times and after imposing compounding fee, a total amount of Rs. 2,83,230/- was imposed.

6. The petitioners challenged the order of the District Magistrate in an appeal before the Commissioner under Section 79 of the Rules, 1963. In the memorandum containing the grounds of appeal that has been enclosed as Annexure-4 to the writ petition, it was stated that no proper opportunity was given to the petitioners for hearing and to produce evidence and neither were the reports of the Tehsildar or the Sub-Divisional Officer supplied to

them. It was stated that the District Magistrate did not decide the case on merits but only on the basis of the reports.

7. By means of an impugned order dated 27.09.2017, the Commissioner has rejected the appeal after taking into account the spot inspection report dated 18.03.2015 made by the Revenue Inspector and the Area Lekhpal who had made a site plan and had taken measurements to conclude that on plot No. 139, 3689 cubic meters of soil was mined. The reports of the Tehsildar and Sub Divisional Officer were also considered and the order of the District Magistrate, Hathras making the imposition on the petitioners was upheld and the appeal was dismissed.

8. The learned counsel for the petitioners has submitted that petitioners are simple agriculturists who neither had any intention nor undertook any mining operation on plot No. 139. It is stated that there was no evidence of mining, sale, or transportation of soil. It is argued by learned counsel that in view of the facts and circumstances of the case, Rule 3 of the aforesaid Rules, 1963 would not apply to the petitioners.

9. Learned counsel in support of his contention has relied upon a judgment of this Court in the case of **Bharat Singh vs. State of UP & 4 Others**[2] in Writ C No. 18753 of 2016 that was decided by this Court on 23.05.2016. It is submitted that this Court in the case of **Bharat Singh**, has relied upon a Government Order dated 24.12.2012, a perusal of which reveals that no case of illegal mining, as ordered by the District Magistrate and upheld in appeal by the Commissioner, is made out against the petitioner.

10. The contentions of learned counsel for the petitioners do not appear to be correct. A perusal of the aforesaid judgment of this Court in **Bharat Singh** reveals that under consideration therein was a notice issued by the Incharge Officer (Mining/ Additional District Magistrate-II), Aligarh, requiring the petitioner therein to show cause why royalty @ Rs. 14 per sq. meter and five times fee of minerals, and penalty Rs. 25,000/- under Section 21 of the Mines and Minerals (Development & Regulation) Act, 1957, be not imposed. After considering the avements and submissions made on behalf of the counsel for the parties, this Court in **Bharat Singh** considered the Government Order dated 24.12.2012 on the subject UP Minor Minerals (Concession) (35th amendment) Rules 2012. The aforesaid Government Order, as quoted in the judgment is being reproduced below:-

"प्रेषक, संख्या 3514/86.2012.235/2010

विवेक वार्ष्णेय
विशेष सचिव
उत्तर प्रदेश शासन।

सेवा मे,

1.निदेशक
भूतत्व एवं खनिकर्म, उ०प्र०
लखनऊ।

2. समस्त जिलाधिकारी।

3. समस्त मण्डलायुक्त।

भूतत्व एवं खनिकर्म अनुभागः लखनऊ

दिनांक 24 दिसम्बर, 2012

विषयः उत्तर प्रदेश खनिज (परिहार) (पैंतीसवा संशोधन) नियमावली, 2012 के सम्बन्ध में।

महोदय,

अवगत कराना है कि उपर्युक्त संशोधन के अन्तर्गत ईट भट्ठों के संचालन में पर्यावरण स्वच्छता प्रमाण पत्र की बाध्यता को समाप्त किये जाने के दृष्टिगत संशोधन के नियम-3 में "स्पष्टीकरण" तथा नियम- 21-1 के बाद उप नियम-(1-क) निम्नवत् जोड दिया गया है।

1- स्पष्टीकरणः- ईट बनाने हेतु हस्तचालन से खुदायी द्वारा अथवा हस्तचालन से सामान्य मिट्टी को निकालने की क्रिया खनन संक्रियाओं के अन्तर्गत नहीं आयेगी जब तक की खनन स्थल की गहरायी 02 मीटर से अधिन न हो।

2- (1-क) नियम-3 में किसी बात के प्रतिकूल होते हुये भी ईट भट्ठा मालिकों को नियमावली की प्रथम अनुसूची में तत्समय विनिर्दिष्ट दरों पर स्वामित्व का भुगतान करना होगा।

इस संबंध में मुझे यह कहने का निदेश हुआ है कि ईट भट्ठों के संचालन के संबंध में उपर्युक्तानुसार आवश्यक कार्यवाही करने का कष्ट करें।

भवदीय,

(विवेख वार्ष्णेय)

विशेष सचिव"

11. This Court relied upon the aforesaid Government Order dated 24.12.2012 and held that in exercise undertaken by the petitioners therein could not be treated to be mining operation. Accordingly the petitions were allowed.

12. A perusal of Rule 3 of Rules, 1963 reflects that it was substituted by the 37th Amendment Rules, 2014 dated 22.10.2014 which came into force with effect from 22.10.2014. Rule 3 as amended by the 37th Amendment Rules, 2014, reads as under:-

"3. Mining Operations to be under a mining lease or mining permit- (1) No person shall undertake any mining operations in any area within the State of any minor mineral to which these rules are applicable except under and in accordance with the terms and conditions of a mining lease or mining permit granted under these rules:

Provided that nothing shall affect any operations undertaken in accordance with the terms and conditions of mining lease or permit duly granted before the commencement of these rules.

Explanation:- For the purposes of this rule manual digging or manual extraction of ordinary clay, ordinary earth for making bricks and pottery shall not be treated as mining operations:

Provided that pit created by such digging or extraction should not be deeper than two meters.

(2) No mining lease or mining permit shall be granted otherwise than in accordance with the provisions of these rules."

(emphasis supplied)

13. The explanation mentioned in this rule provides an exception to sub-section (1) of Rule 1 providing that manual digging or manual extraction or ordinary clay, ordinary earth for making bricks and pottery shall not be treated as mining operations subject to its being used for making bricks and pottery and provided that pit created by such digging or extraction should not be deeper than two meters.

14. On comparison of the Rule 3 of Rules, 1963 as quoted above and the amendment sought to be incorporated by the 35th Amendment of the Rules, 1963 as noted in the Government Order quoted above, reflects a change in the explanation to sub-Rule (1) of Rule 3 was made by the 37th Amendment in the year 2014 inasmuch as the extraction of ordinary clay, ordinary earth, which are not to be treated as mining operations, are qualified to be **for the purpose of making bricks and pottery.** This purpose was not existing in 35th Amendment of the Rules, 1963 as reflected in the aforesaid Government Order dated 24.12.2012.

15. It is pertinent to mention here that the aforesaid judgement of **Bharat Singh**, this Court was considering a notice issued by the competent authority on 23.07.2014 which was prior to the coming

into force of the 37th Amendment to the Rules, 1963, with effect from 22.10.2014.

16. It is noted in the appellate order of the Commissioner that the site plan reflected mining and the measurements of the pits were also taken. The exact quantity of soil extracted was also specified therein. In the explanation submitted by the petitioner pursuant to the notice dated 01.05.2015, in para 8 thereof, they have specifically stated that the site plan enclosed with the order of the District Magistrate is contrary to the factual situation existing at the site. The aforesaid facts and circumstances reflects that the petitioner had full knowledge of the material existing in the records of the District Magistrate and were aware of the site plan also.

17. Under the circumstances, the grounds taken in the appeal that the petitioners were not aware of the site plan and other material on record, does not appear to be correct. In the counter affidavit filed by the State on behalf of the State-respondents, apart from denying the contents of the writ petition, the explanation to Rule 3 of the Rules, 1963 has been repeated and has been emphasised that extraction or digging of ordinary clay, ordinary earth **for making bricks and pottery** shall not be treated as mining operation.

18. It is contended by the learned Standing Counsel that the petitioners have failed to demonstrate before the respondent-authorities that the extraction was for making bricks and pottery.

19. Under the facts and circumstances of the case, the orders impugned do not call for interference and this writ petition is **dismissed**.

(2024) 3 ILRA 1830
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.03.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ -C No. 397 of 2018

Reliance Nippon Life Insurance Co. Ltd.
...Petitioner
Versus
Permanent Lok Adalat & Anr.
...Respondents

Counsel for the Petitioner:
Abhishek Bhatnagar

Counsel for the Respondent:
Arvind Tilhari, Om Prakash Nag

Civil Law - Constitution of India,1950-Article 226-The policyholder claimed that the policies he purchased differed from the promises made by the insurance company's agent-he sought to cancel the policies and refund the premiums paid-the policyholder approached the insurance Ombudsman, who directed adjustments to the premium-unsatisfied, the policyholder moved to the Permanent Lok Adalat which ruled in his favour ordering a refund of the premiums plus interest-the dispute centered on whether the 15 day "free look" period, allowing policy cancellations was adhered to-the insurance company stated that the cancellation request was made outside this period-Held, the court referred to section 9 of the General Clause Act,1897, which excludes the first day in calculating a specified time period-the court upheld that the cancellation request fell within the 15 day period-and The Permanent Lok Adalat decision to refund Rs. 3,23,869/- including interest, to the the policy holder upheld.

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Saketh India Ltd. & ors. Vs India Securities Ltd.(1999) 3 SCC 1

2. Haru Das Gupta Vs St. of W.B.(1972)1 SCC 693

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

1. Heard Sri Abhishek Bhatnagar, learned counsel for the petitioner. No one has put in appearance on behalf of respondent no. 2, though counter affidavit has been filed to the present writ petition.

2. By means of present writ petition the Insurance Company namely Reliance Nippon LIfe Insurance Company Ltd. having its registered office in Mumbai has approached this Court challenging the order dated 09.06.2017, passed by the Permanent Lok Adalat thereby allowing the claim preferred by respondent no. 2 - claimant.

3. The facts of the case in brief are that the respondent no. 2 had applied for various insurance policies for his life and life of his wife by submitting a proposal form obtaining a insurance policy and by paying the proposal deposit amount. In all respondent no. 2 had applied for four policies and had cumulatively deposited premium of Rs.2,49,994/- towards the said policies. All the policies were duly dispatched to respondent no. 2 and had been received by him.

4. Subsequent to receipt of the said policies respondent no. 4 was aggrieved by the terms and conditions mentioned in the said policies which according to him were contrary to the statements made by the Agent of the petitioner insurance company who had approached him for selling the said policies and consequently the policies being at variance with what was promised to him, he informed the Insurance Company that he wanted to repudiate the said policies and duly informed the petitioner also about the same. He also asked for refund of the premium deposited by him.

5. The petitioner by means of letter dated 04.10.2013, which was received by respondent no. 2, declined to accept the request made by respondent no. 2. In the aforesaid circumstances respondent no. 2 approached the Insuarance Ombudsman with regard to his grievance. The Ombudsman by means of order dated 29.05.2015, directed the petitioner to cancel all the policies and adjust the premium into a new single premium policy in the name of respondent no. 2 or any of his family member and subjected the award to the completion of formalities by the complainant-respondent no. 2.

6. It seems that respondent no. 2 was not satisfied by the order dated 29.05.2015, passed by the Ombudsman and approached the Permanent Lok Adalat by filing an application raising all grievance against petitioner. Notices were issued to the petitioner, who had put in appearance and opposed the claim made by respondent no. 2. In their opposition they have submitted that 15 days free-look period has been granted to the insured and it is within those 15 days that the insured had discretion to repudiate or rescind from the conditions of the policies. He submitted that after expiry of 15 days the insured as well as the Insurance Company are bound by the terms and conditions of the Policies.

7. The Permanent Lok Adalat looked into all the evidence and documents filed by the petitioner and respondent no. 2. Dispute was also raised with regard to receipt of Policies and the date from which the 15 day free look period would commence. On behalf of claimant-respondent no. 2, it was stated that from 07.09.2013 the insured and his wife had gone to Bellur (Tamilnadu) in connection with their treatment as they were not well and there they had undergone eye surgery at Shanker Netralaya, Chennai on 16.09.2013 and on the said date they were at Chennai. Then subsequent to the above surgery their check up took place and respondent no. 2 returned back to Lucknow on 22.09.2013. It is only on 24.09.2013 that respondent no. 2 received four policy bonds from the servant of his neighbor who had received the same on 19.09.2013, when he was away in Tamil Nadu.

8. In support of his submissions, respondent no. 2 had filed medical papers issued by the Shanker Netralaya, Chennai from which the Permanent Lok Adalat was satisfied that respondent no. 2 was under treatment from 16.09.2013 to 29.09.2013 and then subsequently on 20.09.2013 he had gone to Chennai for further check up. Respondent no. 2 had also filed leave papers before the Permanent Lok Adalat which indicated that he was on leave from 09.09.2013 to 31.10.2013 and joined his duties only on 01.11.2013. The Permanent Lok Adalat has also stated that no evidence was filed by the petitioner to so as to dispute the contention raised by the complainant-insured.

9. The Permanent Lok Adalat also looked into the delivery reports filed by the petitioner to consider the case that the policies have been sent by registered post to the insured. From the perusal of delivery reports it cannot be verified that the said delivery reports pertain to the petitioner and as to whether the insurance policies had been sent alongwith the same. Neither name nor address of the insured was recorded in any of the papers produced by the petitioner nor could the delivery reports could be linked to the claimant and consequently the Permanent Lok Adalat was of the view that the said delivery reports do not further the case and contentions raised by the petitioner with regard to the delivery of the insurance policies to the insured.

10. It was further considered that the insured on coming to know about the contents of the policies issued in his favour had been purchased through the Agent of the petitioner and repeated request for cancelling the policies were made. In pursuance to the requests made by the insured, it seems that certain policies which were yet to be issued were cancelled and the amount of premium was received back by the respondent no. 2. The four policies in question which were issued were not canceled and accordingly letter dated 14.10.2013 was issued by the petitioner declining to cancel the said policies. It is only when the premium was not refunded to the insured that he communicated to the officials of the petitioner on telephone from where he had been informed by the officials of the petitioner that his request for cancellation of the policies has been declined.

11. It was contended by the insured that 15 day period would commence from 19.09.2013 when the documents were alleged to have been received by the servant of the neighbor of respondent no. 2 from the date till the

request for cancellation was made on 14.10.2013. The claim of respondent no. 2 was allowed by the Permanent Lok Adalat holding that repudiation was made by the insured within the prescribed period of 15 days which was computed from 19.09.2013 to 04.10.2013 and consequently on this ground claim was allowed and the petitioner was directed to refund the amount of premium alongwith interest which amount comes to Rs.323869/- alongwith interest which was computed to Rs.5000/-.

12. Learned counsel for the petitioner while assailing the impugned order has reiterated the contentions raised before the Permanent Lok Adalat. It has been submitted that 15 day period should be computed from the date of receipt of policy i.e. 19.09.2013 till 04.10.2013. There is no dispute with regard to aforesaid dates but learned counsel for the petitioner submits that from 19.09.2013 till 04.10.2013, it is sixteen days and not 15 days as computed by the Permanent Lok Adalat. In this regard learned counsel for the petitioner has sought to rely upon the Insurance Regulatory and Development Authority of India notification dated 22.06.2017 whereby Clause 10 provides that the free look period will be of 15 days from the date of receipt of policy documents. Apart from assailing the time period petitioner does not assail the impugned order on any other ground.

13. Heard learned counsel for the parties and perused the record.

14. The facts of the present case are undisputed. Respondent no. 2 had made proposal for taking four policies for which he had paid premium of Rs.24994/-. The Policies were delivered to the servant of the neighbor of respondent no. 2 on 19.09.2013 and when respondent no. 2 returned from Chennai after his treatment he looked into the policy documents and found that the same were at variance from the terms of the policies which were informed to him through the Agent of the petitioner and consequently, made efforts for cancellation of the said policies. Certain policies were infact cancelled which had not been issued, but the four policies which are disputed in the present case were declined to be cancelled and a letter to this effect was issued by the petitioner on 14.10.2013.

15. The dispute in the present case only pertains to the fact as to whether cancellation was done by respondent no. 2 within fifteen days period of free look as provided under the Insurance Regulatory and Development Authority of India notification dated 22.06.2017. The Permanent Lok Adalat has computed the time period from 19.09.2013 to 04.10.2013 as fifteen days.

16. At this stage, reference may be made to **Saketh India Ltd. and Others Vs. India Securities Ltd., 1999 (3) SCC 1**, wherein Hon'ble Supreme Court has relied upon findings of **Haru Das Gupta Vs. State of W.B., 1972 (1) SCC 693**, has held as under :-

"6. Similar contention was considered by this Court in the case of Haru Das Gupta v. State of W.B. wherein it was held that the rule is well established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded; the effect of defining the period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day. In the

context of that case, the Court held that in computing the period of three months from the date of detention, which was 5-2-1971, before the expiration of which the order or decision for confirming the detention order and continuing the detention thereunder had to be made, the date of the commencement of detention, namely, February 5th has to be excluded; so done, the order of confirmation dated 5-5-1971 was made before the expiration of the period of three months from the date of detention. The Court held that there is no reason why the aforesaid rule of construction followed consistently and for so long should not be applied. For the aforesaid principle, the Court referred to the principle followed in English courts. The relevant discussion is hereunder:

"5. These decisions show that courts have drawn a distinction between a term created within which an act may be done and a time limited for the doing of an act. The rule is well established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded. This rule was followed in Cartwright v. MacCormack (1963) 1 All ER 11, where the expression 'fifteen days from the date of commencement of the policy' in a cover note issued by an insurance company was construed as excluding the first date and the cover note to commence at midnight of that day, and also in Marren v. Dowson Bentley & Co, Ltd., (1961) 2 QB 135, a case for compensation for injuries received in the course of employment, where for purposes of computing the period of limitation the date of the accident, being the date of the cause of action, was excluded. Thus, as a general rule the effect of defining a period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day. There is no reason why the aforesaid rule of construction followed consistently and for so long should not also be applied here."

7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to"."

17. This Court is of the considered view that the Permanent Lok Adalat has rightly determined the period of 15 days, inasmuch as, as per Section 9 of the General Clauses Act, 1897, the first day of the series of days has to be excluded. Section 9 of the General Clauses Act, 1897 is quoted herein below :-

***"9. Commencement and termination of time**.- (1) In any (Central Act) or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".*

(2) This section applies also to all (Central Acts) made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887."

18. Though the period under consideration in the present case is of 2013, while the Insurance Regulatory and Development Authority of India Notification was issued only on 22.06.2017 and consequently same may not be applicable to the facts of the present case as admittedly provisions of the said notification are not retrospective. Even Clause 1(i) of Section 10 of the said notification provides that free look period of 15 days from the date of receipt of the policy document has to be interpreted and as per General Clauses Act which applies to the Central Act or the regulations made after commencement of the said Act, and the first day of the series of days has to be excluded, accordingly, the first day i.e. 19.09.2013 has to be excluded.

19. Accordingly, there is no doubt that the notification issued by the Insurance Regulatory and Development Authority of India has to be interpreted as per the provisions of Section 9 of the General Clauses Act which establishes fundamental foundation for interpretation of legislation. The 15 day period as provided in Clause 10 of the Notification dated 22.06.2017 is subjected to Section 9 of the General Clauses Act and consequently the first day in the series of the days has to be excluded, as provided in Section 9 of the General Clauses Act. Undisputedly, statutory provision shall prevail over the regulations framed by the Central Government.

20. In the light of above, the Permanent Lok Adalat rightly determined the period of free look from 19.09.2023 to 04.10.2013 being of 15 days and not 16 days as canvassed by the petitioner. No other ground has been urged by the petitioner.

21. Accordingly, this Court does not find any merit in the contentions raised by learned counsel for the petitioner. The writ petition being devoid of merits is **dismissed**.

(2024) 3 ILRA 1835
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2024

BEFORE

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

Writ-C No. 1372 of 2024
Along with other connected cases

Raju Sahu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Amrit Khare, Aishvarya Mathur, Apoorva Tewari, Kazim Ibrahim, P.C. Maurya

Counsel for the Opp. Parties:
C.S.C., Anupam Dwivedi, Namit Sharma, Ratnesh Chandra

Civil Law - Constitution of India,1950-Article 226-U.P. Slum Areas (Improvement and Clearance)Act,1962 & U.P. In-Situ Slum Redevelopment Policy 2021-U.P. Urban Planning and Development act,1973-Slum dwellers in Akbar Nagar residing on government land along the Kukrail water channel, challenged eviction and demolition orders issued by the Lucknow development Authority-They sought quashing of these orders and requested a proper rehabilitation schemes

under the Act,1962-The court acknowledged that slum dwellers lack legal title to the land and their constructions are unauthorized-The LDA initiated eviction proceedings u/s 27 of the Act,1973 which the petitioners argued was inapplicable to slum areas-The court identified a conflict between two fundamental rights under Article 21, the right to shelter of the slum dwellers and the right to clean drinking water of the city's residents-the court decided to address the matter on merits rather than remanding it for further proceedings, recognizing the urgency of the issue-Balancing these competing interest, the court calls for an expedited resolution through appropriate rehabilitation measures while ensuring environmental and public health safeguards.(Para 1 to 24)

The writ petition is disposed of. .(E-6)

List of cases cited:

1. Paryavaran Suraksha Samiti & anr. Vs U.O.I. & ors. (2020) SCC OnLine NGT 1337

2. Delhi Development Authority & ors. Vs Joint Action Committee, Allottee of SFS Flats & ors., (2008) 2 SCC 672

3. Subhash Kumar Vs St.of Bih. & ors. (1991) 1 SCC 598

4. Vellore Citizens Welfare Forum Vs U.O.I. & ors. (1996) 5 SCC 647

5. Delhi Water Supply & Sewage & anr. Vs St. of Haryana & ors. (1996) 2 SCC 572

6. M.C Mehta Vs Kamal Nath & ors. (1997) 1 SCC 388

7. A.P. Pollution Control Board II Vs Prof. M.V. Nayudu (Retd.) & ors. (2001) 2 SCC 62

8. Narmada Bachao Andolan Vs U.O.I. & ors. (2000) 10 664

9. M.C. Mehta Vs U.O.I. & ors., (2004) 12 SCC 118

10. Olga Tellis & ors. Vs Bombay Municipal Corp. & ors. (1995) 3 SCC 545

11. Ahmedabad Municipal Corp. Vs Nawab Khan Gulab Khan & ors. (1997) 11 121

12. St.of Kar. Vs Umadevi (3) (2006) 4 SCC 1 : SCC (L&S) 753 : 2006 SCC Online SC 407

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

1. This is a bunch of writ petitions filed by the slum dwellers of slum area known as Akbar Nagar-1 and 2 challenging the demolition orders issued by the Lucknow Development Authority (hereinafter referred to as 'the LDA') and for quashing the rehabilitation scheme framed by the LDA. They also pray for a direction to be issued to the respondents to prepare and implement a rehabilitation scheme in accordance with the provisions of the U.P. Slum Areas (Improvement and Clearance) Act, 1962 (hereinafter referred to as 'the Act of 1962') read with the U.P. In-Situ Slum Redevelopment Policy, 2021.

2. Leading Writ-C No.1372 of 2024 "Raju Sahu and others vs State of UP and others" was filed as one of the last cases, when hearing had started, and on the request of Sri J.N. Mathur, learned Senior Counsel for petitioners, the same was taken up as the leading case, as it contained all grounds raised by the petitioners in this bunch. It was agreed that the counter affidavit filed by the LDA in the earlier leading writ petition will be read in the present petition also. It was also agreed that the questions raised in this leading case are mainly questions of law and further counter affidavit, thus, would not be required. Parties also agreed that broadly the facts are admitted between the parties. Therefore, Writ-C No.1372 of 2024 is taken up as the leading case. Still any and

all further affidavits and documents filed by the parties during course of hearing were accepted, as rights of large number of persons under Article 21 are involved. Further, this Court also permitted interlocutory applications instead of separate petitions to be filed on behalf of residents of Akbar Nagar slums looking into their weak financial position. These applicants are also treated as petitioners in the writ petitions with the same benefits as available to these petitioners.

3. We have heard Sri J.N. Mathur, learned Senior Counsel assisted by Sri Apoorva Tiwari and Ms. Aishvarya Mathur, Sri Amrit Khare, Sri Kazim Ibrahim, Sri Gaurav Mehrotra, Ms. Maria Fatima, Utsav Mishra, Ms. Pushpila Bisht, Sri Akshay Kumar Singh, Sri Mudit Agarwal, Sri Amrendra Nath Tripathi, Sri Shakeel Ahmad Jamal, Sri Amiruddin Khan, Sri Shitla Prasad Tripathi, Sri Shahid Raza, Sri Raj Kumar Singh Suryavanshi, Ms. Shweta Shukla, Sri Shadab Haider, Sri P.C. Maurya, Sri Anshuman Srivastava, Sri Mohd. Murtaza Hasan, Ms. Sadiya Khan, Sri Ruved Kamal Kidwai, Sri Pawan Kumar Dwivedi, Sri Anupam Bajpai, Ms. Shradha Mishra, Sri Gibran Akhtar Khan, Sri Inam Uddin Ahmad, Sri Akber Ahmad, Sri Harsh Vardhan Kediya, Sri Alok Kumar, Sri Pradeep Kumar Srivastava, Sri Rinku Verma, Sri Rajat Srivastava, Sri Ayush Srivastava, Ms. Nandini Verma, Ms. Surabhi Rawat, Ms. Jyoti Rajpoort, Sri Rehan Ahmad Siddiqui, Ms. Nisha Tiwari, Sri Sachida Nand, Sri Mohd. Salman, Ms. Gursimran Kaur, Sri Karan Agarwal, Sri Sheeran Mohiuddin Alavi, Sri Mohd. Mohsin and Sri Ausaf Ahmad Khan, learned counsel for the petitioners. Sri Sudeep Kumar, Sri Anuj Kudesia, Sri Ratnesh Chandra, Sri Ishan Singh Popli, learned counsel for the LDA, Sri Namit Sharma assisted by Ms. Priyanka Vikram Singh, learned counsel for the Nagar Nigam, Lucknow and Sri Shailendra Kumar Singh, learned Chief Standing Counsel assisted by Sri Pratyush Chaube appearing for the State-respondents are heard for the respondents.

4. The admitted facts between the parties are, that, Kukrail water channel originates from Village Asti, Tehsil Bakshi Ka Talab, District Lucknow and merges in Gomti river. Whether to call it a river or nala is a dispute between the parties, but, it does not impact the merits of the case. For convenience, the same is referred to as 'Kukrail Water Channel'. This water channel initially carries neat and clear water, but, slowly and steadily, including around disputed Akbar Nagar area, open drains are let loose in the same and it starts converting into an urban open sewer, and ends in River Gomti. It is also accepted to all that this water of River Gomti is supplied as drinking water to nearly entire Lucknow. Petitioners, slum dwellers, over a long period of time have unauthorizedly occupied the banks of Kukrail water channel and raised these disputed constructions. They all accept that they do not have any title to the land occupied by them and undisputedly, land belongs to the Government, accordingly, their constructions are also without any approval, thus illegal. This fact is accepted to all counsel for the petitioners. However, Sri A. A. Khan, Advocate also raised an alternative argument regarding title to land in a few of his cases. Proceedings for their eviction, by a notice under Section 27 of the U.P. Urban Planning and Development Act, 1973 (for short 'the Act of 1973'), were initiated by the Vice Chairman of the LDA. He rejected the objections filed by the petitioners and passed orders for eviction.

The same were challenged by way of appeals before the Chairman, LDA, who also is Commissioner, Lucknow. The Chairman also rejected the appeals filed by the petitioners. Thus, both these orders are challenged by petitioners before this Court. In some cases, petitioners have approached this Court, without filing any appeal, against the order of Vice Chairman only. All these matters thus are clubbed together in this bunch for hearing.

5. Leading arguments for the petitioners are made by Sri J.N. Mathur, learned Senior Counsel assisted by Sri Apoorva Tiwari and Ms. Aishvarya Mathur, and other learned counsel have adopted the same. Sri Ausaf Ahmad Khan, Advocate has also made an additional alternative submission on behalf of petitioners represented by him.

6. Sri Mathur submits that proceedings could only be held under the Act of 1962, as the same is a special Act for slum areas. The procedure provided in the said Act of 1962 has to be followed by the competent authority provided therein. Sri Mathur submits that violating the same, proceedings against petitioners are held under Section 27 of the Act of 1973. He further submits that even presuming the Act of 1962 is not applicable, in such a case, proceedings could only be initiated under Section 26-A(4) of the Act of 1973 and not under Section 27 of the same. Making a distinction, Sri Mathur submits that Section 27 is with regard to demolition of illegal constructions while Section 26-A(4) is specifically for slum areas and in the present case, admittedly, the disputed constructions exist in Akbar Nagar slum.

7. Further elaborating the said argument, Sri Mathur submits that the entire proceedings held under Section 27 of the Act of 1973 are not only without jurisdiction, but also amounts to colourable exercise of power. Lastly, Sri Mathur submits that the procedural integrity in the present proceedings held under Section 27 of the Act of 1973 is also grossly violated by the authorities concerned. He submits that neither at the initial stage the Vice Chairman of the LDA nor at the appellate stage its Chairman conducted the proceedings in a fair and proper manner. They did not provide proper opportunity of hearing to the petitioners, as, the documents submitted by the respondents at both stages, without providing any copy to the petitioners, were accepted and relied upon while passing the orders by both the authorities. Hence, Sri Mathur submits that neither the procedure prescribed under the Act of 1962, which was applicable, was followed nor the procedure prescribed under Section 26-A(4) of the Act of 1973, alternatively applicable on the slums, was followed and, further, the procedure which was followed under Section 27 of the said Act too was violative of the principles of natural justice. He strongly submits that since procedural integrity of the entire proceedings is seriously violated, therefore, this Court is bound to interfere in the matter and remand the same with appropriate directions to an appropriate authority.

8. Sri Ausaf Ahmad Khan, Advocate, while adopting submissions of Sri Mathur, also raised a desperate alternate submission that the land in dispute belongs to an old Abadi of a revenue village and thus, petitioners have title on the said land. We do not find any force in this alternative submission and out-rightly reject the same. Only document submitted by Mr. Khan in support of his argument is a Khatauni of

1332 fasli (year 1925) of Mohal Mahanagar Mauja Mahanagar Rahim Nagar, Pargana, Tehsil and District Lucknow. Now, both, Rahim Nagar and Akbar Nagar are two separate distinct localities in Lucknow. Further, a perusal of the only Khatauni filed by Mr. Khan shows that Gata no.747 area 0-14-0 (14 biswa) is recorded as Abadi including road and houses etc., and thereafter, Gata no.746, area 2-15-0 (2 Bigha 15 Biswa) is recorded as Road. A village map is also filed, which shows a road having certain Khasra numbers. Even the name of the road is not given in the map. Admittedly, Akbar Nagar 1 and 2 occupy much larger area than the Abadi area shown in the Khatauni of 1332 fasli. Further, there is no manner in which petitioners could show that it is the same old Abadi, which was there in the year 1925. No document of last 100 years to prove the title is filed. If the properties belong to an Abadi land for the last 100 years, there would certainly be mutation orders or ownership documents of the said land, including appropriate sale deeds/transfer deeds/succession documents executed from time to time. It is not possible that not even a single document is available with the petitioners with regard to their title. Further, no other person, except for the petitioners represented by Sri Ausaf Ahmad Khan, has raised this argument. Thus, since no documents of title are filed, we reject this alternative submission made by Mr. Khan.

9. Opposing the petitioners, Sri Sudeep Kumar along with Sri Anuj Kudesia, Advocate led the submissions for respondents. They submit that admittedly this slum, know as Akbar Nagar-1 and 2, is existing on the banks of Kukrail water channel, that merges in River Gomti, which supplies drinking water to nearly entire Lucknow. The population of Lucknow at present is approximately fifty lacs with additional few lacks of floating population visiting every day. All the drains of this slum, containing all its waste including faecal matter, are let loose in this Kukrail water channel, which flows to river Gomti, main supply source of drinking water to people of Lucknow. Respondents submit that clean drinking water is held to be a fundamental right under Article 21 of the Constitution of India and, thus, since fundamental rights of a large number of residents of Lucknow are involved, hence, it is incumbent that Kukrail water channel be kept clean, and thus, around 1158 constructions raised by the petitioners are required to be removed. They further submit that the LDA has already proposed a policy for rehabilitation, by providing appropriate alternative accommodation and, thus, rights of all these persons under Article 21 of the Constitution of India, of an alternative place to live, are duly protected. In support, they also rely upon the judgment and order dated 26.09.2020 passed in ***Paryavaran Suraksha Samiti and Another versus Union of India and Others, 2020 SCC OnLine NGT 1337.***

10. Thus, respondents conclude by emphasizing, that, since it is not merely a case where the fundamental rights under Article 21 of the petitioners for a place to live is involved, but, also vis-a-vis them, the right to clean drinking water, also a fundamental right under Article 21, of every resident and visitor of Lucknow is involved. These effected residents are not even representing before this Court or any authority, except, through the respondent State authorities. Therefore, they submit, that, the present matter cannot be decided merely on procedural technicalities. Once a dispute between fundamental rights of two

separate groups is involved, this Court alone has power to decide the same. Hence, conclude respondents, that this Court should consider the matter on merits and decide the rights of the effected people finally and conclusively, instead of remanding the same.

11. We have considered the submissions made by the parties. National Green Tribunal in ***Paryavaran Suraksha Samiti*** (supra) has referred to the report of OC dated 16.9.2020 and issued directions, relevant part of which reads:

"22. In O.A. 673/2018, a separate report has been filed by the Oversight Committee constituted by this Tribunal for the State of UP making following recommendations:

.....

General Recommendations:

23. Encroachment along drains : At many places in the State there are encroachments in the flood plains of drains. For example more than 300- 400 encroacher households are living in the flood plain of Kukrail drain in Lucknow city. In the absence of any regular toilet facilities, their faecal matter/grey water is washed away directly in the river Gomti, which also supplies drinking water to Lucknow city. The State government needs to take steps for removing such encroachments on priority by rehabilitating these households under the "Housing for All" programme.

32. Monitoring Mechanism: The Committee finds that a number of problems are coordination problems among various departments. Such issues can easily be resolved if there is a regular monthly meeting at the CS level, which unfortunately is not happening. The Committee requests the CS to hold a monthly monitoring meeting as laid down in the monitoring framework submitted by the State Govt. before NGT."

12. The National Green Tribunal further observed:

"Going Forward

24. We have duly considered the CPCB, CMC and OC reports as above and noted the gaps and recommendations. We accept the recommendations of the Committees already quoted above that the States should furnish quality information and comply with the directions of this Tribunal in terms of orders dated 06.12.2019 and 29.06.2020. The violation of mandate of 100% treatment of sewage may be visited with the assessment and recovery of compensation and violation of timelines for setting up of pollution control devices may also be likewise strictly enforced with the compensation regime in place. There is also need for fully utilizing and augmenting the existing infrastructure as already noted above.

25. The States/UTs may consider using HAM as a business model as well as OCOP concept, FSSM Policy, alternative models for treatment of sewage/faecal sludge, decentralized STPs and also strengthen the online monitoring system. We are also of the view that flood plain zones of all the rivers need to be mapped and demarcated and encroachments removed therefrom. The same be utilized for plantation, creation of bio-diversity parks and constructed wetlands or other recreational purposes, consistent with the environmental concern. We agree with the OC that river side mining needs to be regulated. To reduce the timelines for setting up of STPs, many States/UTs are consuming time in preparing DPRs whereas model DPRs. can be prepared and

used for shortening the timelines. Similarly, SOPs need to be prepared for the timeline to be taken in setting up of STPs as well as for maintenance and operation of existing STPs particularly those not meeting the norms. Number of monitoring stations also needs to be suitably increased. We are also of the view that the State RRCs must function effectively and the Chief Secretaries must hold monthly meetings as it is found from the report of the OC for the State of UP that the Chief Secretaries may not be doing so. Huge failures of the States/UTs may show poor governance as far as environment is concerned which may need to be remedied. As found by the CMC, neither delay is explained nor accountability is fixed for the failure of the concerned officers which is not a happy situation.

V. Directions

36. Accordingly, we issue following directions:

.....

v. It must be ensured that no untreated sewage/effluent is discharged into any water body. Prompt remedial action may be taken by the State PCBs/PCCs against non-compliant ETPs/CETPs by closing down or restricting the effluents generating activity, recovering compensation and taking other coercive measures following due process of law.

vi. Directions outlined in Paras 24-26 herein may be implemented by the States/ UTs,and their compliance monitored by the Chief Secretaries at the State level, and the CMC at the National level."

13. The National Green Tribunal as far back as in the year 2020 found existence of the Akbar Nagar slums as a serious ecological issue impacting supply of clean drinking water to Lucknow city and had asked for its removal, which is pending even after four years till now. The matter requires urgent attention. Similarly, petitioners also are entitled to get their rights decided once for all to settle and proceed in life without any threat of eviction looming upon them. Thus, looking into the urgency and also the nature of dispute involved, we take up these matters on merit instead of remanding them to any authority. We find it appropriate, at this stage, to refer to the words of Supreme Court in ***Delhi Development Authority and others v. Joint Action Committee, Allottee of SFS Flats and others, (2008) 2 SCC 672:***

"42. While acting as "State" within the meaning of Article 12 of the Constitution of India, it is imperative that DDA, while implementing its statutory power, upholds the fundamental rights of the citizens and strives hard to give effect to the directive principles of the State policy. We, however, cannot also shut our eyes to the fact that in terms of Article 37 of the Constitution of India whereas the provisions of Part III are justiciable, the provisions of Part IV are not. Only when an action of the State is taken to give effect to any of the provision of Part IV of the Constitution of India which is not otherwise ultra vires the Constitution or offends the principles embodied in Part III of the Constitution of India, the same may be upheld, having regard to the provisions contained in Part III thereof. ***The action of the State, therefore, must at the first instance be adjudged on the touchstone of the principles of fundamental rights and then the provisions contained in the parliamentary Act, the regulations framed thereunder as also the terms of the contract entered into by and between the parties."***

14. Right to live under Article 21 is elaborated upon in a large number of judgments of the Courts. The Supreme Court has held that Article 21 includes within its sphere right to live with human dignity. It would include all aspects that make life meaningful, complete and worth living. The right to food, water, decent environment, education, medical care and shelter are some of its aspects. Thus, both, right of a proper shelter as well as right to neat and clean drinking water is covered by Article 21.

15. Some of the judgments wherein Supreme Court has considered the right to clean drinking water are:

Subhash Kumar vs. State of Bihar and others (1991) 1 SCC 598, paragraph 7 :

"Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life."

Vellore Citizens' Welfare Forum v. Union of India and others (1996) 5 SCC 647, paragraph 16:

"16. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment……"

Delhi Water Supply and Sewage and another vs State of Haryana and others (1996) 2 SCC 572:

"1. Water is a gift of nature. Human hand cannot be permitted to convert this bounty into a curse, an oppression. The primary use to which water is put being drinking, it would be mocking nature to force the people who live on the bank of a river to remain thirsty, whereas others incidentally placed in an advantageous position are allowed to use the water for non-drinking purposes. A river has to flow through some territory; and it would be travesty of justice if the upper-riparian States were to use its water for purposes like irrigation, denying the lower-riparian States the benefit of using the water even for quenching the thirst of its residents."

M.C. Mehta v. Kamal Nath and others (1997) 1 SCC 388:

"34. Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

"A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.) and others (2001) 2 SCC 62:

"3. Drinking water is of primary importance in any country. In fact, India is a party to the resolution of the UNO passed during the United Nations Water Conference in 1977 as under:

"All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs."

Thus, the right to access to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean drinking water to its citizens.

4. Adverting to the above right declared in the aforesaid Resolution, in

Narmada Bachao Andolan v. Union of India [(2000) 10 SCC 664 : (2000) 7 Scale 34] (Scale at p. 124 : SCC p. 767, para 248), Kirpal, J. observed:

"248. Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India…."

.....

44. Coming to the provisions of the Water Act, 1974, it is clear that in view of sub-sections 2(e), 2(k) read with Sections 17 and 18 of the Water Act, the fundamental objective of the statute is to provide clean drinking water to the citizens. Having laid down the policy prohibiting location of any industries within 10 km under GO No. 111 dated 8-3-1996, the State could not have granted exemption to the 7th respondent Industry, nor to any other industry, from any part of the main GO No. 111 dated 8-3-1996. Section 19 permitted the State to restrict the application of the Water Act, 1974 to a particular area, if need be, but it did not enable the State to grant exemption to a particular industry within the area prohibited for location of polluting industries. Exercise of such a power in favour of a particular industry must be treated as arbitrary and contrary to public interest and in violation of the right to clean water under Article 21 of the Constitution of India.

45. The above reasoning given by us does not mean that exemption can be given to all industries within a particular radius of the reservoirs unmindful of the possible danger of pollution to the lakes. In fact, exemption granted even to a single major hazardous industry may itself be sufficient to make the water in the reservoirs totally unsafe for drinking water purposes. The Government could not pass such orders of exemption having dangerous potential, unmindful of the fate of lakhs of citizens of the twin cities to whom drinking water is supplied from these lakes. Such an order of exemption carelessly passed, ignoring the "precautionary principle", could be catastrophic."

Narmada Bachao Andolan v. Union of India and others (2000) 10 SCC 664:

"248. Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The resolution of UNO in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under:

"All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.""

M.C. Mehta v. Union of India and others, (2004) 12 SCC 118:

"46. Further, by the Forty-second Constitutional Amendment, Article 48-A was inserted in the Constitution in Part IV stipulating that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Article 51-A, inter alia, provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Article 47 which provides that it shall be the duty of the State to raise the level of nutrition and the standard of living and to improve public health is also relevant in this connection. ***The most vital necessities, namely, air, water and soil, having regard to right to life under Article***

21 cannot be permitted to be misused and polluted so as to reduce the quality of life of others. *Having regard to the right of the community at large it is permissible to encourage the participation of amicus curiae, the appointment of experts and the appointments of Monitory Committees.* ***The approach of the Court has to be liberal towards ensuring social justice and protection of human rights. In M.C. Mehta v. Union of India [(1987) 4 SCC 463] this Court held that life, public health and ecology has priority over unemployment and loss of revenue. The definition of "sustainable development" which Brundtland gave more than 3 decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs****. In Narmada Bachao Andolan v. Union of India [(2000) 10 SCC 664] this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters****, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's" test****. [See Chairman Barton: The Status of the Precautionary Principle in Australia (Vol. 22, 1998, Harv. Envtt. Law Review, p. 509 at p. 549-A) as referred to in para 28 in A.P. Pollution Control Board v. Prof. M.V. Nayudu [(1999) 2 SCC 718] .]*

16. Similarly, the Supreme Court has also considered, in a large number of cases, rights of the slum dwellers in unauthorized occupation of Government land. Some of them are:

Olga Tellis and others vs. Bombay Municipal Corporation and others (1985) 3 SCC 545, paragraph-57:

"57. To summarise, we hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or earmarked for a public purpose like, for example, a garden or a playground; that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case; and that, the Kamraj Nagar Basti is situated on an accessory road leading to the Western Express Highway. We have referred to the assurances given by the State Government in its pleadings here which, we repeat, must be made good. Stated briefly, pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or, at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites or accommodation will be provided to them; the "Low Income Scheme Shelter Programme" which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and, the "Slum upgradation Programme (SUP)" under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimise the

hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31, 1985 and, thereafter, only in accordance with this judgment. If any slum is required to be removed before that date, parties may apply to this Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz. October 31, 1985."

Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan and others (1997) 11 SCC 121, paragraph-31:

"31. It is true that in all cases it may not be necessary, as a condition for ejectment of the encroacher, that he should be provided with an alternative accommodation at the expense of the State which if given due credence, is likely to result in abuse of the judicial process. But no absolute principle of universal application would be laid in this behalf. Each case is required to be examined on the given set of facts and appropriate direction or remedy be evolved by the court suitable to the facts of the case. Normally, the court may not, as a rule, direct that the encroachers should be provided with an alternative accommodation before ejectment when they encroached public properties, but, as stated earlier, each case requires examination and suitable direction appropriate to the facts requires modulation. Considered from this perspective, the apprehensions of the appellant are without force."

17. The aforesaid judgments clearly demonstrate that right to have a proper shelter overhead and right to neat and clean drinking water both are held by the Supreme Court as fundamental rights covered by Article 21 of the Constitution of India. In the present case, it is clear that petitioners do have a fundamental right to proper shelter over their head fit for human living. Similarly, more than fifty lac residents of Lucknow also have a fundamental right to neat and clean drinking water.

18. Thus, the fundamental right of large number of petitioners for a habitable living place is in contest with the fundamental right of many times more larger number of residents of Lucknow, including petitioners. In the case of ***State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753 : 2006 SCC OnLine SC 407***, Supreme Court has held:

"51. ……. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens."

19. Thus, in the given circumstances, the rights of these two groups are to be settled in the best possible manner. The Courts have repeatedly emphasized and upheld the necessity of clean environment including clean water. It is regarded as our duty towards future generations to come. No individual or group of persons can be permitted to violate the same. The NGT has duly noted the same and emphasized for action. The right of clean drinking water of the present and future generations of Lucknow, therefore, has to be protected. On the other hand, petitioners before this Court are

unauthorized occupants of government land, without any right on the same. At best, all they can claim is an alternative place to live. The respondent authority has already offered a rehabilitation policy under which all the BPL persons are being offered appropriate flats made for Economically Weaker Section (EWS) on production of their ration card or other appropriate documents, proving that they belong to BPL category. Under the said policy, the flats with market value of Rs.15 lacs are being provided under 'Pradhan Mantri Awas Yojana' at the cost of Rs.4.18 lacs only to the petitioners. It is further provided in the said policy that on a registration fee of Rs.5,000, possession of the flats would be provided. The remaining amount is to be paid in equal monthly installments within a period of ten years. Thus, a person is to pay only Rs.4,000 per month for the said flat. The policy further provides that the persons not belonging to BPL category would also be offered appropriate flats for which, payment can be made in easy installments. Thus, the fundamental right of the petitioners is also protected by the respondent authorities. Similarly other persons, not belonging to BPL category, are also offered rehabilitation accommodation.

20. Sri Gaurav Mehrotra, and some other counsel for petitioners submit that since it is a sudden shifting in duress there might be persons who may have some difficulty in paying initial Rs.5,000 or Rs.4,800 every month or complete their installment in ten years. He further submits that there may be some persons, who may not be falling in the BPL category entitled for EWS flats, but they may still not be in such a financial situation to buy a better flat. He prays that the benefit of EWS flats should be made available to all those persons being rehabilitated who apply for the same.

21. We find some force in the said submission of the petitioners. It is, therefore, provided that any person being rehabilitated from Akbar Nagar slums applying for EWS accommodation, shall be provided such an accommodation. Further, we find that these persons applying for EWS flats may face some financial constraints also. We, therefore, provide that EWS flats shall be provided on initial registration deposit of Rs.1,000 instead of Rs.5,000. Further, in case persons provided EWS accommodation, for some unavoidable circumstances, are unable to pay their installments within the aforesaid period of ten years, respondent authorities shall extend the said period for further appropriate period, to a maximum of five years. In case any EWS allottee still faces difficulty even to pay the said installments, it shall be open for such a person to move an appropriate application before the Chief Minister of the State, who shall consider and grant appropriate relief to such deserving bonafide person from the Chief Minister's Beneficiary Fund or from any other appropriate funds or schemes as applicable for the benefit of poor from time to time. We also extend the benefit of rehabilitation scheme to other residents of Akbar Nagar who have not approached the Court.

22. The applications under the rehabilitation scheme shall be filed by the petitioners and other similarly situated persons within a period of two weeks from today and simultaneously, the respondents shall proceed to make allotment of flats for rehabilitation and the entire process of shifting be completed positively by 31.3.2024.

23. All the residents of Akbar Nagar 1 and 2 shall vacate the disputed premises on or before the mid night of 31.3.2024 and thereafter, it shall be open for the respondent-authorities to clear the said area.

24. With the aforesaid directions, present writ petitions as well as all interlocutory applications stand ***disposed of***.

25. Petitioner no.6-Abdulla of Writ-C No.527 of 2024 and petitioner nos.1-Mohd. Shafeek and 5-Smt. Shahana of Writ-C No.642 of 2024, have already been separated from this bunch of writ petitions and writ petitions on their behalf have already been dismissed by this Court by its order dated 27.2.2024 passed in a bunch of writ petitions, leading one being Writ-C No.11383 of 2023 "Syed Hamidul Bari vs. State of U.P. and others".

26. Similarly, petitioner no.1-Sayed Mujeeb Ahmad of Writ-C No.1396 of 2024, petitioner no.65-Mohd. Ehtisham Khan of Writ-C No.1583 of 2024, petitioner no.3-Imran Raja of Writ-C No.1210 of 2024, petitioner No.54-Mohd. Abdul Hasan of Writ-C No.1315 of 2024, petitioner no.2/6-Mohd. Shakeel of Writ-C No.1391 of 2024, petitioner nos.4-Sumit Kumar and 6-Ravi Kumar of Writ-C No.1598 of 2024 and petitioner no.113-Smt. Umaima Khatoon of Writ-C No.1316 of 2024, have also been separated from this bunch and writ petitions on their behalf have also been dismissed by this Court in the light of order dated 27.2.2024 passed in Writ-C No.11383 of 2023 and other connected matters, by a separate order passed in their respective writ petitions.

(2024) 3 ILRA 1847

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.02.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1934 of 2024

Mohd. Shad ...Petitioner
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioner:
Shrawan Kumar Verma, Ram Akshayavar Vishvakarma

Counsel for the Opp. Parties:
C.S.C., Rayees Ahmad Khan

Civil Law - Constitution of India,1950-Article 226- Gram Nyayalay Act,2008-Section 34(b)-The petitioner challenges decision of Gram Nyaylay-The petitioner owns land where he constructed a house-The respondent no 3 owns adjacent land and alleged encroachment by the petitioner-the Gram Nyaylay granted a permanent injunction against the petitioner-Held, the Section 34(c) of the Act,2008 allows appeals even for cases under Rs. 5000/- the valuation of the suit was below Rs. 1000/- moreso, the principle of res judicata was wrongly ignored by the gram Nayalay-The court determined that res judicata constitutes a legal question, making the petitioner's case eligible for appeal-The petitioner had an alternate remedy through appeal u/s 34(c) of the Act,2008.(Para 1 to 13)

The writ petition is dismissed. .(E-6)

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

1. Heard Sri Shrawan Kumar Verma, learned counsel for the petitioner as well as Sri S.K. Khare, learned Standing Counsel for respondent no. 1 and Sri Rayees Ahmad

Khan, learned counsel appearing for respondent no. 3.

2. The petitioner is aggrieved by the judgment and order dated 10.01.2024, passed by the Judicial Magistrate, Gram Nyayalay, Tulsipur, Balrampur wherein he has allowed the suit preferred by respondent no. 3 seeking permanent injunction against petitioner, who was respondent no. 2 in the said suit.

3. It has been submitted by learned counsel for the petitioner that petitioner is owner and in possession over Gata No. 1589/0.06 dismil in which he has constructed a house, while respondent no. 3 is owner of Gata No. 1590/2.23 acres, situated at Village - Gulahariya Hisampur, Pargana and Tehsil - Tulsipur, District - Balrampur. Both the plots are adjacent to each other and in the suit preferred by respondent no. 3 it was alleged that petitioner has encroached upon the land of respondent no. 3/plaintiff illegally and consequently relief of permanent injunction was sought. Respondent no. 2/petitioner herein appeared before the Gram Nyayalay and participated in the suit proceedings. After examining the contentions as well as evidence on record the suit was allowed by means of impugned judgment and order dated 10.01.2024.

4. Preliminary objection has been raised by learned counsel for the respondents stating that against the impugned judgment passed under the Gram Nyayalay Act, 2008 (hereinafter referred to as "the Act, 2008") the said judgment is appellable before the district Courts as per Section 34 of the Act, 2008.

5. Learned counsel for the petitioner has opposed the said preliminary objection stating that in the present mater valuation of suit was less then Rs.1000/- and as per sub-section (b) of Section 34 of the Act, 2008 an appeal does not lie where the valuation of the suit does not exceed Rs.1000/- and consequently, the petitioner does not have any other remedy except for filing writ petition.

6. Heard learned counsel for the parties and perused the record.

7. The primary issue raised by the respondents is with regard to availability of alternate remedy of appeal to the petitioner who is aggrieved by the impugned judgment dated 10.01.2024. For the sake of convenience Section 34 of the Act, 2008 is quoted herein below :-

"34. Appeal in civil cases.- *(1) Notwithstanding any thing contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law, and subject to sub-section (2), an appeal shall lie from every judgment or order, not being an interlocutory order, of a Gram Nyayalaya to the District Court.*

(2) No appeal shall lie from any judgment or order passed by the Gram Nyayalaya-

(a) with the consent of the parties;

(b) where the amount or value of the subject matter of a suit, claim or dispute does not exceed rupees one thousand;

(c) except on a question of law, where the amount or value of the subject matter of such suit, claim or dispute does not exceed rupees five thousand.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Gram Nyayalaya:

Provided that the District Court may entertain an appeal after the expiry of

the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(4) An appeal preferred under sub-section (1) shall be heard and disposed of by the District Court within six months from the date of filing of the appeal.

(5) The District Judge may, pending disposal of the appeal, stay execution of the judgment or order appealed against.

(6) The decision of the District Court under sub-section (4) shall be final and no appeal or revision shall lie from the decision of the District Court: Provided that nothing in this sub-section shall preclude any person from availing of the judicial remedies available under articles 32 and 226 of the Constitution."

8. No doubt sub-section (b) of Section 34 of the Act, 2008 no appeal will lie where valuation of suit does not exceed Rs.1000/-, but according to sub-section (c) of Section 34 of the Act, 2008 it is provided that where question of law arises for consideration and valuation of suit does not exceed Rs.5000/- then an appeal would be maintainable.

9. It is noticed that sub-section (c) of Section 34 of the Act, 2008 starts with the word "except" and therefore it can safely be assumed that sub-section (c) is in the nature of exception to sub-section (b) of Section 34 of the Act, 2008 which bars filing of appeal in case where valuation of the suit is less then Rs.1000/-.

10. In the present case one of the ground taken by the petitioner to oppose the suit was that on the previous occasion where cause of action was similar, the said suit was dismissed and the said dismissal of the suit acted as re-judicata in the present suit proceedings. There were other grounds also taken by the petitioner to oppose the said suit. All the grounds are not considered presently while deciding the issue of maintainability of the present writ petition and also considering whether the petitioner has alternate remedy of appeal.

11. The petitioner has challenged the impugned order on the ground of res-judicata and has submitted that the Gram Nyayalay has wrongly decided the said issue and in fact the suit proceedings were barred by the principle of res-judicata. The petitioner also does not dispute the fact that this question if raised would be a question of law in the appellate proceedings and in the light of above submissions there is no doubt that case of the petitioner would fall under sub-section (c) of Section 34 of the Act, 2008 and where valuation of the sit does not exceed Rs.5000/- and question of law arises for determination then certainly appeal can be preferred against the order of Gram Nyayalay under sub-section (c) of Section 34 of the Act, 2008.

12. In the light of above, this Court is of the considered view that the petitioner has efficacious alternate remedy of appeal under sub-section (c) of Section 34 of the Act, 2008 and since the petitioner has efficacious alternate remedy against the impugned judgment this Court would not entertain the present writ petition against the order of Gram Nyayalay, in the peculiar facts of the present case.

13. In the light of above, the preliminary objection raised by the respondents is sustained. The writ petition is **dismissed** on the ground of availability of alternate remedy under sub-section (b) of Section 34 of the Act, 2008.

(2024) 3 ILRA 1850
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ -C No. 2208 of 2024

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

Counsel for the Petitioner:
Sri Vineet Kumar Singh, Sri H.N. Singh (Sr. Advocate)

Counsel for the Respondent:
Ms. Anujali Upadhya, C.S.C.

Civil Law - Land Acquisition Act, 1894 – Sections 4, 6, 9, 11 & 17 – Constitution Of India,1950 – Article 226 & 300-A – Writ petition seeking mandamus to restrain respondents from demolishing construction and interfering with possession on acquired land (Plot No. 534, Village Tushyana, Gautam Buddh Nagar) – Held, land acquired under Section 4(1)/17(4) and Section 6(1)/17(1) with possession taken on 02.02.2007 and award made on 27.04.2010 – Acquisition proceedings attained finality, vesting land in St. free from encumbrances – No writ of mandamus can be issued to restrain St. from utilizing acquired land – Petitioner's claim of settled possession or regularization under Greater Noida Industrial Development Rural Abadi Sites Regulation, 2011 rejected – Pending revision before St. Government does not justify restraining St. – No violation of Article 300-A as acquisition lawful. (Para 8-19)

Writ petition dismissed.

List of Cases Cited:

1. Indore Development Authority Vs Manoharlal, (2020) 8 SCC 129

2. Land & Building Department through Secretary & anr. Vs Attro Devi, Civil Appeal No. 2749 of 2023 (decided on 11.04.2023)

(Delivered by Hon'ble Ashwani Kumar Mishra, J & Hon'ble Syed Qamar Hasan Rizvi, J.)

1. This writ petition has been filed with the prayer to issue a writ of mandamus commanding the respondents not to demolish the construction of petitioner situated on plot no.534 having an area of 0.7510 hectare situated in village Tushyana, Pargana and Tehsil Dadri, District Gautam Buddh Nagar. A further prayer is made to command the respondents not to interfere in the peaceful possession of the petitioner on the aforesaid plot.

2. Facts of the case, as emerge from the record, are that the State Government exercising its power of eminent domain issued a notification under Section 4(1)/17(4) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') on 10.4.2006 for acquisition of the plot in question. Urgency clause was invoked and the inquiry contemplated under Section 5-A of the Act was dispensed with. A declaration under Section 6(1)/17(1) of the Act came to be made on 30.11.2006. The respondents took possession of the entire acquired land of plot no.534 on 2.2.2007. An award in terms of Section 11 of the Act was made by the District Magistrate on 27.4.2010. It is undisputed that by invoking the power of acquisition under the Act the State acquired the entire land of plot no.534 and the acquisition proceedings have attained finality. Neither the award is under challenge nor any of the proceedings undertaken thereunder. The effect of such

acquisition proceedings, in the context of prayer made in the writ petition, would be dealt with a little later.

3. Petitioner submits that in the proposal submitted for acquisition it was found that plot no.534 had six shops and a gallery and that by virtue of a provision contained in the Government Order dated 24.4.2010 the petitioner was entitled to lease back of the portion of land which was covered by the Government Order.

4. Sri H.N. Singh, learned Senior counsel for the petitioner also places reliance upon the provisions contained in Greater Noida Industrial Development Rural Abadi Sites (Management and Regularization) Regulation, 2011, in order to submit that petitioner has a right of regularization of rural abadi site which existed before 30.6.2011. Attention of the Court has been invited to Regulation 4 of the 2011 Regulation which contemplates constitution of a committee and the functions of the committee have been defined in Rule 5. According to the petitioner there exists a provision for moving of an application for regularization and the maximum land which can be settled for residential/commercial use have been specified. It is submitted that though such an application was moved by the petitioner but such plea of protection of abadi area is rejected by the Chief Executive Officer. The matter was carried in revision before the State, wherein also the petitioner was non-suited.

5. Writ-C no.18997 of 2023 filed against the revisional order has been allowed and the matter has been remitted back to the State Government for a fresh consideration. It is submitted that the State Government has not reconsidered the matter and in between the authorities are proposing to take physical possession of the petitioner's land. It is also submitted that since the petitioner is in settled possession over the property, as such he cannot be dispossessed except in accordance with law. According to learned Senior counsel, this would require filing of a suit by the development authority for taking possession or for filing of appropriate proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. Since this has not been done, the authorities ought to be restrained in the present writ from interfering with the petitioner's possession.

6. Ms. Anjali Upadhya, learned counsel for the respondent-authority, on the other hand, submits that the acquisition proceedings having been concluded, in accordance with law, right, title or interest of the petitioner stands extinguished in the property and, therefore, no writ of mandamus can be issued to protect petitioner's possession over such acquired land. It is also submitted that since the claim of settlement of abadi by virtue of Regulations of 2011 also stands rejected, and the petitioner has not sought any protection in his pending revision before the State Government, he is not entitle to any relief.

7. We have heard learned counsel for the parties and have perused the materials on record.

8. From the facts as have been noticed above it is abundantly clear that land falling part of khasra no.534 stood acquired pursuant to declaration made under Section 6 of the Act. Satisfaction that such land is needed for public purposes has attached finality. Section 17 of the Act of 1894

containing urgency clause has also been invoked while issuing declaration under Section 6 of the Act. Section 17(1) of the Act clearly provides that in case of urgency the State is free to take possession of the land on expiration of fifteen days from the date of notice mentioned under Section 9 of the Act upon payment of 80% estimated compensation. As a consequence such land shall thereupon vest absolutely in the Government free from all encumbrances.

9. As a result of the above statutory scheme, it is clear that when the possession of the land is taken after issuance of notice under Section 9 of the Act, the tenure holder would be extinguished of any right, title or interest over such land. The statutory consequence, as is clearly enumerated in law, cannot be avoided or obstructed by the tenure holder, particularly when the acquisition proceedings itself are not under challenge.

10. We find substance in the contention advanced on behalf of the respondents that once the land has been acquired; possession has been taken on 2.2.2007; and an award has been made under Section 11 of the Act on 27.4.2010 the vesting of a land in the State would be complete. It is otherwise a case of invocation of urgency and, therefore, before award such vesting shall follow if possession is taken after notice under Section 9 of the Act.

11. The position of law in this regard has already been settled by the Constitution Bench of Supreme Court in Indore Development Authority v. Manoharlal and Others (2020) 8 SCC 129. After analyzing the statutory scheme, the Court held as under in para 258 of the judgment:-

"258. Thus, it is apparent that vesting is with possession and the statute has provided under Sections 16 and 17 of the 1894 Act that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified under Section 16, takes place after various steps, such as, notification under Section 4, declaration under Section 6, notice under Section 9, award under Section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the State becomes the absolute owner and in possession of the property. Thereafter there is no control of the landowner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner."

12. Once that be so, we find that no writ of mandamus can be issued against the State or the acquiring body to obstruct the utilization of land which has already vested in the authority free from all encumbrances. No further notice is otherwise required to be issued to the petitioner in the matter.

13. Writ of mandamus can only be issued for performance of a legal obligation on part of the State or its instrumental/authority. No writ of mandamus can be issued for restraining the State/authority from undertaking act which is, in accordance with law. Since the vesting of land is complete in the State

consequent upon acquisition of land, it would not be open for the petitioner to claim issuance of a writ of mandamus for restraining the respondents from asserting their right over the acquired land.

14. The argument that petitioner is in settled possession and, therefore, can be dispossessed only as per law is also an argument bereft of merits. As the land has statutorily vested in the State/authority free from all encumbrances, and possession over the land has otherwise been taken in the manner stipulated in law, it would not be necessary for the authority to either institute a suit to take possession or to institute proceedings under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 to physically dispossess the petitioner. The acquisition by the State/authority is of a vast tract of agricultural land and it would not be expected that actual physical possession continues with the State on every inch of the land. Taking of possession pursuant to notice under Section 9 of the Act is otherwise not disputed. In such circumstances, the grievance raised that petitioner is being evicted except in accordance with law is devoid of merits and, therefore, rejected.

15. Supreme Court in Land & Building Department through Secretary & Anr. vs. Attro Devi in Civil Appeal No.2749 of 2023 decided on 11.4.2023 has made following observations in para 13:-

"13. It is also a fact to be noticed and taken care of that large chunk of land is acquired for planned development to take care of immediate need and also keep buffer for future requirements. Such portion of land may be lying vacant also. As has been observed in Indore Development Authority's case (supra) by this Court, the State agencies are not supposed to put police force to protect possession of the land taken after process of acquisition is complete....."

16. So far as existence of structures on the plot of the petitioner is concerned, we are of the view that such structures would form part of land acquired under the Act and also vest in the authority free from all encumbrances. The petitioner at best would be entitle to claim compensation for such structures as per the award. Undisputedly, the award has been made on 27.4.2010. Neither the award has been placed before the Court nor there are any pleadings that in the award adequate compensation for structures have not been provided. In the absence of any challenge to the award, we refrain ourselves from expressing anything further in respect of petitioner's right of compensation over such land which has vested in the State/authority free from all encumbrances.

17. So far as the petitioner's claim of protection of his abadi site is concerned, we find that decision by the committee has already taken to reject petitioner's claim and that matter has now been remitted to the State Government. Remedy of the petitioner, in such circumstances, would be to press his revision before the State or to move appropriate application etc. for its expeditious disposal. Merely because the revision is pending we would not be justified in issuing a writ of mandamus to restrain the authority from interfering with petitioner's possession when the land has statutorily vested in the State free from all encumbrances.

18. So far as petitioner's contention that Article 300-A of the Constitution of India is violated is concerned, we find such

argument to be misconceived, inasmuch as the protection which the Constitution provides under Article 300-A is that a person would not be deprived of his property except in accordance with law. Since the acquisition herein is in accordance with the provisions of the Act of 1894, the consequence in the nature of vesting of land cannot be treated to be an act violative of Article 300-A.

19. The writ petition is, accordingly, dismissed.

(2024) 3 ILRA 1854
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-C No. 2511 of 2024

Manish Kumar Patel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Kumar Arya

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

Civil Law - Constitution of India,1950-Article 226-U.P. Industrial Development Act,1976-Section 2(d)-The petitioner an agriculturist challenged a notification dated 25.09.2023 issued u/s 2(d) of the Act,1976 which included his village within the territorial limits of the U.P. Expressways Industrial Development Authortiy(UPEIDA)-He argued that this inclusion would prevent him from continuing agricultural activities and affect his right to live, including the ability to construct the house-The court held that the notification was neither arbitrary nor malafide-the petitioner failed to show any misuse of power or ulterior motives behind the notification-The court affirms the State's discretion to promote planned industrial development while protecting agricultural rights until land acquisition occurs as per legal norms.(Para 1 to 11) .(E-6)

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard learned counsel for the parties.

2. This petition has been filed by the petitioner, who claims to be the resident of village Wari at district Prayagraj, challenging a notification issued by the State Government dated 25.9.2023, under Section 2(d) of the U.P. Industrial Development Act, 1976, whereby various villages including village Wari has been included within the territorial limits of the U.P. Expressways Industrial Development Authority (UPEIDA). The notification is primarily challenged on the ground that the petitioner, who is agriculturist of the village would now be prevented from undertaking any agricultural activity on his own land. It is also submitted that on account of the notification under challenge the petitioner would be prevented from raising construction of his house etc. It is also submitted that the petitioner's right to live would also be affected.

3. Petition is opposed by the learned State counsel as also Sri J.B. Singh, learned counsel for the second respondent, on the ground that the notification issued by the State is perfectly just and valid and requires no interference.

4. In order to appreciate the contentions advanced it would be appropriate to refer to the provisions contained in the U.P. Industrial Area Development Act, 1976 (U.P. Act No. 6 of 1976). This Act has been passed by the State Legislature to provide for Constitution of an Authority for the development of certain areas in the State into industrial and urban township and for matters connected therewith. Section 2(d) of the Act contains definition of 'Industrial Development Area' to mean an area declared as such by the State Government by notification. The Authority has been defined under Section 2(b) to mean an Authority constituted under Section 3 of the Act. Section 3 of the Act empowers the State Government to constitute an Industrial Development Authority for any industrial development area notified under Section 2(d).

5. Section 3(1) of the Act reads as under:

> *"The State Government may, by notification, constitute for the purposes of this Act, An authority to be called (Name of the area) Industrial Development Authority, for any industrial development area."*

6. By virtue of sub-section 2 of Section 3, the Industrial Development Authority is to be a body corporate. The Constitution of the members of the Authority is then specified in Section 3. The functions of the Industrial Development Authority have been specified in Section 6 of the Act. The object of the Authority is to secure the planned development of industrial development area. For the purposes of such planned industrial development of the area, powers are given to the Industrial Development Authority to demarcate and develop sites for industrial, commercial and residential purpose according to the plan; to provide infrastructure for industrial, commercial and residential purposes; to provide amenities and to do other ancillary functions as are specified in Section 6 including to regulate the erection of buildings and setting up of industries. Section 7 confers power upon the Authority to transfer its land or buildings. Powers of the Authority to issue various directions are contained in Section 8. Section 9 of the Act contains an embargo whereby no person is authorised to erect or occupy any building in the industrial development area in contravention of any building regulations made by the Authority. The Authority is conferred jurisdiction to require proper maintenance of site or building or levy tax etc. Various provisions of the U.P. Urban Planning and Development Act, 1973 have also been incorporated in the Act of 1976.

7. From the scheme of the Act as has been noticed above, it is apparent that the State Government is competent in law to issue a notification under Section 2(d) of the Act and thereby any area declared by the State Government by notification would be treated as an industrial development area. This industrial development area will have to be for a particular Industrial Development Authority constituted under Section 3 of the Act. The notification herein clearly reveals that the villages specified in the schedule to the notification would be included in the area of UPEIDA. The power of the State to declare an area as

industrial development area under the Act of 1976 is not questioned. The notification under challenge is thus shown to have been issued in exercise of valid authority vested in the State by virtue of Section 2(d) of the Act of 1976.

8. The first argument advanced on behalf of the petitioner is that specific reasons have not been disclosed as to why the land earmarked in the schedule to the notification are proposed to be included in the industrial development area. This argument of the petitioner does not appeal to the Court, inasmuch as the law does not require any exhaustive explanation to be given in the notification under Section 2(d) of the Act as to why a particular area is required to be included in the industrial development area of the concerned Industrial Authority. It is always the prerogative of the State to include a particular area within the limits of the Industrial Development Authority. There is nothing stated in the petition which may show the notification to be malafide or arbitrary. The respondent Industrial Development Authority has been constituted essentially for development of industrial areas near-by the expressways. It is undisputed that village Wari situates in close vicinity to National Highway No. 2. There is no allegation in the writ that the land included in the limits of the respondent Industrial Development Authority is included for some oblique purpose or that there is a colourable exercise of power exercised by the State, in that regard. In the absence of any such plea, we are not inclined to accept the petitioner's argument that the land of village Wari cannot be included in the industrial development area only because specific reasons have not been enumerated in that regard.

9. The other contention of the petitioner is that the petitioner would be prohibited from undertaking any agricultural activity on his land. This argument is wholly misconceived. The Act of 1976 empowers the State to constitute Industrial Development Authority for development of certain areas according to the plan for industrial development. The Authority would be empowered to exercise such jurisdiction and functions as are specifically entrusted to it under the Act of 1976. The Authority would be entitled to regulate the development in the notified industrial development area and to ensure that the development in such area is not unplanned.

10. We find no reason to object to such planned industrial development of the area. The State otherwise has the right to acquire land for valid purpose in accordance with law. Unless the land is acquired for a valid purpose, as per law, the agriculturist would continue to use his land for agricultural purpose. It is not shown in the writ that any of the agricultural activity in the area is proposed to be obstructed merely on inclusion of the land of village Wari in the limits of the Industrial Development Authority. The agricultural activities which are being undertaken by the petitioner would continue unless the petitioner's land itself is acquired in accordance with law. The argument that the petitioner would be deprived of utilising his agricultural land is therefore found misconceived.

11. In view of the deliberations and discussions as above, we find the writ

petition to have no force and is accordingly dismissed.

(2024) 3 ILRA 1857
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.03.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 3761 of 2023

Santosh Kumar ...Petitioner
Versus
Commissioner Devi Patan Mandal Gonda & Anr. ...Opp. Parties

Counsel for the Petitioner:
Rajendra Prasad Lodhi

Counsel for the Opp. Parties:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-Indian Penal Code,1860-Sections 147,148,149 & 302 - Indian Arms Act,1959-Sections 17(3) 18-Petitioner challenged the cancellation of his arms license-his license was canceled after an FIR was filed against the petitioner-he was acquitted in criminal case though on grounds of benefit of doubt-The court held that the petitioner's right to retain his arms license, emphasizing that criminal case pendency or acquittals on benefit of doubt do not justify cancellation.(Para 1 to 20)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Pramod Kumar Vs St. of U.P (2010)5 ADJ 594

2. Mukesh Kumar Yadav Vs Commr Lko Div, Lko (2017)35 LCD 2017

3. Indrajeet Singh Vs St. of U.P. & ors. (2021) 10 ADJ 471

4. Dy. Inspr Gen. of Police & anr..Vs S. Smuthiram (2013)1 SCC 598

5. St. of Raj. & ors. Vs Love Kush Meena (2021) 8 SCC 774

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Shri Rahul Shukla, learned Additional Chief Standing counsel for the respondents.

2. The instant petition has been filed praying for the following main relief:

"(i) Issue a writ, order or direction in the nature of certiorari thereby quashing of the impugned order dated 18.01.2023 passed by opposite party No.1 in Case No.00462 of 2021 (Santosh Kumar Vs. State), computerized Case No.C202108000000462, under Section 18 of Indian Arms Act, 1959 and order dated 18.03.2021 passed by opposite party No.2 in Case No.00485/2021 computerized Case No.D202108150000485, State Vs. Santosh Kumar, under Section-17 (3) of Indians Arms Act, 1959, as contained in Annexure Nos.1 & 2 respectively to this writ petition."

3. The case set forth by learned counsel for the petitioner is that the petitioner was having an arms license. An incident occurred on 17.03.2020, on the basis of which an FIR was lodged against the petitioner and certain other persons on 18.03.2020 under Sections 147, 148, 149 and 302 of the IPC. The case was registered as Case Crime No.78 of 2020. After issuance of show cause notice and after considering the reply of the petitioner, the competent authority vide order dated 18.03.2021, a copy of which is Annexure No.2 to the writ petition, considering the

pendency of the said criminal case, has cancelled the arms license of the petitioner.

4. Being aggrieved, the petitioner filed an appeal, which too has been rejected vide order dated 18.01.2023, a copy of which is Annexure No.1 to the writ petition.

5. Being aggrieved by both the orders impugned, the instant writ petition has been filed.

6. The contention of learned counsel for the petitioner is that it is settled proposition of law that mere pendency of a criminal case cannot be a ground to cancel the arms license of the petitioner. In this regard, he has placed reliance on the judgement of this Court in the case of **Pramod Kumar Vs. State of U.P** reported in **2010 (5) ADJ 594** as well as the case of **Mukesh Kumar Yadav Vs. Commissioner, Lucknow Division, Lucknow** reported in **2017 (35) LCD 2017**.

7. The contention is that despite the aforesaid law as laid down by this Court, the competent authority by simply considering the criminal case lodged against the petitioner has cancelled the arms license of the petitioner. He further states that the petitioner has already been acquitted in the said criminal case by the competent criminal court vide judgment and order dated 31.05.2022, a copy of which is Annexure No.4 to the writ petition, as such even the said ground no longer exists and consequently, there cannot be any occasion for continuance of the aforesaid orders.

8. On the other hand, Shri Rahul Shukla, learned Additional Chief Standing states that a perusal of the acquittal order dated 31.05.2022 would indicate that the petitioner has been granted acquittal on the basis of benefit of doubt.

9. Placing reliance on the judgement of this Court in the case of **Indrajeet Singh Vs. State of U.P. and others 2021 (10) ADJ 471**, it is argued that this Court has held that where the acquittal is on the basis of benefit of doubt and not honorable acquittal the same may not resile from the fact that the petitioner has got criminal antecedents and as such there cannot be any occasion for continuance of arms license and thus it is prayed that no interference is required with the orders by which the arms license has been cancelled and the order by which the appeal filed by the petitioner has been dismissed.

10. Heard learned counsel for the parties and perused the record.

11. From the perusal of the record, it emerges that on account of an incident which occurred on 17.03.2020, an FIR was lodged against the petitioner on 18.03.2020 under Section 148, 149, 149 and 302 of the IPC, which was registered as Case Crime No.78 of 2020. During the pendency of the said case, after issuance of a show cause notice, the competent authority has cancelled the arms license of the petitioner vide order dated 18.03.2021 on the ground of pendency of the said criminal case. The said order has been affirmed with the dismissal of the appeal by the appellate authority vide order dated 18.01.2023. Further the appellate authority has also considered the acquittal of the petitioner, though on the basis of benefit of doubt but has said that because the petitioner is a person having criminal antecedents, as such, there cannot be any occasion for

continuance of the arms license of the petitioner.

12. Whether the arms license can be cancelled on the basis of pendency of criminal case is no longer res integra having settled by this Court in the case of **Pramod Kumar (supra)**, wherein this Court has held as under:-

"8. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Section 17 of the Arms Act has been considered by a Division Bench of this Court in Sheo Prasad Misra Vs. District Magistrate Basti and others, 1979 (16)ACC 6 (sum), wherein the Division Bench relied upon an earlier decision in Mast Uddin Vs. Commissioner, Allahabad, 1972 ALJ 573. In both the aforesaid cases it has been held that mere involvement in a criminal case cannot in any way effect the public security or public interest. In view of this proposition of law the order cancelling or revoking the licence of the petitioner on the aforesaid ground of involvement and pendency of a criminal case is not tenable.

9. In Full Bench Decision of this Court rendered in Chhanga Prasad Sahu Vs. State of Uttar Pradesh, 1984(10) ALR 223 and Kailash Nath and others Vs. State of U.P. and others, 1985 (22) ACC 353 and in the case of Rana Pratap Singh Vs. State of U.P. 1994 JIC 72 (All); 1995 (Supp) ACC 235, it has been held that mere pendency of a criminal case (s) is no ground for cancellation of arms licence. The effect of the aforesaid Full Bench decisions was also considered in Sadri Ram Vs. District Magistrate, Azamgarh and others, 1998 (3) AWC 2102: 1998 (37) ACC 830.

10. This court in the case of Harprasad (supra) held as hereunder:

" involvement and pendency of a case crime is no ground for cancellation of fire-arm licence. It is settled law that after acquittal the very basis for cancellation of the arm licence stands vitiated. In this regard reference of the decision rendered in Lalji Vs. Commissioner, Kanpur and another, 1999 (4) AWC 2952, has been made."

11. Thus in view of the admitted facts and the settled legal position that a fire arm licence can not be cancelled on the ground of mere involvement of licensee in a criminal case, the impugned orders cannot be sustained. Even otherwise the petitioner has been acquitted in the criminal case in which he was involved and hence there is no justification for the continuance of the cancellation of the petitioner's fire arm licence."

13. When the facts of the instant case are seen in that context of law as laid down by this Court in the case of **Mukesh Kumar Yadav (supra)**, it emerges that mere pendency of a criminal case cannot be a ground for cancellation of arms license and thus the order dated 18.03.2021, which cancels the arms license of the petitioner simply on the ground of pendency of a criminal case, cannot be said to be legally sustainable in the eyes of law.

14. However, subsequent to the cancellation of the arms license vide order dated 18.03.2021 on account of pendency of the criminal case, the petitioner was acquitted in the criminal case by the competent criminal court vide order dated 31.05.2022.

15. Subsequent thereto, the appeal that had been filed by the petitioner against

the order dated 18.03.2021 has been decided by the appellate authority vide the order impugned dated 18.01.2023. The appellate authority while deciding the appeal has considered the order of the learned court dated 31.05.2022, by which the petitioner has been acquitted. The appellate authority was of the view that as the petitioner has been acquitted by giving him benefit of doubt as such it is to be presumed that the petitioner is a man of criminal tendency and that such a person should not have an arms license and has thus rejected the appeal filed by the petitioner.

16. The aforesaid order of dismissal of appeal is supported by learned Standing Counsel on the basis of a judgement of this Court in the case of **Indrajeet Singh (supra)**, wherein it has been held that where the acquittal is not honorable but due to grant of benefit of doubt, the licensing authority would have sufficient material to hold that it would not be in the interest of public order and for security of public peace for continuance of the arms license.

17. There can be no doubt to the aforesaid proposition of law as laid down by this Court in the case of **Indrajeet Singh (supra)**. However, what has not been considered by the court is that when it is settled proposition of law that an arms license cannot be cancelled on the basis of the pendency of the criminal case, obviously there cannot be any cancellation in case a person has been acquitted in the said criminal case be it on the basis of benefit of doubt or an honorable acquittal.

18. Incidentally, this Court in the case of **Indrajeet Singh (supra)** while arriving at the said finding, has considered the judgements of the Apex Court in the case of **Deputy Inspector General of Police and another Vs. S. Samuthiram 2013 (1) SCC 598 and State of Rajasthan and others Vs. Love kush Meena** (no citation indicated in the judgement, however, the citation is **(2021) 8 SCC 774).** Incidentally, both the cases of the Hon'ble Supreme Court pertain to public employment. The case in hand does not pertain to public employment of any person rather pertains to the right of a person to an arms license.

19. Thus, keeping in view of the aforesaid discussion, the judgement of **Indrajeet Singh (supra)** would have no applicability to the facts of the instant case.

20. Accordingly, keeping in view of the aforesaid discussion, the writ petition is **allowed**. The impugned orders dated 18.03.2021 and 18.01.2023, a copies of which are Annexure Nos.1 and 2 respectively to the petition, are quashed.

21. Consequences to follow

(2024) 3 ILRA 1860
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ -C No. 4382 of 2024

Ram Janam Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Misra, Sri H.R. Mishra (Sr. Advocate)

Counsel for the Respondent:
Sri Abhishek mIshra, C.S.C., Sri Narendra Kumar Giri

Civil Law - Constitution of India,1950-Article 226-the petitioner challenged the electoral college's composition during an ongoing election process for the Committee of Management of the District co-operative Federation Ltd-the petitioner argued that the electoral college was improperly constituted by including members inducted by an interim committee without proper authority, violating society's bye-laws-Held, the court declined to interfere at this stage, citing the proximity of the election date and emphasizing the availability of post-election remedies-The petitioner was granted liberty to challenge the election results if aggrieved by the composition of the electoral college.(Para 1 to 14)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Ramkant Singh & ors. Vs St.of U.P. & ors. (2005) 3 AWC 2477

2. Ram Ji Mishra Vs St. of U.P. Thru. Prin. Secy. Co-opn. & ors.

3. Banwari Lal Kanchal Vs Dr. Bhartendu Agarwal, (2019)12 ADJ 235

(Delivered by Hon'ble Anjani Kumar Mishra, J & Hon'ble Jayant Banerji, J.)

1. Heard Shri H.R. Mishra, learned Senior Advocate for the petitioner, Shri Narendra Kumar Giri for the U.P. State Cooperative Election Commissioner, Shri Shiv Nath Singh and learned Standing Counsel for the respondents.

2. At the very outset, a preliminary objection has been raised by Shri Shiv Nath Singh regarding maintainability of the writ petition. He has submitted that the election process has already commenced and that voting to elect the Committee of Management of the District Co-operative Federation Ltd., Nadesar, Varanasi is to be held tomorrow.

3. It is settled law that once the election process has been set in motion after the notification for holding elections has been issued, the Court should not interfere so as to stall the election. Reliance has been placed upon paragraph 11 of the decision of this Court in ***Ramkant Singh and others vs. State of U.P. and others, 2005 (3) AWC 2477.***

4. Shri H.R. Mishra, learned Senior Advocate appearing for the petitioner has filed a supplementary affidavit in Court, which is taken on record. He has submitted that the electoral college has been wrongly determined including within it delegates of newly added Societies, which Societies come to the inducted by an interim Committee of the Federation. It is settled law that an interim committee had no power to induct new members.

5. In support of this contention reliance has been placed upon an order dated 23.03.2018 passed by the Lucknow Bench in ***Ram Ji Mishra vs. State of U.P. Thru. Prin. Secy. Cooperation And Others***, which in turned takes note of three other judgments mentioned, therein.

6. It is submitted that it is admitted to the parties that certain delegate members for a part of the electoral college who have been culminated by the societies, which were indicated into the federation by the Interim Management Committee, thereof.

7. Since the electoral college has been wrongly determined the elections cannot be

permitted and this Court is liable to interfere.

8. In response to the preliminary objection raised by Shri Shiv Nath Singh, Shri H.R. Mishra has relied upon the decision in ***Banwari Lal Kanchal vs. Dr. Bhartendu Agarwal,*** 2019 (12) ADJ235, especially paragraphs 70 to 71. The said paragraphs are extracted below:-

"70: We have examined the judgments relied upon by the learned counsel for the appellant in regard to the maintainability of writ petition of initiation of election process by finalizing the electoral college. The law is very much settled that the writ petition under Article 226 of the Constitution of India to interfere in the election process, ordinarily is not maintainable when there are disputed question of facts and the remedy is to avail civil suit after holding of election. We are with the full agreement that ordinarily election process should not be interfered with, but in the facts and circumstances of the present case, the learned Single Judge has recorded finding that the appellant-respondent has not been enrolled as member as the provision contained under the registered bye-laws laws of the society. If the members who have been permitted to participate in the election found their induction to be in utter disregard of the provisions contained under the registered bye-laws of the society and they are not able to establish their induction in consonance with the provisions of the bye-laws, it is always open to this Court in exercise of discretionary power under Article 226 of the Constitution of India to examine the issue of membership and holding of election on the basis of members who are not legally enrolled as members.

71: In view of the provisions contained under the registered bye-laws of the society and in absence of material to establish their induction as members, we are with the full agreement of the finding returned by the learned Single Judge in this regard. We further hold that the electoral college is the essence of an election. The Deputy Registrar without considering the provisions contained under the registered bye-laws of the society, has proceeded to hold four members to be valid members of the general body of the society, therefore, the finding returned in this regard is perverse in nature and contrary to the provisions contained under the registered bye-laws of the society. Once this Court, upon consideration of the point, came to conclusion that members who are going to participate in the forthcoming election are not legally enrolled members, it is open to this Court to interfere in the election process, if the finalization of members who have to participate in the election is found to be not in consonance with the provisions of the registered bye-laws of the society."

9. The afore-noted judgment was rendered in a writ petition, which was directed against an order passed by the Deputy Registrar Firms Societies and Chits, Lucknow, whereby he had finalized the list of Members of a Registered Society and notified the election schedule for holding fresh elections thereto, in exercise of power conferred by Section 25(2) of the Societies Registration Act.

10. It would be relevant to note that a dispute of membership in a registered society is required to be decided by means of a civil suit, which by itself is a long drawn process. This reason, by itself, might have weighed upon the Court to take the view, which is being canvassed by learned

counsel for the petitioner. The election which has been notified and the election process that has been set in motion is for holding an election in accordance with the provision of the Co-operative Societies Act.

11. Although, it is not being disputed that the electoral college consists also of delegates of Co-operative Societies, who were inducted into the Federation by an interim committee of management and that such delegates would prima-facie not be eligible to participate in the election, yet, since the election process has been notified and the election itself is set to be fixed for tomorrow and the election results are to be declared on 28.02.2024, we do not consider it a fit case for interference.

12. The Court therefore, declines to interfere at this stage leaving it open for the petitioner, in case aggrieved, to challenge the election itself after the election result has been declared on the ground that the electoral college was improperly determined.

13. It is also expected that in case such an election petition is filed, the same shall be decided as expeditiously as possible.

14. The writ petition stands dismissed at this stage subject to the observations made herein above.

(2024) 3 ILRA 1863
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Writ-C No. 4717 of 2024

Alfiya Azmil & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Deena Nath, Sri Deepak Kumar, Sri Shubham Yadav

Counsel for the Respondents:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-the petitioners sought protection against the respondent no. 4(his father) as the petitioners are living in live-in-relationship for 5 to 6 months-In the present case, none of the petitioners has moved application for conversion of religion in accordance with section 8 and 9-More so, the petitioner no.1 was below 18 years-no proof of joint account, financial security, joint property is produced before this court-no FIR has been lodged by the parents of any of the petitioner-no application is moved to SSP for protection of their lives or liberty, therefore no cause of action for petitioner to seek protection against respondent no. 4-Therefore, no challenge to the relationship of petitioners.(Para 1 to 21)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Razia & anr..Vs St. of U.P. & ors. Writ-C No. 27338 of 2023

2. Kiran Rawat & anr..Vs St.of U.P Cr. Misc. Writ Petition No. 3310 of 2023

3. Lata Singh Vs St. of U.P.& anr. (2006) 5 SCC 475

4. Shafin Jahan Vs Asokan K.M. & ors. (2018) 16 SCC 368

5. D.Velusamy Vs D. Patchjammal (2010) 10 SCC 469

6. Asha Devi & anr..Vs St. of U.P. & Ors Writ C No. 18743 of 2020

7. Shayara Bano Vs U.O.I.

8. Lily Thomas & anr..Vs U.O.I. & ors.

9. Dir of Settlement, A.P. Vs M.R. Apparao

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

1. Instant writ petition under Article 226 of the Constitution has been filed by the petitioners with prayer for issuing writ, order or direction in the nature of mandamus commanding/directing the respondent nos. 2 and 3 to secure the security of life and property of the petitioners from the respondent No.4.

2. Heard learned counsel for the petitioners, learned Standing Counsel for State respondents and perused the record.

3. It is submitted by the learned counsel for the petitioners that both the petitioners are major and are of marriageable age. It is further submitted that petitioner No.1 is daughter of respondent No.4 and she belong to Muslim community. The date of birth of petitioner No. 1 is 20.01.2006 and the date of birth of petitioner no. 2 is 13.06.2001, in support thereof the petitioners have brought on record their High School marksheet-cum-Certificates respectively which are annexed as Annexure Nos. 1 and 2 to the affidavit filed in support of the writ petition respectively. It is submitted that both the petitioners are living in live-in-relationship since about last 5 to 6 months. Both the petitioners intend to marry each other after lawful conversion of their religion, however, presently they are living in live-in-relationship as the right is guaranteed under Article 21 of the Constitution of India. It is further submitted that father of petitioner No.1 is an influential person of the locality and he is harassing the petitioners in collusion with local police. It is contended that respondent No.4 in collusion with the police of the police station Dhoomanganj, Prayagraj has picked up petitioner No.2 and illegally put him under their illegal detention for a few hours and left him free after physically and mentally harassing him. The petitioners are now forced to run from one place to another in order to save their life and themselves. Petitioners also made several oral and written complaints before the police officials but till date no action has been taken by them, hence, it is prayed that live-in-relationship be protected till they marry with each other after lawful conversion of their religion.

4. Learned Additional Chief Standing Counsel appearing on behalf of the State submitted that petitioners have not applied for conversion of their religion under Section 8 and 9 of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 so far nor they have moved any application for protection to police. No valid proof of date of birth of petitioner No.1 is filed. Father of petitioner No.1 is not residing in Jhapiya Lalbihara, Bamrauli, Jhapiya, Allahabad and he is posted in air force and is residing in Belia, Post-Kota Mukundpur, P.S. Kotwali Sadar, District-Maharajganj. It is also submitted the missing report is also lodged by respondent No.4 vide G.D. No. 48 on 03.02.2024 at 15:52, therefore, there is no force in the contention of the petitioner that petitioner No.2 was detained in P.S.-Dhoomanganj, Prayagraj. It is further submitted that no application for protection has been moved to any police officer, therefore, no cause of action survives, hence, the petition is liable to be dismissed.

5. In view of the order proposed to be passed, there is no need to issue notice to private respondent. With the consent of learned counsel appearing for the parties, this writ petition is being disposed of finally at this stage in terms of the Rules of the Court.

6. I have heard the rival submissions advanced on behalf of the parties and perused the entire materials brought on record.

7. Perusal of the record reveals that date of birth of petitioner No.1 is 20.01.2006 as per her High School mark-sheet and date of birth of petitioner No.2 as per his High School mark-sheet is 13.06.2001 and both the petitioners are major. It further transpires from paragraph No. 7 of the petition that petitioners are in relationship since about five-six months, hence, at the time of start of their relationship, petitioner No.1 was minor. It is also clear that petitioner No.1 has not applied for conversion as per the mandate provided under Section 8 and 9 of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021. It is also submitted that petitioner No.2 was illegally detained in police station, however, no proof is brought on record that petitioner No.2 was detained in police station and no date and time of detention is mentioned in the application.

8. Reliance has been placed on the judgment passed by Co-ordinate Bench of this Court in case of ***Razia and Anr. Vs. State of U.P. and Ors***. passed in ***Writ-C No. 27338 of 2023***, in which Co-ordinate Bench of this Court relying upon various judgment granted protection to the couple living in live-in-relationship. Learned counsel for the petitioners submitted that in this case also one of the party is muslim by faith and in the identical situation, the court has granted protection. Opposing the arguments advanced by learned counsel for the petitioners, learned Chief Standing Counsel appearing on behalf of the State relied upon the case law passed by Division Bench in case of ***Kiran Rawat and Anr. Vs. State of U.P. passed in Criminal Misc. Writ Petition No. 3310 of 2023***. From the perusal of both the cases, it is apparent that the judgment of ***Kiran Rawat (supra)*** is mentioned by the Single Bench decision of this Court in case of ***Razia (supra)*** but the ruling is not discussed on merits in that case nor the ruling is distinguished on facts, hence, the ruling has no application on the present case. Reliance has also been placed by petitioners upon the judgement of the Apex Court in ***Lata Singh Vs. State of Uttar Pradesh and Anr.*** reported in ***(2006) 5 SCC 475***, whereby Hon'ble the Apex Court has held as under:-

"17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-

religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. We sometimes hear of `honour' killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism."

9. In ***Shafin Jahan Vs. Asokan K.M. and Ors***. reported ***in (2018) 16 SCC 368***, the Apex Court emphasized due importance to the right of choice of an adult person, which the Constitution accords to an adult person. Hon'ble the Apex Court held as under :-

"52. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person in intrinsic to his/he meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realisation of a right is more important than the conferment of the right. Such actualisation indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition"

10. Both these cases guarantees the fundamental right of choice of an adult person while marrying with inter-faith persons. The said freedom is both a constitutional and human right and no-one is allowed to deprive all such freedom from any human being.

11. In the case of ***D.Velusamy Vs. D. Patchajammal*** reported in ***(2010) 10 SCC 469***, Hon'ble Apex Court while considering the definitions given under Section 2 of the Domestic Violence Act dealt with the definition of "domestic relationship", as a relationship in the nature of marriage. It laid down the following

requisite criteria in the relationship in the nature of marriage:-

"(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time."

12. In the case of **Asha Devi and Another vs. State of U.P. and** Others passed in **Writ (C) No.18743 of 2020**, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce sofar ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?"

13. In the judgment of **Asha Devi (Supra),** Hon'ble Division Bench of this Court has discussed the judgment of Hon'ble Apex Court in the case of "**D. Velusamy Vs. D. Patchaiammal**", in which the Hon'ble Apex court held that:-

"32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence.

If a man has a `keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."

(Emphasis supplied)

14. In the judgment of **Asha Devi (Supra),** the Division Bench of this Court on the basis of various judgments of High Court held that following relationship are not recognized or approved as live-in-relationship:-

*"(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma Vs. V. K. V. Sarma**.*

*(b) **Polygamy**, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.4 (paras 17 to 21, 27, 28 & 29**). Polygamy is also a criminal offence under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India** 5 (paras 299.3).*

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under

Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy, vide ***Lily Thomas and another Vs. Union of India and others****6 (Para 35). In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-*

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

(Emphasis supplied)

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide ***D Velusamy Vs. D Patchaiammal (supra)*** *(para 31)."*

15. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of **"Director of Settlement, A.P. Vs. M.R. Apparao**, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. ..... One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. ....."

16. In the relationship of marriage or in the nature of live-in-relationship there must be two consenting adults human beings. The concept of Gotra, Caste and Religion is left a way back. No one has

right to interfere in the personal liberty of two adults, not even the parents to two adults can interfere in their relationship, but, the Right to Freedom or Right to Personal Liberty is not an absolute or unfettered right, it is qualified by some restrictions also. The freedom of one person extincts where the statutory right of another person starts, hence, the freedom of one person cannot encroach or overweigh the legal right of another person. If the petitioners are already married and had their spouse alive, he/she cannot be permitted to enter into live-in-relationship with third person without seeking divorce from the earlier spouse. He/she first has to obtain the decree of divorce from the court of competent jurisdiction before solemnizing marriage of entering into live-in-relationship out of their legal marriage.

17. It is pertinent to mention here that The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 (in brevity ?the Act?) has come into force on 05.03.2021, thereafter it is made mandatory for interfaith couples to seek conversion according to the provisions of the Act. In the case at hand, admittedly, none of the petitioners has moved application for conversion of religion in accordance with Section 8 and 9 of the Act. Explanation to Section 3(1) of the Act reads as follows:-

"3(1) No person shall convert or attempt to convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means. No person shall abet, convince or conspire such conversion.

Explanation:- For the purposes of this sub-section conversion by solemnization of marriage or relationship in the nature of marriage on account of factors enumerated in this sub-section shall be deemed included."

18. Explanation goes to show that conversion is not only required for the purpose of marriage, but it is also required in all relationship in the nature of marriage, therefore, Conversion Act applies to relationship in the nature of marriage or live-in-relationship. Petitioners have not yet applied for conversion as per provisions of Section 8 and 9 of the Act, hence, the relationship of petitioners cannot be protected in contraventions of the provisions of law.

19. Certainly, the Courts have power to interpret the provisions of law if there is ambiguity in the provisions of law, but, the above mentioned law is explicit which mandates that conversion is required not only in cases of inter-caste marriages but relationship in the nature of marriage, hence, Courts should refrain from embarking upon the interpretation of law in any sense when the law is very explicit.

20. While applying the principles laid down in various pronouncements by Hon'ble the Apex Court, it gives guidelines to the fact that couple must be of legal age to marry and qualified to enter into legal marriage including being unmarried and they must be akin to spouse for significant period of time. In the present case, the age of petitioner No.1 was below 18 years when she started living with petitioner No.2. There is nothing on record primarily to show that they are living as husband and wife except their affidavit. No proof of joint account, financial security, joint property or joint expenditure is produced before this Court. Petitioners have not

applied for conversion so far, no application has been moved to police authority for protection of their live-in-relationship. No information is given to the higher authorities or to any Magistrate that the petitioners are being tortured and detained by police at the behest of the mother of petitioner No.1. Till date, no F.I.R. has been lodged by the parents of any of the petitioner, therefore, there is no challenge to the relationship of petitioners. No application is moved to S.S.P. for protection of their lives or liberty, therefore, there is no cause of action for petitioner to seek protection against respondent No. 4.

21. In view of the discussions as above, it is not considered desirable that live-in-relationship of the petitioners be protected in contravention of the statutory provisions of law passed by legislature, hence, petition has no force and is liable to be dismissed and is **dismissed** accordingly.

(2024) 3 ILRA 1870
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ -C No. 5761 of 2024

Brijmohan Tanwar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kant Tripathi, Sri Praveen Kumar

Counsel for the Respondent:
C.S.C., Sri Pradeep Kumar Tripathi, Sri Ravi Prakash Pandey

Civil Law - Constitution of India,1950-Article 226-U.P. Urban Planning and Development Act, 1973-Unauthorized construction-Urban development-compliance with Sanctioned Plans-Petitioner's grievance is that the private respondents are building beyond the sanctioned map, causing damage to petitioner's property-The court observed that the private respondents had exceeded the permissible construction area under the approved plan, and the development authority's decision to permit compounding undermines the purpose of urban planning laws-The court criticized this practice, emphasizing that compounding must not facilitate relaxation of building norms, as it encourages illegal constructions and disrupts planned development-development authorities must prevent construction beyond approved plans-Assessment of damages caused to the petitioner's property must be undertaken.(Para 1 to 8)

The writ petition is disposed of.(E-6)

(Delivered by Hon'ble Ashwani Kumar Mishra, J & Hon'ble Syed Qamar Hasan Rizvi, J.)

1. A grievance is raised in the present petition that constructions are being allowed by the development authority contrary to the sanction plan on account of which petitioner's adjoining constructions are getting damaged. Taking note of such contention, we passed following orders on 26.2.2024:-

"1. Grievance of the petitioner is that private respondents are raising construction contrary to the sanctioned map on account of which petitioner's construction, on the adjoining, is getting damaged.

2. Learned counsel for the Development Authority is directed to obtain instructions in the matter.

3. Let notices be also issued to fifth respondent by registered speed post for which appropriate steps shall be taken within 24 hours, fixing 13th March, 2024 as the date in the matter.

4. List again as fresh on 13.03.2024.

5. In the meantime, the Development Authority shall ensure that no constructions contrary to sanctioned map are allowed to be raised."

2. Sri Pradeep Kumar Tripathi, learned counsel representing development authority states that though constructions are being raised by the private respondents over and above the area for which map has been sanctioned but such constructions are within the compoundable limits. Written instructions are produced as per which the private respondent has been given an opportunity to apply for compounding.

3. Urban areas are required to be developed in accordance with the plan. It is with this object that U.P. Urban Planning and Development Act, 1973 has been enacted. The authorities have also framed building bye-laws which permits constructions on specified area only after getting the plan approved. In the present case also the private respondent has in fact got a map approved. In case constructions are raised as per it, there can hardly be any objection. In this case also the private respondent has secured sanction of a residential construction and in the event such constructions are undertaken, there can be no objection. However, it transpires that constructions are being raised by the private respondent in excess of construction allowed as per the approved plan. The authority instead of allowing constructions to be raised strictly as per the approved plan is permitting the private respondent to raise additional constructions on the ground that such additional constructions are compoundable.

4. Building bye-laws and plans are supposed to be followed scrupulously so that urban development is allowed in a planned manner. What is, however, disturbing is the practice of allowing constructions in excess of approved plan and thereafter entertaining compounding plans, ostensibly with the purpose of augmenting the financial interest of the development authority. The object of establishment of development authority is planned development and not to allow illegal constructions and thereafter compound illegal constructions by charging huge money. Organized nexus appears to be operating in the development authorities where the builders, in collusion with other elements collude for raising constructions contrary to the building plan.

5. We can appreciate the rationale for allowing compounding where prior sanction is not obtained for various reasons. The authority, however, while compounding the plan must not allow constructions over and above the permissible constructions in the building bye-laws. In the event authority eases the norms of permissible constructions as per the building bye-laws, while compounding the plan, it allows not only curing the illegality but also encourage illegal constructions which would violate the object of planned development. An honest person who gets his building plan approved as per the building bye-laws would be allowed to raise constructions over a lesser area, while the one who violates the law by

raising illegal constructions is allowed to raise additional constructions in the garb of compounding, by paying additional money, to the authority. While development authority benefits in the form of additional revenue from compounding the unscrupulous elements operating in the field also benefit. Everyone wins at the cost of planned development.

6. Question arises thus as to whether the development authorities are established to secure planned development or are to facilitate large scale violation of building bye-laws in the name of compounding. In the facts of the present case also we find from the instructions that though the authority has been made aware that constructions are being raised contrary to the building plan and in excess of the permissible area over which constructions are allowed in the building plan but instead of ensuring that constructions are restricted only in accordance with the approved plan, the authority is facilitating compounding by calling upon the private respondents to get such illegality regularized. This approach of the development authority has to be discouraged.

7. The development authority has been constituted to ensure that constructions are allowed to be raised strictly as per the plan. The foremost endeavor has to be ensure that no constructions contrary to the plan are allowed. The practice of allowing deviations and then facilitating such departures from the norms by getting the maps compounded must stop.

8. In the facts of the present case, we call upon the respondents to ensure that no constructions in excess of the sanction plan is allowed to be raised on the spot. The State Government is also directed to issue immediate directions to all development authorities to ensure that no constructions are allowed to be raised over and above the permissible constructions as per the building bye-laws. We may also specify that the norms for constructions as per the building bye-laws must not be relaxed in cases of compounding, inasmuch as the compounding can only be to facilitate ex-post facto approval of plan, but while doing so, the building norms cannot be relaxed. What is not permissible under the building bye-laws should not be allowed by way of compounding. The Principle Secretary of the Department of Housing shall, therefore, file his personal affidavit in compliance of the above directions. The Vice-Chairman shall ensure that no constructions on the plot is allowed to be raised except in accordance with the sanction plan. The authority shall also make an assessment of the damage which apparently has been caused to the petitioner's construction on account of deviations allowed while raising constructions by the private respondents.

9. List as fresh on 8.4.2024.

(2024) 3 ILRA 1872
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-C No. 6049 of 2023
alongwith other connected cases

Anshuman Singh Rathore ...Petitioner
Versus
U.O.I. Ors. ...Opp. Parties

Counsel for the Petitioner:
In Person, Aditya Kumar Tiwari, Ghulam Mohammad Kamil

Counsel for the Opp. Parties:
A.S.G.I., Afzal Ahmad Siddiqui, Mahendra Bahadur Singh, Mohd. Kumail Haider, Sanjeev Singh, Shailendra Singh Rajawat, Sudhanshu Chauhan, Syed Husain, Vikas Singh

Civil Law - Civil Procedure Code, 1908 – Order XL Rule 1, Sections 151 & 152 – Appointment of Receiver – Interlocutory Mandatory Injunction – Appeals under Order XLIII Rule 1(s) challenging orders dated 17.01.2024 and 31.01.2024 appointing District Magistrate, Varanasi as Receiver for Vyas Ji Tehkhana (cellar) and directing worship/rituals – Held, appointment of Receiver justified as plaintiff established strong prima facie case of possession by Vyas family since 1551, supported by map in *Din Mohammad* case (1937) and Commissioner's report (1996) – No evidence of appellant's possession over tehkhana – Order dated 31.01.2024 correcting omission of relief (b) valid under Sections 151/152 CPC, as it rectified accidental slip without altering merits – *Actus curiae neminem gravabit* applied – Interlocutory mandatory injunction to restore worship (stopped in 1993) upheld, as it restores status quo ante, not final relief – No clash of interest in District Magistrate's role as Receiver and ex-officio member of Kashi Vishwanath Trust Board – Pleas of limitation, res judicata, and non-joinder/mis-joinder premature without written St.ment or framed issues – *Dorab Cawasji Warden* guidelines satisfied. (Para 61-165)

Appeals dismissed.

List of Cases Cited:

1. Bharat Sanchar Nigam Limited Vs Prem Chandra Premi, (2005) 13 SCC 505

2. Mohd. Aslam @ Bhure Vs U.O.I., (1997) 5 SCC 575

3. T. Krishnaswamy Chetty Vs C. Thangavelu Chetty, AIR 1955 Mad 430

4. Dwaraka Das Vs St. of M.P., (1999) 3 SCC 500

5. My Palace Mutually Aided Cooperative Vs B. Mahesh, 2022 LiveLaw (SC) 698

6. UPSRTC Vs Imtiaz Hussain, (2006) 1 SCC 380

7. Plasto Pack, Mumbai Vs Ratnakar Bank Ltd., (2001) 6 SCC 683

8. Metro Marines Vs Bonus Watch Co. (P) Ltd., (2004) 7 SCC 478

9. Jayalakshmi Coelho Vs Oswald Joseph Coelho, (2001) 4 SCC 181

10. Dorab Cawasji Warden Vs Coomi Sorab Warden, (1990) 2 SCC 117

11. Gurunanak Dev University Vs Parminder Kumar Bansal, 1993 Supreme (SC) 458

12. Samir Narain Bhojwani Vs Aurora Properties and Investments, (2018) 17 SCC 203

13. St. of U.P. Vs Ram Sukhi Devi, (2005) 9 SCC 733

14. Mohd. Mehtab Khan Vs Khushnuma Ibrahim Khan, (2013) 9 SCC 221

15. Deputy Director Land Acquisition Vs Malla Atchinaidu, MANU/SC/0121/2006

16. Niyamat Ali Molla Vs Sonargon Housing Cooperative Society Ltd., (2007) 13 SCC 421

17. Madan Lal Vs Sneh Gupta, AIR 2001 Del 433

18. Syed Khuwaja Syed Ahmed Vs Maharashtra Housing and Area Development Authority, 1983 Mah LJ 120

(Delivered by Hon'ble Vivek Chaudhary,h, J.& Hon'ble Subhash Vidyarthi, J.)

(A) Reference Order And Introductory Facts (Paragraphs 1 to 9)
(B) Submissions Of Parties (Paragraphs 10 to 25)
(C) Preliminary Objection (Paragraphs 26 to 46)

(D) History Of Madarsas In State Of U.P. And Relevant Provisions Of Madarsa Act And Regulations (Paragraphs 47 to 52)

(E) Grounds Of Challenge:

(I) Violative Of Secularism Article 14 (Paragraphs 53 to 71)

(II) Violative Of Articles 21 And 21-A (Paragraphs 72 to 84)

(III) Conflict Of Madarsa Act And U.G.C. Act (Paragraphs 85-98)

(F) Conclusion (Paragraph 99)

(A) REFERENCE ORDER AND INTRODUCTORY FACTS

1. A Single Judge Bench hearing Writ A No. 29324 of 2019 (Mohammed Javed versus State of U.P. and others), passed the following order on 23.10.2019: -

"1. Heard learned counsel for petitioner.

2. Sri Alok Sharma, learned Additional Chief Standing Counsel has accepted notices on behalf of opposite party no.1 and 3, Sri Afzal Siddiqui, learned counsel has accepted notices on behalf of opposite party no.2.

3. Issue notice to opposite party no.4 returnable at an early date.

4. Petitioner has filed present writ petition claiming that he was appointed as part-time assistant teacher in the year 2011 for the primary Section of respondent no.4 Madrasa Nisarul Uloom Shahzadpur, Akbarpur Post Office, District Ambedkar Nagar on a fix salary of Rs.4,000/- per month, subject to 8% annual increment. He prays that no regular appointment should be made by respondent no.1 to 3 i.e. the State Government, the Madarsa Shiksha Parishad and District Minority Welfare Officer and his service should be regularized. Further prayer is that he should be paid salary as is being paid to the regular teachers.

5. Petitioner places reliance upon the provisions of U.P. Board of Madarsa Education Act, 2004 (Madarsa Act, 2004) and the regulations framed thereunder. At the time of hearing, perusal of the Madarsa Act, 2004, Section 2(h) defines:-

"Section 2(h):-Madarsa-Education" means education in Arbic Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time."

6. For the purposes of Madarsa education, a Board is constituted under Section 3 of the Madarsa Act, 2004 which reads :-

"Section 3(3) The Board shall consist of the following members, namely:

(a) a renowned Muslim educationist in the field of traditional Madarsa-Education, nominated by the State Government who shall be the Chairperson of the Board;

(b) the Director, who shall be the Vice-Chairperson of the Board;

(c) the Principal, Government Oriental College, Rampur;

(d) one Sunni-Muslim Legislator to be elected by both houses of the State Legislature;

(e) one Shia-Muslim Legislator to be elected by both houses of the State Legislature;

(f) one representative of National Council for Educational Research and Training;

(g) two head of institution established and administered by Sunni-Muslim nominated by the State Government;

(h) one head of institution established and administered by Shia-

Muslim nominated by the State Government;

(i) two teachers of institutions established and administered by Sunni-Muslim nominated by the State Government;

(j) one teacher of an institution established and administered by Shia-Muslim nominated by the State Government;

(k) one Science or Tibb teacher of an institution nominated by the State Government;

(l) the Account and Finance Officer in the Directorate of minority Welfare, Uttar Pradesh;

(m) the Inspector;

(n) an officer not below the rank of Deputy Director nominated by the State Government, who shall be the member Registrar;

7. From perusal of the same, following questions arise for consideration:-

(i) Since the Madarsa Board is constituted for education in 'Arbic, Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time', how come persons of a particular religion are provided to be member of the same? It does not talks about exponence in the aforesaid fields, for the purposes of which the Board is constituted, but persons of specific religion. It was put to learned Additional Chief Standing Counsel as to whether the purpose of the Board is to impart religious education only, to which he submits that a perusal of the Madarsa Education Act, 2004 does not indicate so.

(ii) With a secular constitution in India can persons of a particular religion be appointed/nominated in a Board for education purposes or it should be persons belonging to any religion, who are exponent in the fields for the purposes of which the Board is constituted or such persons should be appointed, without any regard to religion, who are exponent in the field for the purposes of which the Board is constituted?

(iii) The Act further provides the Board to function under the Minority Welfare Ministry of State of U.P., hence, a question arises as to whether it is arbitrary for providing the Madarsa education to be run under the Minority Welfare Department while all the other education institutions including those belonging to other minorities communities like Jains, Sikhs, Christians etc being run under the Education Ministry and whether it arbitrarily denies the benefit of experts of education and their policies to the children studying in Madarsa?

8. All these questions impacts the vires of the Madarsa Act, 2004 and are important questions to be decided before looking into the application of the Madarsa Act, 2004 and the regulations framed thereunder. Thus, I find it appropriate that the matter may be placed before the Larger Bench for decision on the aforesaid issue.

9. In view thereof, office is directed to place the matter before the Hon'ble the Chief Justice/Senior Judge for constitution of a Larger Bench."

2. Thereafter, on the basis of the aforesaid reference order, other writ petitions, namely, Writ A No. 3735 of 2012, 5548 of 2014, 3615 of 2020 and Writ (C) No. 481 of 2020, were also referred to the Larger Bench.

3. The matters referred were nominated to different Benches, but, could not be taken up. Finally, by order dated 18.05.2023 of the Chief Justice, the present Bench was nominated to hear the reference.

Writ (C) No. 6049 of 2023 (Anshuman Singh Rathore versus Union of India and others) was filed meanwhile, challenging the vires of the U.P. Board of Madarsa Education Act, 2004 (for short 'the Madarsa Act') on the ground that the same violates the principle of Secularism, which forms a part of the basic structure of the Constitution of India as well Articles 14, 15 and 21-A of the same. He further challenges Section 1(5) of Right of Children to Free and Compulsory Education Act, 2009 (for short 'the R.T.E. Act') This Writ Petition was also nominated to this Bench by order dated 31.07.2023 of the Chief Justice. Hence, all these matters with regard to vires of the Madarsa Act are before us.

4. These petitions relate to the enforcement of Fundamental Rights of minor children of the marginalised and poor Sections of the largest minority community of the State. Looking into the vastness of the issues involved and depth of impact it would have upon them, this Court appointed Sri Gaurav Mehrotra, Sri Akber Ahmad and Sri Madhukar Ojha, Advocates, as Amici Curiae to assist the Court vide order dated 14.07.2023 passed in Writ A No.29324 of 2019.

5. During the course of hearing, the following parties filed applications seeking impleadment/intervention in Writ-C No.6049 of 2023: -

(1) Managers Association, Madaris Arabiya, U.P., through Sri G. M. Kamil, Advocate;

(2) All India Teachers Association, Madarsa Arabia, New Delhi, through Sri Syed Hussain, Advocate;

(3) Manager Association, Arbi Madarsa, Nai Bazar, Balrampur, through Sri Aditya Kumar Tiwari, Advocate;

(4) Adhyayan Foundation for Policy Research, through Sri Amrendra Nath Tripathi, Advocate;

(5) Shikshharettar Karamchari Association, Madaris E Arabia, Kanpur Nagar, through Sri Mohd. Kumail Haider and Sri Iqbal Ahmad, Advocates;

(6) Madarsa Jamia Baitul Uloom, Balrampur, through Sri Mohd. Kumail Haider and Sri Iqbal Ahmad, Advocates;

(7) Teachers Association, Madaris Aribiya, U.P. Kanpur, through Sri Prashant Chandra Senior Advocate assisted by Sri M. B. Singh, Advocate.

6. The learned Counsel for all the abovementioned applicants stated that as the issues involved are purely legal in nature, they would not file any counter affidavit and they advanced their submissions on the legal and Constitutional issues involved in the matter. The learned counsel for some of the parties have submitted some Government Orders and Notifications etc. through affidavits or otherwise and all of those have been taken on record.

7. We have heard at length the petitioner Sri Anshuman Singh Rathore, who himself is an Advocate, as well as Sri Sudeep Kumar, learned counsel for the petitioner, Amici Curiae Sri Gaurav Mehrotra, Sri Akber Ahmad and Sri Madhukar Ojha Advocates, Sri Anil Pratap Singh, learned Additional Advocate General and Sri Sanjeev Singh, learned Standing Counsel for the State of U.P., Sri Sudhanshu Chauhan and Sri Anand Dwivedi, learned counsel appearing on behalf of Union of India, Sri Sandeep Dixit,

Senior Advocate assisted by Sri Afzal Ahmad Siddiqui Advocate for the Madarsa Board, Sri Prashant Chandra Senior Advocate assisted by Sri M. B. Singh and Sri Vikas Singh Advocates for Teachers' Association Madarsa Aribiya, Sri G. M. Kamil Advocate for Managers Association Madaris Arabiya, Uttar Pradesh, Sri Syed Hussain Advocate for All India Teachers Association Madarsa Arabia, New Delhi, Sri Aditya Kumar Tiwari Advocate for Manager Association, Arbi Madarsa, Nai Bazar, Balrampur, Sri Amrendra Nath Tripathi Advocate for Adhyayan Foundation for Policy and Research, and Sri Mohd. Kumail Haider and Sri Iqbal Ahmad Advocates for Shikshharettar Karamchari Association, Madaris E Arabia, Kanpur Nagar and Madarsa Jamia Baitul Uloom, Balrampur.

8. The reference order doubts the validity of specific provisions of the Madarsa Act on the principles of secularism. The standing counsel before the single judge had stated that purpose of the Madarsa Board is not to impart religious education. However, both, the State of U.P. and the Madarsa Board before this Court fairly accepted that the Board imparts not only religious education, but, also religious instructions and teachings. Therefore the reference was reframed as follows: -

"Whether the provisions of the Madarsa Act stand the test of Secularism, which forms a part of the basic structure of the Constitution of India."

9. This re-framing of the reference does not impact the scope of hearing, as the challenge raised in the writ petition of Anshuman Singh Rathore to the Madarsa Act is on the ground that the provisions, scheme and the environment created by the Madarsa Act with regard to education in Madarsas in the State violates Articles 14, 15 and 21-A of the Constitution of India. The Fundamental Rights under the aforesaid Articles, more specifically under Article 14 and 21-A, includes right to universal quality education, which also includes secular education.

(B) SUBMISSIONS OF PARTIES

10. The Petitioner and his counsel submit that the Madarsa Act violates the principles of secularism, which forms a part of the basic structure of the Constitution of India; fails to provide quality compulsory education up to the age of 14 years/Class-VIII, as is mandatorily required to be provided under Article 21-A of the Constitution of India; and further fails to provide universal and quality school education to all the children studying in madarsas, as is mandatorily required to be provided under Article 21 of the Constitution of India. Thus it violates the Fundamental Rights of the students of the madarsas. The writ petition also challenges vires of Section 1(5) of the R.T.E. Act which excludes Madarsas, Vedic Pathshalas and educational institutions primarily imparting religious instructions.

11. Learned *Amici Curiae* also supported the submissions of the petitioner. They further submit that Article 25 provides the right to freedom of conscience and the right to freely profess, practice and propagate religion. This right does not affect the right of regulating any social activity which may be associated with religious practice and right of the State from making any law providing for social welfare and reform. Sri Mahrotra also submitted that while making laws which are saved by Article 25(2), the State should

be progressive and reformative in its approach, and its approach cannot be regressive. The Madarsa Act denies the children studying in Madarsa, the right to receive quality education like other children studying in regular schools and, therefore, the Madarsa Act is a regressive enactment, which is unconstitutional.

12. The learned *Amici Curiae* also submitted that Part 4-A of the Constitution of India deals with Fundamental Duties and Article 51-A of the Constitution of India inter alia provides that it shall be the duty of every citizen to promote harmony and the spirit of common brotherhood amongst the people of India transcending religious, linguistic, regional or sectional diversities, to develop the scientific temper, humanism and the spirit of inquiry and reform, to strive towards excellence in all the spheres of individual and collective activity so that the nation constantly rises to higher level of endeavor and achievement. Clause (K) of Article 51-A provides that it shall be the duty of every parent or guardian to provide opportunities for education to his child or, as the case maybe, ward between the age of 06 and 14 years. The learned Amici Curiae submit that although the fundamental duties are not enforceable and the State cannot be compelled to act in furtherance of Article 51-A, at the same time, the State cannot act in a manner which would be contrary to the provisions contained in Article 51A. The provisions of Madarsa Act making special provisions for education to the children of a single minority community, in a very limited sphere of knowledge and of level lower than the normal level of education imparted in regular educational institutions, is clearly violative of the fundamental duties and, therefore, the Madarsa Act is violative of the basic spirit of the Constitution of India.

13. The learned *Amici Curiae* further submit that Seventh Schedule appended to the Constitution of India contains three list – List I being the Union List, List II being the State List and List III being the Concurrent List. Entry 66 of List I is a "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Entry 25 in List III is- "Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List 1; vocational and technical training of labour." Section 9(a) and 9(j) of Madarsa Act contain provisions regarding determination of standards of higher education in Madarsa, power that vests in the Central Government, as per entry 66 of List I, and, therefore, the State does not have the legislative competence to legislate in this regard.

14. Section 3 of the Madarsa Act provides for constitution of Madarsa Board and no educational qualification is prescribed for any person to be a member of the Madarsa Board.

15. The learned *Amici Curiae* submitted that secularism is a part of the basic structure of Constitution of India and the Madarsa Act violates the principle of secularism. In support of this submission, they have placed reliance on large number of judgments which are referred to in later part of the judgment.

16. The submission of the learned *Amici Curiae* is that the Madarsa Act violates Secularism and Article 14, 15, 16(5), 29(2), 30 and Article 51-A of the Constitution of India.

17. They further submitted that to the extent of higher education, the Madarsa Act is directly in conflict with and violates the U.G.C. Act and entrenches upon the field occupied by the central legislation and thus to the said extent is also ultravires.

18. Opposing the aforesaid submissions, the stand of State of U.P. through the learned additional Advocate General is that no doubt the Madarsa Board is providing religious education as well as religious instructions to the students, but the State has sufficient power to impart such education under the Constitution of India and is rightly permitting such education. He has also traced the history of Madarsa education in the State of U.P. Sri Sanjiv Singh learned standing counsel further submits that education provided by Madarsa Board is traditional education, relating to religion, culture and language which does not change with time. It is covered by entry 25 of List III of VII schedule to the Constitution of India. Providing religious education and instructions is not barred or illegal. For such religious education a separate Board is necessarily required, which needs to have members of such particular religion. He further states that these madarsas are providing cheap education to these children, who belong to poor and marginalised families. The U.G.C. Act does not relate to religious teachings, education and instructions or with traditional education and thus both occupy different fields.

19. Sri. Sandeep Dixit Senior Advocate for Madarsa Board raised a preliminary objection against the locus standi of the petitioner and also insufficiency of pleadings to challenge the maintainability of the writ petition. He also relies upon Article 25 to 30 of the Constitution of India to submit that State Government has power to provide religious education and instructions of a particular religion in schools. He strongly states that nearly free education is being provided by these madarsas to minor children, with a monthly fee of hardly rupees 10/- or 20/- per month and in case the Madarsas are closed, these children would be left without even this education. These madarsas themselves are surviving on the aid received from the Government. Therefore the court, in the interest of these children from poor families, should dismiss the petition.

20. Sri. Prashant Chandra Senior Advocate appearing for Teachers' Association Madarsa Aribiya, Kanpur, opposing the petition, also supported the preliminary objections and further submitted that even if this Court finds some of the provisions of the Madarsa Act to be violating Chapter-III of the Constitution of India, still this Court should, as far as possible, only declare such provisions of the Madarsa Act to be ultra vires and save the remaining provisions of the Act, either by reading down the said provisions or by carving the same out of the Act.

21. Sri Amrendra Nath Tripathi Advocate on behalf of Adhyayan Foundation for Policy and Research submitted that it is the jurisdiction of NCTE to provide quality education up to Class-VIII and Madarsa Board violates the provisions of NCTE Act also. Counsel for respondents and intervenor broadly adopted leading arguments made by State of U.P., Madarsa Board and Teachers Association, Madarsa Arabiya, Kanpur.

22. All the learned Counsel opposing the petition and reference order have, while adopting arguments of aforesaid persons, also relied upon Articles 25 to 30 of the Constitution of India to submit that religious education and instructions of a religion can be provided in schools and thus State Government can frame such an Act.

23. Learned counsel for the respondents and interveners submit that the State Government is having sufficient power to legislate with regard to traditional education. They submit that the UGC Act does not cover the field of traditional education and there is also no other Central Act that occupies the said field of traditional education, therefore, the State has rightly exercised its legislative power in the said field. Learned counsel for the respondents and interveners, however, has not placed any case law or other material before us in support of their submission. They also, despite repeated queries, could not elaborate the difference between traditional education and modern education, except for their submission that religious education is covered in the field of traditional education. They also could not specify the provisions that could be carved out of the Madarsa Act to save any part of the same.

24. Mr. Sudhanshu Chauhan for the Union of India states that the stand of the Union of India is that religious education and religious instructions of a single religion cannot be included in school education and State Government has no power to create statutory Education Boards permitting religious education. He further submits that the earlier policy of Union of India for providing grants/funds to Madarsas was effective till 31.03.2022 and there is no proposal of Government of India to extend the same. He strongly opposes challenge to vires of Section 1(5) of the R.T.E. Act.

25. In support of their respective submissions parties have placed reliance on large number of precedents, which are dealt with in the later part of this judgment.

(C) PRELIMINARY OBJECTIONS

26. Sri Sandeep Dixit, learned Senior Advocate, appearing for the Madarsa Board, and Sri Prashant Chandra, learned Senior Advocate, appearing for the Teachers' Association Madarsa Aribiya, Kanpur, have raised two preliminary objections with regard to maintainability of the writ petition filed by Sri Anshuman Singh Rathore. Their first objection is that the petitioner is an Advocate practicing in the High Court and he has no personal interest in the matter, hence, he could not have filed this writ petition. At best, he may have filed a Public Interest Litigation, but the present writ petition is not a Public Interest Litigation and, hence, he has no locus standi to file the present writ petition.

27. Sri. Sandeep Dixit has further submitted that the Writ Petition No.6049 of 2023 filed by Sri. Anshuman Singh Rathore Advocate appears to have been filed for the benefit of Madarsas, as in case the Madarsa Act is held to be unconstitutional or ultra vires, the State will lose control over the Madarsas and the Madarsas will become absolutely free, which will not be in the interests of the students of the Madarsas.

28. In support of their preliminary objection regarding lack of locus standi, they have placed reliance upon the

judgments in the cases of Jasbhai Motibhai Desai versus Roshan Kumar, Haji Bashir Ahmed and others (1976) 1 SCC 671 and **Vinoy Kumar versus State of U.P. and others** (2001) 4 SCC 734.

29. Replying to the preliminary objection regarding locus standi, Sri Sudeep Kumar, learned counsel for petitioner, and learned Amici Curiae submitted that this is a matter relating to Fundamental Right to life and education of minor children of financially weak families of a minority community of this country, therefore, this Court cannot refuse to entertain the writ petition involving questions of Fundamental Rights of such minor children belonging to a marginal section of the society on technicalities. As has been submitted by the State and Madarsa Board, the children studying in Madarsas belong to poor families, which are unable to bear the cost of education of regular schools and it is duty of this Court to come forward and protect their Fundamental Rights, rather to refuse to interfere on mere technicalities. They further submit that all the aforesaid judgments, relied upon by the respondents, arose from disputes which are regarding personal rights of individuals and the same cannot be applied to a matter relating to Fundamental Rights of minor children of poor and marginal families. Reliance is placed by Sri Sudeep Kumar upon a judgment of Supreme Court in the case of **S. P. Gupta versus Union of India and another**, 1981 (Supp) SCC 87.

30. In ***Jasbhai Motibhai Desai versus Roshan Kumar, Haji Bashir Ahmed and others*** (1976) 1 SCC 671, it was held that: -

"13. This takes us to the further question: Who is an "aggrieved person" and what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. English Courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person". However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or "standing" to invoke certiorari jurisdiction.

* * *

37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) "person aggrieved"; (ii) "stranger"; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of

administration. The High Court should do well to reject the applications of such busybodies at the threshold.

38. The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of "persons aggrieved". In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be "persons aggrieved".

39. To distinguish such applicants from "strangers", among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person"against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something?"

Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?"

31. In ***Vinoy Kumar versus State of U.P. and others*** *(2001) 4 SCC 734*, it was held that: -

"2. Generally speaking, a person shall have no locus standi to file a writ petition if he is not personally affected by the impugned order or his fundamental rights have neither been directly or substantially invaded nor is there any imminent danger of such rights being invaded or his acquired interests have been violated ignoring the applicable rules. The relief under Article 226 of the Constitution is based on the existence of a right in favour of the person invoking the jurisdiction. The exception to the general rule is only in cases where the writ applied for is a writ of habeas corpus or quo warranto or filed in public interest. It is a matter of prudence, that the Court confines the exercise of writ jurisdiction to cases where legal wrong or legal injuries are caused to a particular person or his fundamental rights are violated, and not to entertain cases of individual wrong or injury at the instance of third party where there is an effective legal aid organisation which can take care of such cases. Even in

cases filed in public interest, the Court can exercise the writ jurisdiction at the instance of a third party only when it is shown that the legal wrong or legal injury or illegal burden is threatened and such person or determined class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief."

32. However, in ***S. P. Gupta versus Union of India and another***, *1981 (Supp) SCC 87*, a larger bench consisting of seven Judges of the Supreme Court held that: -

"...But it must now be regarded as well settled law ***where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of some disability or it is not practicable for him to move the Court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the Court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him.*** *...*

* * *

It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. Where the weaker Sections of the community are concerned, such as under trial prisoners languishing in jails without a trial, inmates of the Protective Home in Agra, or Harijan workers engaged in road construction in the district of Ajmer, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public-spirited individual espousing their cause and seeking relief for them. This Court will readily respond even to a letter addressed by such individual acting pro bono publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public-minded individual as a writ petition

and act upon it. Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief. It is in this spirit that the Court has been entertaining letters for judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach. *But we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the Court or even in the form of a regular writ petition filed in court.* ***We may also point out that as a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organisation which can take care of such cases.***

The types of cases which we have dealt with so far for the purpose of considering the question of locus standi are those where there is a specific legal injury either to the applicant or to some other person or persons for whose benefit the action is brought, arising from violation of some constitutional or legal right or legally protected interest. What is complained of in these cases is a specific legal injury suffered by a person or a determinate class or group of persons. But ***there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or is there no one who can complain and the public injury must go unredressed? To answer these questions it is first of all necessary to understand what is the true purpose of the judicial function. This is what Prof. Thio states in his book on Locus Standi and Judicial Review:***

"Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of Government within their powers in the interest of the public (jurisdiction de droit objectif) or is it mainly directed

towards the protection of private individuals by preventing illegal encroachments on their individual rights (jurisdiction de droit subjectif)? The first contention rests on the theory that Courts are the final arbiters of what is legal and illegal…. Requirements of locus standi are therefore unnecessary in this case since they merely impede the purpose of the function as conceived here. On the other hand, where the prime aim of the judicial process is to protect individual rights, its concern with the regularity of law and administration is limited to the extent that individual rights are infringed."

We would regard the first proposition as correctly setting out the nature and purpose of the judicial function, as it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it by the Constitution or the law. If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and care thereby improving the administration of justice. Lord Diplock rightly said in Rex v. Inland Revenue Commissioners [(1981) 2 WLR 722, 740] :

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of

locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of Central Government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only judge."

This broadening of the Rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalising the Rule of locus standi that it is possible to effectively police the corridors of power and prevent violations of law. It was pointed out by Schwartz and H.W.R. Wade in their book on Legal Control of Government at p. 354:

"Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some Government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?"

It is also necessary to point out that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or public injury, not only will the cause of legality suffer but the people not having any judicial remedy to redress such public wrong or public injury may turn to the street and in that process, the rule of law will be seriously impaired. It is absolutely essential that the rule of law must wean the people away from the lawless street and win them for the Court of law.

There is also another reason why the Rule of locus standi needs to be liberalised. Today we find that law is being increasingly used as a device of organised social action for the purpose of bringing about socio-economic change. The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large Sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all. The new social and economic rights which are sought to be created in pursuance of the Directive Principles of State Policy essentially require active intervention of the State and other public authorities. Amongst these social and economic rights are freedom from indigency, ignorance

and discrimination as well as the right to a healthy environment, to social security and to protection from financial, commercial, corporate or even Governmental oppression. More and more frequently the conferment of these socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which a single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of effluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air; defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport. In cases of this kind it would not be possible to say that any specific legal injury is caused to an individual or to a determinate class or group of individuals. What results in such cases is public injury and it is one of the characteristics of public injury that the act or acts complained of cannot necessarily be shown to affect the rights of determinate or identifiable class or group of persons : public injury is an injury to an indeterminate class of persons. In these cases the duty which is breached giving rise to the injury is owed by the State or a public authority not to any specific or determinate class or group of persons, but to the general public. In other words, the duty is one which is not correlative to any individual rights. Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law. It would also open the door for corruption and inefficiency because there would be no check on exercise of public power except what may be provided by the political machinery, which at best would be able to exercise only a limited control and at worst, might become a participant in misuse or abuse of power. It would also make the new social collective rights and interests created for the benefit of the deprived Sections of the community meaningless and ineffectual.

Now, as pointed out by Cappelletti in Vol. III of his classic work on Access to Justice at p. 520, "The traditional doctrine of standing (legitimatio ad causam) attributes the right to sue either to the private individual who 'holds' the right which is in need of judicial protection or in case of public rights, to the State itself, which sues in Courts through its organs." The principle underlying the traditional rule of standing is that only the holder of the right can sue and it is therefore, held in many jurisdictions that since the State representing the public is the holder of the public rights, it alone can sue for redress of public injury or vindication of public interest. It is on this principle that in the United Kingdom, the Attorney-General is entrusted with the function of enforcing due observance of the law. The Attorney-General represents the public interest in its entirety and as pointed out by S.A. de Smith in Judicial Review of Administrative Action (3rd Edn.) at p. 403, "the general public has an interest in seeing that the law is obeyed and for this

purpose, the Attorney-General represents the public". There is, therefore, a machinery in the United Kingdom for judicial redress for public injury and protection of social, collective, what Cappelletti calls "diffuse" rights and interests. We have no such machinery here. We have undoubtedly an Attorney-General as also Advocates General in the States, but they do not represent the public interest generally. They do so in a very limited field; see Sections 91 and 92 of the Civil Procedure Code. ***But, even if we had a provision empowering the Attorney-General or the Advocate-General to take action for vindicating public interest, I doubt very much whether it would be effective. The Attorney-General or the Advocate-General would be too dependent upon the political branches of Government to act as an Advocate against abuses which are frequently generated or at least tolerated by political and administrative bodies. Be that as it may, the fact remains that we have no such institution in our country and we have therefore to liberalise the Rule of standing in order to provide judicial redress for public injury arising from breach of public duty or from other violation of the Constitution or the law. If public duties are to be enforced and social collective "diffused" rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the Court and act for a general or group interest, even though, they may not be directly injured in their own rights. It is for this reason that in public interest litigation — litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, "diffused" rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any straitjacket formula for the purpose of defining or delimiting "sufficient interest". It has necessarily to be left to the discretion of the court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable Sections of the people by creating new social, collective "diffuse" rights and interests and imposing new public duties on the State and other public authorities, infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action.***

.....

We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace

of realisation of the constitutional objectives. *"Law", as pointed out by Justice Krishna Iyer in Fertilizer Corporation Kamgar Union (Regd.) v. Union of India [(1981) 1 SCC 568 : AIR 1981 SC 344 : (1981) 1 LLJ 193] "is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction" (SCC p. 585)...."*
(Emphasis added)

33. In view of the law laid down in S. P. Gupta (supra), there remains no dispute that this Court has sufficient power to initiate proceedings even on a letter written by a person, who has no concern with the case, but, only brings the same in the knowledge of the Court and this Court can even exercise its jurisdiction suo moto where it finds that the Fundamental Rights of children belonging to financially deprived Section of the largest minority community are being violated by any action/inaction of the State.

34. No material is placed before us to show that the petitioner, an Advocate who is a regular practitioner in this court, does not have bona fide intentions in filing the present writ petition. There is no reason to disbelieve his intentions. Further, the cause raised by him is a genuine cause, which impacts not only these children and their families, but also each and every citizen of this country. If a substantial number of children of the State are denied universal quality education it would in future result in social and economic disparity in the society. Those denied the benefits of modern quality education would find themselves stuck with limited options of growth and livelihood. Such situations cause social disparity resulting in tensions in society. It is the duty of the State to ensure that universal quality education is provided by it to one and all so that each individual gets equal opportunity to grow and create a bright future. A peaceful society is a right vested in every citizen of this country, both individually and collectively. To work in the said direction is a constitutional obligation of the State. Policies of the State have to be in furtherance of such constitutional obligations. Any person with bona fide apprehensions that the State is failing in its constitutional obligations can approach the High Court under Article 226 or, where the same are impacting Fundamental Rights, also to the Supreme Court under Article 32 of the Constitution of India. It is the duty of the Constitutional Courts to ensure that the Rule of Law prevails. Performance of this constitutional duty cannot be refused merely on technicalities of locus or pleadings. Courts have been accepting mere letters as sufficient to initiate proceedings in appropriate cases. Even newspaper reports are found sufficient to initiate suo moto action by courts, where cause is alarming enough. Constitutional Courts have understood and stood for the necessity of quality education to children. It is the Courts that read the right to receive universal quality education as a part of the Fundamental Right to Life guaranteed under Article 21 of the Constitution of India. In the present case, it is not only the petitioner who has raised the cause of these children studying in madarsas, but, this Court itself found a need to look into the issue.

35. In view of the foregoing discussion, we find no force in the preliminary objection regarding Locus Standi of the petitioner.

36. The second preliminary objection raised by Sri. Sandeep Dixit Senior Advocate is that there are no proper pleadings in the writ petition filed by Sri Anshuman Singh Rathore and in absence of proper pleadings, the writ petition cannot stand. He has submitted that the earlier writ petition, in which the reference order was passed, also does not challenge the vires of the Madarsa Act, but it is for issuance of a Writ of Mandamus commanding the respondents to pay salary to the petitioner regularly in the prescribed pay scale of the State Government for the post of Assistant Teacher of Primary Section of Madarsa, with a further prayer to absorb and regularize the services of petitioner on the post of Assistant Teacher and no regular appointment should be made by the respondents, and thus in the same also, in absence of any pleadings, vires cannot be looked into.

37. In support of the preliminary objection regarding lack of adequate pleadings, the learned Counsel for the respondents have relied upon the judgments in the cases of **Union of India and others versus Manjurani Routray and others (**2023) 9 SCC 144; **Haji Abdul Gani Khan and another versus Union of India and others,** (2023) SCC OnLine SC 138; **State of Kerala and others versus Shibu Kumar P.K. and another**,(2019) 13 SCC 577; **Kerala State Toddy Shop Contractors Association versus T.N. Prathapan, MLA and others** (2014) 15 SCC 466; **Ashutosh Gupta versus State of Rajasthan and others** (2002) 4 SCC 34; and **S.S. Sharma and others versus Union of India and others** (1981) 1 SCC 397.

38. In the case of ***Union of India and others versus Manjurani Routray and others*** (2023) 9 SCC 144, it is held that: -

"11. While hearing the learned counsel appearing for the parties, we asked Shri B.H. Marlapalle, learned Senior Counsel along with Shri Shibashish Mishra appearing on behalf of the respondents and intervenors, as to how, in absence of any pleading setting out grounds challenging the vires of Rule 4(b) and in the absence of seeking any relief to that effect, the High Court was justified in exercising jurisdiction to declare Rule 4(b) as ultra vires? In response, the learned Senior Counsel has fairly stated that it is a defect in the pleadings as well as in the relief sought before CAT and in the writ petition. But still, they made an unsuccessful attempt to satisfy this Court that the said rule appears to be discriminatory and therefore the High Court has rightly exercised the jurisdiction while passing the impugned order. It is a trite law that for striking down the provisions of law or for declaring any rules as ultra vires, specific pleading to challenge the rules and asking of such relief ought to be made, that is conspicuously missing in the present case. In the absence of such a pleading, the Union of India did not have an opportunity to rebut the same. The other side had no opportunity to bring on record the object, if any, behind the Rules that were brought into force. We are also of the considered view that, in the writ petition seeking a writ of certiorari challenging the order of CAT, the High Court ought not to have declared Rule 4(b) as ultra vires in the above fact situation. Therefore, the High Court was not justified to declare Rule 4(b) as ultra vires."

39. In ***Haji Abdul Gani Khan and another versus Union of India and others***, (2023) SCC OnLine SC 138, it is held that: --

"20. There cannot be any doubt that when a party wants to challenge the constitutional validity of a statute, he must plead in detail the grounds on which the validity of the statute is sought to be challenged. In absence of the specific pleadings to that effect, Court cannot go into the issue of the validity of statutory provisions. The Constitutional Courts cannot interfere with the law made by the Legislature unless it is specifically challenged by incorporating specific grounds of challenge in the pleadings. The reason is that there is always a presumption of the constitutionality of laws. The burden is always on the person alleging unconstitutionality to prove it. For that purpose, the challenge has to be specifically pleaded by setting out the specific grounds on which the challenge is made. A Constitutional Court cannot casually interfere with legislation made by a competent Legislature only by drawing an inference from the pleadings that the challenge to the validity is implicit. The State gets a proper opportunity to defend the legislation only if the State is made aware of the grounds on which the legislation is sought to be challenged."

40. In ***State of Kerala and others versus Shibu Kumar P.K. and another***,(2019) 13 SCC 577, the Supreme Court held that: -

"4. In these matters, none of the parties to the proceedings had laid the required pleaded foundation for questioning the vires of Rules 4 and 5 of the Rules as imperative in law. What was really questioned by the respondent(s)/defaulter(s) was/were only the show-cause notice(s) issued for the recovery of the amounts due from him/them, either to the financial institution(s) or to the bank(s). Ignoring this aspect of the matter, the Division Bench of the High Court has proceeded to consider the vires of Item (viii) under Rules 4 and 5(1) of the Rules.

5. In our opinion, the first and foremost, in the absence of adequate pleadings and grounds of challenge to the vires of the Rules in the writ petition, the Division Bench ought not to have considered that issue, and given its verdict or opinion. Even otherwise, in our opinion, the High Court has not convincingly substantiated its conclusion that the aforesaid Rules are unreasonable and arbitrary and, therefore, require to be struck down on the touchstone of Article 14 of the Constitution of India."

41. In **Kerala State Toddy Shop Contractors Association versus T.N. Prathapan, MLA and others** (2014) 15 SCC 466, it is held that: -

"9. In State of A.P. v. K. Jayaraman [State of A.P. v. K. Jayaraman, (1974) 2 SCC 738 : 1974 SCC (L&S) 547] , it has been observed that when an averment is made that a particular rule is invalid for violating Articles 14 and 16 of the Constitution, relevant facts showing how it is discriminatory ought to have been set out.

10. In Union of India v. E.I.D. Parry (India) Ltd. [Union of India v. E.I.D. Parry (India) Ltd., (2000) 2 SCC 223] , a two-Judge Bench has observed thus: (SCC p. 225, para 4)

"4. ... There was no pleading that the rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the trial Court did not frame any issue on that question. The High Court of its own proceeded to

consider the validity of the rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law…."

11. In State of Haryana v. State of Punjab [State of Haryana v. State of Punjab, (2004) 12 SCC 673] , reiterating the principle, this Court has held that: (SCC p. 706, para 82)

"82. ... merely saying that a particular provision is legislatively incompetent [ground (ii)] or discriminatory [ground (iii)] will not do. At least prima facie acceptable grounds in support have to be pleaded to sustain the challenge. In the absence of any such pleading the challenge to the constitutional validity of a statute or statutory provision is liable to be rejected in limine."

From the aforesaid authorities, it is clear as day that in the absence of any assertion how a particular provision offends any of the Articles of the Constitution, the same cannot be adverted to. It is a settled principle of law that a person who assails a provision to be ultra vires must plead the same in proper perspective.

As we find in the case at hand, the High Court was required to interpret Rule 28-A of the Rules. Under such circumstances, the High Court has fallen into grave error by declaring another Rule as discriminatory and unreasonable. Suo motu assumption of jurisdiction in this regard is totally uncalled for and, therefore, that makes the judgment and order declaring the 2003 Rules as discriminatory sensitively susceptible."

42. In **Ashutosh Gupta versus State of Rajasthan and others** (2002) 4 SCC 34, the Supreme Court held that: -

"5. ..... Apart from making such submission on a hypothetical basis, no material has been produced to indicate if any one of the persons recruited under the Emergency Recruitment Rules has reaped any undue advantage in respect of his past experience by adoption of the formula in the Emergency Recruitment Rules for the purpose of allotting the year of allotment as 1976-N-1 + half of N-2. In the absence of an iota of material on this aspect, we are not required to examine the correctness of the said submission of Mr Jain, on an assumption that the provisions of the Recruitment Rules might have enabled the professionals on being recruited to count their past experience for reckoning their seniority in the cadre of administrative service even though the said experience might not have any correlation with the administrative service. Even otherwise, the entire experience of such recruits could not have been totally wiped off and therefore the rule-making authority while making the rules for recruitment on emergency basis did make the provisions contained in Rule 25 which is also in pari materia with similar provisions available elsewhere including the one which was meant for emergency recruitment to the Indian Administrative Service. Where the challenge is made to a statutory provision being discriminatory, allegations in writ petition must be specific, clear and unambiguous. There must be proper pleadings and averments in the substantive petition before the question of denial of equal protection of infringement of fundamental right can be decided. There is always a presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The presumption of constitutionality stems from

the wide power of classification which the legislature must, of necessity possess in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience. The claim of equal protection under Article 14, therefore, is examined with the aforesaid presumption that the State Acts are reasonable and justified. If we examine the challenge to the impugned provision from the aforesaid standpoint, we have no hesitation to hold that the appellants have utterly failed to establish any material from which grievances about the discrimination alleged can be said to have been made."

43. In ***S.S. Sharma and others versus Union of India and others*** *(1981) 1 SCC 397*, it was held that: -

"6. ...We are of opinion that the Courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation except through the well known process of formally applying for amendment. We do not mean that justice should be available to only those who approach the Court confined in a strait-jacket. But there is a procedure known to the law, and long established by codified practice and good reason, for seeking amendment of the pleadings. If undue laxity and a too easy informality is permitted to enter the proceedings of a Court it will not be long before a contemptuous familiarity assails its institutional dignity and ushers in chaos and confusion undermining its effectiveness. Like every public institution, the Courts function in the security of public confidence, and public confidence resides most where institutional discipline prevails. Besides this, oral submissions raising new points for the first time tend to do grave injury to a contesting party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response."

44. In response to the objection regarding lack of proper pleadings, Mr. Sudeep Kumar learned Counsel for the petitioner has drawn attention of the Court to the pleadings made in paras 6, 7, 8, 13, 14 and 18 of the Writ Petition, which are being reproduced below: -

"6. That it is submitted that enactment of this law i.e. the Madarsa Act, 2004 is not only beyond the jurisdiction of the State legislation but also, from gainful reading of the provisions of the said enactment, the same is found to be arbitrary, discriminatory and unconstitutional in as much as by operation and implementation of the Madarsa Act, 2004 the benefit of quality education through common curriculum and common syllabus formulated by experts is denied to the children studying at Madarsa on basis of religious discrimination.

7. That the children studying at Madarsa are not only deprived of the common quality syllabus as formulated under the National Education Policy, 2020 (NEP) but are also denied the right to free and compulsory education as enshrined under Article 21A of the Constitution of India solely on the grounds of religious discrimination.

8. That by virtue of the enactment of the Madarsa Act, 2004, the legislature has arbitrarily and in a discriminatory manner included the Madars sought to be run

under the minority welfare Department while the other religious education institutions particularly those belonging to communities like Jan, Sikhs, Christians etc. are being run under the Education Ministry and deriving the benefit of the Right to Education Act, 2009 as well as the National Education Policy 2020.

13. That it is submitted that the prevailing system introduced by virtue of the Amendment act, 2012 does not provide equal opportunity to all children in terms of syllabus and curriculum in as much as children enrolled in Madarsas have been discriminated upon and not only been removed from the ambit of the Act of 2009 providing not only free and compulsory education but also quality and uniform education as envisaged under the National Education Policy, 2020.

14, that it is submitted that Right to Education is a fundamental right under Article 21A inserted by 86th Amendment of the Constitution. Even before the said amendment, the law of land has treated right to education as a fundamental right. Further, it is the settled law that Right to education and Article 21A of the Constitution has to be read in conformity with Article 14 and 15 of the Constitution and there must be no discrimination in quality of education. Thus, a syllabus and common curriculum is required. The right of education, the right of a child should not be restricted only to Free and compulsory education, but should be extended to have quality education without any discrimination on the ground of its economic, social and cultural backgrounds. 18. That it is apposite to submit here that in the Madarsas neither the regulation of the education department nor the syllabus prescribed therein is adopted whereas in every NEP there is a specific obligation upon all institutions to undertake study in a common syllabus and common programme of examination and thus, for a holistic development of a child is studying at Madarsa education, incorporation of the NEP, 2020 is imperative and in consonance with the fundamental rights guaranteed under the Constitution of India.

45. Ground A taken in Writ C No. 6049 of 2023 is as follows: -

"A. Because the U. P Board of Madarsas Education Act, 2004 is arbitrary, unconstitutional and is in violation of Articles 14, 15 and 21A of the Constitution of India."

46. The aforesaid pleadings made and the ground taken in Writ C No. 6049 of 2023 are sufficient to make all the other parties understand the case set up by the petitioner and required to be defended by the opposite parties. As all the aforesaid connected Writ Petitions involve the question of entitlement of payment of salary to teachers of Madarsas from State Exchequer, they were connected and were heard together. All the learned Counsel have advanced their submissions on various points, including vires of the Madarsas Act. Therefore, it is not a case which lacks proper pleadings or where the parties have been taken by surprise for lack of proper pleadings. Accordingly, we turn down the second preliminary objection raised by the counsel for the opposite parties.

(D) HISTORY OF MADARSAS IN STATE OF U.P. AND RELEVANT PROVISIONS OF MADARSA ACT AND REGULATIONS

47. It appears that after independence, private Madarsas continued in the State of U.P. The said Madarsas were not

recognized by the State Government. However, the same continued to provide education at local levels. For the first time in the year 1969, the State Government came out with the 'Rules of Recognition of Arabic and Persian Madarsas, U.P.' by Government Order No.Ga-2/1390/15-40(41)-65, dated 18.06.1969. The said Rules provided that Arabic and Persian institutions desiring recognition should apply to the Registrar, Arabic and Persian Examinations, U.P., Allahabad, specifying clearly the examination or examinations for which recognition is sought for. The same broadly provided for the building, library, financial position and teachers for such Madarsas.

48. 'U.P. Ashaskiya Arbi Tatha Farsi Madarson Ki Manyata Niyamavali' was propounded by Government Order No. 3367/15-17-87-53(5)-86, dated 22.08.1987, which was non-statutory.

49. The State Government created a new department called ‘Minority Welfare Department’ vide Government Order No.1856/45Sa-E-1-95-639(2)/95 dated 12.08.1995. The same was followed by another Government Order No.272/15-6-96-28[4]/96 dated 31.1.1996, whereby all the matters with regard to declaring minority institution in basic and secondary education institutions, all work of Arbi and Farsi Madarsas, the enforcement of the schemes made by the Central Government for modernization of Arbi and Farsi Madarsas and forming of Committee for modernization of syllabus of these Madarsas and educational development schemes run by the Union of India with regard to minorities for construction of their hostels in the field of secondary education, were handed over to the Minority Welfare Department.

50. The aforesaid Government orders were followed by the U. P. Board of Madarsa Education Act, 2004, the validity whereof is being scrutinized in this case. The objects and reasons and the relevant provisions of the Madarsa Act reads as follows:

“Statement of Objects and Reasons of U.P. Board of Madarsa Education Act, 2004

In para 55 of the Education Code the Registrar, Arabi-Pharasi Examinations, Uttar Pradesh Allahabad had been authorised to recognise the Arabi-Pharasi Madarsas in the State and for conducting the examinations of such Madarsas. These Madarsas were managed by the Education Department. But with the creation of the Minority Welfare and Wakfs Department in 1995 all the works relating to such Madarsa were transferred from Education Department to the Minority Welfare Departments by virtue of which all the works relating to Madarsas are being performed under the control of the Director, Minority Welfare Uttar Pradesh and the Registrar/Inspector Arabi-Pharasi Madarsas, Uttar Pradesh. The Arabi-Pharasi Madarsas were being administered under the Arabi-Pharasi Madarsas Rules, 1987 but since the said rules have not been made under an Act, many complication arose in running the Madarsas under the said rules. Therefore with a view to removing the difficulties arisen in running the Madarsas, improving the merit therein and making available the best facility of study to the students studying in Madarsas it was decided to make a law to provide for the establishment of a Board of Madarsa Education in the State and for the matters connected therewith or incidental thereto.

Since the State Legislature was not in session and immediate legislative

action was necessary to implements the aforesaid decision the Uttar Pradesh Board of Madarsa Education Ordinance 2004 (U.P. Ordinance No.12 of 2004) was promulgated by the Governor on September 3, 2004.

This Bill is introduced to replace the aforesaid Ordinance."

51. The relevant provisions of the Madarsa Act read as under: -

"2. In this Act unless the context otherwise requires:-

(a) "Board" means the Uttar Pradesh Board of Madarsa Education established under Section 3;

*(f) "**institution" means the Government Oriental College, Rampur and includes a Madarsa or an Oriental College established and administered by Muslim-Minorities and recognised by the Board for imparting Madarsa-Education;***

(h) "Madarsa-Education" means education in Arbic, Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time;

* * *

3. Constitution of the Board.—

(1) With effect from such date as the State Government may, by notification, appoint, there shall be established at Lucknow a Board to be known as the Uttar Pradesh Board of Madarsa-Education.

(2) The Board shall be a body corporate.

(3) The Board shall consist of the following members, namely:-

(a) ***a renowned Muslim educationist in the field of traditional Madarsa-Education, nominated by the State Government who shall be the Chairperson of the Board;***

(b) the Director, who shall be the Vice-Chairperson of the Board;

(c) the Principal, Government Oriental College, Rampur;

*(d) one **Sunni-Muslim Legislator** to be elected by both houses of the State Legislature;*

*(e) one **Shia-Muslim Legislator** to be elected by both houses of the State Legislature;*

(f) one representative of National Council for Educational Research and Training;

*(g) **two head of institution established and administered by Sunni-Muslim** nominated by the State Government;*

*(h) **one head of institution established and administered by Shia-Muslim** nominated by the State Government;*

*(i) **two teachers of institutions established and administered by Sunni-Muslim** nominated by the State Government;*

(j) one teacher of an institution established and administered by Shia-Muslim nominated by the State Government;

(k) one Science or Tibb teacher of an institution nominated by the State Government;

(l) the Account and Finance Officer in the Directorate of minority Welfere, Uttar Pradesh;

(m) the Inspector,

(n) an officer not below the rank of Deputy Director nominated by the State Government, who shall be the member Registrar.

(4) As soon as may be after the election and nomination of the members of the Board are completed, the State Government shall notify that the Board has been duty constituted:

Provided that a notification under this sub-section may be issued even before the election of the member specified in clause (d) or clause (e) of sub-section (3) has been completed.

(5) (a) Where mere is only one Shia member or only one Sunni member in the State Legislators then each will be nominated by the State Government.

(b) If no Shia member in the State Legislature is available then two Sunni-Muslim Legislators shall be elected as member of the Board and in the nomination paper of one of such Legislator it shall be mentioned before election that he shall cease to hold the office of the member of the Board on the date a Shia-Muslim Legislators takes oath as the member of the Board. Similarly in the case of non availability of Sunni-Muslim Legislator two Shia-Muslim Legislators shall be elected as the member of the Board and in the nomination paper of one of such Shia Legislators it shall be mentioned before election that he shall cease to hold office of the member of the Board on the date of taking oath of the office of the member of the Board by a Sunni-Muslim Legislator.

(6) On and from the date on the establishment of the Board under sub-section (1), the Arbi and Farsi Education Board functioning immediately before such establishment, hereinafter referred to as the earstwhile Board, shall stand dissolved and upon such dissolution,-

(a) all the properties and assets of the earstwhile Board shall stand transferred to, and vest in the Board;

(b) all debts, liabilities and obligations of the existing Board, whether contractual or otherwise, shall stand transferred to the Board;

(c) all the officer and employees of the earstwhile Board shall become the officers and employees of the Board on the same forms and conditions and with the same rights and privileges as to retirement benefits and other matters as would have been applicable to them immediately before such dissolution till their employment under the Board is duly terminated or until their remuneration and other conditions of service are duly altered not to their disadvantage:

Provided that an officer or employee of the earstwhile Board may by notice addressed to the Board served within a period of thirty days from such dissolution, intimate his option not to become an officer or employee of the Board and upon receipt of such notice, the post held until then by him shall stand abolished and his services shall stand terminated and he shall be paid an amount equivalent to his three months salary as compensation.

* * *

Section 9 - Functions of the Board

Subject to the other provisions of this Act the Board shall have the following functions, namely:-

(a) ***to prescribe course of instructions, text-books, other books and instructional meterial, if any, for Tahtania, Fauquania, munshi, Maulavi, Alim, Kamil, Fazil and other courses;***

(b) ***prescribe the course books, other books and instruction material of courses of Arbi, Urdu and Pharsi for classes upto High School and Intermediate standard in accordance with the course determined there for by the Board of High School and Intermediate Education;***

(c) ***to prepare manuscript of the course books, other books and instruction material referred to in clause (b) by excluding the matters therein wholly or partially or otherwise and to publish them;***

(d) ***prescribe standard for the appointment of Urdu translators in the various offices of the State and ensure through the appointing authority necessary action with respect to filling up of the vacant posts;***

(e) ***to grant Degrees, Diplomas, Certificates or other academic distinctions to persons, who-***

(i) ***have pursued a course of study in an institution admitted to the privileges or recognition by the Board;***

(ii) ***have studied privately under conditions laid down in the regulations and have passed an examination of the Board under like conditions;***

(f) ***to conduct examinations of the Munshi, Maulavi, Alim and of Kamil and Fazil courses;***

(g) to recognise institutions for the purposes of its examination;

(h) to admit candidates to its examination;

(i) to demand and receive such fee as may be prescribed in the regulations;

(j) to publish or withhold publication of the result of its examinations wholly or in part;

(k) to co-operate with other authorities in such manner and for such purposes as the Board may determine;

(l) to call for reports from the Director on the condition of recognised institutions or of institutions applying for recognition;

(m) ***to submit to the State Government its views on any matter with which it is concerned;***

(n) to see the schedules of new demands proposed to be included in the budget relating to institutions recognised by it and to submit if it thinks fit, its views thereon for the consideration of the State Government;

(o) to do all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising Madarsa-Education up to Fazil;

(p) ***to provide for research or training in any branch of Madarsa-Education viz. Darul Uloom Nav Uloom, Lucknow, Madarsa Babul Ilm, Mubarakpur, Azamgarh, Darul Uloom Devband, Saharanpur, Oriental College Rampur and any other institution which the State Government may notify time to time.***

(q) to constitute a committee at district level consisting of not less than three members for education up to Tahtania or Faukania standard, to delegate such committee the power of giving recognition to the educational institutions under its control.

(r) to take all such steps as may be necessary or convenient for or as may be incidental to the exercise of any power, or the performance or discharge of any function or duty, conferred or imposed on it by this Act.

* * *

Section 10 - Powers of the Board

(1) The Board shall subject to the provisions of this Act and the rules made thereunder, shall have all such powers as may be necessary for the performance of its fuctions and the discharge of its duties under this Act, or the rules or regulations made thereunder.

(2) In particular and without prejudice to the generality of the foregoing powers, the Board shall have the powers,-

(i) to cancel an examination or withhold the result of an examination of a candidate, or to disallow him from appearing at any future examination who is found by it to be guilty of,-

(a) using unfair means in the examination; or

(b) making any incorrect statement or suppressing material information or fact in the application form for admission to the examination; or

(c) fraud or impersonation at the examination; or

(d) securing admission to the examination in contravention of the rules governing admission to such examination; or

(e) any act of gross indiscipline in the course of the examination;

(ii) to cancel the result of an examination of any candidate for all or any of the acts mentioned in sub-clauses (a) to (d) of clause (i) or for any bona fide error of the Board in the declaration of the result:

(iii) to prescribe fees for the examinations conducted by it and provide for the mode of its realisation;

(iv) to refuse recognition of an institution,-

(a) which does not fulfill, or is not in a position to fulfill, or does not come up to, the standards for staff, instructions, equipment or buildings laid down by the Board in this behalf; or

(b) which does not, or is not, willing to abide by the conditions of recognition laid down by the Board in this behalf;

(v) to withdraw recognition of an institution not able to adhere to, or make provisions for, standards of staff, instructions, equipment or buildings laid down by the Board or on its failure to observe the conditions of recognition to the satisfaction of the Board;

(vi) to call for reports from the head of institution in respect of any act of contravention of the rules or regulations of decisions, instructions or directions of the Board and take suitable actions for the enforcement of the rules or regulations decisions, instructions or directions of the Board, in such manner as may be prescribed by regulations;

(vii) to inspect an institution for the purpose of ensuring due observance of the prescribed courses of study and that the facilities for instructions are duly provided and availed of; and

(viii) to fix the maximum number of students that may be admitted to a course of study in an institution.

(3) The decision of the Board in all matters mentioned in sub-sections (1) and (2) shall be final.

* * *

Section 17 – Appointment and constitution of committee and sub-committees

(1) The Board shall appoint the following committees, namely:-

(a) ***Curriculum Committee;***

(b) Examination Committee;

© Result Committees;

(d) Recognition Committee; and

© Finance Committee.

(2) Such a committee shall consist of the members of the Board only and shall be constituted in such a way that as for as possible atleast one member from each of the following classes are represented in each of the committees:-

(a) head of institutions;

(b) teachers of institutions;

© Academicians:

Provided that no member of the Board shall serve on more than one of such committees, and the term of members of the committee shall cease with the cessation of the membership of the Board.

(3) In addition to the committees mentioned in sub-section (1) the Board may appoint such other committees or sub-committees as may be prescribed by regulations.

(4) The committees and sub-committees appointed under sub-section (3) shall be constituted in such manner and on such terms and conditions as may be prescribed by regulations.

* * *

Section 18 - Power to delegate

The Board may, by general or special order, direct that any power exercisable by it under this Act except the power to make regulations may also be exercised by its Chairperson or Vice-Chairpersons or by such Committee or officer in such cases and subject to conditions, as may be specified therein.

* * *

Section 20 - Power of the Board to make regulations

(1) The Board may make regulations for carrying out the purposes of this Act

(2) In particular and without prejudice to the generality of the foregoing powers, the Board may make regulations providing for all or any of the following matters, namely:-

(a) constitution, power and duties of committees and sub-committees;

(b) the conferment of Degrees, Diplomas and Certificates;

(c) the conditions of recognition of institutions;

(d) the courses of study to be laid down for all Degrees, Diplomas and Certificates;

(e) the conditions under which candidates shall be admitted to the examinations and research programme of the Board and shall be eligible for Degrees, Diplomas and Certificates;

(f) the fees for admission to the examination of the Board;

(g) the conduct of examination;

(h) the appointment of examiners, moderators, collators, scrutinisers, tabulators, Centre inspectors, Superintendents of Centres and invigilators and their duties and powers in relation to the Board's examinations and the rates of their remuneration;

(i) the admission of institutions to the privilege of recognition and the withdrawal of recognition;

(ii) all matters which are to be, or may, provided for by regulations."

52. The Board of Madarsa in exercise of its powers under Section 20 of the Madarsa Act framed "U.P. Non-Governmental Arabic and Persian Madarsa Recognition, Administration and Service Regulations, 2016" (for short 'the Regulations of 2016') and the relevant regulations, viz. Regulation 2 in Part I and Regulations 3(1) and 3(2) of Part-III read as under:-

"Part-I

* * *

2. Definitions. - (1) In these regulations unless there is anything repugnant in the subject or context:-

(a) "Act" means the Uttar Pradesh Board of Madarsa Education Act, 2004.

(b) "Department" means the Minority Welfare Department, Government of Uttar Pradesh.

(c) "District Madarsa Education Officer" means the District Minority Welfare Officer.

*(d) "**Oriental or Traditional" subject mean Arabic, Persian, Urdu, Hadees, Tafseer, Theology, Maqoolat, Maths, History, Geography and Tibb.***

(e) "State Government" means the Government of Uttar Pradesh.

*(f) "**Ductoora" means a degree for senior and complete research program**.*

*(g) "**Alama" means a degree for junior research program.***

*(h) "**Fazil" means post-graduate degree of the Board.***

(i) "Kamil" means under graduate degree of the Board.

(j) "Alim" means a certificate of senior secondary level examination of the Board.

(k) "Maulvi/Munshi" means a certificate of 10th level examination of the Board.

*(l) "**Hafiz" means the certificate of Hafiz-e-Quran.***

*(m) "**Quari" means the diploma in Tajveed-e-Quran.***

(n) "Fauquania" means upper elementary classes (VI to VIII).

(o) "Tahtania" means elementary classes (I to V).

(p) "Head" means the head of the institution (i.e. Headmaster or Principal as the case may be).

(q) "Lecturer" (Mudarris) means a teacher appointed and or recognized for teaching in Alim or higher classes.

(2) Words and expression not defined in these regulations but defined in the Act shall have the meaning respectively assigned to them in the Act.

* * *

Part-III

Services of Teaching and Non Teaching employees

3.The minimum qualification for appointment of the amployees in a Madarsa shall be as follows: -

Sl. No.	*Designation*	*Age*	*Qualifications*
1	*Principal (Alim or higher level Madarsa)*	*Minimum age 30 years*	*Degree of Fazil and Kamil (Persian) with minimum 5 years teaching experience in Munshi/Maulvi or higher classes Or M.A. in Diniyat/Arabic/Persian with 50% marks and 5 years teaching experience as above Or Fazil/M.A. with Dukturah in Diniyat/Arabic/Persian/ Traditional Ancient subjects with 3 years experience as above.*
2	*Head (up to munshi and maulvi level recognized madarsa)*	*Minimum age 30 years*	*Fazil or Master degree in Arabic/ Persian/Theology with at least 50% marks and minimum 3 years teaching experience in Munshi/ Maulvi classes.*
3	*Mudarris (teacher of*	*Minimum age*	*Fazil or Master degree*

	alim or higher classes)	*22 years*	*in Arabic/ Persian/Theology/Traditional Ancient subjects with at least 50% marks and minimum 2 years teaching experience in Munshi/ Maulvi classes. But the teaching experience is not mandatory for the person who has the decree of Dukturah/Allama in Arabic/Persian/Diniyat.*
4	*(a) Assistant teacher (munshi/maulvi) (b) Teacher for optional subject*	*Minimum age 21 years*	*Fazil or Master degree in Arabic/ Persian/Theology/Traditional Ancient subjects with at least 50% marks and minimum 3 years teaching experience in Fazil or Master degree in related or trained kamil or trained graduate with at least 50% marks alongwith that a certificate of Alim or inter with Urdu is mandatory.*
5	*(a) Assistant teacher (fauquania) (b) Teacher for optional subject*	*Minimum age 20 years*	*Kamil or graduate with at least 50% marks alongwith that a certificate of Alim or inter with Urdu is mandatory. Kamil or graduate in relevant subject with at least 50% marks and a certificate of not below Munshi/Maulvi level examination with Urdu/Arabic/ Persian. Or Quari of a recognized Madarsa with a certificate not below the Alim level examination with Urdu/ Arabic/Persian.*
6	*Assistant teacher (tahtania)*	*Minimum age 18*	*Alim or inter with Urdu Or Hafiz*

		years	
7	*Junior Assistant*	*Minimum age 18 years*	*(a) Alim or Inter or Equivalent certificate (b) Maulvi level certificate in Arabic/Persian. (c) CCC (Course on Computer Concept) Certificate granted by NEILET) National Institute of Electronics and Information Technology) for computer operation and speed of 25/30 words per minute in Hindi/English is mandatory.*
8	*Group-D employees*	*Minimum age 18 years*	*1. Fauquania level certificate with Urdu/Arabic/ Persian 2. Driving of cycle or bike shall be necessary.*

Note: (1) ***Degree and diploma in the concerned subject of this Board or any University established or regulated by or under any Central or Provincial Act or State Act which is considered to be a University under Section 3 of University Grants Commission Act, 1956 or of any such institution especially empowered by any Act of Parliament shall be recognized for the purpose of minimum qualification prescribed under it.***

(2) ***The Alimeeyat or Fazeelat granted by Darul Uloom Nadwatul Ulma Lucknow/Darul Uloom Devband/Mazahirul Uloom Saharanpur/Madarsa Alia (Oriental College), Rampur/ Jamiatul Salfia Varanasi/Madrastu Isiah Azamgarh/Jamea Asharafia Mubarakpur, Azamgarh, Jamiatul Falah Bilariyaganj, Azamgarh; Sultanul Madaris, Lucknow shall be considered equivalent to Alim/Fazil of Madarsa Education Board Uttar Pradesh.***

(3) Under it in reference to prescribed qualification with word ***"trained" means port-graduation such as, Kamil-e-Tadrees or Fazil-e-Tadrees recognized by the Board of Madarsa Education and Bechelor of Education or Master of Education of any University or institution as prescribed in earlier para or any equivalent Degree or Diploma.***

(4) For the recruitment of Junior Assistant and Group-D employees, the maximum age shall be 40 years."

(emphasis added)

(E) GROUNDS OF CHALLENGE:

(I) VIOLATIVE OF SCULARISM

53. The term secularism itself is left undefined in our constitution but the Supreme Court has defined and explained the same in a number of judgments.

Reliance is place by the petitioner and Amici Curiae on the following cases: -

i)***S.R. Bommai and others versus Union of India and others*** *(1994) 3 SCC 1;*

ii)***Bal Patil and another versus Union of India and others*** *(2005) 6 SCC 690;*

iii) ***Subramanian Swamy versus Director, Central Bureau of Investigation and another (2014)8 SCC 682;***

iv)***Ziyauddin Burhanuddin Bukhari versus Brijmohan Ramdass Mehra and others*** *(1976) 2 SCC 17;*

v)***T.M.A. Pai Foundation and others versus State of Karnataka and others*** *(2002) 8 SCC 481*; vi)***Aruna Roy and others versus Union of India and others*** *(2002) 7 SCC 368.*

54. ***S.R. Bommai***(Supra) was decided by a Bench consisting of 9 Judges of the Supreme Court. Justice S. Ratnavel Pandian, and Justice A. M. Ahmadi authored their separate judgments, Justice J. S. Verma authored a judgment for himself and Justice Yogeshwar Dayal, Justice P. B. Sawant wrote a judgment for himself and Justice Kuldeep Singh, Justice Ramaswamy wrote a separate judgment and Justice B. P. Jeewan Reddy wrote a judgment for himself and Justice S. C. Agarwal.

55. Justice P. B. Sawant, while expressing the opinion for himself and Justice Kuldeep Singh, held that: -

"148.One thing which prominently emerges from the above discussion on secularism under our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited. This is evident from the provisions of the Constitution to which we have made reference above. ***The State's tolerance of religion or religions does not make it either a religious or a theocratic State. When the State allows citizens to practise and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State.*** *This is also clear from sub-section (3) of Section 123 of the Representation of the People Act, 1951 which prohibits an appeal by a candidate or his agent or by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of or appeal to religious symbols. Sub-section (3-A) of the same Section prohibits the promotion or attempt to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion, race, caste, community or language by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. A breach of the provisions of the said sub-sections (3) and (3-A) are deemed to be corrupt practices within the meaning of the said section." (emphasis added)*

While summarizing his conclusions, Justice P. B. Sawant held that: -

153.Our conclusions, therefore, may be summarised as under:

* * *

VIII. Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution."

56. Justice Ramaswamy explained the concept of Secularism as follows:

"178.*Freedom of faith and religion is an integral part of social structure. Such freedom is not a bounty of the State but constitutes the very foundation on which the State is erected. Human liberty sometimes means to satisfy the human needs in one's own way. Freedom of religion is imparted in every free society because it is a part of the general structure of the liberty in such a society and secondly because restrictions imposed by one religion would be an obstacle for others. In the past religious beliefs have become battlegrounds for power and root cause for suppression of liberty. Religion has often provided a pretext to have control over vast majority of the members of the society. Democratic society realises folly of the vigour of religious practices in society. Strong religious consciousness not only narrows the vision but hampers rule of law. The Founding Fathers of the Constitution, therefore, gave unto themselves "we people of India", the Fundamental Rights and Directive Principles of State Policy to establish an egalitarian social order for all Sections of the society in the supreme law of the land itself. Though the concept of "secularism" was not expressly engrafted while making the Constitution, its sweep, operation and visibility are apparent from fundamental rights and directive principles and their related provisions. It was made explicit by amending the preamble of the Constitution 42nd Amendment Act. The concept of secularism of which religious freedom is the foremost appears to visualise not only of the subject of God but also an understanding between man and man.* ***Secularism in the Constitution is not anti-God and it is sometimes believed to be a stay in a free society. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State on grounds of public interest, order and general welfare. The State guarantee individual and corporate religious freedom and dealt with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another.*** *The concept of the secular State is, therefore, essential for successful working of the democratic form of Government. There can be no democracy if anti-secular forces are allowed to work dividing followers of different religious faith flying at each other's throats. The secular Government should negate the attempt and bring order in the society. Religion in the positive sense, is an active instrument to allow the citizen full development of his person, not merely in the physical and material but in the non-material and non-secular life.*

* * *

180.... InZiyauddin Burhanuddin Bukhariv.Brijmohan Ramdass Mehra[(1976) 2 SCC 17] this Court held that :

"The Secular State rising above all differences of religion, attempts to secure the good of all its citizens irrespective of

their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. *Maitland had pointed out that such a State has to ensure, through its laws, that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practice of any particular religion."...*

* * *

183.The preamble of the Constitution inter alia assures to every citizen liberty of thought, expression, belief, faith and worship. Article 5 guarantees by birth citizenship to every Indian. No one bargained to be born in a particular religion, caste or region. Birth is a biological act of parents. Article 14 guarantees equality before the law or equal protection of laws. Discrimination on grounds of religion was prohibited by Article 15. Article 16 mandates equal opportunity to all citizens in matters relating to employment or appointment to any office or post under the State and prohibits discrimination on grounds only of inter alia religion. Article 25 while reassuring to all persons freedom of conscience and the right to freely profess, practice and propagate his religion, it does not affect the operation of any existing law or preventing the State from making any law regulating or restricting any social, financial, political or other secular activity which may be associated with the religious practice. It is subject to providing a social welfare and reform or throwing open all Hindu religious institutions of public character to all classes of citizens and Sections of Hindus. Article 26 equally guarantees freedom to manage religious affairs, equally subject to public order, morality and health. Article 27 reinforces the secular character of Indian democracy enjoining the State from compelling any person or making him liable to pay any tax, the proceeds of which are specifically prohibited to be appropriated from the consolidated fund for the promotion or maintaining of any particular religion or religious denomination. Taxes going into consolidated funds should be used generally for the purpose of ensuring the secular purposes of which only some are mentioned in Articles 25 and 26 like regulating social welfare, etc. Article 28(1) maintains that no religious instruction shall be imparted in any educational institutions wholly maintained out of the State funds or receiving aid from the State. Equally no person attending any educational institution recognised by the State or receiving aid from the State funds should be compelled to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or in the case of a minor person his guardian has given his consent thereto. By Article 30(2) the State is enjoined not to discriminate, in giving aid to an educational institution, on the ground that it is a minority institution whether based on religion or language. It would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, State is neither pro particular religion nor anti particular religion. It stands aloof, in other words maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on secular part.

184.*InRatilal Panachand Gandhiv. State of Bombay[1954 SCR 1055 : AIR 1954 SC 388] this Court defined religion that it is not necessarily atheistic and, in fact, there are well-known religions in India like Buddhism and Jainism which do not believe in the existence of God or caste. A religion undoubtedly has different connotations which are regarded by those who profess that religion to be conducive to their spiritual well-being but it would not be correct to say or seems to have been suggested by the one of the learned Brothers therein that matters of religion are nothing but matters of religious faith and religious belief. The religion is not merely only a doctrine or belief as it finds expression in acts as well. InCommissioner, Hindu Religious Endowments, Madrasv.Sri Lakshmindra Thirtha Swamiar[1954 SCR 1005 : AIR 1954 SC 282] , known asShirur Mutt casethis Court interpreted religion in a restricted sense confining to personal beliefs and attended ceremonies or rituals.* ***The restrictions contemplated in Part III of the Constitution are not the control of personal religious practices as such by the State but to regulate their activities which are secular in character though associated with religions, like management of property attached to religious institutions or endowments on secular activity which are amenable to such regulation. Matters such as offering food to the diety, etc. are essentially religious and the State does not regulate the same, leaving them to the individuals for their regulation. The caste system though formed the kernel of Hinduism, and as a matter of practice, for millenniums 1/4th of the Indian population — Scheduled Castes and Scheduled Tribes — were prohibited entry into religious institutions like temples, maths, etc. on grounds of untouchability; Article 17 outlawed it and declared such practice an offence. Articles 25 and 26 have thrown open all public places and all places of public worship to Hindu religious denominations or sects for worship, offering prayers or performing any religious service in the places of public worship and no discrimination should be meted out on grounds of caste or sect or religious denomination****. InKesavananda Bharati case[Kesavananda Bharativ. State of Kerala, (1973) 4 SCC 225] andIndira Nehru Gandhiv.Raj Narain[1975 Supp SCC 1] this Court held that secularism is a basic feature of the Constitution. It is true that Schedule III of the Constitution provided the form of oath being taken in the name of God. This is not in recognition that he has his religion or religious belief in God of a particular religion but he should be bound by the oath to administer and to abide by the Constitution and laws as a moral being, in accordance with their mandate and the individual will ensure that he will not transgress the oath taken by him. It is significant to note that the Oaths Act, 1873 was repealed by Oaths Act, 1966 and was made consistent with the constitutional scheme of secularism in particular, Sections 7 to 11.*

185.Equally admission into an educational institution has been made a fundamental right to every person and he shall not be discriminated on grounds only of religion or caste. The education also should be imparted in the institutions maintained out of the State fund or receiving aid only on secular lines. *The State, therefore, has a missionary role to reform the Hindu society, Hindu social order and dilute the beliefs of caste hierarchy. Even in matters of entry into religious institutions or places of public resort prohibition of entry only on grounds of caste or religion is outlawed.*

186.*Dr S. Radhakrishnan, stated that: "Religion can be identified with emotion, sentiments, intensity, cultural, profession, conscious belief of faith." According to Gandhiji : "By religion I do not mean formal religion or customary religion but that religion which underlies all religions." Religion to him was spiritual commitment just total but intentionally personal. In other words, it is for only development of the man for the absolution of his consciousness (sicconscience) in certain direction which he considered to be good. Therefore, religion is one of belief personal to the individual which binds him to his conscience and the moral and basic principles regulating the life of a man had constituted the religion, as understood in our Constitution. Freedom of conscience allows a person to believe in particular religious tenets of his choice. It is quite distinct from the freedom to perform external acts in pursuance of faith. Freedom of conscience means that a person cannot be made answerable for rights of religion. Undoubtedly, it means that no man possesses a right to dictate to another what religion he believes in; what philosophy he holds, what shall be his politics or what views he shall accept, etc. Article 25(1) protects freedom of conscience and religion of members of only of an organised system of belief and faith irrespective of particular affiliations and does not march out of concern itself as a part of the right to freedom of conscience and dignity of person and such beliefs and practices which are reasonable. The Constitution, therefore, protects only the essential and integral practices of the religion. The religious practice is subject to the control of public order, morality and health which includes economic, financial or other secular activities. Could the religious practice exercise control over members to vote or not to vote, to ignore the National Flag, National Anthem, national institutions? Freedom of conscience under Article 25 whether guarantees people of different religious faiths the right to religious procession to antagonise the people of different religious faiths or right to public worship? It is a fact of social and religious history in India that religious processions are known to ignite serious communal riots, disturb peace, tranquillity and public order. The right to free profession of religion and exercising right to organise religious congregations does not carry with it the right to make inflammatory speeches, nor be a licence to spread violence, nor speak religious intolerance as an aspect of religious faiths. They are subject to the State control. In order to secure constitutional protection, the religious practices should not only be an essential part but should also be an integral part of proponent's religion but subject to State's control. Otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be quoted as religious forms and make a claim for being treated as religious practices. Law as a social engineer provides the means as well as lays down the rules for social control and resolution of conflicts of all kinds in a human society. But the motive force for social, economic and cultural transformation comes from individuals who comprise the society. They are the movers in the mould of the law as the principal instrument of an orderly transient to a new socio-economic order or social integration and fraternity among the people. The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. I am respectfully in agreement with our Brethren Sawant and Jeevan Reddy, JJ. in this respect. Secularism, therefore, is part of the*

fundamental law and basic structure of the Indian political system to secure to all its people socio-economic needs essential for man's excellence and of (sichis) moral well-being, fulfilment of material and prosperity and political justice. (emphasis added)

57. Justice A. M. Ahmadi expressed concurrence with the aforesaid view by adding that: -

"29. Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our constitutional philosophy. The term 'Secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit. The Preamble itself spoke of liberty of thought, expression, belief, faith and worship. While granting this liberty the Preamble promised equality of status and opportunity. It also spoke of promoting fraternity, thereby assuring the dignity of the individual and the unity and integrity of the nation. While granting to its citizens liberty of belief, faith and worship, the Constitution abhorred discrimination on grounds of religion, etc., but permitted special treatment for Scheduled Castes and Tribes, vide Articles 15 and 16. Article 25 next provided, subject to public order, morality and health, that all persons shall be entitled to freedom of conscience and the right to profess, practice and propagate religion. Article 26 grants to every religious denomination or any Section thereof, the right to establish and maintain institutions for religious purposes and to manage its own affairs in matters of religion. These two Articles clearly confer a right to freedom of religion. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds whereof are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. This is an important Article which prohibits the exercise of State's taxation power if the proceeds thereof are intended to be appropriated in payment of expenses for the promotion and maintenance of any particular religion or religious denomination. ***That means that State's revenue cannot be utilised for the promotion and maintenance of any religion or religious group****. Article 28 relates to attendance at religious instructions or religious worship in certain educational institutions. Then come Articles 29 and 30 which refer to the cultural and educational rights. Article 29 i****nter alia provides that no citizen will be denied admission to an educational institution maintained wholly or partly from State funds on grounds only of religion, etc. Article 30 permits all minorities, whether based on religion or language, to establish and administer educational institutions of their choice and further prohibits the State from discriminating against such institutions in the matter of granting aid.*** *These fundamental rights enshrined in Articles 15, 16, and 25 to 30 leave no manner of doubt that they form part of the basic structure of the Constitution. Besides, by the 42nd Amendment, Part IV-A entitled 'Fundamental Duties' was introduced which inter alia casts a duty on every citizen to cherish and follow the noble ideals which inspired our national struggle for freedom, to uphold and protect the sovereignty, unity and integrity of India, to*

promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, and to value and preserve the rich heritage of our composite culture. These provisions which I have recalled briefly clearly bring out the dual concept of secularism and democracy, the principles of accommodation and tolerance as Advocated by Gandhiji and other national leaders. ***I am, therefore, in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ., that secularism is a basic feature of our Constitution. They have elaborately dealt with this aspect of the matter and I can do no better than express my concurrence but I have said these few words merely to complement their views by pointing out how this concept was understood immediately before the Constitution and till the 42nd Amendment. By the 42nd Amendment what was implicit was made explicit."***

(emphasis added)

58. In ***Bal Patil and another versus Union of India and others*** *(2005) 6 SCC 690*, the Supreme Court held that: -

"37....Differential treatments to linguistic minorities based on language within the State is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various Sections of people getting special protections, privileges and treatment as part of the constitutional guarantee.Encouragement to such fissiparous tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic State based on multinationalism. Our concept of secularism, to put it in a nutshell, is that the "State" will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship."

59. In ***Ziyauddin Burhanuddin Bukhari***(supra), the Supreme Court held: -

"44.*The Secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. Maitland had pointed out that such a State has to ensure, through its laws, that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practise of any particular religion. ...."*

60. In ***T.M.A. Pai Foundation****(supra)*,the Supreme Court held that: -

"332.Although the idea of secularism may have been borrowed in the Indian Constitution from the West, it has adopted its own unique brand of secularism based on its particular history and exigencies which are far removed in many ways from secularism as it is defined and followed in European countries, the United States of America and Australia.

* * *

344.In the ultimate analysis the Indian Constitution does not unlike the United States, subscribe to the principle of non-interference of the State in religious organisations but it remains secular in that it strives to respect all religions equally, the equality being understood in its substantive sense as is discussed in the subsequent paragraphs."

61. In ***Aruna Roy*** *(supra)* the Supreme Court held that: -

M.B. Shah, J.

31. Further, for controlling the wild animal instinct in human beings and for having a civilized cultured society, it appears that religions have come into existence. Religion is the foundation for value-based survival of human beings in a civilized society. The force and sanction behind civilized society depends upon moral values. The philosophy of coexistence and how to coexist is thought over by the saints all over the world which is revealed by various philosophers. How to coexist, not only with human beings but all living beings on the earth, maybe animals, vegetation and the environment including air and water, is thought over and discussed by saints and leaders all over the world which is reflected in religions. If that is taught, it cannot be objected as it is neither violative of constitutional or legal rights nor it offends moral values. This has been dealt with elaborately by the S.B. Chavan Committee. The Committee as stated above had invited suggestions from noted educationists on various aspects of value-based education. As stated by the Committee it had benefited by the views of eminent experts/NGOs doing pioneering work in this area. Further, no one can dispute that truth (satya), righteous conduct (dharma), peace (shanti), love (prem) and non-violence (ahimsa) are the core universal values accepted by all religions. The Committee has also pointed out that religion is the most misused and misunderstood concept. However, the process of making the students acquainted with the basics of all religions, the values inherited therein and also a comparative study of the philosophy of all religions should begin; students have to be made aware that the basic concept behind every religion is common, only the practices differ. If these recommendations made by the Parliamentary Committee are accepted by NCERT and are sought to be implemented, it cannot be stated that its action is arbitrary or unjustified.

32. Further, it appears to be a totally wrong presumption and contention that knowledge of different religions would bring disharmony in the society. On the contrary, knowledge of various religious philosophies is material for bringing communal harmony as ignorance breeds hatred because of wrong notions, assumptions, preaching and propaganda by misguided interested persons.

.....

37. Therefore, in our view, the word "religion" should not be misunderstood nor contention could be raised that as it is used in the National Policy of Education, secularism would be at peril. On the contrary, let us have a secularistic democracy where even a very weak man hopes to prevail over a very strong man (having post, power or property) on the strength of rule of law by proper understanding of duties towards the society. Value-based education is likely to help the nation to fight against all kinds of prevailing fanaticism, ill will, violence, dishonesty, corruption, exploitation and drug abuse. As stated above, NCF, 1988

was designed to enable the learner to acquire knowledge and was aimed at self-discipline, courage, love for social justice etc., truth, righteous conduct, peace, non-violence which are core universal values that can become the foundation for building a value-based education. These high values cannot be achieved without knowledge of moral sanction behind it. For this purpose, knowledge of what is thought over by the leaders in the past is required to be understood in its true spirit. Let knowledge, like the sun, shine for all and that there should not be any room for narrow-mindedness, blind faith and dogma. For this purpose also, ***if the basic tenets of all religions over the world are learnt, it cannot be said that secularism would not survive.***

38. Learned counsel for the petitioners heavily relied upon Article 28 of the Constitution for contending that the National Curriculum is against the mandate of the said article. For appreciating the said contention, we would first refer to Article 28:

"28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.— (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto."

(emphasis supplied)

39. In substance, the aforesaid article prohibits imparting of religious instruction in any educational institution wholly maintained out of State funds. At the same time, there is no such prohibition where such an educational institution is established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

40. Further, no person attending any educational institution recognised by the State or receiving aid out of State funds could be compelled to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution. So the entire emphasis of the article is against imparting religious instruction or of performing religious worship. There is no prohibition for having study of religious philosophy and culture, particularly for having value-based social life in a society which is degenerating for power, post or property. In D.A.V. College v. State of Punjab [(1971) 2 SCC 269] the constitutional validity of certain provisions of the Guru Nanak University, Amritsar, Act 21 of 1969 was challenged by the DAV (Dayanand Anglo-Vedic) College Trust. The Trust was formed to perpetuate the memory of Swami Dayanand Saraswati who was the founder of an organisation known as Arya Samaj. It was claimed that it was having a fixed religious programme and its constitution is designed to perpetuate the religious teaching and philosophy of its founder. It was inter alia contended that as Guru Nanak University was wholly maintained out of the State funds and the provision under Section 4(2)

offends Article 28(1) which is not saved by clause (2) thereof and in that context the Court observed (in para 24) thus : (SCC pp. 278-79)

"24. ... If the university makes provision for an academic study and research of the life and teachings of any saint it cannot on any reasonable view be considered to require colleges affiliated to the university to compulsorily study his life and teachings or to do research in them. The impugned provision would merely indicate that the university can institute courses of study or provide research facilities for any student of the university whether he belongs to the majority or the minority community to engage himself in such study or research but be it remembered that this study and research on the life and teachings of the Guru Nanak must be a study in relation to their culture and religious impact in the context of Indian and world civilizations which is mostly an academic and philosophical study."

"26. Even so the petitioners have still to make out that Section 4(2) implies that religious instruction will be given. We think that such a contention is too remote and divorced from the object of the provision. ***Religious instruction is that which is imparted for inculcating the tenets, the rituals, the observances, ceremonies and modes of worship of a particular sect or denomination****. To provide for academic study of life and teaching or the philosophy and culture of any great saint of India in relation to or the impact on the Indian and world civilizations cannot be considered as making provision for religious instructions."*

(emphasis supplied)

D.M. Dharmadhikari, J.

65. In a pluralistic society like India which accepts secularism as the basic ideology to govern its secular activities, education can include study based on "religious pluralism". "Religious pluralism" is opposed to exclusivism and encourages inclusivism.

66. ***Exclusivism in religion has been explained to mean — the view that one particular tradition alone teaches the truth and constitutes the way to salvation or liberation.*** *The Christians believe in the words attributed to Jesus in the "Gospel of St. John":"No one can come to the Father, but by me." They also believe as early as the third century the dogma of extra ecclesiam nulla salus ("outside the church, no salvation").*

67. Muslims similarly believe that there is only one God and His one messenger "the Prophet". Jews cherish their ethnically exclusive identity as God's chosen people.

68. Hindus revere the Vedas as eternal and absolute and Buddhists have often seen Gautama's teachings as the dharma that alone can liberate human beings from illusion and misery.

69. The above kind of perception has led to inclusivist theologies and religious philosophies that their own tradition presents the final truth and other traditions are seen as approaches to that final truth.

70. The comprehensive approach to religion which should be inculcated in a society comprising people of different religions and faiths is described as inclusivism. In explicit pluralism, the view accepted is that the great world faiths embodied different perceptions and conceptions of and correspondingly different responses to, the Real or Ultimate and that within each of them independently the transformation of human existence from

self-centredness to reality-centredness is taking place.

71. ***Education in India which is to be governed by the secular ethos contained in its Constitution and where "religious instruction" in institutions of the State are forbidden by Article 28(1), the "religious education" which can be permitted, would be education based on "religious pluralism".*** *The experiment is delicate and difficult but if undertaken sincerely and in good faith for creating peace and harmony in the society is not to be thwarted on the ground that it is against the concept of "secularism" as narrowly understood to mean neutrality of the State towards all religions and bereft of positive approach towards all religions.*

....

77. ***The study of religious pluralism can be articulated in a generally acceptable way and such attempt has to be made particularly in India which time and again has suffered due to religious conflicts and communal disharmony. What is needed in the education is that the children of this country should acknowledge the vast range and complexity of differences apparent in the phenomenology of religion while at the same time they should understand the major streams of religious experience and thought as embodying different awarenesses of the one ultimate reality. A wider acceptance of a pluralist view of the religious life of humanity must involve developments in the self-understanding of each tradition, a modification of their claims to unique superiority in the interests of a more universal conception of the presence of the Real to the human spirit.*** *(See Comparative Study of Religion contained in the Encyclopedia of Religion under the heading "Religious Pluralism", pp. 331-33.)*

78. The purpose of making a survey of various thoughts and philosophies of different religions and the views of different philosophers, educationists and thinkers is only to show that the majority of them do not advocate a ban on religious education to children from the school to the college stage. ***What has been emphasised is that the religious education imparted to children should be one to make them aware of various thoughts and philosophies in religions without indoctrinating them and without curbing their free thinking, right to make choices for conducting their own life and deciding upon their course of action according to their individual inclinations****. For an all-round development of a child, all educationists feel that mere imparting of information to students to sharpen their intellect is not enough. Inner qualities of head and heart as also capacity to regulate their own life and their relation with society should also be imparted to them for their own and general good of the society as also for achieving the highest goal of life. The attainment of constitutional ideals is possible only if side by side with sharpening the intellect, the moral character of children, is also developed to make them good citizens.*

79. How best this religious pluralism to accord with "secular thought" of the country can be achieved by properly selecting the material for inclusion in the textbooks for children of different ages and different stages in the education, is a matter which has to be left to the academicians and educationists. Their involvement with all dignitaries and with other experts in related fields is necessary. This exercise has to be undertaken by the Government for which any direction from the court is neither required and nor can the court assume such power to encroach

on the field of preparation of an educational policy by the State.

80. The scrutiny of the textbooks to find out whether they conform to the secular thought of the country is also to be undertaken by the experts, academicians and educationists. The members of NCERT should be open to any such dialogue with the academicians and educationists. On the basis of general consensus, suitable curriculum, which accords with secularism as understood in a wide and benevolent sense, has to be evolved.

81. The expression "religious instruction" used in Article 28(1) has a restricted meaning. It conveys that teaching of customs, ways of worship, practices or rituals cannot be allowed in educational institutions wholly maintained out of State funds. But Article 28(1) cannot be read as prohibiting study of different religions existing in India and outside India. If that prohibition is read with the words "religious instruction", study of philosophy which is necessarily based on study of religions would be impermissible. That would amount to denying children a right to understand their own religion and religions of others, with whom they are living in India and with whom they may like to live and interact. Study of religions, therefore, is not prohibited by the Constitution and the constitutional provisions should not be read so, otherwise the chances of spiritual growth of the human being, which is considered to be the highest goal of human existence, would be totally frustrated. ***Any interpretation of Article 28(1), which negates the fundamental right of a child or a person to get education of different religions of the country and outside the country and of his own religion would be destructive of his fundamental right of receiving information, deriving knowledge and conducting his life on the basis of a philosophy of his liking.***

...

86. The word "secularism" used in the preamble of the Constitution is reflected in provisions contained in Articles 25 to 30 and Part IVA added to the Constitution containing Article 51-A prescribing fundamental duties of the citizens. It has to be understood on the basis of more than 50 years experience of the working of the Constitution. The complete neutrality towards religion and apathy for all kinds of religious teachings in institutions of the State have not helped in removing mutual misunderstanding and intolerance inter se between Sections of people of different religions, faiths and beliefs. ***'Secularism', therefore, is susceptible to a positive meaning that is developing understanding and respect towards different religions. The essence of secularism is non-discrimination of people by the State on the basis of religious differences. 'Secularism' can be practised by adopting a complete neutral approach towards religions or by a positive approach by making one Section of religious people to understand and respect religion and faith of another Section of people. Based on such mutual understanding and respect for each other's religious faith, mutual distrust and intolerance can gradually be eliminated.***

87. Study of religions, therefore, in school education cannot be held to be an attempt against the secular philosophy of the Constitution.

...

90. Democracy cannot survive and the Constitution cannot work unless Indian citizens are not only learned and intelligent, but they are also of moral character and imbibe the inherent virtues

of the human being such as truth, love and compassion. Thinkers and philosophers strongly recommend introduction of teaching of religions in education. There may be some difference of opinion between them as to at what stage of education it should be introduced. Whether it should be introduced right from the primary stage, may be a subject of debate and it is not for the courts but for the educationists and academicians, to assist the Government in formulating a sound educational policy for primary education. India is mostly composed of people who are followers of one or the other religions or faiths. A very small section comprises those who are non-believers. They may be described as purely humanists and rationalists. Bertrand Russell in The School Curriculum Before Fourteen, speaking on teaching history to the school children, advocates imparting knowledge of the impact of thinkers and philosophers. He said:

"I should not keep silence, but I should not hold up military conquerors to admiration. The true conquerors, in my teaching of history, should be those who did something to dispel the darkness within and without — Buddha and Socrates, Archimedes, Galileo and Newton, and all the men who have helped to give us mastery over ourselves or over nature. And so I should build up the conception of lordly splendid destiny for the human race, to which we are false when we revert to wars and other atavistic follies, and true only when we put into the world something that adds to our human dominion." (See Bertrand Russell on Education, at p. 172.)

(emphasis added)

62. By the aforesaid judgments the Supreme Court has defined the term "secularism", in Indian context, to mean equal treatment to all religions and religious sects and denominations by the State, without either identifying itself with or favoring any particular religion, religious sect or determination. One thing which prominently emerges from the judgments is that whatever be the attitude of State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the state. In fact, the encroachment of religion into secular activities is strictly prohibited. The Courts have gone to the extent of saying that secularism is a part of the basic structure of the Constitution and acts of the State Government which are calculated to subvert or sabotage secularism as enshrined in the Constitution, can lawfully be deemed to give rise to a situation in which the Government of State cannot be carried on in accordance with the provisions of the Constitution. Constitution makes clear demarcation and matters which are purely religious are left personal to the individuals and secular part is taken care of by the State. The State does not extend patronage to any particular religion and cannot be either pro-particular religion or anti-particular religion. It stands aloof. In other words, it maintains neutrality in matters of religion and provides equal protection to all religions and actively acts on secular part. State will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship. The concept of secular State is essential for successful working of the democratic form of Government.

63. It is in the aforesaid concept of secularism that this Court is to judge upon the constitutional validity of the Madarsa Act. The history and statement of objects and reasons of Madarsa Act shows that initially private Arbi Farsi Madarsas were

established by some persons, which were unregulated. Executive directions for their registration were issued for the first time in the year 1969. Later in the year 1987 non-statutory rules were framed for their regulation. A separate Minority Department in the State Government was created on 12.08.1995 and on 31.01.1996 the work of Madarsas was transferred from Education Department to this new Minority Department. The earlier non-statutory regulations of 1987 were replaced by the impugned Madarsa Act of 2004 with a view to *'remove the difficulties arisen in running and improving the merit in the Madarsas and to make available the best facility of study to its students'*. The aims and objects of the Act is silent as to how and why requirement arose to have a separate education Board for a particular religion while there are secular Primary Education Board and Board for High School and Intermediate Education in State of U.P. providing education to one and all without making any differential between children of different religions.

64. The definition of 'institution' under Section 2(f) of Madarsa Act includes a Madarsa or Oriental College established and administered by Muslim-Minorities and recognized by the Board for imparting Madarsa-Education. The definition of 'Madarsa-Education' under Section 2 (h) includes 'Islamic-studies'. Under Section 3 Constitution of the board under sub-section (3) clause (a) requires a muslim educationist in the field of Traditional Madarsa-Education to be its chairman. Under clause (c) Principal, Government Oriental College, Rampur (a unique college run by State Government having power to give its own certificates of education, having at present only around 35 students and a Principal and no teachers), under clause (d) and (e) a Sunni-Muslim and a Shia-Muslim legislator, under clause (g) one head of institution established and administered by Sunni-Muslim and under clause (h) one head of institution established and administered by Shia-Muslim, amongst others, as members of the Board. Section 9 (a) includes, amongst the other functions of the Board, to prescribe course of instructions, textbooks, other books and instructional material. Section 9 (b) provides one of the function of the board is to prescribe the course books, other books and instruction material of courses of Arbi, Urdu and Pharsi for classes up to high School and intermediate in accordance with the course determined there for by the Board of High School and Intermediate Education. Section 9(c) however empowers the Board to prepare manuscript of the course books, other books and instruction material referred to in clause (b) by excluding the matter therein wholly or partially or otherwise and to publish them. Thus the board is not bound to adopt the books of Board of High School and Intermediate education as they are but modify the same as it so desires. Clause (e) and (f) empowers the Board to grant degrees, diplomas, certificates or other academic distinctions and to conduct examinations for the same. Clause (g) empowers it to recognise institutions for the purposes of its examination. For the purpose of performing its functions the board is required to constitute committees and sub-committees under Section 17. These committees are to be constituted from amongst the members of the Board only. Under the Regulations of 2016 as per definitions provided in regulation 2 of part-I, containing definitions 'Tahtania' means elementary classes (1 to 5) ; 'Fauquania' means upper elementary classes (6 to 8); 'Quari' means diploma in Tajweed-e-

Quran; 'Hafiz' means the certificate of Hafiz-e-Quran. Regulation 3 provides for qualification of teachers of Madarsas. Surprisingly, without first recognizing institutions, it recognises certain degrees granted by those private religious institutions, as named in regulation 3(2), as equivalent to senior secondary and undergraduate (Alim/Fazil) of Madarsa Board.

65. A perusal of the syllabus of primary classes (class 1 to 8) shows that Quran and Islam, amongst other subjects, are taught in every class. Similarly in class 10th (Maulvi/Munshi) theology Sunni and Shia are compulsory subjects while only one optional subject is required to be taken from amongst Math, Home Science (only for girls), Logic and Philosophy, Social Science, Science and Tib (medical science). Similarly in class 12th (Alim) Theology - both Sunni and Shia, are compulsory subjects while one of the optional subject is to be opted from amongst Home Science (for girls only), General Hindi, Logic and Philosophy, Tib (Medical Science), Social Science, Science and Typing. The Certificate of 'Hafiz' and 'Quari' means Certificate of 'Hafiz-e-Quran' and 'Tajveed-e-Quran' [Part-I Regulation 2 (l)(m)], which are certificates of having knowledge of Quran - the religious book of Islam, including its religious instructions, making these certificates only with regard to study of a particular religion and its instructions. More particularly Sections 2(a), (f), (h), Section 3, Sections 9(a), (f) and Part-I Regulation 2(d), (l) and (m) prescribe for teaching of a particular religion, its prescriptions and philosophy. It is admitted to both the State and the Board for Madarsa that Islam as a religion, with all its prescriptions, instructions, philosophies and deliberations is taught in its recognized institutions as per its course material.

66. From the aforesaid it is clear that under the provisions of the Madarsa Act for being recognized by the Madarsa Board it is compulsory for an institution to be setup as a muslim minority institution and it is also compulsory for a student of Madarsa to study in every class, Islam as a religion, including all its prescriptions, instructions and philosophies, to get promoted to next class. The modern subjects are either absent or are optional and a student can opt to study only one of the optional subjects. Thus, the scheme and purpose of the Madarsa Act is only for promoting and providing education of Islam, its prescriptions, instructions and philosophy and to spread the same. This fact is admitted to the State and the Board and is also not disputed by any of the respondents/interveners.

67. To provide education, more particularly for minors, that is children upto the age of 18 years, is a constitutional duty of the State. Under Article 21-A State is bound to provide compulsory and free education to children between the age of 6 and 14 years, that is from class I to class VI. Further it is the duty of the State to provide education which is secular in nature. It cannot discriminate and provide different type of education to children belonging to different religions. Any such action on part of State would be violative of secularism, which is part of the basic structure of the Constitution of India. Such an action on the part of the State is not only unconstitutional but also highly divisive of the society on religious lines. To maintain unity in the society is a primary duty of the State and all its authorities. Any policy of the State which is divisive of society on

religious lines is violative of the constitutional principles. Where any legislative Act of the State is violative of the basic structure of the Constitution, one of the core principles of which is secularism; it is bound to be struck down.

68. The defense taken by the respondents, including the State Government and the Madarsa Board, is that State has sufficient power to frame laws with regard to education to be provided at school level, including traditional education. It is argued that in exercise of its powers under entry 25 of list III of schedule VII of the Constitution of India State has enacted the Madarsa Act. It is claimed that while having power to legislate for education it also has sufficient power to legislate on traditional education and since religion is part of traditional education, therefore, State Government can legislate on the same also. Further, in case this Court finds any provision of the Madarsa Act to be violative of the Constitution of India, it may only strike down such provisions and may save the remaining portions of the Act. The entire Act may not be struck down by this Court. Further, reliance is placed upon Article 25 to 30 of the Constitution of India. The Board and other respondents, while adopting arguments of the State, have further submitted that Article 25 to 29 provide rights to propagate religion and under Article 30 the rights of minority to establish and administer their educational institutions is specifically protected. They submit that State Government has sufficient power to establish a Board for religious education of a minority religion.

69. No doubt State has sufficient power to frame laws with regard to education to be provided at school level, both primary and thereafter up to intermediate; however, such education has to be secular in nature. The State has no power to create a Board for religious education or to establish Board for school education only for a particular religion and philosophy associated with it. Any such action on part of State violates the principles of secularism, which is in the letter and spirit of the Constitution of India. The same also violates Article 14 of the Constitution of India, which provides for equal treatment to every person by the State.

70. So far as Articles 25 to 29 of the Constitution of India are concerned, the same relate to the rights of the citizens and not those of the State. It is the citizens of this country who have right to profess and propagate their religion and its values. It is not mandatory for a citizen of this country to be secular by nature. He can have faith in his own religion or in some/every religion or may not have faith in any religion. But, the State cannot do so. The State has to remain secular. It must respect and treat all religions equally. The State cannot, in any manner whatsoever, discriminate between religions while performing its duties. Since providing education is one of the primary duties of the State, it is bound to remain secular while exercising its powers in the said field. It cannot provide for education of a particular religion, its instructions, prescriptions and philosophies or create separate education systems for separate religions. Any such action on the part of the State would be violative of the principles of secularism. Further, Article 30 only protects rights of minorities to establish and administer their educational institutions. The same, like Article 25 to 29, has no application on exercise of power by the

State Government while establishing an Education Board. The protection of Article 30 is only to the minorities, both religious and linguistic, to establish and administer educational institutions of their choice. The Board is not an educational institution established and administered by any minority, but is an institution established by the State for providing an education system. It prescribes courses, recognises degrees and certificates, conducts examinations and also recognizes schools and colleges for providing education. Therefore, Article 30 has no application to the facts and circumstances of the present case. We repetitively inquired from the respondents to point out the provisions which can be segregated to save the Madarsa Act but, over days of hearing this query was not replied to by any respondent. We also find that since the very purpose of the Madarsa Act is found to be violative of Secularism; it is not possible to segregate and save any portion of the Act which would be of any relevance.

71. Thus, on the basis of principles settled by the Supreme Court in the aforesaid judgments, we concluded that the very object and purpose of the Madarsa Act and the relevant provisions referred to above are violative of the principles of secularism and thus violate the Constitution of India and cannot stand.

(II) VIOLATION OF ARTICLE 21 AND 21-A

72. Sri. Sudeep Kumar, the learned Counsel for the petitioner submits that under Article 21A of the Constitution of India it is the duty of the State to provide free education to children between six and 14 years studying in Class 1 to 6. Under Article 21- right to life, the Supreme Court by repeated judgments has held that the life has to be purposeful and meaningful. In large fields covered by 'life', ‘education’ also finds prominent place. Such education has to be modern, of good quality and universal in nature. Whether the education provided is free or paid, the same has to be of good quality, universal and modern. It should necessarily include all modern subjects including science. Any education that is not universal and modern cannot be called quality education. He submits that in the name of education the State cannot prescribe and dispense with education which is neither of quality nor universal in nature and also lacks modern outlook. A perusal of syllabus of the Madarsa Board shows that the education provided therein is only of languages and Islam as a religion with a little touch of maths etc. The modern subjects including science are only optional and entire school education can be completed without studying modern subjects.

73. Learned Amici Curiae further enhanced the said argument and submitted that the State cannot teach a particular religion in the name of traditional education. While fulfilling its duties of Free and Compulsory Education from classes 1 to 6 State Government is bound to provide education which is universal in nature that is education that is equally applied to all. Education to children of any minority community has to be of same quality as is being provided to other children of the state. By providing limited traditional and that too religious education the State cannot wash-off its hands and claim that it is fulfilling its duty under Article 21-A. The same principles also apply to education after Class 6. Education - whether free or paid, has to be of the same standard and of the same nature. The State cannot

differentiate in the quality of education being provided to the children of largest minority of the State from that being provided to the children of other majority or minority communities.

74. Opposing these submissions, the learned Counsel for the respondents and interveners submitted that the State is free to prescribe the form of education it desires to provide. No interference can be made by the Courts in the said freedom of the State. The State has a right also to provide traditional education and in exercise of the said right it has established the Madarsa Board, which has prescribed the syllabus. Therefore the syllabus is valid and in accordance with law declared by the State. It is wrong to suggest that the syllabus does not prescribe to the education as provided under Article 21 or 21A.

75. The learned counsel for the petitioner and Amici Curiae have placed reliance on the judgment in the case of ***Bhartiya Seva Samaj Trust through President and another versus Yogeshbhai Ambalal Patel and another:*** *(2012) 9 SCC 310*, wherein the Supreme Court held that: -

"20. In view to have greater emphasis, the Eighty-sixth Amendment in the Constitution of India was made in 2002 introducing the provision of Article 21-A, declaring the right to free and compulsory education of the children between the age of 6 to 14 years as a fundamental right. Correspondingly, the provisions of Article 45 have been amended making it an obligation on the part of the State to impart free education to the children. The amendment in Article 51-A of the Constitution inserting clause (k) has also been made making it obligatory on the part of the parents to provide opportunities for education to their children between the age of 6 to 14 years.

21. Thus, in view of the above, it is evident that ***imparting elementary and basic education is a constitutional obligation on the State as well as societies running educational institutions. When we talk of education, it means not only learning how to read and write alphabets or get mere information but it means to acquire knowledge and wisdom so that one may lead a better life and become a better citizen to serve the nation in a better way.***

22. The policy framework behind education in India is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through the provision of inclusive elementary education to all. ***Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker Sections is, therefore, not merely the responsibility of the schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.***

23. Every generation looks up to the next generation with the hope that they shall build up a nation better than the present. Therefore, ***education which empowers the future generation should always be the main concern for any nation.***

24. Right to education flows directly from Article 21 and is one of the most important fundamental rights. ***In Ashoka Kumar Thakur v. Union of India [(2008) 6 SCC 1], while deciding the issue of reservation, this Court made a reference to the provisions of Articles 15(3) and 21-A of the Constitution,***

observing that without Article 21-A the other fundamental rights are rendered meaningless. Therefore, there has to be a need to earnestly implement Article 21-A. Without education a citizen may never come to know of his other rights. Since there is no corresponding constitutional right to higher education-the fundamental stress has to be on primary and elementary education, so that a proper foundation for higher education can be effectively laid. Hence, we see that education is an issue, which has been treated at length in our Constitution. It is a well-accepted fact that democracy cannot be flawless; but, we can strive to minimise these flaws with proper education. Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs.

25. This Court in State of T.N. v. K. Shyam Sunder [(2011) 8 SCC 737] held as under :

18. In the post-constitutional era, attempts have been made to create an egalitarian society by removing disparity among individuals and in order to do so, education is the most important and effective means. There has been an earnest effort to bring education out of commercialism/mercantilism.

***

21. ***The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds.***

26. In view of the above, ***education and particularly that elementary/basic education has to be qualitative and for that the trained teachers are required. The legislature in its wisdom after consultation with the expert body fixes the eligibility for a particular discipline taught in a school. Thus, the eligibility so fixed requires very strict compliance and any appointment made in contravention thereof must be held to be void."***

(emphasis added)

76. The aforesaid judgments repeatedly emphasis the need of quality education for the children which is universal in nature. Without quality, idea of education in itself is a failure. Teaching merely one religion and a few languages, without any study of modern subjects, cannot be called quality education.

77. Section 2 (h) of Madarsa Act defines 'Madarsa-Education' as education in Arbic, Urdu, Parsian, Islamic-studies, Tibb Logic, Philosophy and includes such other branches of learning as may be specified by the Board from time to time. The syllabus of class I to class VIII of Madarsas shows that study of Islam is necessary in every class along with study of languages. A student cannot get promoted to next class unless he would clear his exam in religion.

78. The syllabus of study for the Munshi/Maulvi Course (equivalent to Class X) under Madarsa Act is as follows: -

	Subject	Question papers
1	Theology (Sunni)	1. Tafseer
		2. Hadith
		3. Fiqah
	Theology	1. Tafseer

	(Shia)	2. Hadith
		3. Fiqah
2	Arabic Literature (Only for Maulvi)	1. Prose, Poetry History of Arabic Literature
		2. Arabic Grammer
	Persian Literature (Only for Maulvi)	1. Prose & Grammer
		2. Poetry & Translation
3	Urdu Literature	1. Urdu Prose & Grammer
		2. Urdu Poetry & History of Urdu Literature
4	General English	Prose & Poetry
5	General Hindi	Prose & Poetry
6	Optional Subject (Select any one)	1. Math
		2. Home Science (Only for girl candidates)
		3. Logic & Pholosophy
		4. Social Science
		5. Science
		6. Tib (Medical Science)

79. The syllabus of study for the Arabic & Persian Alim (equivalent to Class XII) is as follows: -

	Subject	Question papers
1	Theology (Sunni)	1. Tafseer & Aqayad
		2. Hadith & Seerat Khulfa-E-Rashdeen
		3. Fiqah
	Theology (Shia)	1. Tafseer & Aqayad
		2. Hadith & Seerat Khulfa-E-Rashdeen
		3. Fiqah
2	Arabic Literature (For Alim-Arabic)	1. Prose & Poetry & History of Arabic Literature
		2. Grammer Balaghat Insha
	Persian Literature (For Alim-Persian)	1. Prose, Grammer Balaghat
		2. Poetry, History of Persian Insha
3	Urdu Literature	1. Urdu Prose & Grammer
		2. Urdu Poetry & History of Urdu Literature
4	General English	General English
5	General Hindi	Prose & Poetry
6	Optional Subject (Select any one)	1. Home Science (Only for girl candidates)
		2. General Hindi
		3. Logic & Pholosophy
		4. Tib
		5. Social Science
		6. Science
		7. Typing

80. Thus it is apparent that the students of Class X have to study Theology (Sunni) and Theology (Shia), Arabic, Persian, Urdu, General English and General Hindi as compulsory subjects and they are to study only one of the subjects from

amongst Maths, Logic & Philosophy, Social Science, Science and Tib (Medical Science). Home science is an optional subject for girls only. Students upto Class X do not have an option to study science, Maths and social science simultaneously.

81. Similarly, the students of Class XII have to study Theology (Sunni) and Theology (Shia), Arabic, Persian, Urdu and General English, but the General English taught to the students of Class XII is of the level of NCERT books of Class X. They can study only one of the subjects from amongst General Hindi, Logic & Philosophy, Social Science, Science, Tib (Medical Science) or Typing. Home science is an optional subject for girls only. The students upto Class XII also do not have an option to study Maths as a subject. The optional subject Science taught to Class XII students is of the level of Classes VIII, IX and X. Whereas in State Board, Physics, Chemistry and Biology are separate subjects.

82. In the same manner, subject Tib (Medical Science) is taught as an optional subject from Classes 9th to 12th. It is surprising to note that there is no regular Science subject from Classes 9th to 12th and Science is also an optional subject. Without giving basic education of Science particularly Biology, Medical Science education is being provided in the name of Tib to the students of Classes 9th to 12th.

83. From the above discussion it is clearly established that education under the Madarsa Act is certainly not equivalent to the education being imparted to the students of other regular educational institutions recognized by the State Primary and High School and Intermediate Boards and, therefore, the educations being imparted in Madarsas is neither 'quality' nor 'universal' in nature.

84. While the students of all other religions are getting educated in all modern subject denial of the same quality by the Madarsa Board amounts to violation of both Article 21-A as well as Article 21 of the Constitution of India. The State cannot hide behind the lame excuse that it is fulfilling its duty by providing traditional education on nominal fee. The Supreme Court has repeatedly emphasised on modern education with modern subjects, an education that is universal in nature that prepares a child to make his future bright and to take this country forward. It does not prescribe, by any stretch of imagination, limited education with emphasis only upon a particular religion, its instructions and philosophies. Education being provided by the Madarsa Board, therefore, is in violation of the standards prescribed by the Supreme Court while interpreting constitutional provisions. Therefore this Court has no hesitation in holding that the education being provided under the Madarsa Act is violative of Article 21 and 21A of the Constitution of India.

(III) CONFLICT OF MADARSA ACT AND UGC ACT

85. As is clear from the provisions of the Madarsa Act, the Board is empowered with regard to Madarsa education from primary level to post-graduation and research level. So far as the education being imparted in Madarsas to the students of Kamil or under-graduate degree, Fazil or post-graduate decree, Alama, which is a degree for junior research programme and Ductoora, which is a degree for senior and complete research programme, it is important to note that Section 22 of the

University Grants Commission Act, 1956, provides: -

"22. Right to confer degrees.— *(1) The right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under Section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees.*

(2) ***Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.***

(3) For the purposes of this section, "degree" means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the Official Gazette.

86. As per the provision contained in Section 22 of the UGC Act, only Universities or institutions deemed to be Universities under Section 3 of the Act can confer degrees and no other person or authority, including any Madarsa or the Madarsa Board, can confer any degree.

87. The University Grants Commission has issued numerous Notifications in exercise of the power conferred by Section 22 of the UGC Act, which have specified numerous Bachelor's, Master's and Doctorate degrees that can be awarded by the Universities and no degree, which has not been notified by the UGC, can be awarded by any University. Kamil, Fazil, Alama and Ductoora degrees have not been notified by the UGC and these degrees, therefore, cannot be awarded by any body.

88. University Grants Commission (Minimum Standards and Procedure for Award of M.Phil./Ph.D. Degrees) Regulations, 2016 lays down minimum standards and procedure for award of M.Phil./Ph.D. Degrees and these have necessarily to be followed for awarding these degrees. However, the Madarsa Board does not follow these minimum standards and procedures for award of M.Phil./Ph.D. Degrees.

89. Entry 66, List-I of Schedule 7 appended to the Constitution of India provides "Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions", while Entry 25 of List-III-Concurrent List provides "Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List-I; vocational and technical training of labour."

90. The issue with regard to power of the Union of India vis-a-vis State Government with regard to higher education has been considered by the Supreme Court repeatedly. In ***Osmania University Teachers' Association versus State of Andhra Pradesh and another***: (1987) 4 SCC 671, the Supreme Court held that: -

"15. The Parliament has exclusive power to legislate with respect to matters included in List I. The State has no power at all in regard to such matters. ***If the State legislates on the subject falling within List I that will be void, inoperative and unenforceable.***

* * *

30. The Constitution of India vests Parliament with exclusive authority in

regard to coordination and determination of standards in institutions for higher education. The Parliament has enacted the UGC Act for that purpose. The University Grants Commission has, therefore, a greater role to play in shaping the academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the Universities. Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs. It is hoped that University Grants Commission will duly discharge its responsibility to the Nation and play an increasing role to bring about the needed transformation in the academic life of the Universities."

(emphasis added)

91. In ***Dr. Preeti Srivastava and another versus State of M.P. and others*** (1999) 7 SCC 120, a Constitution Bench consisting of five Judges of the Supreme Court held: -

"35. The legislative competence of Parliament and the legislatures of the States to make laws under Article 246 is regulated by the VIIth Schedule to the Constitution. In the VIIth Schedule as originally in force, Entry 11 of List II gave to the State an exclusive power to legislate on

"education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III".

Entry 11 of List II was deleted and Entry 25 of List III was amended with effect from 3-1-1976 as a result of the Constitution 42nd Amendment Act of 1976. The present Entry 25 in the Concurrent List is as follows:

"25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

Entry 25 is subject, inter alia, to Entry 66 of List I. Entry 66 of List I is as follows:

"66. Coordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able

to legislate in this field, except as provided in Article 254.

36. ***It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education.*** *Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education.* ***Standards of education in an institution or college depend on various factors. Some of these are:***

(1) the calibre of the teaching staff;

(2) a proper syllabus designed to achieve a high level of education in the given span of time;

(3) the student-teacher ratio;

(4) the ratio between the students and the hospital beds available to each student;

(5) ***the calibre of the students admitted to the institution;***

(6) equipment and laboratory facilities, or hospital facilities for training in the case of medical colleges;

(7) adequate accommodation for the college and the attached hospital; and

(8) the standard of examinations held including the manner in which the papers are set and examined and the clinical performance is judged."

(emphasis added)

92. In ***Prof. Yashpal and another versus State of Chhattisgarh and others*** *(2005) 5 SCC 420*, the Supreme Court held that : -

"46. Entry 66 which deals with coordination and determination of standard in institutions for higher education or research and scientific and technical institutions is in the Union List and Parliament alone has the legislative competence to legislate on the said topic*. The University Grants Commission Act has been made with reference to Entry 66 (see Prem Chand Jain v. R.K. Chhabra and Osmania University Teachers' Assn. v. State of A.P.). The Act has been enacted to ensure that there is coordination and determination of standards in universities, which are institutions of higher learning, by a body created by the Central Government. It is the duty and responsibility of the University Grants Commission, which is established by Section 4 of the UGC Act, to determine and coordinate the standard of teaching curriculum and also level of examination in various universities in the country. In order to achieve the aforesaid objectives, the role of UGC comes at the threshold. The course of study, its nature and volume, has to be ascertained and determined before the commencement of academic session. Proper standard of teaching cannot be achieved unless there are adequate infrastructural facilities in the campus like classrooms, libraries, laboratories, well-equipped teaching staff of requisite calibre and a proper student-teacher ratio. For this purpose, the Central Government has made a number of rules in exercise of powers*

conferred by Section 25 of the UGC Act and the Commission has also made regulations in exercise of power conferred by Section 26 of the UGC Act and to mention a few, the UGC Inspection of Universities Rules, 1960, the UGC Regulations, 1985 Regarding the Minimum Standards of Instructions for the Grant of the First Degree, UGC Regulations, 1991 Regarding Minimum Qualifications for Appointment of Teachers in Universities and Colleges, etc. UGC with the approval of the Central Government and exercising power under Section 22(3) of the UGC Act has issued a schedule of degrees which may be awarded by the universities. The impugned Act which enables a proposal on paper only to be notified as a university and thereby conferring the power upon such university under Section 22 of the UGC Act to confer degrees has the effect of completely stultifying the functioning of the University Grants Commission insofar as these universities are concerned. Such incorporation of a university makes it impossible for UGC to perform its duties and responsibilities of ensuring coordination and determination of standards. In the absence of any campus and other infrastructural facilities, UGC cannot take any measures whatsoever to ensure a proper syllabus, level of teaching, standard of examination and evaluation of academic achievement of the students or even to ensure that the students have undergone the course of study for the prescribed period before the degree is awarded to them.

*48. **Any State legislation which stultifies or sets at naught an enactment validly made by Parliament would be wholly ultra vires.** We are fortified in our view by a Constitution Bench decision in R. Chitralekha v. State of Mysore [(1964) 6 SCR 368] where power of the State under Entry 11 List II (as it then existed), and Entry 25 List III qua Entry 66 List I came up for consideration. Subba Rao, J. after quoting the following passage from Gujarat University v. Krishna Ranganath Mudholkar [1963 Supp (1) SCR 112 : AIR 1963 SC 703] (SCR p. 139): (R. Chitralekha case [(1964) 6 SCR 368 : AIR 1964 SC 1823] , at SCR p. 379)*

"The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within Entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the coordination of such standards either on an all-India or other basis impossible or even difficult."

enunciated the following principle defining the contours of the legislative powers of States vis-à-vis Union so as to steer clear of any overlap or collision: (SCR p. 379)

*"This and similar other passages indicate that i**f the law made by the State by virtue of Entry 11 of List II of the Seventh Schedule to the Constitution makes impossible or difficult the exercise of the legislative power of Parliament under the entry 'Coordination and determination of standards in institutions for higher edu**cation or research and scientific and technical institutions' reserved to the Union, the State law may be bad. This cannot obviously be decided on speculative and hypothetical reasoning. If the impact of the State law providing for such standards on Entry 66 of List I is so heavy or devastating as to wipe out or appreciably abridge the Central field, it*

may be struck down. But that is a question of fact to be ascertained in each case."

(emphasis added)

93. The Supreme Court in ***Annamalai University, Represented by Registrar versus Secretary to Government, Information and Tourism Department and others*** (2009) 4 SCC 590, held as under: -

"40. The UGC Act was enacted by Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas the Open University Act was enacted by Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the Statement of Objects and Reasons of the Open University Act shows that the formal system of education had not been able to provide an effective means to equalise educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.

42. The provisions of the UGC Act are binding on all universities whether conventional or open. Its powers are very broad. The Regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-section (1) of Section 26 are of wide amplitude. They apply equally to open universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by UGC. The standards and the coordination of work or facilities in universities must be maintained and for that purpose required to be regulated. The powers of UGC under Sections 26(1)(f) and 26(1)(g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of UGC are all-pervasive in respect of the matters specified in clause (d) of sub-section (1) of Section 12-A and clauses (a) and (c) of sub-section (2) thereof.

47. In University of Delhi v. Raj Singh [1994 Supp (3) SCC 516 : 1995 SCC (L&S) 118 : (1994) 28 ATC 541] this Court held: (SCC pp. 526-27, para 13)

"13. ... By reason of Entry 66, Parliament was invested with the power to legislate on 'coordination and determination of standards in institutions for higher education, or research and scientific and technical institutions'. Item 25 of List III conferred power upon Parliament and the State Legislatures to enact legislation with respect to 'vocational and technical training of labour'. A six-Judge Bench of this Court [Ed.: The reference is to Gujarat University v. Krishna Ranganath Mudholkar, AIR 1963 SC 703.] observed that the validity of the State legislation on the subjects of university education and education in technical and scientific institutions falling outside Entry 64 of List I as it then read (that is to say, institutions for scientific or technical education other than those financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance) had to be judged having regard to whether it impinged on the field reserved for the Union under Entry 66. In other words, the validity of the State legislation depended upon whether it prejudicially affected the coordination and determination of standards. It did not depend upon the actual existence of the Union legislation in respect of coordination

and determination of standards which had, in any event, paramount importance by virtue of the first part of Article 254(1)."

48. In State of T.N. v. Adhiyaman Educational and Research Institute [(1995) 4 SCC 104] this Court laid down the law in the following terms: (SCC pp. 134-35, para 41)

"41. What emerges from the above discussion is as follows:

(i) The expression 'coordination' used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.

(ii) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.

(iii) If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause (2) of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.

(iv) Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case.

(v) When there are more applicants than the available situations/seats, the State authority is not prevented from laying down higher standards or qualifications than those laid down by the Centre or the Central authority to shortlist the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.

However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the Central law, they act unconstitutionally. So also when the State authorities derecognise or disaffiliate an institution for not satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally."

94. In ***Kalyani Mathivanan versus K.V. Jeyaraj and others*** *(2015) 6 SCC 363,the Supreme Court held: -*

"48. Article 254 relates to repugnancy of law made by the State with the law made by Parliament. Article 254 reads as follows:

"254.Inconsistency between laws made by Parliament and laws made by the legislatures of States.—(1) If any provision of a law made by the legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the legislature of the State."

49. The effect in case of inconsistency between the legislation made by Parliament and the State Legislature on the subject covered by List III has been decided by this Court in numerous cases.

* * *

53. The aforesaid judgment makes it clear that to the extent the State legislation is in conflict with the Central legislation including subordinate legislation made by the Central legislation under Entry 25 of the Concurrent List shall be repugnant to the Central legislation and would be inoperative."

95. In all the aforesaid judgments, the consistent law settled by the Supreme Court is that higher education is a field reserved for Union of India. Therefore, State Government has no power to legislate in the said field.

96. Section 9 (a) of the Madarsa Act confers power on the Board to prescribe course of instructions, text-books, other books and instructional material even for Alim, i.e. under-graduate course, Kamil i.e. post-graduate course, Fazil, i.e. Junior research Programme and other courses.

97. Section 9 (e) empowers the Madarsa Board to grant Degrees to persons, who have pursued a course of study in an institution admitted to the privileges or recognition by the Board or even who have studied privately and have passed an examination of the Board. Section 9(f) of the Madarsa Act empowers the Board to conduct examinations of the Alim (Graduate), Kamil (Post Graduate) and Fazil (Junior Research Programme) courses; Section 9 (g) empowers the Madarsa Board to recognise institutions for the purposes of its examination and Section 9 (h) empowers it to admit candidates to its examination. Section 9 (p) empowers the Madarsa Board to provide for research or training in any branch of Madarsa-Education.

98. All the aforesaid provisions confers powers on the Madarsa Board which are vested in the University Grants Commission by the UGC Act, falls within the purview of Entry 66 of List I of the

Seventh Schedule to the Constitution of India and, therefore, the Madarsa Act is violative of the provision contained in Article 246 (1) of the Constitution of India and is unconstitutional to the said extent.

(F) CONCLUSION

99. In view of the foregoing discussion, we hold that the Madarsa Act, 2004, is violative of the principle of Secularism, which is a part of the basic structure of the Constitution of India, violative of Articles 14, 21 and 21-A of the Constitution of India and violative of Section 22 of the University Grants Commission Act, 1956. Accordingly, the Madarsa Act, 2004 is declared unconstitutional. Further, we are not deciding the validity of Section 1(5) of the R.T.E. Act as we have already held the Madarsa Act to be ultra vires and we are also informed by learned counsel for both the parties that in State of U.P. Vadik Pathshalas do not exist.

100. Since there are large number of Madarsas and Madarsa students in State of U.P., the State Government is directed to take steps forthwith for accommodating these Madarsa students in regular schools recognized under the Primary Education Board and schools recognized under the High School and Intermediate Education Board of State of U.P. The State Government for the said purpose shall ensure that as per requirement sufficient number of additional seats are created and further if required, sufficient number of new schools are established. The State Government shall also ensure that children between the ages of 6 to 14 years are not left without admission in duly recognized institutions.

101. The Writ-C No.6049 of 2023 stands allowed and Writ-A Nos.29324 of 2019, 3735 of 2012, 5548 of 2014, 3615 of 2020 and Writ-C No.481 of 2020, which are placed before this Court on reference, are returned to the appropriate Court.

102. We appreciate the assistance given to us in the hearing of this matter by all the learned counsel and Sri Anshuman Singh Rathore, the petitioner of Writ-C No.6049 of 2023, who also addressed the Court in person. We also appreciate the hard work and able assistance provided by Sri Gaurav Mehrotra, Advocate, Sri Madhukar Ojha, Advocate and Sri Akber Ahmad, Advocate, learned Amici Curiae. Sri Nandesh Verma, Sri Ankit Baranwal and Sri Adarsh Mohan Nigam, Research Associate/Law Intern have also contributed by their in depth research.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 7313 of 2017

Regional Manager, Central Bank of India ...Petitioner
Versus
Presiding Officer, Central Govt. Indus. Tribunal & Anr. ...Opp. Parties

U7Counsel for the Petitioner:
Sri Vishnu Pratap

Counsel for the Opp. Parties:
C.S.C., Sri Atul Kumar I, Sri Indra Mani Tripathi

Civil Law - Constitution of India,1950-Article 226-Industrial Disputes Act.1947-Section 11A-the respondent no.2 was appointed as clerk in central bank later promoted, during his service some misconduct was committed by him-the disciplinary authority dismissed the respondent no.2-the misconduct was greater having caused loss to the bank-however, the Tribunal modified punishment awarded to him-The court held that Tribunal was not justified in modifying the punishment awarded by the disciplinary authority having been confirmed by the Appellate Authority as well as by the Division Bench of the court from that of dismissal to compulsory retirement with superannuation benefits-Therefore , the impugned order is unsustainable in the eyes of law and the same is set aside.(Para 1 to 30)

The writ petition is allowed. .(E-6)

List of cases cited:

1. SBI Vs Tarun Kumar Banerjee & ors. (2000)4 A.W.C 3304 SC: 2000) 8 SCC 12 (Para 3)

2. Tripura Gramin Bank & ors. Vs Tarit Baran Roy & anr. (2001)2 AWC 1125 SC

3. Harinarayn Seet Vs Andhra Bank (2022) LiveLaw AP 125

4. RSRTC Vs Gopal Singh (1998)2 SCT 277

5. Depot Manager, TSRTC Vs Mohd. Fakruddin & ors. (2017)155 FLR 263

6. Management of Hindustan Machine Tools Ltd. Bangalore Vs Mohd. Usman & anr. (1984) AIR SC 321

7. Jitendra Singh Rathor Vs Shri Baidyanath Ayurved Bhawan Ltd. & anr. (1984) AIR SC 976

8. Chairman & MD, United Commercial Bank & ors. Vs P.C. Kakkar (2003) 4 SCC 364

9. Canara Bank Vs V.K.Awasthy (2005) 6 SCC 321,

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Through this writ petition a challenge has been made to the award dated 22.08.2016, published on 05.09.2016, by the Central Government Industrial Tribunal (CGIT) cum Labour Court, Kanpur exercising power under Section 11A of Industrial Disputes Act, 1947 *(hereinafter called as "Act of 1947")* modifying punishment of dismissal to that of compulsory retirement with superannuation benefits.

2. Facts, giving rise to the present petition, are that respondent No.2 late R.P.Singh was appointed as a Clerk on 11.01.1971 in Central Bank of India. He was promoted to the post of Special Assistant in the year 1992 with retrospective effect since 1987. While posted as Special Assistant at Extension Counter of main branch, Aligarh at Kshetriya Shri Gandhi Ashram (KSGA), Aligarh during the period October, 2003 to February, 2004, some misconduct was committed by him. He was put under suspension on 17.02.2004. A charge sheet was served on 16.03.2004 alleging ten charges against him, which are as under :

"CHARGE NO. 1

Current Account No 176 of M/s Rajesh & Co. was opened with the address, 101, President, Railway Road, Aligarh, which Sh. Singh has tempered with malafide intention and ulterior motive as 7/107, Railway Road, Algarh.

CHARGE NO. 2

On 8.10.2003 the account of M/s Rajcsh & Co. was allowed to be closed for which relevant record is not available in the branch except an entry of Rs.2900/- in C/D A/c 176. Ledger Folio No. 99. The account was closed by payment through cash for Rs.2900/ as noted in the ledger.

On perusal of the ledger folio it is specific that Cheque Book was not issued in the account and loose Cheque Book also was not issued, payment was also not made through pay slip/Banker's cheque/Debit Note. Thus Sh. Singh has allowed the closure of the account in unusual manner violating Bank's rules to facilitate the Account holder with obvious reason.]

CHARGE NO. 3

The account opening form, signature card and debit voucher Dt. 8.10.2003 in C/D account 176 of M/s Rajesh & Co. are not available in the branch record. Sh. Singh has taken way all these documents with malafide intention to suppress his misdoings.

CHARGE NO. 4

On 9.10.2003 Sh. Rajesh Kisher opened a HSS A/c No. 3825 and provided copy of PAN Card, Driving Licence as proof of identity and address. The date of Birth as noted in PAN Cord and Driving Licence differs which Sh. Singh intentionally ignored to facilitate Sh. Rajesh Kishor to commit the fraud with the Bank. The address in account opening application form, Driving Licence, letter of thanks dated 09.10.2003 in the handwriting of Mr. Rajesh Kishore and Receipt no.520 dated 09.10.2003 of Speed Post mention the address of Mr. Rajesh Kishore differently, which Mr. Singh ignored to notice with ulterior motive and rather actively facilitated Mr. Rajesh Kishor to open the account and commit fraud with the Bank. Thus aforesaid facts speak loudly the connivance of Mr. Singh with Mr Rajesh Kishor in his design to defraud Bank.

CHARGE NO. 5

Sh. Rajesh Kishor has given his address as 101, President, Sadar Chungi Ke Pass, Railway Road, Aligarh, which is not the correct address. Sh. Singh being local of Aligarh has failed to apply ordinary prudence with malafide intention to facilitate Sh. Rajesh Kishor to disappear after committing the fraud.

CHARGE NO. 6

Sh Rajesh Kishor has opened the account on 9.10.2003 and immediately thereafter the deposited cheques of heavy amount for collection as under:

AMOUNT	*DATE OF DEPOSIT*
RS.160000/-	*14.10.2003*
RS 310000/-	*4.12.2003*
RS 320000/-	*11.12.2003*

Sh. Singh has forwarded all the cheques for collection to B/o Panchkula, Chandigarh and also allowed the withdrawals against Central Office guidelines to be vigilant in the operation of the account

All the cheques were drawn on HDFC Bank and Sh. Singh failed to apply his ordinary prudence to enquire the purpose of collection in newly opened account.

With all these collections, fraud has been committed and the Bank has suffered a loss of Rs 7.90 lac.

CHARGE NO. 7

With a deceit motive Sh. Singh has used the Courier Service for collection of aforesaid 3 (three) cheques while he was using the Postal Service for sending the Letter of Thanks. The intentions of Sh. Singh were more grave as to find out that Courier Service was not approved one.

CHARGE NO. 8

Sh. Singh with a malafide intention has not issued Letter of Thanks to the Introducer Sh. Jeet Pal Singh HSS A/c 3550 who has reportedly introduced the HSS account 3825 of Sh. Rajesh Kishor Sh. Singh has also not verified the signature of Sh. Jeet Pal Singh.

Later on Sh. Jeet Pal Singh has disowned his signature for introducing the account. The Bank has lost an opportunity to identify and locate Sh. Rajesh Kishor, the Account holder has committed the fraud, due to intentionally committed lapses on the part of Sh. Singh.

CHARGE NO. 9

In HSS A/c 3825 of Sh. Rajesh Kishor, the first cheque book was issued on 28.10.2003 containing 10 leaves, of which 3 cheques bearing No. 30682 to 30684 were returned due to insufficient funds in the account on 13.11.2003.

Sh. Singh has issued second cheque book of 25 leaves on 1.12.2003 ignoring the material facts of returning of cheques while the credit balance in the account was only Rs.3829/-. Sh. Singh has issued second cheque book containing 25 leaves while cheque book of 10 leaves was available in the branch. Sh. Singh has also ignored the fact that all cheques from the first cheque book were not presented for payment at the branch. It clearly confirms Sh. Singh's connivance with Sh. Rajesh Kishor in whose account a fraud has committed for Rs.7.90 lac and the Bank has suffered the loss.

CHARGE NO. 10

Sh. Singh has acted in a deceitful manner while issuing the Letter of Thanks to Account holder HSS A/c 3825 Sh. Rajesh Kishor wherein tempering is made in a word written just before President in Letter of Thanks Dt. 9.10.2003. The intention of Sh. Singh is confirmed by Speed Post Receipt No. 0520 Dt. 9.10.2003, wherein address is noted 101, Hotel President. This shows that Sh. Singh has knowingly opened the account of a person not having permanent address, collected cheques of heavy amount and connived with Sh Rajesh Kishor to commit a fraud of Rs.7.90 lac and make loss to the Bank."

3. A reply was filed to the said charges, after which an inquiry was conducted. The disciplinary authority passed order of dismissal under Regulation 6(a) of Memorandum of Settlement of Disciplinary Action, Procedure for Workmen dated 10.04.2002 dismissing the petitioner from service on 20.10.2005. The order was challenged before the Appellate Authority who confirmed the same vide order dated 09.01.2006. The order of dismissal as well as appellate order were challenged before the writ Court through Writ Petition No.7726 of 2006 which was dismissed vide order dated 16.02.2006. Against the said order, Special Appeal No.251 of 2006 was preferred which was dismissed on 27.03.2006.

4. Thereafter, respondent No.2 raised an industrial dispute and the matter referred to CGIT cum Labour Court, Kanpur, which was registered as Industrial Dispute No.24 of 2007. The dispute referred to the Tribunal for adjudication was,

"Whether the action of the management of Central Bank of India, Regional Office, Agra dismissing Sri R.P. Singh son of Late Sri Kalyan Singh from the bank services vide orer dated 20.10.05 of disciplinary authority and confirming the same by appellate authority vide order dated 09.01.06 is legal and fair? If not

what relief the workman concerned is entitled?"

5. CGIT, vide order impugned, made an award modifying the punishment of dismissal from service to that of compulsory retirement from service with superannuation benefits. Hence the present writ petition.

6. Sri Vishnu Pratap, learned counsel appearing for the petitioner-Bank submitted that charges against respondent No.2 were grave and serious and stood proved in the disciplinary proceedings, which stood affirmed by the order of Appellate Authority. Both the orders of disciplinary as well as appellate authorities were subject matter of challenge before this Court in writ petition and special appeal. This Court found that inquiry conducted was fair and charges do not appear to be moon shine and, therefore, no interference was required.

7. According to counsel for the Bank, once the charges stood proved and it was held that inquiry conducted was fair, the Tribunal, while exercising power under Section 11A of Act of 1947 could not have modified the order of dismissal on the basis of new material on record as proviso clearly prohibits for the same. Moreover, no reason has been assigned by the Tribunal in modifying the punishment from dismissal to compulsory retirement with superannuation benefits except comparing the punishment awarded to the co-delinquent Surendra Kumar against whom charges were not grave and serious.

8. Rliance has been placed upon a decision of Apex Court in **State Bank of India vs. Tarun Kumar Banerjee and others 2000 (4) A.W.C. 3304 (S.C.) : (2000) 8 SCC 12 (Para 3),** which is extracted hereasunder :

"3. The Tribunal having held that the domestic enquiry was fair and valid, the scope of interference was very limited. This Court in Workmen of Messrs. Firestone Tyre and Rubber Company of India (P.) Ltd. v. Management and others (1973) 3 SCR 587 stated the law as follows:

"32. (1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide.

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and the employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it

is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognised that the Tribunal should straight away, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in Panitole Tea Estate v. Workmen [(1971) 1 SCC 742], within the judicial discretion of a Labour Court or Tribunal. The above was the law as laid down by this Court as on 15-12-1971, applicable to all industrial adjudications arising out of orders of dismissal or discharge."

9. According to learned counsel, Tribunal has no jurisdiction to sit in judgment over the decision of employer as an appellate body and the interference with the decision will only be justified in case the finding is arrived that inquiry was perverse or management is guilty of victimization, unfair labour practice or mala fides. The Tribunal can take into evidence the documents placed before it for the first time only when no enquiry has been held or the inquiry held by the employer is found defective.

10. Reliance has also been placed upon a decision of Apex Court in **Tripura Gramin Bank and others vs. Tarit Baran Roy and another 2001 (2) AWC 1125 (SC)** and judgment of Andhra Pradesh High Court in **Harinarayn Seet vs. Andhra Bank 2022 LiveLaw (AP) 125**.

11. Sri Indra Mani Tripathi, learned counsel appearing for legal heirs of respondent No.2 submitted that respondent No.2 was placed at the Extension Counter and Surendra Kumar, the other delinquent employee, who was at the main branch, had

sent the advise to the Extension Counter after passing FSCM(s) and on the basis of the same, worker had no authority to further verify the same except giving credit of the amount of cheque. According to him, both respondent No.2 as well as Surendra Kumar were collectively responsible for loss of Rs.7.90 lakhs while in the disciplinary proceedings initiated against Surendra Kumar, the disciplinary authority has proposed punishment of discharge from service but later on, in the final order passed by the disciplinary authority, punishment of reduction by two stages in time scale of pay for a period of five years was awarded.

12. According to counsel for respondent No.2, once it was found that it was a collective mistake of both respondent No.2 and Surendra Kumar and the punishment awarded was different, the Tribunal, finding the punishment awarded to respondent No.2 being disproportionate to the gravity of charges, reduced the same from dismissal to compulsory retirement with superannuation benefits. Reliance has been placed upon a Full Bench judgment of Rajasthan High Court in **Rajasthan State Road Transport Corporation vs. Gopal Singh 1998(2) SCT 277**; decision of Telangana and Andhra Pradesh High Court in **Depot Manager, TSRTC vs. Mohd. Fakruddin and other 2017(155) FLR 263; decisions of Apex Court in Management of Hindustan Machine Tools Ltd. Bangalore vs. Mohd. Usman and another 1984 AIR (SC) 321 and Jitendra Singh Rathor vs. Shri Baidyanath Ayurved Bhawan Ltd. and another 1984 AIR (SC) 976.**

13. I have heard the respective counsel for the parties and perused the material on record.

14. The short question engaging attention of the Court is, as to the power of CGIT-cum-Labour Court under Section 11A of Act of 1947 in modifying the punishment of dismissal to that of compulsory retirement with superannuation benefits in the facts of the case.

15. It is an admitted case that respondent No.2 was an employee of the Bank. He was posted at the Extension Counter of the main branch at KSGA, Aligarh during the period October, 2003 to February, 2004. It is during this period that respondent No.2 had opened current account No.176 of M/s Rajesh & Company and also HSS Account No.3825 of Rajesh Kishore. It is during this period that three cheques of Rs.1,60,000/- deposited on 14.10.2003; Rs.3,10,000/- deposited on 04.12.2003; and Rs.3,20,000/- deposited on 11.12.2003 were forwarded for collection to branch office Panchkula, Chandigarh. An amount of Rs.7,90,000/- was withdrawn. Surendra Kumar, who was posted at branch office Panchkula, had cleared these three cheques without tallying the signatures. When the matter came into light, respondent No.2 was posted as Special Assistant at Regional Office Agra, firstly, he was suspended and thereafter a charge sheet containing ten charges were given to him. On 28.09.2004, the charge sheet was also issued to Surendra Kumar containing one charge, which is as under :

Charge No. 1

While working as Special Assistant at B/o Aligarh, Mr. Surendra Kumar has passed the following FSCMs on the date mentioned against the FSCM Nos without tallying the signature of officials of B/o Panchkula in the FSCM with the Specimen Signature Album

FSCM NO.

Amount of FSCM
Date on which FSCM passed
23755
Rs.1,60,000/-
17.11.2003
23792
Rs. 3,10,000/-
20.12.2003
23797
Rs. 3,20,000/-
01.01.2004
Total
Rs. 7,90,000/-

The signatures of the officials of B/o Panchkula on the above FSCMs are not tallying with their signatures those given in specimen signature album. Mr. Surendra Kumar has passed the credit voucher of FSCM No. 23792 for Rs.3,10,000/- but not passed the manifold with obvious intention. Mr. Surendra Kumar has also not ensured the 2nd signature (counter signature) on all the aforesaid manifolds as per bank's rules. Later on B/o Panchkula has disowned the manifolds and therefore bank has suffered a loss of Rs.7,90,000/- due to negligence of Mr. Surendra Kumar. Thus Mr. Surendra Kumar is charged with gross misconduct for the above acts under para 5(j) of Memorandum of settlement on Disciplinary Action Procedure for Workmen Dt. 10.04.2002."

16. During the enquiry, charges stood proved against respondent No.2 and the disciplinary authority recommended for dismissal which was approved and the order of dismissal was passed on 20.10.2005, which was affirmed by the Appellate Authority on 09.01.2006. The Division Bench of this Court in Special Appeal No.251 of 2006 declined to interfere in the matter and found that the enquiry was conducted fairly and charges so proved did not require any interference.

17. The Labour Tribunal also while passing the order impugned had recorded a clear finding to the effect that there was no discrepancy in the enquiry as held against the worker which was done in fair and proper manner and the enquiry officer had rightly arrived at the conclusion. The Labour Tribunal further found charges proved against worker. It is only in the light of the punishment awarded to other co-delinquent Surendra Kumar that the Labour Tribunal proceeded to exercise power under Section 11A and modified the punishment.

18. The question, which arises for consideration by this Court is to the scope and power of Labour Tribunal to interfere in the punishment awarded by the disciplinary authority and modify the same having been confirmed by the Division Bench of this Court when no illegality, perversity, victimization or unfair labour practice has been found or recorded against the employer/petitioner.

19. Proviso to Section 11A of Act of 1947 clearly restricts the power of Labour Court, Tribunal or National Tribunal in admitting additional evidence or material, while invoking power under Section 11A and the entire scope of Labour Court rest on the material on record. The satisfaction which a Labour Court, Tribunal or National Tribunal is to record while modifying the order of discharge or dismissal is only on the basis of material on record and no external aid can be taken.

20. In Chairman and Managing Director, United Commercial Bank and others vs. P.C.Kakkar (2003) 4 SCC 364, the Apex Court held that Court should not interfere with administrative decision unless it is illogical or suffers from procedural impropriety. The punishment imposed by the disciplinary authority or appellate authority shocks the conscience of the

Court/Tribunal then only the order can be interfered. Relevant paras 11, 12 and 13 of the judgment are extracted hereas under :

"11. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA) the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

12. To put it differently, unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/tribunal, there is no scope for interference. Further, to shorten litigation it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In the normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed.

13. In the case at hand the High Court did not record any reason as to how and why it found the punishment shockingly disproportionate. Even there is no discussion on this aspect. The only discernible reason was the punishment awarded in M.L. Keshwani case. As was observed by this Court in Balbir Chand v. Food Corpn. of India Ltd. (1997) 3 SCC 371 even if a co-delinquent is given lesser punishment it cannot be a ground for interference. Even such a plea was not available to be given credence as the allegations were contextually different."

21. The Court further held that a bank officer is required to exercise higher standards of honesty and integrity. He deals with money of depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer.

22. In Canara Bank vs. V.K.Awasthy (2005) 6 SCC 321, the Apex Court while dealing with scope of interference with quantum of punishment held that such interference cannot be a routine matter and held as under :

"24. Lord Greene said in 1948 in the famous Wednesbury case [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely, the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council for Civil Services Union v. Minister of Civil Service [(1984) 3 All ER 935 : 1985 AC 374 : (1984) 3 WLR 1174] (called CCSU case) summarised the principles of judicial

review of administrative action as based upon one or the other of the following viz. illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility"."

"27. In Union of India v. G. Ganayutham (1997) 7 SCC 463 this Court summed up the position relating to proportionality in paras 31 and 32, which read as follows : (SCC pp. 478-80)

"31. The current position of proportionality in administrative law in England and India can be summarised as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational — in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU [(1984) 3 All ER 935 : 1985 AC 374 : (1984) 3 WLR 1174] principles.

(3)(a) As per Bugdaycay [R. v. Secy. of State for Home Deptt., ex p Bugdaycay, 1987 AC 514 : (1987) 1 All ER 940 (HL)], Brind [(1991) 1 AC 696 : (1991) 1 All ER 720 : (1991) 2 WLR 588 (HL)] and Smith [R. v. Ministry of Defence, ex p Smith, (1996) 1 All ER 257 : 1996 QB 517 : (1996) 2 WLR 305 (CA)] as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at the decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of 'proportionality' and

assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19 and 21 etc. are involved and not for Article 14.

32. Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of 'proportionality'. There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to 'irrationality', there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in 'outrageous' defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain 'Ranjit Thakur [Ranjit Thakur v. Union of India, (1987) 4 SCC 611]." (emphasis in original)

23. In State Bank of India (supra), Apex Court had laid down the scope of interference by the Tribunal. The Court found that interference with the decision of an employer will be justified only when the findings arrived at in the inquiry are perverse or management is guilty of victimization, unfair labour practice or mala fides. It was further held that the Tribunal can only take into consideration the evidence placed before it for the first time in case no inquiry was held or after the enquiry was conducted by the employer it was found to be defective.

24. In the instant case, the Labour Tribunal had categorically recorded in para 12 of its judgment that whole inquiry proceedings held against the delinquent employee was in a fair and proper manner and the enquiry officer has rightly come to the conclusion that charges stood proved against the worker. Once such finding was recorded by the Tribunal, it had no power to proceed further to modify the punishment awarded from dismissal to that of compulsory retirement with superannuation benefits.

25. The judgment of the Tribunal is against the dictum of Apex Court not only in case of State Bank of India (supra) but also in other catena of judgments. Reliance placed upon decision of disciplinary authority awarding punishment to Surendra Kumar cannot be taken into consideration in the instant case while modifying the punishment since the charges against both the delinquent employees are different. Moreover, ten serious charges have been levelled against respondent No.2, while only one charge was against Surendra Kumar. The parity drawn by the Tribunal cannot be justified at any cost. The Tribunal sailed beyond its power vested under Section 11A of the Act of 1947.

26. The comparison drawn by the Tribunal cannot be accepted looking to the gravity of charges levelled against the two delinquent employees of the Bank. The wisdom of the disciplinary action of the bank cannot be questioned as the charges are different. Respondent No.2 was responsible for opening the two accounts one being current account No.176 of M/s Rajesh & Company and the second account in the name of Rajesh Kishore being HSS Account No.3825, while Surendra Kumar had only cleared the cheques without tallying the signature. The misconduct on the part of respondent No.2 was greater having caused loss to the bank.

27. The Apex Court in case of P.C.Kakkar (supra) held that a bank officer is required to exercise higher standard of honesty and integrity. The parity drawn by the Tribunal does not come under the category that

punishment awarded was shockingly disproportionate to the offence which required the interference by the Tribunal under Section 11A of Act of 1947.
28. Thus, I find that the Tribunal was not justified in modifying the punishment awarded by the disciplinary authority having been confirmed by the Appellate Authority as well as by the Division Bench of this Court in Special Appeal No.251 of 2006 from that of dismissal to compulsory retirement with superannuation benefits.
29. Considering the facts and circumstances of this case, I find that the impugned award dated 22.08.2016 published on 05.09.2016 is unsustainable in the eyes of law and the same is hereby set aside. The order passed by disciplinary authority dismissing respondent No.2 from services stands confirmed.
30. The writ petition succeeds and is hereby allowed.

(2024) 3 ILRA 1943
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.03.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ -C No. 9403 of 2023

Ritesh Agrawal ...Petitioner
Versus
Commissioner, Devi Patan Mandal, Gonda & Ors. ...Respondents

Counsel for the Petitioner:
Rajeev Kumar Singh

Counsel for the Respondent:
C.S.C., Raj Mishra, Pankaj Gupta, Ratnesh Singh, Shivam Srivastava

Civil Law - Constitution of India,1950-Article 226-U.P.Revenue Code,2006-Section 210,116-The petitioner challenged the order dated 24.08.2023 passed by commissioner which set aside the SDM's status quo order dated 4.08.2023 in a property division dispute-Held, the SDM's status quo order qualifies as an injunction order, making an appeal u/s 207 appropriate rather than a revision u/s 210-The comissioner's order is set aside.(Para 1 to 30)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Jean Marc Nken, petitioner Vs Eric H. Holder, Jr., Attorney General(2009)556 U.S 418

2. Weinberger Vs Romero-Barcelo(1982) 456 U.S 305 (1982)

3. Chamundi Mopeds Ltd Vs Church of South India Trust MANU/SC/0501/1992: JT 1992 (3) SC 98

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioner, Shri Dharm Raj Mishra and Shri Ratnesh Singh, learned counsel for the respondents and Shri Hemant Kumar Pandey, learned State Counsel.

2. By means of the present petition, the petitioner has assailed the order dated 24.08.2023 passed by respondent No.1-Commissioner, Devi Patan Mandal, District-Gonda in the Revision instituted under Section 210 of U.P. Revenue Code, 2006 (in short "Code of 2006"), registered as Case No.1201 of 2023, (Rahul Agrawal vs. Ritesh Agrawal).

3. The brief facts are to the effect that in a Case No. 5244 of 2023 (Ritesh Kumar vs. Rahul Agrawal& Others), Computerized Case No. 20230815050244, instituted under Section 116 of the Code of

2006, the revenue court of first instance, namely, Sub-Divisional Magistrate, Payagpur, District-Bahraich (in short "S.D.M.") passed the order dated 04.08.2023, whereby the authority concerned directed the parties to maintain status-quo. The order dated 04.08.2023 being relevant on reproduction reads as under:-

"पत्रावली प्रस्तुत। वादी रितेश कुमार पुत्र महावीर द्वारा उ०प्र० राजस्व संहिता 2006 की धारा 116 के तहत न्यायालय उपजिलाधिकारी पयागपुर जनपद-बहराइच पर बटवारें का वाद दायर किया गया है। इनके द्वारा स्थगन प्रार्थना पत्र भी दिया गया है। वादी रितेश कुमार पुत्र महावीर द्वारा स्थगन प्रार्थना पत्र में कहा गया है कि प्रार्थी आराजी नं० खाता सं० 829 की गाटा सं० 1086/0.020 हे०, 1079मि०/0.005 हे०, 1085/0.0056 हे०, 1084/0.057 हे० व खाता सं० 790 की गाटा सं० 1087/0.304 हे० व खाता सं० 788 की गाटा सं०1079मि०/0.005 हे० व खाता सं० 1189 की गाटा सं० 1079 मि०/0.009 हे० का सहसंक्रमणीय भूमिधर काश्तकार हैं तथा गाटा सं० 1079 का कुल रकबा 0.019 हे० है। जिसमें विपक्षी नं 1 राहुल अग्रवाल जो एक सरकस व जबरदस्त किस्म के व्यक्ति है। वे अपनी सरकसी के बिना पर प्रश्नगत वादग्रस्त भूमि में प्रार्थी/वादी के अंश की भूमि पर बिना विधिक विभाजन के जबरिया कब्जा करके प्रार्थी को कब्जे से बेदखल कर देना चाहते है तथा निर्माण कर लेना चाहते है। जिसके लिए वे ईट, बालू इत्यादि निर्माण सामग्री का इन्तजाम कर रखे है। प्रार्थी के मना करने पर आमादा फौजदारी होते है। यदि वे अपने मकसद मे कामयाब हो गये तो प्रार्थी/वादी की अपूर्णनीय क्षति होगी। हमेशा के लिए कब्जे से बेदखल हो जायेगा। जिसकी भरपाई भविष्य में हो पाना सम्भव न होगा। अन्त में इनके द्वारा कहा गया है कि दौरान विभाजन वाद विपक्षी नं०1 राहुल अग्रवाल को मना किया जावें कि जबतक विभाजन वाद का निस्तारण नही होता है, तबतक वे प्रार्थी/वादी को जबरिया प्रश्नगत वादीय भूमि उपरोक्त से कब्जे से बेदखल न करे तथा जबरिया निर्माण न करे और मौके की यथास्थित बनाये रखे।

न्यायालय पर० उ०प्र० राजस्व संहिता 2006 की धारा 116 के अन्तर्गत बंटवारे का वाद विचाराधीन है। न्यायहित में ग्राम रूकनापुर स्थित भूमि का गाटा सं० 1086/0.020हे०, 1085/0.0056हे०, 1084/0.057हे० व गाटा सं० 1087/0.304हे० व गाटा सं०1079मि०/0.005 हे०, 1079मि०/0.005 हे० व 1079मि०/0.009 हे० गाटा सं० 1079 कुल क्षेत्रफल 0.019 हे० पर न्यायालय में वाद विचाराधीन रहते उभय पक्षों को निर्देशित किया जाता है कि मौके पर यथास्थित बनाये रखें। पत्रावली दिनांक 01.09.2023 को पेश हो।"

4. Being dissatisfied/aggrieved by the order of status-quo dated 04.08.2023 passed by the S.D.M., the revision was preferred and the revisional authority namely, respondent No.1 after giving opportunity of hearing to the parties concerned, allowed the revision and interfered in the order dated 04.08.2023 passed by S.D.M. The relevant portion of the impugned order dated 24.08.2023 reads as under:-

"मैंने निगरानी की ग्राह्यता के स्तर पर उभयपक्षों द्वारा प्रस्तुत तर्कों एवं निगरानी पत्रावली पर उपलब्ध अभिलेखों का गहनतापूर्वक परीक्षण किया। प्रश्नगत आदेश के अवलोकन से यह स्पष्ट है कि अवर न्यायालय में उ०प्र० राजस्व संहिता की धारा-116 के अंतर्गत बामुकदमा रितेश कुमार बनाम राहुल अग्रवाल के वाद में रितेश कुमार पुत्र महावीर द्वारा उ०प्र० राजस्व संहिता की धारा 116 के अंतर्गत बंटवारे का वाद दायर किया गया था, जिसमें इनके द्वारा स्थगन प्रार्थना-पत्र भी दिया गया था। वादी रितेश कुमार ने अपने स्थगन प्रार्थना-पत्र में कहा गया कि प्रार्थी आराजी नं० खाता सं० 829 की गाटा सं0 1086/0.020 हे0, 1079मि0/0.005 हे0, 1085/0.0056हे0, 1084/0.0570 व खाता सं0 790 की गाटा सं0 1087/0.304हे० खाता सं0 788 की गाटा सं0 1079मि0/0.005 हे0 व खाता सं0 1189 की गाटा सं0 1079मि/0.009 हे० का सहसंक्रमणीय भूमिधर काश्तकार है तथा गाटा सं0 1079 का कुल रकबा 0.019 हे0 है, जिसमें विपक्षी नं० 1 राहुल अग्रवाल जो एक सरकस व जबरदस्त किस्म के व्यक्ति हैं। वे अपनी सरकसी के बिना पर प्रश्नगत वादग्रस्त भूमि में वादी के अंश की भूमि पर बिना विधिक विभाजन के जबरिया कब्जा करके प्रार्थी के कब्जे से बेदखल कर देना चाहते हैं तथा निर्माण कर लेना चाहते हैं, जिसके लिए वे ईट, बालू, इत्यादि निर्माण सामग्री का इंतजाम कर रखे है। प्रार्थी के मना करने पर आमादा फौजदारी होते है। यदि वे अपने मकसद में कामयाब हो गये तो वादी की

अपूर्णनीय क्षति होगी। हमेशा के लिए कब्जे से बेदखल हो जायेगा, जिसकी भरपाई भविष्य में हो पाना सम्भव न होगा। अन्त में कहा गया कि दौरान विभाजन वाद विपक्षी नं० 1 राहुल अग्रवाल को मना किया जावे कि जबतक विभाजन वाद का निस्तारण नहीं होता है तबतक वे वादी को जबरिया प्रश्नगत वादीय भूमि उपरोक्त से कब्जे से बेदखपल न करे तथा जबरिया निर्माण न करें और मौके पर यथास्थिति बनाये रखें। इस पर अवर न्यायालय ने प्रश्नगत आदेश दिनांक 04.08.2023 द्वारा विवादित भूमि पर उभयपक्षों को यथास्थिति बनाये रखने का आदेश पारित करते हुए पत्रावली अग्रिम तिथि नियत की गयी है, जिसके विरूद्व निगरानी आयुक्त न्यायालय में योजित की गयी है।

उभयपक्षों के तर्कों को सुनने एवं निगरानी पत्रावली पर उपलब्ध अभिलेखों के अवलोकनोपरान्त यह स्पष्ट होता है कि अवर न्यायालय ने प्रश्नगत आदेश पारित करने से पूर्व निगरानीकर्ता को साक्ष्य एवं सुनवाई का समुचित अवसर नहीं प्रदान किया गया है, जिस कारण प्रश्नगत आदेश प्राकृतिक न्याय सिद्धान्त के विपरीत होने के कारण निरस्त होने योग्य है। अतः निगरानीकर्ता के तर्क में बल है इसलिए निगरानीकर्ता द्वारा प्रस्तुत निगरानी स्वीकार किये जाने योग्य है।

अतः उपरोक्त के परिप्रेक्ष्य में प्रस्तुत निगरानी स्वीकार करते हुए अवर न्यायालय द्वारा पारित आदेश दिनांक 04.08.2023 निरस्त किया जाता है तथा पत्रावली अवर न्यायालय को इस निर्देश के साथ प्रतिप्रेषित की जाती है कि वह प्रश्नगत वाद में उभयपक्षों को साक्ष्य सुनवाई का समुचित अवसर प्रदान करते हुए वाद का स्पीकिंग आदेश द्वारा अंतिम निस्तारण दो माह के भीतर सुनिश्चित करें। उक्त आदेश की प्रति सम्बन्धित न्यायालय को भेजी जाय। इस न्यायालय की पत्रावली दाखिल दफतर हो।"

5. The main ground which has been taken for interfering in the order dated 04.08.2023 is based upon the provisions indicated in the Code of 2006 i.e. Section 207 and Section 209 of the Code of 2006.

6. Impeaching the impugned order dated 24.08.2023 passed by respondent No.1, learned counsel for the petitioner submitted that in view of Section 207 particularly Sub-Section 2 (b) and (c), the appeal was maintainable against the order dated 04.08.2023 whereby the parties were directed to maintain 'status-quo', and the revision under Section 210 of the Code of 2006 was not maintainable and being so in entertaining and allowing the revision, the respondent No.1 committed material illegality.

7. In continuation, he also stated that an order directing the parties to maintain 'status-quo' would fall under Order 39 Rule 1 and 2 of C.P.C. and as such in view of Section 207, which indicates that an appeal shall lie against an order of the nature specified under Order 43 Rule 1 of the First Schedule to the said Code namely Code of Civil Procedure, 1908 (in short 'C.P.C.'), the appeal was maintainable and not the revision. In this regard, a reference has been made to the Order 43 of C.P.C.

8. He further submitted that the expression 'Stay' under Sub-Section 209(d) is relevant. There is a difference between expression 'Injunction' and 'Stay'. As per settled principle of law, an 'Injunction' order would relate to party or parties, as the case may be, to the case/suit and 'Stay' order relates to the Court/Authority concerned. Accordingly, Section 209 would not be available to the side opposite to say that revision was maintainable.

9. Per contra, Shri D.R. Mishra, based upon Section 209 (d) and 209 (h) submitted that the interim order i.e. order dated 04.08.2023 was an ex-parte order, as such, in view of the Sub-Section (h) read with Sub-Section (d) of Section 209, the revision was maintainable. As such, no interference in the matter is required. Prayer is to dismissed the petition.

10. Considered the submissions made by the learned counsel for the parties and perused the record.

11. For the purposes of disposal of the present petition, this Court finds it appropriate to reproduce Section 207, Section 209 as also Section 210 of the Code of 2006.

12. Section 207 of the Code of 2006 reads as under:-

"First appeal.-(1) Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in Column 2 of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in Column 5, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.

(2) A first appeal shall also lie against an order of the nature specified-

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) in Order XLIII Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against."

13. Section 209 of the Code of 2006 reads as under:-

"209. Bar against certain appeals.- Notwithstanding anything contained in sections 207 and 208, no appeal shall lie against any order or decree-

(a) made under Chapter XI of this Code;

(b) granting or rejecting an application for condonation of delay under section 5 of Limitation Act,

1963;

(c) rejecting an application for revision;

(d) granting or rejecting an application for stay;

(e) remanding the case to any subordinate Court;

(f) where such order or decree is of an interim nature;

(g) passed by Court or officer with the consent of parties; or

(h) where has been passed ex-parte or by default:

Provided that any party aggrieved by order passed ex-parte or by default, may move application for setting aside such order within a period of thirty days from the date of the order;

Provided further that no such order shall be reversed or altered without previously summoning the party in whose favour order has been passed to appear and be heard in support of it."

4. Section 210 of the Code of 2006 reads as under:-

"Power to call for the records.-(1) The Board or the Commissioner may call for the record of any suit or proceeding decided by any sub-ordinate Revenue Court in which no appeal lies, for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding, and if such subordinate Court appears to have-

(a) exercised a jurisdiction not vested in it by law: or

(b) failed to exercise a jurisdiction so vested: or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity: the Board, or the Commissioner, as the case may be, may pass such order in the case as it or he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner, no further application by the same person shall be entertained by the other of them.

Explanation- For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.]

(3) No application under this section shall be entertained after the expiry of a period of [sixty days] from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later."

15. A perusal of the Section 207 of the Code of 2006 indicates that an appeal would lie against an order of the nature specified in Section 104 and also against an order of the nature specified in Order 43 Rule 1 of the First Schedule to the C.P.C. and these provisions are relevant for coming to the conclusion on the issues involved and as such, the same are being extracted hereinunder:-

"Section104. Orders from which appeal lies-

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:---

*1 * * * * * 2*

[(ff) an order under section 35A;

3[(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;

(g) an order under section 95

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree

(i) any order made under rules from which an appeal is expressly allowed by rules

2[Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section."

"FIRST SCHEDULE
ORDER XLIII
Appeals From Order

1. Appeal from orders*-An appeal shall lie from the following orders under the provisions*

of Section 104, namely :--

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court [except where the procedure specified in Rule 10-A of Order VII has been followed] ;

(b) [***]

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte ;

(e) [***]

(f) an order under Rule 21 of Order XI ;

(g) [***]

(h) [***]

(i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a

sale ;

[(ja) an order rejecting an application made under sub- rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable;]

(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;

(l) an order under Rule 10 of Order XXII giving or refusing to give leave ;

(m) [***]

(n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

[(na) an order under Rule 5 or Rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent person ;]

(o) [***]

(p) orders in interpleader-suits under Rule 3, Rule 4 or Rule 6 of Order XXXV;

(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII ;

*(r**) an order under Rule 1**, Rule 2, [Rule 2-A], Rule 4 or Rule **10 of Order XXXIX**;*

(s) an order under Rule 1 or Rule 4 of Order XL

(t) an order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to rehear, an appeal;

(u) an order under Rule 23 [or Rule 23-A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;

(v) [***]

(w) an order under Rule 4 of Order XLVII granting an application for review."

16. The power to grant interim order or temporary injunction is provided under Order 39 of C.P.C. Under this Order, the Court can grant the interim order/injunction and the Court can also grant an ex-parte interim order/temporary injunction and an order for injunction can be discharged, varied or set aside by the Court. Refereable Rules are Rule 1, Rule 2, Rule 3 and Rule 4 of Order 39 of C.P.C. The Court under this Order can also punish for disobedience/breach of injunction as appears from Rule 2A.

17. A conjoint reading of Order 43 Rule 1(r) and referred Rules of Order 39 of C.P.C., indicates that the order passed under Rule 1, Rule 2, Rule 3 and Rule 4 of Order 39 of C.P.C. is appellable.

18. An appeal against an order granting or rejecting an application for stay would therefore be barred notwithstanding anything contained under Sections 207 and 208. It is for the reason that Section 209 provides that certain orders or decrees are not appealable, and clause (d) thereof refers to an order granting or rejecting an application for a stay.

19. Thus, the question now for consideration is as to whether an order granting or refusing to grant a temporary injunction can be held to be an order granting or rejecting an application for stay so as to attract the bar under Section 209 and to hold such order to be non-appealable.

20. The question with regard to the effect of a stay order and its distinction from an order of injunction fell for consideration in the case of **Mulraj vs. Murti Raghonathji Maharaj; AIR 1967 SC 1386**, wherein, it was held that an order of 'Injunction' is generally issued to a party by which it is forbidden from doing certain acts whereas a 'Stay' order is addressed to a court which prohibits it from proceeding further. The distinction between a 'Stay' order and an order of 'Injunction' was drawn by observing as follows:-

"8...In effect therefore a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts. It is well settled that in such a case the party must have knowledge of the injunction order before it could be penalised for disobeying it. Further it is equally well settled that the injunction order not being addressed to the court, if the court proceeds in contravention of the injunction order, the proceedings are not a nullity. In the case of a stay order, as it is addressed to the court and prohibits it from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. That in our opinion is the only difference between an order of injunction to a party and an order of stay to a court. In both cases knowledge of the party concerned or of the court is necessary before the prohibition takes effect. Take the case where a stay order has been passed but it is never brought to the notice of the court, and the court carries on proceedings ignorance thereof. It can hardly be said that the court has lost jurisdiction because of some order of which has no knowledge.....

9. It is argued that this view would introduce uncertainty inasmuch as proceedings may go on and it may take sometime — whether long or short — for the stay order to reach the court. There is in our opinion no question of uncertainty, even if we hold that the stay order must come to the knowledge of the court to which it is addressed before it takes effect. The court may receive knowledge either on receipt of an order of stay from the Court that passed it or through one party or the other supported by an affidavit or in any other way. There is in our opinion no uncertainty by reason of the fact that the court to which the stay order is addressed must have knowledge of it before it takes effect for it can always be proved that the court to which the stay order was addressed had knowledge of it and that is not a matter which should really create any difficulty or uncertainty. Once it is clear that a stay order is in the nature of a prohibitory order, knowledge of it by the court which is prohibited is essential before the court is deprived of the power to carry on the proceedings. As was pointed out in Bassesswari Chowdhurany case [(1896-97) 1 CWN 226] "the appellate court has nothing to do with the execution of the decree; the execution proceeds under the direction of the court which made the decree and it has full authority to execute it. An order of stay does not undo anything which has been done; its utmost affect is to stop further action in the direction of execution, but it would only have that effect when it reached the court or person whose duty it was to obey it".

10. As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the court to which it is addressed has

knowledge of it, it cannot deprive that court of the jurisdiction to proceed with the execution before it. But there is one difference between an order of injunction and an order of stay arising out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the court. As the stay order is addressed to the court as soon as the court has knowledge of it, it must stay its hand; if it does not do so, it acts illegally. Therefore, in the case of a stay order as opposed to an order of injunction, as soon as the court has knowledge of it, it must stay its hand and further proceedings are illegal; but so long as the court has no knowledge of the stay order it does not lose the jurisdiction to deal with the execution which it has under the Code of Civil Procedure."

(emphasis supplied)

21. The difference between an order of 'Injunction' and an order of 'Stay' can also be taken note of from the decision of United States' Supreme Court in **Jean Marc Nken, petitioner Vs. Eric H. Holder, Jr., Attorney General; 556 U.S. 418 (2009)**, wherein, after considering the judgment passed in the case of **Weinberger vs. Romero-Barcelo, 456 U.S. 305 (1982);** it was held that a 'Stay' and an 'Injunction' were not synonymous since an 'Injunction' refers to an order requiring a person to act or refrain from acting and a 'Stay' is a temporary suspension of legal proceedings. It was observed as follows:-

"An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. When a court employs "the extraordinary remedy of injunction," Weinberger v. Romero-Barcelo, it directs the conduct of a party, and does so with the backing of its full coercive powers."

22. Thus, an order of 'Injunction' and an order of 'Stay' are different. An 'Injunction' order is usually passed against a party and operates in personam while a 'Stay' order is addressed to the Court and as such 'Stay' order operates upon the judicial proceedings.

23. In **Chamundi Mopeds Ltd. vs. Church of South India Trust; MANU/SC/0501/1992: JT 1992 (3) SC 98**, the Hon'ble Apex Court has explained the effect of the interim order in the following words:-

"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay or operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and it does not mean that the said order has been wiped out from the existence."

24. In the instant case, in the application seeking interim relief filed in a suit for division of holdings instituted under Section 116 of the Code of 2006, the petitioner herein sought the following prayer:-

"अतः निवेदन है कि दौरान विभाजन वाद विपक्षी नं0–1 राहुल अग्रवाल को मना किया जावे कि जब तक विभाजन वाद का निस्तारण नहीं होता है तब

तक वे प्रार्थी/वादी को जबरिया प्रश्नगत वादीय भूमि उपरोक्त से कब्जे से बेदखल न करें, तथा जबरिया निर्माण न करें और मौके की यथास्थित बनाये रखे। जिससे प्राथी को उचित न्याय मिल सके, कृपा होगी।"

25. The effect of the prayer, quoted above, sought in the application seeking interim relief is to maintaining status-quo till the disposal of the suit filed under Section 116 of the Code of 2006.

26. As per the averments made in the application the defendant/Rahul Agarwal in the suit was adamant to forcibly dispossess the petitioner from the property in question and to raise construction over the same, and in view thereof an order directing status-quo was required.

27. The prayer sought in the application seeking interim relief, quoted above, also indicates that the same is not for grant of a stay order to any court or authority. The order dated 04.08.2023 passed on the application seeking interim relief preferred by the petitioner indicates that the parties to the proceedings were directed to maintain status-quo. The operative portion of the order dated 04.08.2023 reads as under:-

"न्यायालय पर० उ०प्र० राजस्व संहिता 2006 की धारा 116 के अन्तर्गत बंटवारे का वाद विचाराधीन है। न्यायहित में ग्राम रूकनापुर स्थित भूमि की गाटा सं० 1086/0.020हे०, 1085/0.0056 हे०, 1084/0.057हे0 व गाटा सं0 1087/0.304 हे0 व गाटा सं० 1079 मि0 / 0.005हे0, 1079मि० / 0.005 हे0 व 1079मि0 / 0.009हे० गाटा संख्या 1079 कुल क्षेत्रफल 0.019हे0 पर न्यायालय में वाद विचाराधीन रहते उभय पक्षों को निर्देशित किया जाता है कि मौके पर यथास्थित बनाये रखें। पत्रावली दिनांक 01.09.2023 को पेश हो।"

27. It would be apt to indicate that a prayer to direct the parties to maintain status-quo during the pendency of the suit is an injunctive relief.

28. In the instant case, the interim order directing the parties to the proceedings to maintain status-quo was passed ex-parte on 04.08.2023 and, as such, the order dated 04.08.2023 would fall under Rule(s) 1 & 2 of Order 39 of C.P.C. Thus, to the view of this Court, the appeal under Section 207 of the Code of 2006 would lie against the order dated 04.08.2023 and being so challenging the order dated 04.08.2023 the revision filed under Section 210 of the Code of 2006 was not maintainable.

29. Accordingly, for the reasons aforesaid, the impugned order dated 24.08.2023 passed in Revision No. 1201 of 2023, Computerized Case No.C202308000001201 (Rahul Agarwal vs. Ritesh Agarwal) by the respondent No.1-Commissioner, Devi Patan Mandal, Gonda, is hereby set aside.

30. The petition is ***allowed***. No order as to costs.

(2024) 3 ILRA 1951
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.03.2024

BEFORE

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

Writ-C No. 11080 of 2023

Ajmat Ullah Ansari & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioners:

Dadu Ram Shukla (D.R. Shukla), Krishna Kumar Tiwari, Manoj Kumar Singh

Counsel for the Opp. Parties:
C.S.C., Rohit Tripathi

Civil Law - Constitution of India,1950-Article 226-The petitioner challenged the Assistant District Election Officer order for release of sum of Rs. 6,60,200/-the petitioners are doing money transfer service through net banking as a sub-agent under the authority given by RBI-The police officers seized the the said amount which was to be disbursed to 36 persons-list of 36 persons were provided by the petitioners but the respondents have not placed any documents or evidence which suggest that the seized cash was to be used in the process of panchayat election illegally-More so, the though cash was seized but surprisingly in that regard no FIR has been lodged nor following the statutory provisions of section 102 of CrPC, hence the court found that there is fault with the police officers and declare the action bad-Respondent no.3 is directed to release the seized cash to the petitioners.(Para 1 to 22)

The writ petition is allowed. .(E-6)

List of cases cited:

1. **Chandra** Kishor Jha Vs Mahavir Prasad & ors. (1999) 8 SCC 266

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

(1) The challenge in the present writ petition under Article 226 of the Constitution of India is the order dated 11th July, 2023 passed by the Assistant District Election Officer, District Office (Panchayat and Nagariya Nikay), Gonda (respondent no.3), whereby representation dated 06.06.2023 preferred by the petitioners for release of sum of Rs.6,60,200/-, which was seized during the Three-tier Panchayat General Election, 2021 from Vehicle No. UP-32-FP-4674 (Eco Sport Ford) belonging to the petitioners on 01.04.2021, has been rejected.

(2) In nutshell, the facts of the case are that petitioners are the real brothers. Petitioner No.1-Ajmat Ullah Ansari, who is the sub-agent of Instant Global Money Transfer Private Limited, bearing license No. F.E.C.G.F.M.C.088/2005 dated 30.09.2005 M.T.S.S. License No. E.C.C.O. E.P.D./995/22624/9899 dated 30.03.1999, deals with the transfer of money. The said license was issued on 30.04.2005 and continued till 31.05.2018 and the same was renewed from time to time under the condition stipulated by the Reserve bank of India. On 10.10.2018, the name of the company was changed and renewed upto 31.06.2021 and thereafter it has again been renewed till 31.06.2024.

(3) It is the case of the petitioners that during the last phase of March, 2021 for five days, bank was closed. The petitioners had to deliver a sum of Rs.7,57,340/- to 36 account holders, details of such persons have been enclosed as Annexure No.4 to the writ petition. For this purpose, the petitioner no.1 had transferred a sum of Rs.6,00,000/- from HDFC Bank Account No. 50200006369820 (IFSC Code No. HDFC003765) through his colleague, namely, Shahid, who runs National Mobile Travels Agency Jamunia Bagh, Gonda and the said money was transferred to Account No.051505500857 to Branch Gonda. According to the petitioners, on 01.04.2021, after withdrawing the said amount, they were going to deliver the same to 36 persons from their Vehicle No. UP-32-FP-4674 (Eco Sport Ford). In the way, local police of Police Station Dhanepur, District Gonda had intercepted

them and found a bag containing said amount of Rs.6,60,200/-. Immediately thereafter, the petitioners had produced the documentary evidence before the police, but the local police was not satisfied with the documentary evidence and as such, the bag containing the aforesaid amount was seized. Thereafter, as per report of Station Officer of Police Station Dhanepur, Gonda, the aforesaid amount was deposited in Government Treasury with sealed pack at serial No.730 dated 03.04.2021. Thereafter, on 06.06.2023, they preferred a representation to the District Election Officer (Panchayat and Nagariya), Gonda, which was rejected vide order dated 11.07.2023. It is this order dated 11.07.2023, which has been challenged in the instant writ petition.

(4) Heard Shri Dadu Ram Shukla, learned Counsel representing the petitioners, learned Standing Counsel representing the State/respondents no.1, 2, 5, 6 and 7 and Shri Rohit Shukla, learned Counsel representing the respondents no.3 and 4.

(5) Learned Counsel representing the petitioners has submitted that vide Master Circular No. 14/2011-12 (updated as on March 22, 2012) dated 01.07.2011, the Reserve Bank of India has issued Master Circular on Money Transfer Service Scheme (hereinafter referred to as **'MTSS'**). As per clause 3 of the aforesaid Circular, this Circular would stand withdrawn on July 1, 2012 and will be replaced by an updated Master Circular on the subject. The guidelines was issued in two parts i.e. Part-A and Part-B. Under Part-A, Section-I deals with Guidelines for Permitting Indian Agents and MTSS, whereas Section II deals with guidelines for overseas Principals and Section III deals with Guidelines for appointment of Sub-Agents by Indian Agents, which is relevant and reads as under :-

"**Section III**

Guidelines for appointment of Sub-Agents by Indian Agents

The Indian Agent may appoint Sub-Agents who have place of business and a minimum net worth of Rs.5 lakh. The Sub-Agents should operate through the Indian Agents and should not deal directly with the Overseas Principal. The Sub-Agents should act on the payment instructions issued by the Indian Agents. The Indian Agents are fuly responsible for the activities of their Sub-agents. While the Indian Agents will be encouraged to act as self-regulated entities, the onus of ensuring the proper conduct of activities of the Sub-agents in the prescribed manner will lie solely on the Indian Agents. Every Indian Agent would be required to conduct due diligence before appointing a Sub-agent and any irregularity observed could render the Indian Agent's permission liable for cancellation."

(6) Learned Counsel for the petitioners has further submitted that by means a Circular No. RBI/FED/2016-17/52 dated 22.02.2017, Chief General Manager-in-Charge of the Reserve Bank of India has notified Master direction-Money Transfer Service Scheme (MTSS), giving therein a vivid description as regards the manner in which relates transaction are to be conducted by the authorized persons with their customers/constituents. According to the learned Counsel, the aforesaid Master Direction-Money Transfer Service Scheme has also been issued describing statutory basis and authroized dealer has also been defined including as to who would be treated full fledged money changer at point

no. 2.3, whereas at point no. 2.4, there is a definition clause of overseas principal and thereafter guidelines for Indian Agents and Guidelines for appointment of Sub-Agents by Indian Agents has also been issued comprehensively. In this backdrop, learned Counsel has submitted that the petitioners were well within their rights and they were fully authorized as per guidelines of Reserve Bank of India. The authorized Indian Agent entered into an agreement as permitted by the Reserve Bank of India with the petitioners and the petitioners at the strength of the said agreement were carrying out their business.

(7) Elaborating his submission, learned Counsel for the petitioners has submitted that after due inquiry, the police report has been submitted by the S.H.O., Police Station Dhanepur, Gonda dated 20.05.2021 to the District Magistrate Gonda (Annexure no.3), recommending that the seized amount of Rs.6,60,200/- is liable to be refunded to the petitioners. Even thereafter, the said amount has not been released to the petitioners nor the provisions of Section 102 of the Code of Criminal Procedure, which deals with the power of the police officer to seize certain property has been followed nor any F.I.R. in this regard was lodged. Thus, he prays that impugned order is liable to be quashed and the petitioners are entitled for refund of the said seized amount.

(8) Per contra, learned Counsel representing the respondents no. 3 and 4 has submitted that the State Election Commission had notified the Three-Tier Panchayat General Election, 2021 vide notification no. 709 dated 26.03.2021 and this notification remained in operation till 02/03.05.2021. In order to enforce the model code of conduct, a general search operation was carried on 01.04.2021 and during the said general search operation, a vehicle bearing registration no. UP-32-FP-4674 was intercepted, whereupon it was found that vehicle was driven by petitioner no.2 and cash amounting to Rs.6,60,2000/- was also in the said vehicle and on query, as no satisfactory explanation was given by the petitioner no.2 regarding possession of substantial amount of cash nor any document was presented by the petitioner no.2, the said cash amount was seized and deposited in the district treasury vide application dated 03.04.2021. Thereafter, the petitioner no.1 submitted an application for release of money, to which a report was called from the three member Committee constituted by the District Election Officer/District Magistrate, Gonda vide letter dated 28.05.2021. On receipt of the said letter, the Chairman of the three member Committee i.e. Sub-Divisional Officer issue a letter/notice dated 29.05.2021, requiring the petitioners to submit relevant documents on six points mentioned in the letter. In response thereof, the petitioners had submitted his reply, stating that petitioner no.2 was carrying out a business of Net Banking and that from 29.03.2021 to 01.04.2021, he had to pay an amount of Rs.07,57,340/- to 36 persons, however, as the bank was closed for five days, he had transferred Rs.6,00,000/- to one of his friend carrying out net-banking business and that the case seized from him was meant for disbursing the money to those 36 persons. According to the learned Counsel, the Officer-in-Charge, P.S. Dhanepur had also reported vide letter dated 14.10.2022 that the petitioners had not cooperated in the enquiry and that he had not submitted any evidence in support of his application. Based on this report, the three Member Committee formed an opinion that it could not be said that the

seized cash was not meant to be used for any illegitimate purpose in connection with the Panchayat Elections, therefore, it was recommended that it would not be proper to refund or return the seized cash to the petitioners. This recommendation was placed before the District Magistrate/District Panchayat Officer, Gonda for final disposal of the matter, upon which the District Panchayat Officer, Gonda had accepted the report of the three Member Committee on 10.07.2023 and consequently, vide letter dated 11.07.2023, informed the petitioners about rejection of his representation/application. Thus, the instant writ petition is liable to be dismissed.

(9) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before us in the instant writ petition, it is required to be noted that license for carrying out business of Net Banking by name and style of Instant Global Mani Transfer Pvt. Limited by the petitioners is not in dispute.

(10) The controversy involved in the instant writ petition has arisen due to the rejection of the application preferred by the petitioners for refund/release the seized amount i.e. Rs.6,60,200/- by means of the impugned order dated 11.07.2023.

(11) The petitioners claimed that they are carrying out business of Net Banking as Sub-Agent under the legally granted license by the Reserve Bank of India. The seized cash amount i.e. Rs.6,60,200/- was meant for disbursing the money to those 36 persons details of which have been mentioned as Annexure No. 4 to the writ petition and the Station Officer of Police Station Dhanepur, Gonda clarified that the petitioner deals with money banking transfer known as Instant Global Money Transfer Limited and is an agent and the recovery of specified amount of Rs.6,60,200/- does not contravene any provision of law and therefore recommendation was made to the District Magistrate, Gonda to release the said amount, however, no offence is reported by the police authorities in regard to seize of the said amount and in a casual and arbitrary manner, the representation of the petitioners has been deal with and has been rejected without spelling out any valid rhyme or reason reluctantly into forfeiture of the aforesaid amount.

(12) On the other hand, the stand of the respondents no.3 and 4 before this Court is that the impugned order dated 06.08.2023 has been passed on considering the report of the Three Member Committee duly constituted by the District Magistrate for smooth functioning of the Panchayat Election and the petitioners have failed to show that the seized cash amount was not meant to be used for any illegitimate purpose in connection with the Panchayat Election, hence the application of the petitioners have rightly been rejected by means of the impugned order.

(13) Before analyzing the contentions of the learned Counsel for the parties, we deem it apt to mention herein that in the case of **Chandra Kishor Jha vs. Mahavir Prasad and Ors**. : (1999) 8 SCC 266, the Apex Court has emphasized that it is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.

(14) Therefore, if the salutary principle is kept in perspective, in the

instant case, though the police authorities are vested with sufficient power; such power is circumscribed by a procedure laid down under the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law.

(15) Section 102 Cr.P.C reads as follows :-

"102. Power of police officer to seize certain property.-

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

[(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, 2[or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation,] he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:]

[Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]

(16) The reading of sub-section (1) of Section 102 makes it clear that the police officer may seize any property alleged or suspected to have been stolen or or which may be found under circumstances, which create suspicion of commission of any offence.

(17) In the instant case, what we find is that the police officers though seized the cash amount from the vehicle of the petitioners on the allegation that the said cash amount has to be used for Panchayat Election but surprisingly in that regard no F.I.R. has been registered nor following the statutory provisions of Section 102 of Criminal Procedure Code, hence we find that there is fault with the Police Officer and declare the action bad only in so far as not following the legal requirement before and after seizure of the cash amount of Rs. 6,60,200/- from the possession of the petitioners, however, this shall not be construed as an opinion expressed on the merit of the allegation or any other aspect relating to the matter and the action initiated against the petitioners, which is a matter to be taken note in appropriate proceedings if at all any issue is raised by the aggrieved party.

(18) It is also apparent from Annexure No.3, which is a report of the Station Officer, Police Station Dhanepur, Gonda, that the Station Officer, Police Station Dhanepur, Gonda, vide its report dated 20.05.2021 addressed to District

Magistrate, Gonda, after investigating the matter, recommended to release the seized cash. However, from perusal of the impugned order and the counter affidavit, there is not a whisper of word regarding the aforesaid recommendation of the Station Officer, Police Station Dhanepur, Gonda. In the counter affidavit, the respondents have admitted the fact that the petitioners are doing money transfer service through net banking as a sub-agent under the authority given by the Reserve Bank of India. There is also not denial in the counter affidavit about the fact that the petitioners were not carrying Net Banking business. The petitioners' case right from the beginning is that the cash amounting to Rs.6,60,000/- , which was seized, was to be disbursed to 36 persons and list of such persons has been enclosed in Annexure No.4 to the writ petition. This has also not been denied by the respondents in the counter affidavit.

(19) Apart from the above consideration, what has also engaged the attention of this Court is with regard to the plea put forth on behalf of the petitioners regarding the need to release the seized amount to enable the petitioners to pay the due amount as per the statutory rules. The petitioners in that regard has relied Annexure No.4 also, which is a list of 36 persons and it indicates that the amount payable towards to such persons, in all amounting to Rs.7,57,340.07. Furthermore, the respondents have not placed any document(s) or evidence, which suggest that the seized cash was to be used in the process of panchayat election illegally.

(20) Since we have indicated that the seizure of the cash amounting to Rs.6,60,200/- has been done without due compliance of law, interest of justice would be suffice, if respondents No.3-Assistant District Election Officer, District Election Office (Panchayat and Nagriya Nikay), Gonda is directed to release the seized cash to the petitioners.

(21) In terms of the above, the order dated 11.07.2023 passed by the respondent no.3 is hereby quashed. We direct that the respondents shall release the seized amount for a sum of Rs.6,60,200/- to the petitioners. However, liberty is reserved to respondent No.3 thereafter to initiate action afresh in accordance with law, if they so desire.

(22) The instant writ petition is **allowed** to the above extent with no order as to costs.

(2024) 3 ILRA 1957
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.02.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 12689 of 2017

U.P.S.R.T.C. ...Petitioner
Versus
Presiding Officer Labour Court, Fzd. & Anr. ...Opp. Parties

Counsel for the Petitioner:
Akhilesh Kumar Srivastava

Counsel for the Opp. Parties:
C.S.C., Birendra Prasad Singh

Civil Law - Constitution of India,1950-Article 226-Industrial Disputes Act,1947-Section 33(c)-The Petitioner(UP road transport corporation) preferred the writ petition challenging the order of Labour Court-Respondent no. 2 was a conductor

in the corporation, he was not given the overtime amounting to Rs. 54,965/-the petitioner did not file objections stating that all the documents had been destroyed while respondent no. 2 had filed all the documents-The labour court allowed the claim-the petitioner also challenged the order for review but was rejected-The court held that the claim is for small sum of Rs. 54,965/- for such a small amount the petitioner is litigating for the last six years having no litigation policy-The court is of the opinion that it is mandatory for all the corporations, which are running on commercial basis to have a litigation policy-The awarded amount may be paid to the respondent no.2/workman within period of six weeks.(Para 1 to 13)

The writ petition is dismissed. .(E-6)

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

1. Heard Shri Akhilesh Kumar Srivastava, learned counsel for petitioner, learned Standing Counsel for State/respondent no. 1, Shri Birendra Prasad Singh, learned counsel for respondent no. 4 and perused the material available on record.

2. The U.P. Road Transport Corporation has preferred the present writ petition assailing the validity of the order passed by the Labour Court dated 04.05.2016.

3. The brief facts of the case are that the respondent no.2 was a Conductor in the petitioner's corporation and superannuated in the year 2006. He had filed a claim before the Labour Court stating that from July, 2003 to December, 2004, he was not given the overtime amounting to Rs. 54,965/-. In the said claim, it was stated that till July, 2003 whenever he had worked for overtime, he was granted the said allowance but for his services between July, 2003 to December, 2004 despite having worked and was entitled to be paid overtime the respondents denied the payment and accordingly, moved an application under Section 33 (c) of the Industrial Disputes Act, 1947 claiming the admissible dues from the petitioner. The petitioner had appeared before the Labour Court but did not file any objections to the claim. During the proceedings, the Labour Court had directed the petitioner to produce the record pertaining to the service rendered by the workman/respondent no. 2 but despite the orders passed, no such documents were filed by the petitioner and otherwise it was submitted that all the documents had been destroyed.

4. The workman/respondent no. 2 on the other hand, had filed all the documents and registers demonstrating that from July, 2003 to December, 2004, he had worked for overtime and he was entitled for the same and considering that there was no contrary evidence or material filed by the petitioner, the Labour Court allowed the claim and directed the petitioner to pay an amount of Rs.54,965/- as the overtime admissible to the employee. The petitioner while assailing the order of the award submits that the said order is arbitrary and inasmuch as, the claim of workman does not fall within the circular dated 22.04.2003 and only when the bus had run for more than 350 kilometers in a day and more than 700 kilometers for two consecutive days, the overtime is allowed. It is stated that for two days the bus in which he was performing his duties had run for 616 kilometers. Apart from this fact, there is no other material to contest the claim of the employee. No other arguments were raised for assailing the said order.

5. I have considered the arguments and perused the record.

6. From the impugned award, it is clear that the workman had filed all the documents pertaining to his employment from July, 2003 to December, 2004 indicating that he was entitled for to be paid overtime as per the circular of the petitioner. Despite contesting the said case and appearing before Labour Court, the petitioner did not file any written submissions or any evidence to contest the claim of the workman.

7. It is in the aforesaid circumstances that after considering the aforesaid facts, the Labour Court has allowed the claim holding that the workman was entitled for the overtime claimed by him. Even if for a moment, the objections of the petitioner are considered, there was no material to indicate that for the entire period from July, 2003 to December, 2004 the bus in which he was performing the duties had not run for more than 350 kilometer in a single day and 700 kilometers for two consecutive days as no document or register was filed in support of their contention. There is no material even before this Court to hold that the findings recorded by the Labour Court are perverse and deserves interference by this Court in exercise of power under Article 226 of the Constitution of India.

8. In light of the above, the arguments raised by the petitioner are rejected.

9. The petitioner has also challenged the order dated 24.03.2017 where the application preferred by the petitioner for review of the award dated 04.05.2016 was rejected. The said review was rejected on the ground that the Labour Court does not have any power of review nor the petitioner could indicate any such prayer existing in the Industrial Disputes Act, 1947. Even before this Court the petitioner could not indicate that the Industrial Tribunal is vested with the power of review and accordingly as per the judgment of the Supreme Court in the case of ***Dr. Smt. Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur and others reported in 1987 (4) SCC 525*** has held that unless the statutory authority is vested with the power of review, it cannot exercise the said power and consequently, this Court does not find any infirmity with the order dated 24.03.2017 rejecting the review of the petitioner.

10. The other facts, which have drawn the attention of this Court that the claim in the present case is for a paltry sum of Rs.54,965/-. For such a small amount, the petitioner is litigating before this Court for the last six years. It is in the aforesaid circumstances that the petitioner was asked to respond as to whether there is any litigation policy in the corporation. Learned counsel for petitioner has fairly submitted that there is no litigation policy.

11. It is in the aforesaid circumstances, this Court is of the considered opinion that it is mandatory for all the corporations, which are running on commercial basis to have a litigation policy, which should clearly take into account the cost of litigation, and the matters which should be contested. The matters/cases, where the consequences or pecuniary liability is large then only should writ petition be filed against the statutory tribunals/authorities, they should refrain from challenging the routine orders or

where the sum involved is small/insignificant, inasmuch as, the amount involved in litigation sometimes far exceeds, then the benefit, for which the petition has been filed by the corporation.

12. In light of the above, the writ petition is dismissed. Interim order, granted earlier, is hereby discharged.

13. The awarded amount may be paid to the workman/ respondent no. 2 expeditiously say within a period of six weeks from today.

(2024) 3 ILRA 1960
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ -C No. 12727 of 2012

M/s Uttranchal Automobile (P)Ltd., Meerut ...Petitioner
Versus
Chief Controlling Revenue Auth. & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.K. Gupta, Sri Sheetla Sahai

Counsel for the Respondent:
C.S.C.

Civil Law - Constitution of India,1950-Article 226- Uttar Pradesh Stamp (Valuation of Property)Rules,1997-Rule 7(3)© The petitioner challenged additional stamp duty levied by authorities, who treated their land as non-agricultural-the petitioner claimed the land was agricultural at the time of sale, with no structures or activities besides agriculture-the authorities failed to conduct mandatory spot verification as per rule 7(3)©-comparable sales used by the authorities were not applicable as they referred to non-agricultural land nearer to highway-Held, valuation should rely on adequate material, not assumptions or surmises-Reiterated the necessity of spot inspection and evidence of the land's potential use at the time of sale-The court quashed the orders for additional stamp duty, ruling them erroneous and unsupported by evidence-Directed authorities to refund any deposited amount with 4% interest within six weeks.(Para 1 to 13)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Ajay Agarwal & ors. Vs Commr Lko & ors. (2023) ADJ 561 LB

2. Ram Khelawan @ Bachcha Vs St.of U.P. & anr..(2005)2 AWC 1087

3. Raj Kumar Vs St.of U.P. & ors. (Writ-C No. 19644 of 2016

4. Smt. Pushpa Sareen Vs St. of U.P. (2015) Supreme (All) 132

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard learned counsel for the petitioner and the learned Additional Chief Standing Counsel for the State.

2. This writ petition under Article 226 of the Constitution of India has been filed assailing the order dated February 3, 2011 passed by the respondent No.2 in Stamp Case No.V-767/09-10 and the order passed in appeal dated October 17, 2011 by the respondent No.1 in Appeal No.21/2010-11.

3. The challenge in this writ petition is with regard to the additional stamp duty sought by the respondents-authorities

having treated the land in question as a non-agricultural land.

CONTENTIONS OF THE PARTIES

4. Counsel appearing on behalf of the petitioner submits that the nature of the land at time of execution of the sale deed was agricultural in nature and it was forty metres away from the highway. He has submitted that the authorities have treated the land as non-agricultural land on the basis of another sale deed of an adjacent land that is nearer to the highway. He has further submitted that no spot verification was carried out as per Rule 7(3)(c) of the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 (hereinafter referred to as "the Rules"), which according to him is mandatory as has been pronounced time and again by this Court in various judgments including **Ajay Agarwal and others v. Commissioner Lucknow and others** reported in **2023 (2) ADJ 561 (LB), and Ram Khelawan alias Bachcha v. State of U.P. and another** reported in **2005 (2) AWC 1087**. Lastly, counsel for the petitioner submitted that at the relevant point of time, the land in question was agricultural in nature and there were no structures or any activity apart from agriculture being carried out on the said land. He has relied upon the judgment of the coordinate Bench of this Court in **Raj Kumar v. State of U.P. and others** (Writ-C No.19644 of 2016 decided on April 13, 2023) and the Full Bench judgment of this Court in **Smt. Pushpa Sareen v. State of U.P**. reported in **(2015) 0 Supreme (All) 132** to support his arguments.

5. Per contra, learned Additional Chief Standing Counsel has also relied upon the judgment in **Smt. Pushpa Sareen's case (supra)** to indicate that the Collector has the power to evaluate the value of a land depending on the potential use of the said land in question. He specifically relied upon paragraph Nos.26 to 28 of the aforesaid judgement to buttress his argument. He has fairly submitted that the spot verification was not carried out as per the said Rule and no notice of the same was given to the petitioner. He, however, submits that the valuation carried out by the Collector is in line with the principles established in law and in keeping with the potential use of the land in question.

ANALYSIS AND CONCLUSION

6. The Full Bench judgment of this Court in **Smt. Pushpa Sareen's case (supra)** penned by Hon'ble D.Y. Chandrachud, C.J. (as he then was) has, in great detail, dealt with the power of Collector under Section 47-A of the Indian Stamp Act, 1899 (as applicable in the State of U.P.). The relevant paragraphs of the said judgment are provided below:

"26. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

27. Undoubtedly, the Collector is not permitted to launch upon a speculative

inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

28. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. Ambrish Tandon and another11. This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

7. Upon a perusal of the judgment in **Smt. Pushpa Sareen's case (supra)**, it is clear that the potential of the land can be assessed on the date of execution of the instrument for determination by the Collector of the true market value. However, this exercise by the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on record to come to a finding as to the potential use of the land and only thereafter assess the same on such potential use. In the event there is no material present, the Collector cannot base his valuation only on conjectures and surmises.

8. One may further look into the judgment of the coordinate Bench of this Court in **Raj Kumar's case (supra)** wherein the coordinate Bench has held that spot inspection has to be carried out in terms of Rule 7(3)(c) of the Rules. Furthermore, the Court held that burden of proof is on the State to prove that deficient stamp duty has been paid by the petitioner

and the valuation of the land in question has to be made on concrete grounds. The relevant paragraphs of **Raj Kumar's case (supra)** are delineated below:

17. Moreover, had the allegation of the State been to the effect that though the land was purchased for agricultural purposes, but its user was immediately changed and on the date of sale deed, it was being used for any other purpose like, industrial, commercial or even residential, the situation would have been different. Even in those situations, spot inspection at the relevant point of time was a necessity, but, admittedly, in the present case, no spot inspection has been carried out. Necessity of spot inspection and its mandatory nature, with reference to Rule 7 (3) (c) of the aforesaid Rules of 1997, has been reiterated, time and again by this Court in various authorities including Ajay Agarwal and others vs Commissioner Lucknow and others, reported in 2023 (2) ADJ 561 (LB), and Ram Khelawan alias Bachcha vs State of U.P. and another, reported in 2005 (2) AWC 1087.

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19. The observations/findings recorded in the orders impugned are also contrary to principles of burden of proof particularly, in a case where proceedings arise out of a fiscal statute. Once the State was proceeding to impose deficient stamp duty upon the petitioner, the entire burden lay upon the State to establish beyond reasonable doubt that the petitioner made some concealment at the time of getting the sale deed executed in his favour or that within a close proximity of dates, the user of the land in dispute was changed so as to levy additional stamp duty. Nothing to this effect has been brought on record, rather, not only the findings recorded in the orders impugned are contrary to the provisions of the Indian Stamp Act, 1899, as applicable in the State of U.P. as well as U.P. Stamp (Valuation of Property) Rules, 1997, but certainly contrary to the law consistently laid down by this Court.

9. In the present case, indubitably no spot verification was carried out as per the Rules. Such being the case, the burden of proof that rested solely on the Revenue to indicate the nature of the land and the potential use of the land was not discharged properly. Furthermore, the reasoning provided by the authorities below for valuing the land on the basis of non-agricultural cannot be sustained as the same is based on another piece of the land that was much closer to the highway and certain constructions were made on that piece of land.

10. It is to be noted that the land, which was used as the base, was not being used for any agricultural purpose while at the time of execution of the sale deed, the land in question before this Court was being used for agricultural purposes.

11. In light of the above findings, I am of the view that the authorities below have erred in law and on facts in determining the value of the land basing the same as a land for non-agricultural purposes.

12. Accordingly, the impugned orders dated February 3, 2011 and October 17, 2011 are quashed and set aside. The amount, if any, deposited by the petitioner for the deficient stamp duty, should be returned to the petitioner along with interest @ 4 per cent within six weeks from date.

13. With the above direction, the writ petition is allowed.

(2024) 3 ILRA 1964
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 13146 of 2022

M/s Tanya Marketing Pvt. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ali Jamal Khan, Smt. Mamta Singh, Sri Mukesh Chandra Gupta, Sri Shubham Prakash Gupta, Sri Rakesh Pande (Sr. Advocate)

Counsel for the Respondents:
Sri Jagannath Maurya, Sri Shiv Prakash Gupta

Civil Law - Constitution of India,1950-Article 226-U.P. Urban Planning and Development Act,1973-Sections 41(3) & 27(1)-The petitioner is engaged in the business of meat processing-his meat processing plant located on agricultural land received a conditional No Objection Certificate in 2013 from the District Magistrate Meerut-the petitioner constructed the plant without obtaining the necessary approvals or addressing objections raised by the Development Authority-The road leading to the plant did not meet the minimum 24 meter width required under bye-law 2.3.2 for industrial establishments located more than 400 meters from the main highway-The court held that the petitioner failed to comply with the legal requirements including prior approval of the map and adherence to bye laws concerning road width-the actions of the development authority and the state government found to be lawful and justified.(Para 1 to 52)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Nazir Ahmad Vs King-Fmperor AIR 1936 PC 253

2. Dhananjaya Reddy Vs St.of Kar.(2001) 4 SCC 9

3. Commr. of Income Tax, Mumbai Vs Anjum M.H. Ghaswala (2002) 1 SCC 633

4. St. of Jhar. & ors. Vs Ambay Cements & anr. (2005) 1 SCC 368,

5. Priyanka Estates International Pvt. Ltd. & ors.. Vs St. of Assam & ors., JT (2009)14 SC 654

6. Shanti Sports Club & anr..Vs U.O.I. & ors. (2009) 15 SCC 705

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Through this writ petition, a challenge has been made to the order dated 28.03.2022 passed by respondent no. 1 under Section 41(3) of U.P. Urban Planning and Development Act, 1973 (hereinafter referred as "the Act of 1973") and order dated 06.03.2021 passed by Meerut Development Authority (hereinafter referred as "the Authority") exercising power under Section 27(1) of the Act of 1973. The prayer has also been made for directing the respondent-Development Authority to remove the seal from the petitioner's firm.

2. Facts leading to the present case, are that petitioner is engaged in the business of meat processing, after obtaining license from Agriculture and Processed Food Product Export Development

Authority, Delhi (APEDA). The factory of the petitioner is situated at Khasra No. 81, 82, 70, 55A, 55B, 56A, 56B, 57, 59 and 60, Alipur, Jijwana, Hapur Road, Meerut. It is also registered under the Food Safety and Standards Authority of India (FSSAI).

3. It had sought a No Objection Certificate from District Magistrate, Meerut in the year 2013 for establishing an integrated meat processing plant and slaughtering house on the aforesaid khasra number. On 06.06.2013, conditional No Objection Certificate was granted, wherein it was provided under Clause 12 to seek permission from Development Authority in regard to construction of building. The condition further provided that permission from Pollution Control Board, Lucknow was also required before establishing the integrated meat plant.

4. The petitioner without approval of sanction of map by the Authority had constructed the plant, pursuant to which a notice dated 27.03.2017 under Section 27(1) was issued. Immediately, on 30.03.2017, the petitioner moved an application for compounding of construction of factory raised on Khasra Nos. 81 and 83. Certain objections were raised by the Authority on 12.09.2017. Since the objections were not removed, the Authority rejected the compounding application on 19.01.2018. Thereafter, petitioner again on 12.01.2019 moved another application for reconsideration of sanction of map and compounding the construction raised by him. The application was rejected on 11.02.2019 for not removing the objections. The Enforcement Officer of the Authority passed an order on 25.02.2019 to seal the premises, and on 27.04.2019, the premises was sealed.

5. Petitioner challenged both order dated 11.02.2019 and 25.02.2019 through an appeal before Commissioner, Meerut Division, Meerut. On 01.07.2019, the Commissioner directed the Authority to decide the matter afresh after making verification, but refused to interfere in the sealing order of the premises. The petitioner filed a revision under Section 41(3) before State Authority, which was decided by order dated 31.10.2019 requiring the Commissioner, Meerut Division, Meerut to decide the appeal afresh.

6. The appeal was reheard, and on 20.01.2020 the order dated 11.02.2019 was set aside and the Authority was directed to decide the matter regarding sealing of petitioner's premises. Pursuant to said order, Authority issued notice to petitioner on 15.02.2020 and on 03.07.2020 to remove the objections raised by Authority on compounding application. Simultaneously, a letter was sent on 11.09.2020 to Chief Town and Country Planner seeking instructions with regard to width of the road as provided under Para 2.3 of Building Construction and Development Bye-law, 2008. On 14.10.2020, Chief Town and Country Planner provided the guidelines. According to which, non residential and commercial area where the land is put to industrial use, the width of the road must be at least 12 meter wide whose length is 200 meter. In case length of road is between 201 and 400 meter, the width should be 18 meter, and in case of length of road from 401 meter to 1000 meter, the width should be 24 meter. While those roads whose length is more

than 1000 meter, the width should be 30 meter.

7. In the meantime, petitioner filed Writ Petition No. 14410 of 2020, wherein an interim order was passed on 17.12.2020 and sealing order was stayed. The Authority complying the order passed an order on 28.12.2020 desealing the premises in question.

8. On 01.02.2020, petitioner had again moved an application for compounding and sanction of map of construction raised over Khasra No. 55A, 55B, 56A, 56B, 57, 59, 60, 70, 81 and 82. As the industrial activity was being carried in agricultural area, the Committee under Zonal Regulations submitted its report on 11.11.2020 and recommended not to compound the map. The report of the Committee was approved by Meerut Development Authority Board in its 116th meeting on 09.02.2021.

9. The Vice-Chairman of the Authority on 06.03.2021 rejected the application for compounding in light of the report of the Committee and approval of the same by the Board. Pursuant to order of Vice-Chairman, authorised officer of the Authority on 08.03.2021 again passed an order for sealing of premises and on 09.03.2021, the factory premises was sealed by the Authority. Against the order of sealing as well as order dated 06.03.2021, petitioner preferred a revision under Section 41(3) before State Government which was rejected by order impugned dated 28.03.2022. Hence, this writ petition.

10. Sri Rakesh Pande, learned Senior Counsel appearing for the petitioner submitted that along with application for compounding and sanction of map a total of Rs.45 lacs has already been deposited by petitioner but the Authorities have not considered the said fact and simply on extraneous consideration proceeded to reject the application for compounding and sanction of map. According to him, meat processing plant came into existence subsequent to No Objection Certificate having been issued by District Magistrate, Meerut in the year 2013. The plant is situated 500 meter away from the main Hapur Road. According to him, the Committee in its report had found that there was no uniform width of the road and it ranged from 8.5 meter to 14 meter while the minimum standard prescribed width is 12 meter.

11. He then contended that there is no coherence in the report of Chief Town and Country Planner and the decision taken by the Committee as well as the order passed by Vice-Chairman, Meerut Development Authority on 06.03.2021 regarding the width of road on which the integrated meat processing plant is situated and the minimum required standard. He has tried to point out the discrepancy in the various reports and orders of the Authority, Chief Town and Country Planner and Committee. He lastly contended that closing down the project would create financial hardship to petitioner and will render several people jobless who are employed in the factory.

12. Sri J.N. Maurya, learned counsel appearing for the Authority submitted that the very No Objection Certificate granted by District Magistrate, Meerut on 06.06.2013 enumerated various conditions to be fulfilled before setting up of the integrated meat processing plant and slaughtering house. One of the essential

conditions given in Para No. 12 was sanction of map and permission by Development Authority before plant starts. According to him, neither any application was made for sanction of map nor permission was sought before starting the commercial production. It was on 27.03.2017 that notice under Section 27(1) was issued, pursuant to which the petitioner had submitted a compounding application, on which the Authority had raised certain objections which were not fulfilled/complied by petitioner leading to rejection of application for compounding/sanctioning of map. Till date, the petitioner has not complied the objections which has led to rejection of compounding application twice as well as the revision by State authorities. Further, the Development Authority is ready to refund Rs.45 lacs submitted by petitioner.

13. He then contended that as per the Zonal Regulations of Authority, industrial activity in agricultural areas is permissible with special permission of the Board. Admittedly, petitioner's unit for meat processing is situated in an agricultural area, therefore, as per Zonal Regulations, the matter was required to be scrutinized by the Committee under Zonal Regulations. The matter was referred to the Committee so constituted, and after examining in the light of the provisions, it submitted its report on 11.11.2020 and recommended not to compound the map in view of fact that plant was situated on a 12 meter wide road which is 500 meter away from the main Hapur Highway, and as per the requirement, the width has to be 24 meter.

14. He has relied upon Para No. 2.3.2 of Building Construction and Development Bye-law, 2008 (as amended in 2011 and 2016) of Meerut Development Authority, wherein the width of road is provided in case of non residential and commercial area, which is used for industrial purpose. The said provision provides width of road at 24 meter in case it is 401 to 1000 meter in length. In the instant case, the plant is situated 500 meter away from the main highway, thus, the required width of the road is 24 meter for starting a commercial activity.

15. I have heard respective counsel for the parties and perused the material on record.

16. The short question which arises for consideration of this Court is as to whether the Authority and the State Government was justified in rejecting the application for compounding and sanctioning of map post granting of No Objection Certificate by District Magistrate, Meerut in the year 2013 for setting up integrated meat processing plant and slaughtering house with certain conditions.

17. It is an admitted case to both the parties that petitioner had applied for No Objection Certificate from District Magistrate for setting up an integrated meat processing plant and a slaughtering house on Khasra No. 81, 82, 70, 55A, 55B, 56A, 56B, 57, 59 and 60 situated at Village-Alipur, Jijwana, Hapur Road, District-Meerut.

18. The grant of No Objection Certificate was conditional, subject to fulfilling 12 conditions laid down in the No Objection Certificate dated 06.06.2013. Condition No. 2 relates to the permission from U.P. Pollution Control Board which was necessary prior to production being

started in the factory. Condition No. 12 clearly provided that before starting construction, permission of Development Authority was required and the procedures for building construction was compulsorily required to be followed. Relevant Conditions 2 &12 are extracted hereasunder:-

"2- उद्योग इकाई में परीक्षण / उत्पादन तब तक प्रारम्भ नहीं किया जायेगा जब तक कि वह उत्तर प्रदेश प्रदूषण नियंत्रण बोर्ड, लखनऊ से जल एवं वायु प्रदूषण के अधिनियमों के अन्तर्गत सहमति प्राप्त न कर लें। जल एवं वायु की सहमति प्राप्त करने हेतु इकाई में उत्पादन प्रारम्भ करने की तिथि से, कम से कम 2 माह पहले निर्धारित सहमति आवेदन पत्र उत्पादन पूर्व प्रथम आवेदन का उल्लेख करते हुए इस कार्यालय में अवश्य जमा कर दिये जायें। यदि उधोग उपरोक्त का अनुपालन नहीं करता है तो उक्त अधिनियम के वैधानिक प्राविधानों के अन्तर्गत उद्योग के विरुद्ध बिना किसी सूचना के विधिक् कार्यवाही की जा सकती है।

12- निर्माण कार्य प्रारम्भ होने से पूर्व विकास प्राधिकरण की अनुमति प्राप्त की जाये एवं भवन निर्माण के सम्बन्ध में अन्य नियमों / शासनादेशों का फर्म द्वारा अनुपालन किया जाना आवश्यक होगा।"

19. The petitioner had established the meat processing plant and raised construction without any sanction of map by the Authority, resulting in notice issued by the Authority under Section 27(1) of the Act of 1973 on 27.03.2017. Compounding application filed on 30.03.2017 was not processed as certain objections were raised by the Authority on 12.09.2017, which remained unattended by petitioner resulting in the rejection of the application on 19.01.2018. Thereafter, second application was moved for the same cause of compounding the offence by petitioner which had again resulted in the rejection on 11.02.2019 which had led to the various challenge by petitioner before Commissioner through an appeal, before this Court through writ petition and before State Government in revision under Section 41(3) of the Act of 1973. In all the proceedings, the Authorities found that illegal construction raised by petitioner could not be compounded as per the bye-laws of Meerut Development Authority.

20. Master Plan, 2021 for Meerut was approved by State Government on 13th October, 2006 and was published and came into effect from 23rd October, 2006. The Master Plan, 2021 provides for the land used in zones for different activities. Under the category "public use", slaughter house has been mentioned at 6.6 wherein land falling under agricultural area, special permission has to be taken before its use.

21. Once a master plan has been finalised and implemented, it cannot be changed by any Authority exercising discretion for the reason that procedure for change of master plan is envisaged in the statute which needs to be followed and is mandatory.

22. Reference to certain provisions of the Act of 1973 is necessary for better appreciation of the case. The Act of 1973 gives due importance to master plan and zonal development plan. Section 8 and 9 are of great importance as they provide for master plan for development area and zonal development plan, which are extracted hereasunder:-

"8. Civil survey of, and master plan for the development area. – *(1) The Authority shall, as soon as may be, prepare a master plan for the development area.*

(2) The master plan shall –

(a) define the various zones into which the development area may be divided for the purposes of development and indicate the manner in which the land in each zone is proposed to be used (whether

by the carrying out thereon of development or otherwise) and the stages by which any such development shall be carried out; and

(b) serve as a basic pattern of framework within which the Zonal. development plans of the various zones may be prepared.

(3) The master plan may provide for any other matter which may be necessary for the proper development of the development area.

***9. Zonal Development plans**. – (1) Simultaneously with the preparation of the master plan or as soon as may be thereafter, the Authority shall proceed with the preparation of a zonal development" plan for each of the zones into which the development area may be divided.*

(2) A zonal development plan may-

(a) contain a site-plan and use-plan for the development of the zone and show the approximate locations and extents of land uses proposed in the zone for such things as public buildings and other public works and utilities, roads, housing, recreation, industry, business, markets, schools, hospitals and public and private open spaces and other categories of public and private uses;

(b) specify the standards of population density and building density;

(c) show every area in the zone which may, in the opinion of the Authority, be required or declared for development or re-development; and

(d) In particular, contain, provisions regarding all or any of the following matters, namely-

(i) the division of any site Into plots for the erection of buildings;

(ii) the allotment or reservation of land for roads, open spaces, gardens, recreation-grounds, schools, markets and other public purposes:

(iii) the development of any area Into a township or colony and the restrictions and conditions subject to which such development may be undertaken or carried out,

(iv) the erection of buildings on any site and the restrictions and conditions in regard to the open spaces to be maintained in or around buildings and height and character of buildings:

(v) the alignment of buildings of any site;

(vi) the architectural features of the elevation or frontage of any building to be erected on any site,

(vii) the number of residential buildings which may be erected on plot or site;

(viii) the amenities to be provided in relation to any site or buildings on such site whether before or after the erection of buildings and the person or authority by whom or at whose expense such amenities are to be provided:

(ix)the prohibitions or restrictions regarding erection of shops. work-shops, warehouses of factories or buildings of a specified architectural feature or buildings designed for particular purposes in the locality,

(x) the maintenance of walls, fences, hedges or any other structural or architectural construction and the height at which they shall be maintained:

(xi) the restrictions regarding the use of any site for purposes other than erection of buildings;

(xii) any other matter which is necessary for the proper development of the zone or any area thereof according to plan and for presenting buildings being erected haphazardly, in such zone or area."

23. Section 10, 11 and 12 are of great relevance as they provide for

submission of plan to State Government for approval, and the procedure to be followed in preparation and approval of plan, further the date of commencement of plan. Master Plan, 2021 has already been implemented in the city of Meerut since the year 2006.

24. Chapter IV of the Act of 1973 provides for amendment of master plan and zonal development plan. Section 13 is of great importance as it provides amendment of plan, which reads as under:-

"13. Amendment of Plan. – *(1) The Authority may make any amendments in the master plan or the zonal development plan as it thinks fit, being amendments which, in its opinion do not effect important alteration in the character of the plan and which do not relate to the extent of land uses or the standards of population density.*

(2) The State Government may make amendments in the master plan or the zonal development plan whether such amendments are of the nature specified in Sub-section (1) or otherwise.

(3) Before making any amendments in the plan, the Authority, or as the case may be, the State Government shall publish a notice in at least one newspaper having circulation in the development area inviting objections and suggestions from any person with respect to the proposed amendments before such date as may be specified in the notice and shall consider all objections and suggestions that may be received by the Authority or the State Government.

(4) Every amendment made under this section shall be published in such manner as the Authority or the State Government, as the case may be, may specify, and the amendments shall come into operation either on the date of the first publication or on such, other date as the Authority or the State Government, as the case, may be, may fix.

(5) When the Authority makes any amendments in the plan under Sub- section (1) it shall report to the State Government the full particulars of such amendments within thirty days of the date on which such amendments come into operations.

(6) If any question arises whether the amendments proposed to be made by the authority are amendments which effect important alterations In the character of the plan or whether they relate to the extent of land-uses or, the standards of population density, it shall be referred to the State Government whose decision, thereon shall be final.

(7)Any reference in any other Chapter, except Chapter III, to the master plan or the zonal Development plan shall be construed as a reference to the master plan or the zonal development plan as amended under this section."

25. Section 16 puts an embargo on the use or permit to be used of any building or land in a planned area otherwise than in confirmity with such plan. The proviso however provides that in case on the date of enforcement of plan, the land or building was used in any other manner, the same would continue subject to terms and conditions as may be prescribed by the bye-laws. Section 16 is extracted hereasunder:-

"16. Uses of land and buildings in contravention of plans. – *After the coming into operation of any of the plans in a zone no person shall use or permit to be used any land or building in that zone otherwise that in conformity with such plan :*

Provided that, it shall be lawful to continue to use, upon such terms and conditions, as may be prescribed by bye-laws made in that behalf, any land or

building for the purposes and to the extent for and to which it is being used upon the date on which such plan comes into force"

26. The No Objection Certificate granted by Collector on 06.06.2013 was conditional that integrated meat processing plant and slaughter house to come up pursuant to sanction/permission by the Authority. Neither any permission was sought nor map was sanctioned.

27. Section 26 talks of the penalties to be imposed by the Authority in case of use of land or building, in violation of plan, and where development of land has been allowed to any person or body in violation of the condition of such development plan, such infraction is an offence punishable under this provision.

28. Section 27 talks for order of demolition of building, where any development has been commenced or is being carried on or has been completed in contravention of the Master Plan or without permission approval or sanction referred to in Section 14, subject to procedure laid, an order for demolition shall be passed.

29. The offences under the Act of 1973 are compoundable under Section 32 which reads as under:-

***"32. Composition of Offences**. – (1) Any offence made punishable by or under this Act, may either before or after the institution of proceedings, be compounded-by the [Vice-Chairman (or any officer authorised by him in that behalf by General or Special order)] on such terms, including any term as regards payment of a composition fee, as [the Vice-Chairman] (or such officer) may think fit.*

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of the offence compounded.

30. Thus, the question which arises that once the master plan and the zonal plan has been enforced in the District-Meerut and there being no challenge to the same, the petitioner was required to follow the norms as provided under them.

31. The integrated meat processing plant and slaughter house was sought to be established pursuant to permission granted by District Magistrate on 06.06.2013 which was subject to fulfillment of certain conditions. One of the necessary condition was prior approval of the Development Authority in regard to sanction of map before project started. The words, "निर्माण कार्य प्रारम्भ होने से पूर्व विकास प्राधिकरण की अनुमति प्राप्त की जाये" are of great relevance. The petitioner was bound to make application for permission and sanction of map prior to starting the construction over the land on which the integrated meat processing plant was going to come up. No such application or permission was sought before raising construction, and it was only when the factory was operational and notice under Section 27(1) was issued, that the petitioner tried to get the offence compounded under Section 32 of the Act of 1973.

32. Master Plan, 2021 clearly provides in clause 6.6 that slaughter house can come up in an agricultural area only on a special permission granted by Development Authority.

33. Bye-law 2.3.2 lays down the width of the road for the land used in non residential area where the commercial

activity is carried out. It clearly provides that width of the road must be minimum 12 meter in case of its length upto 200 meter, in case of a commercial establishment situated on the road whose length is 201 meter to 400 meter, its width has to be 18 meter. While in case of road whose length is 401 meter to 1000 meter, the width is to be 24 meter. Relevant bye-law is extracted here-asunder:-

"(i) अनावासीय क्षेत्र यथा व्यवसायिक, कार्यालय एवं औद्योगिक भू-उपयोग में किसी भी सड़क की चौड़ाई 12 मीटर से कम नहीं होगी, जिसकी लम्बाई अधिकतम 200 मीटर होगी। 201 से 400 मीटर लम्बी सड़क की चौड़ाई 18 मीटर होगी और 401 से 1000 मीटर तक लम्बी सड़क की चौड़ाई 24 मीटर होगी तथा 1000 मीटर से अधिक लम्बी सड़क की चौड़ाई 30 मीटर होगी।

(ii) अन्य मार्गों की चौड़ाई महायोजना / जोनल प्लान में निर्धारित चौड़ाई के अनुसार होगी।"

34. The very purpose of providing minimum width of the road for commercial activity is keeping in mind the movement of heavy commercial vehicles. In the instant case, it is admitted that meat processing plant is situated 500 meter away from main Hapur Highway and comes under the category of 401 to 1000 meter. Thus, minimum width of the road should be 24 meter before the permission is accorded.

35. In **Nazir Ahmad Vs. King-Emperor AIR 1936 PC 253**, Lord Roche speaking for himself and the other Members held that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. The other methods of performance are necessarily forbidden.

36. In **Dhananjaya Reddy Vs. State of Karnataka (2001) 4 SCC 9**, the Apex Court held that it is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all.

37. In **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala (2002) 1 SCC 633**, the Apex Court held that it is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said Authority has to exercise it only in the manner provided in the statute itself.

38. In **State of Jharkhand & others Vs. Ambay Cements & another (2005) 1 SCC 368**, the Apex Court held that whenever the Statute prescribes that a particular act is to be done in a particular manner and also lays down the failure to comply with the said requirement leads to severe consequence, such requirement would be mandatory. It is a cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character it must be strictly construed and followed.

39. In **Priyanka Estates International Pvt. Ltd. and Ors. Vs. State of Assam and others, JT 2009 (14) SC 654**, the Apex Court while dealing with violation of sanction or approved plan held that if the offence was not compoundable then necessary consequence of demolition should follow. Relevant para 66 and 73 are extracted hereasunder:-

"66. It is not necessary to deal with the aforesaid judgments of this Court in greater detail as the consistent ratio

decidendi of this Court is that if the constructions are in absolute violation of sanctioned or approved plans and are not likely to fall in the category of compoundable items, then the necessary consequence is to order its demolition and seal of approval for such illegal activities is not required to be given by this Court.

73. It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multi-storeyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the Builder."

40. In **Shanti Sports Club and Anr. Vs. Union of India and others, (2009) 15 SCC 705**, the Apex Court while dealing with unauthorised construction which was against the master plan or zonal development plan held as under:-

"74. In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact

on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc.—K. Ramadas Shenoy v. Town Municipal Council, Udipi [(1974) 2 SCC 506] , G.N. Khajuria (Dr.) v. DDA [(1995) 5 SCC 762] , M.I. Builders (P) Ltd. v. Radhey Shyam Sahu [(1996) 6 SCC 464] , Friends Colony Development Committee v. State ofOrissa [(2004) 8 SCC 733] , M.C. Mehta v. Union of India [(2006) 3 SCC 399] and S.N. Chandrashekar v. State of Karnataka [(2006) 3 SCC 208] .

75. Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions."

41. Thus, in view of various dictums of Apex Court, it is clear that obtaining prior permission is mandatory for raising construction as per the developmental and zonal plan.

42. In the instant case, District Magistrate on 06.06.2013 had granted conditional No Objection Certificate, which mandated for prior sanction/approval of map by the Authority before starting construction. The prior permission was mandatory, therefore, non compliance with the same must result in cancelling the concession made in favour of petitioner.

43. Moreover, the area over which the integrated meat processing plant has been set up falls in the agricultural area and Master Plan of 2021 clearly provides for special permission for setting up a slaughter house in an agricultural area. The bye-laws further confirm that width of the road has to be 24 meter in case the land used is for non residential purpose. The report of the Chief Town & Country Planner which was admitted and approved by the Committee is in consonance with bye-law 2.3.2.

44. The argument raised from petitioner side as to variation in the width of road ranging from 8.5 meter to 14 meter by different authorities has no force. It is an admitted position that meat processing plant is situated 500 meter away from the main Hapur Highway, and the length of road is beyond 400 meter, thus, the width of 24 meter as required under bye-law 2.3.2 cannot be displaced.

45. Petitioner has not brought out any ground of procedural irregularity having done by authorities or the State Government in rejecting the application for compounding/sanctioning of map.

46. Right from the year 1936 till date, the Apex Court is of the view that cardinal principle is that where a statute requires a particular act to be done in particular manner, the act has to be done in that manner alone. In the instant case, there is no challenge to the master plan or the zonal development plan, nor any amendment has been sought of the master plan or the zonal development plan. The area is undisputedly an agricultural area where permission has been sought for setting up a slaughter house, the same can only be granted after due compliance has been done by the petitioner.

47. Composition of offence as provided under Section 32 can only be done when the case falls within the parameter. The statutory Authority cannot go beyond the provision of the statute and bye-laws to compound the offence.

48. The action of the Authority and State Government cannot be faulted as it rests on Clause 2.3.2 of bye-laws which clearly stipulates the condition for running a commercial establishment/industry on the road which is substantially wide enough to bear the burden of heavy commercial vehicles.

49. The bye-laws have been framed keeping in mind the impact of vehicular movement on the road where commercial activity is being carried out since the business is of meat processing and slaughtering, there will be movement of heavy trucks and trolleys, which a narrow lane or road could not bear. Sufficient width of the road is required to felicitate vehicular movement, causing no inconvenience to the other commercial establishment or industry situated near it or the residents using the road.

50. In the instant case, petitioner should have been vigilant and before raising construction he should have complied with the condition laid down by the District Magistrate in the year 2013 itself and before making investment should have got the map sanctioned. In case, application was moved before Development Authority, the petitioner would have come to know that plant could not be established on such a narrow passage of 12 meter, since bye-law required 24 meter width.

51. Considering the facts and circumstances of the case, I find that orders impugned do not make out any case for interference exercising extraordinary jurisdiction under Article 226 of Constitution of India.

52. Writ petition fails and is hereby dismissed.

(2024) 3 ILRA 1976
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ-C No. 26784 of 2023

Energo Const. Pvt. Ltd. ...Petitioner
Versus
U.P. Rajya Vidyut Utpadan Nigam Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prashant Shukla, Sri Navin Sinha (Sr. Advocate)

Counsel for the Respondents:
Sri Shishir Prakash, Sri Raghav Dev Garg, Sri Shad Khan, Sri Anurag Khanna (Sr. Advocate)

Civil Law - Constitution of India,1950-Article 226-The petitioner was previously contracted for operations and maintenance services-in a subsequent tender the petitioner was disqualified despite being the lowest bidder due to allegations of submitting a false affidavit denying prior blacklisting or termination of contracts-The court analysed that judicial review in tender matters is limited and applies only in cases of arbitrariness, malafide, or public interest violations-However, the petitioner's affidavit was found to be misleading, rendering their disqualification justified-the principle of fairness was upheld and no malafide intent by the respondents was evident.(Para 1to 29)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. **Cent**ral Coalfields Ltd & anr. Vs SLL-SML (Joint Venture Consortium) & ors. (2016) 8 SCC 622

2. Tata Motors Vs Brihan Mumbai Electricity Supply & Transport Undertaking & ors. (2023) SCC Online SC 671

3. Meerut Development Authority Vs Assn of Mgmt Studies & anr. (2009) 6 SCC 171.

4. Jai Bholenath Consn. Vs The Chief Exe. Officer, Zilla Parishad, Nanded & ors. (Civil Appeal No. 41440 of 2022

5. Ram & Shyam Co. Vs St. of Har. & ors. (1945) 3 SCC 267

6. M/s Star Enterprises & ors. Vs City & Industrial Development Corpn of Mah. Ltd. & ors. (1990) 3 SCC 280

7. M/s Jai Hanuman Consn.Vs St. of U.P. & ors. (2023) SCC OnLine All 2033

8. Jagdish Mandal Vs St.of Ori & ors.(2007)14 SCC 517

9. Afcons Infra. Ltd. Vs Nagpur Metro Rail Corpn Ltd & anr. (2016)16 818

10. Sterling Computers Ltd Vs M & N Publications Ltd MANU/SC/ 0439/1993 AIR 1996 SC 51

11. Tata Cellular Vs U.O.I. MANU/SC/0002/1996 AIR 1996 SC 11.

12. Raunaq International Ltd. Vs I.V.R Consn. Ltd. MANU/SC/0770/1998 AIR 1999 SC 393

13. Air India Ltd. Vs Cochin International Airport Ltd. MANU/SC/0055/2000 [2000] 1 SCR 505

14. Assn.of Registration Plates Vs U.O.I. MANU/SC/1013/2004 AIR 2005 SC 469

15. B.S.N. Joshi Vs Nair Coal Services Ltd MANU/SC/8598/2006 AIR 2007 SC 437

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Navin Sinha, learned Senior Advocate, assisted by Sri Prashant

Shukla, learned counsel for the petitioner; Sri Shad Khan, learned counsel holding brief of Sri Shishir Prakash, learned counsel for the respondent Nos.1 to 3 and Sri Anurag Khanna, learned Senior Advocate, assisted by Sri Raghav Dev Garg, learned counsel for the respondent No.4.

Facts:-

2. The facts of the case as emerging out from the record are that the petitioner herein is a company engaged in business of Operation and Maintenance Services (for the sake of brevity hereinafter referred as 'O&M Services') for Uttar Pradesh Rajya Vidyut Utapadan Nigam Ltd. including O&M Services and Coal Handling Plants. The respondent no.1 floated a tender sometimes in June 2020 for execution of O&M Services for its Coal Handling Plants at Paricha Station for a period of two years. The petitioner, who participated in the bid, was found suitable and contract was awarded to it. It was at that point of time, when one of the unsuccessful bidder alleged that petitioner had been debarred by another State owned power generating company in Madhya Pradesh, hence the petitioner was not qualified to be awarded the contract, as such, response was asked from the petitioner. Vide letter dated 15.10.2020, the petitioner clarified that the allegations against it were incorrect and were raised only to disqualify the petitioner. The tender proceeding culminated into a contract dated 15.03.2021.

3. The respondent no.2 again floated a tender for the period commencing from 01.03.2023. For some reason this tender could not be finalized and the existing contract of the petitioner was extended till 31.03.2023, for a period of one month. Thereafter a fresh tender was floated on 22.03.2023, which had two bid mode of technical and financial bids. The petitioner alongwith other bidders participated in the tender proceeding and technical bid were opened on 06.04.2023. The petitioner alongwith respondent no.4 and few others were found technically qualified. Since the tender proceedings could not be culminated for some reasons, hence the existing tender of the petitioner, which was coming to an end on 31.03.2023, was again extended upto 31.05.2023.

4. The financial bid of bidders, who qualified in the technical bid, were opened and the bid of petitioner was found to be the lowest (L1). It is claimed that despite the petitioner being L1, the tender was not awarded to the petitioner. When the petitioner met the officials of respondent no.1, he came to know that the respondent no.4 has filed a complaint alleging that the petitioner had filed a false affidavit regarding blacklisting/debarment/termination of the contract. It was alleged that earlier the petitioner had been debarred by one of the State owned company in Madhya Pradesh. The petitioner submitted that no communication has been made by the respondent no.1 qua the said complaint and he came to know that the respondent no.1 was about to award contract to respondent no.4. Such situation impelled the petitioner to prefer the earlier Writ C No.6515/2023 (Energo Construction Pvt. Ltd. New Delhi vs. U.P. Rajya Vidyut Utpadan Nigam Ltd.) before the Lucknow Bench of this Court, which was dismissed as withdrawn by order dated 02.08.2023 with liberty to file fresh petition before appropriate Bench/Court as the matter pertains to

district Jhansi. Meanwhile, the respondent no.1 has issued LOI in favour of respondent no.4 on 28.07.2023. Aggrieved by the award of LOI to respondent no.4, the petitioner preferred the instant writ petition with following reliefs:-

(i) Issue an appropriate writ or direction or order in the nature of certiorari thereby quashing the Letter of Intent dated 28.07.2023 bearing Ref. No.441/CHD-IV/PTPP/ 2023-24/CF issued by respondent nos.1 to 3 in favour of respondent no.4 (Annexure-2).

(ii) Issue an approriate writ or direction or order in the nature of mandamus thereby seeking appropriate directions to respondent nos.1 to 3 to award to the petitioner (i.e. L1 bidder) in Tender breafing Ref. No.N-PAR/C/O&MC5/CHD4/6000001163_00 for 'Round the Clock complete O&M of Coal Handling Plant of Parichha Thermal Power Project' (Annexure-1);

(iii) Direct respondent nos.1 to 3 to not take any precipitative/coercive/prejudicial steps against the petitioner including but not limited to forfeiture of earnest money deposit on any gound or prejudice other contracts/tenders in any manner.

(iv) Such other appropriate writ, order or direction as this Court may deem just and proper in the circumstances of the case and in the interest of justice, be passed in favour of the petitioner.

(v) Cost of the writ petition be awarded in favour of the petitioner.

5. After filing the present writ petition, an Email was sent to the petitioner, wherein, he was informed that the Tender Valuation Committee had rejected the bid of the petitioner with following remarks:-

"You are informed that your bid for the above tender has been rejected during Financial evaluation by the duly constituted committee for the reason Competent Committee did not consider the offer of L-1 firm due to submission of false information on notarized affidavit regarding blacklisting/debarment/termination of contract."

6. The petitioner herein, after getting this Email moved an amendment application, which was allowed on 28.11.2023. By the said order following relief has been added:-

"i (A) Issue a writ, order or direction in the nature of certiorari quashing the impugned email dated 08.08.2023 (Annexure No.-11 to this petition)"

Arguments of petitioner :-

7. Shri Navin Sinha, learned Senior Advocate appearing for the petitioner, submitted that the procedure adopted by respondent Nos. 1 to 3 for issuing LOI in favour of respondent No. 4 is arbitrary and violative of Article 14 of the Constitution of India. Petitioner complied with all the requisite technical requirements and was found eligible with lowest financial bid. Despite the bid being the lowest, the petitioner was disqualified (after opening of the financial bid) ostensibly on the ground that the petitioner had submitted a false affidavit as a part of its bid. Before filing the present writ petition, at no point of time, the petitioner was informed of its disqualification or even the fact that a complaint was received against it. The first official communication to the petitioner, regarding its disqualification was received

on 08.08.2023 i.e. after filing of the present Writ Petition.

8. Shri Sinha further submitted that rejection of petitioner's lowest bid, allegedly on ground of submission of false information on notarized affidavit, is wholly misconceived. The petitioner submitted the requisite affidavit in the template provided at Annexure-V in compliance with clause B-6 read with Annexure-V, which seeks a declaration that no termination has happened for any kind of fraudulent activities. In support of his submission, he placed reliance on the judgement of Hon'ble Apex Court in ***Central Coalfields Limited & Anr v SLL-SML (Joint Venture Consortium) & Ors (2016) 8 SCC 622***, wherein, the importance with the format in tender matters have been dealt with. Respondents have alleged that petitioner concealed material facts by failing to disclose the termination by MPPGCL. He submitted that in 2018, MPPGCL admittedly terminated petitioner's tender due to non-performance and not for 'fraudulent activities', therefore, there was no concealment of material facts. Further, the termination itself is a matter pending adjudication before Madhya Pradesh High Court in Writ Petition No. 13486 of 2018. This fact was already in the knowledge of Respondent No.1 and in case, a proper opportunity would have been provided to the petitioner, it would have satisfactorily explained the same. During the tendering process in 2020/2021, the issue of MPPGCL's termination was raised, which was satisfactorily explained by the petitioner and consequently, the contract was awarded by the respondent no.1.

9. Shri Navin Sinha, learned Senior Advocate vehemently contended that the dispute in question raises public issues, in relation to the practice and procedure adopted by a State entity while awarding a tender. The action taken by the respondent no.1 is arbitrary, irrational and malafide and whenever there is an infirmity in decision making process, the writ courts have a Constitutional duty to interfere even if they are contractual issues, especially in cases where the conditions of the tender are tailor-made to suit interests of one party and the said conditions are to be examined by way of reverse engineering. In support of his submission, he placed reliance on the dictum of Hon'ble Apex Court in ***Tata Motors vs. Brihan Mumbai Electricity Supply and Transport Undertaking and others 2023 SCC OnLine SC 671 and Meerut Development Authority vs. Association of Management Studies and another 2009 (6) SCC 171***. In this backdrop, he submitted that the matter warrants justifiable interference by this Court.

10. Refuting the allegations levelled in the complaint, Shri Sinha submitted that during the tendering process for preceding period of 2020-2021, similar allegations were raised against the petitioner. Even though, there was no requirement of an affidavit, still an opportunity to explain its position was given at that point of time but no opportunity of hearing/clarification was given to the petitioner now. This makes the conduct of respondent Nos. 1 to 3 even more questionable since when the threshold is higher, a show cause notice was required to be issued to the petitioner for providing an opportunity to submit its explanation. In the case of ***Jai Bholenath Construction vs. The Chief Executive Officer, Zilla Parishad, Nanded & Ors. (Civil Appeal No. 41440 of 2022 decided on 18.05.2022),***

the Supreme Court remanded back the tender to its earlier stage, for it being violative to principles of natural justice and fairness. The procedure adopted by respondent nos. 1 to 3 is violative to principles of natural justice and fair play. No show cause notice or opportunity of hearing was given to the Petitioner before rejecting its bid. Even, the decision of rejecting petitioner's bid was not communicated till 08.08.2023. He submitted that after unilaterally disqualifying the petitioner, secret negotiations were held between respondent no.1 and respondent no.4 and its offer was revised. Most importantly, all of this was done in secrecy and in an offline mode without uploading any document on the bidding portal or apprising the other bidders. It is settled law that secret negotiations cannot be undertaken with one bidder (See ***Ram and Shyam Company v State of Haryana & Ors. (1945) 3 SCC 267, Uttar Pradesh Procurement Manual, 2016 ("in short "Manual"] Clause 3.4 (11) Pg. 14, Clause (1) Pg. 17, Clause 14.12 Pg. 119, Clause 14.30 Pg. 126).*** The said action can also not pass the judicial scrutiny, being violative of Wednesbury Principle of Reasonableness. (see ***M/s Star Enterprises & Others v City and Industrial Development Corporation of Maharashtra Ltd. & Others (1990) 3 SCC 280 (Para 10), M/s Jai Hanuman Construction State of UP & Ors 2023 SCC OnLine All 2033 (Para 25), Clause 14.14(4) Pg. 120, Clause 14.34(3) @ Pg. 129 of the Manual)***. Summing up his arguments, he submitted that the petitioner has acted in reasonable and fair manner and considering the facts in entirity, relief is liable to be accorded by this Court being empowered under Article 226 of the Constitution of India, otherwise, the petitioner would suffer irreparable loss and injury.

Arguments of Contesting Respondents :-

11. Shri Shad Khan, Advocate holding brief of Shri Shishir Pathak, learned counsel for respondent no.1, 2 and 3 submitted that an e-tender was published on 22.03.2023 for the work "Round the clock Complete Operation & Maintenance Works of entire Coal Handling Plant of 2x210 MW CHP for uninterrupted coal feeding of 2x210 MW + 2x250 MW (Unit No.3,4,5&6), unloading works of 2x110MW CHP including manual loading works of 2x110 MW CHP including manual unloading and management, operation and shutting work etc., and Round the clock Complete Mechanical & Electrical Maintenance works of Coal Unloading Plant 2x110MW CHP etc. (for two years)" of Parichha Thermal Power Station, U.P. Rajya Vidyut Utpadan Nigam Ltd. In the said e-tender, four firms have participated and were found technically qualified. On 03.05.2023, the financial bids of the qualified bidder were as follows : (i) L-1 M/s Energo Construction Pvt. Ltd., New Delhi -Bid Amount Rs.28,42,44,530/-, (ii) L-2 M/s Lokenath Constructions Pvt. Ltd., Kolkata-Bid Amount - Rs.28,55,76,205.26/-, (iii) L-3 M/s Star O&M Group, Ghaziabad- Bid Amount- Rs.28,95,90,856/- and (iv) L-4 M/s Chennai Radha Engineering Works (P) Ltd., Chennai -Bid Amount- Rs.63,97,04,928/-.

12. Shri Khan further submitted that on 19.05.2023, a complaint was received from the respected Member of Parliament (Lok Sabha), wherein, it has been informed that the work of the petitioner's firm was terminated and the firm was debarred by the MPPGCL, Khandwa and there were certain disputes

regarding the G.S.T. at Hisaar Plant. The complaint was sent for verification to MPPGCL, who verified that the petitioner's contract was terminated and it was debarred from participating in the future tenders of MPPGCL. He further submitted that as per tender condition the bidder has to provide declaration on notarized affidavit, Non Judicial Stamp paper of Rs.100/-, to the effect that the bidder has not been blacklisted/work awarded to the bidder has not been terminated by the SEBs/State GENCO/Central GENCO/PSU's/CPSU/Statutory Body, Independent Power Producers (IPP). He further submitted that, on 04.04.2023, the petitioner company by concealment of material facts has given an affidavit, whereby, it has been declared that the petitioner has not been blacklisted/debarred and their work has not been terminated by the SEBs/State GENCO/Central GENCO/PSU's/CPSU/Statutory Body, Independent Power Producers (IPP).

13. He further submitted that the petitioner was guilty of *suppressiio veri and suggestio falsi* as it has submitted a false declaration on affidavit and hence its bid was rejected, thereafter, the negotiations took place and the contract was awarded to L2, who is respondent no.4. After getting the contract, the respondent no.4 has also commenced the work with huge investment. He further submits that at the time of awarding earlier contract, petitioner was not required to file an affidavit qua blacklisting/debarment/termination of contract, however in the Tender 2023, a specific clause was added requiring the participating firms to give information on a notarized affidavit regarding the blacklisting/debarment/termination of any contract, which was falsely responded by the petitioner firm. He also submitted that petitioner vide letter dated 15.06.2023 and 23.06.2023 were duly informed that their bid was rejected on the ground of false declaration given by them. Lastly, he submitted that since the the scope of judicial review in contractual matters is very limited and hence this Court should refrain from interfering with the contractual matters.

Arguments of Respondent no.4 :-

14. Shri Anurag Khanna, learned Senior Advocate assisted by Shri Raghav Dev Garg, learned counsel for respondent no.4 submitted that Hon'ble Apex Court has time and again held that the Courts while exercising powers under the Constitution of India must refrain from interfering with such issues which are contractual in nature and can only be adjudicated upon after appreciation of disputed questions of facts. He submitted that petitioner has violated the terms of Clause B-6 of the E-tender and Annexure-V was to be incorporated by the bidders in terms of Clause B-6.]

15. He further submitted that the intent of such clause is to verify the credibility of the bidders on whom large amount of public money are being proposed to be spent. He elaborated that it is immaterial as to why the firm has been blacklisted/work terminated, since it is not only the character of the firm, which has to be considered but also the working capabilities of the firm as well and the contracting agency, being the drafter of the terms of the document, are the best judge to interpret the same in case of any ambiguity. Lastly, he submitted that the principles of equity and natural justice stay at a distance in such matters of fraud and concealment

and as such, no interference is required in the matter. In support of his submission, he placed reliance on the judgement passed by Hon'ble Apex Court in ***Jagdish Mandal vs. State of Orrissa and others 2007 (14) SCC 517 and Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd and another 2016 (16) SCC 818.***

Analysis :-

Scope of judicial review in award of Contracts:

16. We may refer to some of the decisions of this Court, which have dealt with the scope of judicial review in award of contracts.

17. In ***Sterling Computers Ltd v. M & N Publications Ltd. MANU/SC/0439/1993 AIR 1996 SC 51***, this Court observed (SCC p.458, para 18):

"18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the decision making process the courts can certainly examine whether 'decision making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

18. In ***Tata Cellular v. Union of India MANU/SC/0002/1996 AIR 1996 SC 11***:, this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus: (SCC pp.687-88, para 94)

"(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

19. In ***Raunaq International Ltd. v. I.V.R. Construction Ltd. MANU/SC/0770/1998 AIR 1999 SC 393***, this Court dealt with the matter in some detail. This Court held: (SCC pp.500-01, paras 9-11)

"9.The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are

commercial considerations. These would be :

(1) The price at which the other side is willing to do the work;

(2) Whether the goods or services offered are of the requisite specifications;

(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

20. In ***Air India Ltd. v. Cochin International Airport Ltd. MANU/SC/0055/2000 [2000] 1 SCR 505***, this Court summarized the scope of interference as enunciated in several earlier decisions thus: (SCC pp.623-24, para 7)

"7.....The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

[Emphasis supplied]

21. In ***Association of Registration Plates v. Union of India MANU/SC/1013/2004 AIR 2005 SC 469*** , this Court held: (SCC p.700, para 43)

"Article 14 of the Constitution prohibits government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contracts. At the same time, no person can claim a fundamental right to carry in business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest."

22. In ***B.S.N. Joshi v. Nair Coal Services Ltd. MANU/SC/8598/2006 AIR 2007 SC 437***, this Court observed: (SCC p.568, para 56)

"56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

23. The legal proposition drawn in the light of above judgements of Hon'ble Supreme Court is that the judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.

24. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, in our considered opinion, the court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

ii) Whether public interest is adversely affected.

25. If the answers to the above questions are in the negative, there should be no interference under Article 226 of the Constitution of India in such cases involving black-listing or imposition of penal consequences on a tendered/contractor or distribution of state largesse.

Conclusion :-

26. In this matter, the petitioner has apparently given a wrong affidavit in order to get the contract. For ready reference, Clause B-6 is reproduced as under:-

B 6	Declaration of bidder against blacklisting	Bidder has to provide declaration on notarized affidavit, Non Judicial Stamp paper of Rs.100/-, that the bidder has not been blacklisted/work awarded to the bidder has not been terminated by the SEBs/State GENCO/Central GENCO/PSU's/CPSU/Statutory Body, Independent Power Producers (IPP). (As per Annexure-V must be uploaded) Original copy of declaration on non-judicial stamp paper must

		be submitted in hard copy to the office of Superintending Engineer, O&MC-V, 2x250MW, CTPS, PTPP, Parichha, Jhansi.

A bare perusal of clause B-6 and Annexure V incorporated in the bid document clearly goes to show that the bidder has to provide declaration on notarized affidavit, Non Judicial Stamp paper of Rs.100/-, that the bidder has not been blacklisted/work awarded to the bidder has not been terminated by the SEBs/State GENCO/Central GENCO/PSU's/CPSU/Statutory Body, Independent Power Producers (IPP). The petitioner knowing the fact that he was disqualified gave a false declaration and in order to cross the first hurdle of technical qualifications, by misrepresenting the petitioner got itself to be technically qualified and its bid was opened. Claim of being L1 is immaterial as only those financial bids could be entertained, who are technically qualified. The petitioner herein does not qualify or pass first hurdle and hence it cannot take a benefit or argue that since its bid was lowest, the tender should be awarded to it.

27. As per ratio laid down in catena of judgements of the Hon'ble Supreme Court, it is clear that the scope of judicial review in the contractual matter is very limited. Moreover the respondents have the freedom to award the contract. The fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. The decision of the respondent must not only be tested by the application of Wednesbury Principle of Reasonableness but must be free from arbitrariness not affected by bias or actuated by malafides. This is the case in which there is no malafides or bias or arbitrariness. The bid of the petitioner had rightly been rejected since it had given a wrong statement on an affidavit stating that nowhere they have been blacklisted or their contract have been terminated.

28. The petitioner, knowing the fact that it was not qualified to participate in the tender, tried to grab the tender by giving a false declaration by way of an affidavit, by misrepresenting the petitioner tried to get itself technically qualified and accordingly, the bid was opened. The claim of the petitioner that it being the lowest (L1) is not material, as the bid of technically qualified can only be considered. Hence, the petitioner, who is technically disqualified, cannot be considered in the tender procedure.

29. In view of above discussions, we find no merit in the writ petition, hence the writ petition is accordingly ***dismissed***.

30. No order as to costs.

(2024) 3 ILRA 1986
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024

BEFORE

THE HON'BLE SIDDHARTH VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-C No. 28658 of 2023

Kavita Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Mohan Asthana

Counsel for the Respondents:
C.S.C., Sri Sudhir Mehrotra, Sri Manoj Kumar Sharma

Civil Law - Constitution of India,1950-Article 226-Registration Act-Section 34-In the present case, the allegations and the consequent findings are that the alleged sale deed dated 25.07.1956 had never existed and the same had been interpolated in the records of the Sub-Registrar in place of some pre-existing registered sale deed-Since, the existence of the sale deed in favor of the father of the petitioner was not found to be in existence and the petitioner failed to produce the original sale deed-therefore, on complaints received, the District Magistrate concerned had directed the inquiry-The respondent no. 2 and 3 had carried out the inquiry and had found the sale deed was never in existence-The court held that where such a fact had been established with regard to the non-existence of any particular document then the bar of section 34 of the Registration Act would not apply-Therefore, on receipt of such complaints the inquiry conducted by the respondents no. 2 and 3 cannot be said to be without jurisdiction-The petitioner cannot be granted any relief as when the cloud was cast on his title he had not filed any suit for the declaration of his own rights-Hence, no interference requires.

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Smt Kusum Lata Vs St. of U.P. & ors.(2018) AIR Alld 210

2. Hari Vishnu Kamath Vs Ahmad Ishaque & ors. (1955)AIR SC 233

3. Jamila Begam Vs Shami Mohd(2019) 2 SCC 727

4. UO & ors. Vs Vasavi Co-Op. Housing Socy Ltd. & ors. (2014) AIR SC 937

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. This writ petition has been filed with a prayer that the Joint Inquiry Report dated 22.5.2019 submitted by the Additional District Magistrate (Finance & Revenue), District Moradabad and the Assistant Inspector General (Registration), District Moradabad in respect of a sale-deed executed on 4.7.1956 and registered on 25.7.1956, which was found to be registered as Document No. 1335, at Bahi No. 1, Jild No. 892 at Page Nos. 265 to 266 and was registered before the Sub-Registrar, Moradabad, be quashed.

2. A further prayer has been made that the petitioner be not proceeded against with regard to the registered document i.e. sale-deed dated 25.7.1956 in pursuance of the Inquiry Report dated 22.5.2019.

3. The petitioner has contended that a sale-deed was registered on 25.7.1956 in favour of one Vijay Kumar Sharma, the father of the petitioner herein and the vendor was one Smt. Prem Kunwar, widow of Prasadi Lal. It is the further contention of the petitioner that the name of Sri Vijay Kumar Sharma was mutated on 25.10.1956. Further it has been argued that after Vijay Kumar Sharma died on 13.2.2011, an application for mutation was moved by the petitioner which came to be dismissed on 6.11.2015 on the ground that the application was barred by the provisions of Section 49 of the Consolidation of Holdings Act, 1953. He further submits that thereafter the petitioner filed a revision before the Board of Revenue, which was allowed on 20.1.2017.

4. Learned counsel for the petitioner thereafter states that an application was filed before the Consolidation Courts under Rule 109A(1) of the U.P. Consolidation of Holdings Rules, 1954, in which the name of the petitioner was entered in the plots in dispute being Plots No. 370/1, 370/2, 371/1, 371/2, 372, 373, 379/1 measuring total rakba 2.81 acre, Mauza Majhauli, Tehsil Sadar, District Moradabad. It has been submitted that the numbers of the plots were re-numbered and were also reduced in area during consolidation. The four plots now bore Nos. 280Ka, 282, 283, 289Ka). The petitioner has stated that the predecessor in the interest of intervenor, Sri Ram Bahadur and Sri Ram Kripal had though purchased the same plots in question on 16.9.1961, had no title in those plots as the plots had already been sold on 25.7.1956. Learned counsel for the petitioner therefore states that no right was flowing to the predecessor in the interest of the intervenor on account of the sale deed dated 10.9.1961.

5. Since there was interference in the plots in question and the mutation etc. was being hindered the petitioner filed an original suit being Original Suit No. 148 of 2013 and in it releif was for a declaratory decree declaring that the sale-deed dated 16.9.1961 executed in favour of the predecessor in the interest of defendants in the suit was null and void. There was also a prayer for permanent injunction that the defendants in the suit may not disturb the possession of the petitioner. This suit came to be dismissed on 11.7.2023. Learned counsel for the petitioner further submitted that the order impugned in the writ petition had come in the way of the civil suit and therefore, after the civil court had decreed the suit on the basis of the impugned Joint Inquiry Report dated 22.5.2019 the instant writ petition was filed. Learned counsel for the petitioner therefore has ultimately prayed that the Joint Inquiry Report dated 22.5.2019 be set aside.

6. Sri K.M. Asthana, learned counsel for the petitioner has vehemently argued that the Joint Inquiry Report which is in the form of the order dated 22.5.2019 could not have been passed by respondent nos.2 and 3 i.e. Additional District Magistrate (Finance & Revenue), District Moradabad and the Assistant Inspector General (Registration), District Moradabad as they had neither the authority nor jurisdiction to conduct the said inquiries. They also had no authority to annul the sale-deed of the petitioner dated 25.7.1956. He has submitted that in the Registration Act even though, under Section 34 and 35, inquiry could be conducted before the Registration by the Registering Officer regarding the document to be registered, the registering authority had no power to cancel any particular document which had been registered. In support of this argument, learned counsel for the petitioner has relied upon a Full Bench judgment of this Court report in **AIR 2018 Allahabad 210, Smt. Kusum Lata v. State of U.P. and Ors**. He has submitted that if any registered document had to be cancelled then the same could be done by filing a civil suit in a competent civil court and, therefore, only under the common laws a registered document could be cancelled.

7. Learned counsel for the petitioner further submitted that if an order/report was without jurisdiction then the same could be quashed by issuance of a Writ of Certiorari. For that purpose learned counsel for the petitioner has relied upon a Supreme Court judgment reported in **AIR**

1955 SC 233, Hari Vishnu Kamath v. Ahmad Ishaque and others. Specifically, he has relied upon paragraph 21 of it. Still further he has submitted that registered sale-deed is proof enough of valid execution of a sale-deed and once it is registered it can only be set aside by the filing of a suit. For bolstering his argument, learned counsel for the petitioner relied upon a judgment of the Supreme Court reported in **Jamila Begam v. Shami Mohd. (2019) 2 Supreme Court Cases 727.**

8. Learned counsel for the intervenor, on the other hand, in reply submitted that the petitioner had, to begin with, no right over the property as the sale-deed, which the petitioner alleged was executed on 4.7.1956 and registered on 25.7.1956, was in fact, never in existence. He submits that there was no question of any presumption of the correctness of the document inasmuch as the presence of the proof of registration itself was doubted. He has submitted that there are reports to the effect that the sale-deed which was registered at Bahi No. 1, Jild No. 892,Document No. 1335,□at Page Nos. 265 to 266, was in fact, some other document and by manipulation and interpolation the petitioner has got his sale-deed printed/transcribed on those pages. He submits that therefore, it was a clear case of forgery and the petitioner could not say that there was a sale-deed in existence and the registration of the same had been questioned and had thereafter been looked into by respondent nos. 2 and 3 i.e. Additional District Magistrate (Finance & Revenue), District Moradabad and the Assistant Inspector General (Registration), District Moradabad. Sri Sudhir Mehrotra and Sri Manoj Kumar Sharma, learned counsel for the intervenor have submitted that if there was any cloud on the title of the petitioner then he should have filed a civil suit for the declaration of his title. For that purpose he relies upon a judgment reported in **AIR 2014 SC 937 Union of India & Ors. Vs. Vasavi Co-Op. Housing Society Ltd. & Ors.** He specifically relies upon paragraph nos. 17 and 20, which have been reproduced hereinunder:-

"....17.This Court in several Judgments has held that the revenue records does not confer title.In Corporation of the City of Bangalore v. M. Papaiah and another (1989) 3 SCC 612 held that "it is firmly established that revenue records are not documents of title, and the question of interpretation of document not being a document of title is not a question of law." In Guru Amarjit Singh v. Rattan Chand and others (1993) 4 SCC 349 this Court has held that "that the entries in jamabandi are not proof of title". In□State of Himachal Pradesh v. Keshav Ram and others (1996) 11 SCC 257 this Court held that "the entries in the revenue papers, by no stretch of imagination can form the basis for declaration of title in favour of the plaintiff."

20. We are of the view that even if the entries in the Record of Rights carry evidentiary value, that itself would not confer any title on the plaintiff on the suit land in question. Ext.X-1 is Classer Register of 1347 which according to the trial court, speaks of the ownership of the plaintiff's vendor's property. We are of the view that these entries, as such, would not confer any title. Plaintiffs have to show, independent of those entries, that the plaintiff's predecessors had title over the property in question and it is that property which they have purchased. The only document that has been produced before the court was the registered family

settlement and partition deed dated 11.12.1939 of their predecessor in interest, wherein, admittedly, the suit land in question has not been mentioned."

9. Learned counsel for the intervenor states that in the case cited above, cloud had been cast on the title on the basis of wrong revenue entries and the plaintiff had filed a civil suit and it was held by the Supreme Court that the suit for declaration definitely lay. Further learned counsel for the intervenor had relied upon **AIR 2015 Allahabad 174** and had submitted that whenever there is an invasion amounting to denial of title, it gives a fresh right to the petitioner to file a suit and he can always file a suit for declaration in his favour. Similarly, he has relied upon a judgment reported in **AIR 1984 Karnataka 153** and has submitted that suit may be instituted under the provisions of Specific Relief Act against the persons denying title of the plot. Learned counsel for the intervenor therefore, has submitted that when the cloud was cast on the title of the petitioner he should have filed a civil suit for declaration of his own rights and if any document/order/entry was coming in his way then by leading of the evidence he could have got the report/inquiry falsified.

10. Learned counsel for the intervenor has submitted that the petitioner had erroneously come to the High Court with a prayer for setting aside of the inquiry report dated 22.5.2019. He has submitted that the setting aside of the inquiry report would demand leading of evidence and that cannot be conveniently done by a Court exercising powers under Article 226 of the Constitution of India. Learned counsel for the intervenor, Sri Sudhir Mehrotra further had submitted that a perusal of the order under Section 34 of the U.P. Land Revenue Act dated 6.11.2015 definitely shows that it contained a finding that the land which was subject matter of dispute i.e. plot nos. 370/1, 370/2, 371/1, 371/2, 372, 373, 379/1 measuring total area 2.81 acre was subjected to consolidation and the names of the predecessors in the interest of intervenor were entered. He has submitted that once consolidation operations intervened and there was an opportunity to the persons whose names were not entered then any litigation thereafter was barred under Section 49 of the U.P. Consolidation of Holdings Act, 1953.

11. Sri Sudhir Mehrotra, learned counsel for the intervenor heavily relied upon Section 49 of the U.P. Consolidation of Holdings Act, 1953, which is reproduced hereinunder:-

"49. Bar to civil Courts jurisdiction. - Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of right of tenure-holder in respect of land lying in an area, for which a [notification] has been issued [under sub-section (2) of Section 4] or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act :

[Provided that nothing in this section shall preclude the Assistant Collector from initiating proceedings under

Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 in respect of any land, possession over which has been delivered or deemed to be delivered to a Gaon Sabha under or in accordance with the provisions of this Act.]"

12. Learned counsel for the intervenor further has submitted that if the petitioner is still to get his rights declared then he can always under the civil laws file a civil suit for the declaration of his right under Section 34 of the Specific Relief Act. He can lead all evidence which would enable him to establish that he had a right and title over the property in dispute.

13. Having heard learned counsel for the parties, we are definitely of the view that the writ petition lacks merits and deserves to be dismissed.

14. Learned counsel for the petitioner relying upon Sections 34 of the Registration Act, has contented that once a document regarding the transfer of immovable property is registered, no inquiry with regard to the same can be conducted by the Registering Authority, subsequent to the registration. In the instant case, the allegations and the consequent findings are that the alleged sale deed dated 25.07.1956 had never existed and the same had been interpolated in the records of the Sub-Registrar in place of some pre-existing registered sale deed. Since, the existence of the sale deed in favour of the father of the petitioner herein was not found to be in existence and the petitioner has failed to produce the original sale deed, therefore, on the complaints received, the District Magistrate concerned had directed the inquiry. Thereupon, the respondent nos. 2 and 3 had carried out the inquiry and had found that the sale deed which is dated 25.07.1956 was never in existence and only by interpolation in some pre-existing deed, this sale deed had been created in favour of the father of the petitioner herein. Therefore, in the considered view of this Court where such a fact had been established with regard to the non existence of any particular document then the bar of Section 34 of the Registration Act would not apply.. Therefore, on receipt of such complaints the inquiry conducted by the respondent nos. 2 and 3 cannot be said to be without jurisdiction.

15. The petitioner as we have seen was aggrieved by the cloud cast on his title. He had filed a suit but the suit was only for declaration that the sale-deed registered on 16.9.1961 be declared null and void. He had not filed any civil suit for the declaration of his rights. The law of the land is settled that whenever there is a cloud cast on the title of a person and he claims title then for that purpose he has to file a civil suit and would necessarily lead evidence for the declaration of his right.

16. In the instant case, the petitioner cannot be granted any relief as when the cloud was cast on his title he had not filed any suit for the declaration of his own rights. Further, we as a Court exercising powers under Article 226 of the Constitution of India cannot permit the parties to lead evidence here in the High Court for seeing as to whether the inquiry report was based on proper evidence. Had it been an open and shut case where no evidence had to be led then of course, the High Court could have looked into the facts as to whether the order/inquiry report which had declared the entries in the registration register as fabricated was based on correct facts. But in the instant case

there are many surrounding circumstances which need to be establish by leading of evidence. Under such circumstances, we consider that no interference is warranted and we do not think it to be a fit case for interference. Accordingly, the writ petition is **dismissed**.

17. We find that the petitioner's original suit bearing Suit No. 148 of 2014 was dismissed and the petitioner has already filed a First Appeal bearing First Appeal No. 131 of 2023. None of the findings as have been arrived at in this judgment would affect the merits of the First Appeal. It may be decided on its own merits.

18. It may also be noted that we have not passed any order on the merits of the report dated 22.5.2019, which is under challenge.

(2024) 3 ILRA 1992
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.02.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 30867 of 2016

Shravan Kumar ...Petitioner
Versus
Commissioner Division Lko. & Anr. ...Opp. Parties

Counsel for the Petitioner:
Amit Kumar Pathak, Ganesh Kumar Gupta

Counsel for the Opp. Parties:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-Arms Act,1959-Section 17,3/25/30-Petitioer challenged the cancellation of arms license-an FIR was lodged against the petitioner and his cousin-merely on account of recovery of gun from his cousin's premises, notice was issued to the petitioner-The court held that merely because the weapon was found in the possession of other individual cannot be ground sufficient itself to construe violation of terms and conditions of the license-there is no allegation that the petitioner or his cousin had ever misused the licensed weapon-Accordingly, the findings recorded by the District Magistrate as well as the order passed by the Appellate authority are arbitrary and accordingly set aside.(Para 1 to 17)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Satish Singh Vs D.M. Sultanpur(2009)4 ADJ 33 (LB)

2. Superintendent & Remembrancer of Legal Affairs Vs Anil Kumar Bhunja & ors. (1974) 4 SCC 274

3. Gunwantlal Vs St. of M.P. (1973) 1 SCR 508

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

1. Heard Shri Manoj Kumar Yadav, Advocate holding brief of Shri Ganesh Kumar Gupta, learned counsel for petitioner, learned Standing Counsel for the State and perused the material available on record.

2. By means of the present writ petition, the petitioner has challenged the order dated 20.09.2012 passed by the District Magistrate, Lakhimpur Kheri whereby in exercise of powers under Section 17 of the Arms Act, 1959, he has cancelled the arm licence of the petitioner as well as order dated 03.11.2015 wherein the appeal filed against the order of the

cancellation has been rejected by the Commissioner, Lucknow Division, Lucknow.

3. It has been submitted by learned counsel for the petitioner that he was issued an Arm Licece No. 659/95 DBBL Gun No. 7402115. Subsequently, an FIR was lodged against the petitioner and his cousin namely, Sheo Pujan in Case Crime No. 842 of 2010, under Section 3/25/30 of the Arms Act at Police Station Phool Behad, District Kheri where it was alleged that the licensed gun of the petitioner was recovered from Sheo Pujan. Merely on account of recovery of the gun, notice was issued to the petitioner as to why his licence be not cancelled. The petitioner replied to the show cause notice and denied the allegations therein and further submitted that there is no criminal case lodged against the petitioner and only for a short period of time had kept the gun at a particular place and left. When he returned back he found that the gun has been taken away by the police parties and an first information report was lodged. It seems that the petitioner did not participate any further in the proceedings before the Licensing Authority/District Magistrate. Consequently, the impugned order dated 20.09.2012 was passed by the District Magistrate holding that the allegations against the petitioner were correct and cancelled his arm licence.

4. The petitioner, being aggrieved by the order of cancellation of his arm licence, filed an appeal before the Commissioner, Lucknow Division, Lucknow. Before the Commissioner, the petitioner has submitted that the allegations levelled against him were false and that the gun was never given in the custody of Sheo Pujan and it is only the fact that the said gun was kept at a plot under the control of Sheo Pujan fromwhere the police team raided and recovered the said weapon. He stated that there was no misuse of any condition of the arm licence and merely on conjectures and hypothesis, the said licence has been cancelled. He further submits that there is no material before the Licensing Authority to come to a conclusion that there was any violation of the condition of the licence and consequently, prayed for allowing of the appeal and setting aside the order of the District Magistrate. The Commissioner has duly recorded the contention of the petitioner and reiterated the findings recorded by the Licensing Authority and rejected his appeal.

5. Learned counsel for the petitioner has submitted that firstly merely even if the allegations levelled against him are found to be correct then also it does not construe as a violation of the condition of the arm licence. He further submitted that there was no material before the Licensing Authority to have come to a conclusion that there was violation of the condition of the licence necessitating cancellation of licence. In this regard, he has submitted that though he objected to the allegations levelled against him but none of the objections were considered. He further submitted that the allegations were never proved as no one appeared before the Licensing Authority to prove that the licensed weapon issued to the petitioner was found in the custody of Sheo Pujan.

6. He further submits that along with the show cause notice no material or any statement was made available to the petitioner from which it could be ascertained that there was sufficient material in support of the allegations levelled against the petitioner.

7. I have heard learned counsel for respective parties and perused the record.

8. The only point for consideration as to whether with the allegations levelled against the petitioner were sufficient to enable the Licensing Authority to cancel the arm licence of the petitioner. Undisputed facts are that on 02.04.2010 on the basis of information, the police had raided the plot of one Sheo Pujan, who was closely related to the petitioner. During the raid, the licensed weapon of the petitioner was found in the premises of Sheo Pujan and consequently, an FIR under the Arms Act was registered. The said Sheo Pujan was also taken into custody and he was released on bail on 05.05.2010. Simultaneously a notice was given to the petitioner as to why his arm licence be not cancelled.

9. It is also admitted that there is no allegation that the said weapon was ever used by Sheo Pujan or that he had fired from the said weapon. Mainly it is the case of the prosecution that the recovery of the weapon was made from the premises under control of Sheo Pujan. No evidence was recorded by the Licensing Authority to ascertain the aforesaid facts, which were the very basis of the cancellation of the arm licence. No police official, who was the part of the raid party, was ever examined before the District Magistrate to record a satisfaction with regard to the location from which the weapon was recovered, neither was Sheo Pujan examined nor given notice to appear before the Licensing Authority. Apart from the First Information Report, there was no other material available with the District Magistrate.

10. It is at this stage that Licensing Authority must be reminded of the findings by a Division Bench of this Court in the case of ***Satish Singh Vs. District Magistrate, Sultanpur, 2009 (4) ADJ 33 (LB)***, has observed in paragraph nos. 6 and 7 as under:-

"6. Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licenses are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence.

7. We may take notice of the fact that for any reason whatsoever, the crime rate is raising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilized society, only civilized persons require arms licence for their safety and security and not the criminals. Of course, in case the Government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind

and keeping in view the letter and spirit of section 17 of the Arms Act."

11. Though in the entire order passed by the Licensing Authority, there is no mention of the particular condition but assuming that the condition relates to an injunction of giving weapon to anyone else possession, then merely because the weapon was found in someone's possession cannot be construed as a violation of condition of licence unless and until it is proven that the particular individual in whose possession the weapon was found had full control and custody of the weapon coupled with the fact the licencee had given the custody voluntarily Further it has also to be considered that the Licencee did not even retain constructive possession of the said weapon.

12. Hon'ble the Supreme Court has discussed "possession' in the case of ***Superintendent and Remembrancer of Legal Affairs Vs. Anil Kumar Bhunja and others reported in (1974) 4 SCC 274*** and has held in paragraph nos. 13, 14, 15, 16 and 28 as under:-

"13. "Possession" is a polymorphous term which may have different mean- ings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Juris- prudence, 12th Ed., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, ibid.)

14. According to Pollock and Wright,

"When a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing."

15. While recognising that "possession" is not a purely legal concept but also a matter of fact, Salmond (12th Ed., page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it".

*16. In **Gunwantlal v. State of M.P. (1973) 1 SCR 508**, this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case.*

In that connection, it was observed:

In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question.

28. Then, in three of these cases, namely, Manzur Husain v. Emperor, Sadh Ram v. State and Emperor v. Harpal Rai, the licence-holder sent his licensed firearm for repairs through a person who had the licence-holder's oral authority, expressly or impliedly given, to carry it to the repairer. It was held that the carrier, though he held no licence to keep the firearm, could not be said to be in "possession" of it, nor could the licence-holder be said to have parted with the "possession" of the firearm or delivered its possession to an unauthorised person. Similarly, in one of the cases cited, the licence-holder sent his fire- arm to the Magistrate through his servant or agent for getting the licence renewed. In that case also, it was held that the servant was not guilty of any offence for having in his possession or "carrying" a gun wihout a licence. The possession was held to be still with the licence-holder-owner of the weapon."

13. Merely because the weapon was found in the possession of other individual cannot be a ground sufficient itself to construe violation of terms and conditions of the licence, inasmuch as, there may be embodied occasions where the licencee has to part away temporarily with the possession of the weapon for retaining constructive possession of the said weapon.

14. For Example, if a person goes to visit a temple or any other place where he is not allowed to carry the weapon, he is under compulsion to part with the possession of the weapon temporarily for a short period of time and during his time another individual has custody but the licencee would certainly have constructive custody of the weapon. In such a situation, though the physical possession of the weapon had been given to another individual but at all point of time, he retained the constructive possession and in such a case it cannot be said that there was a violation of condition of the licence.

15. It is therefore, in the aforesaid circumstances, this Court is of the considered view that when the Licensing Authority/Prescribed Authority has reason to proceed to consider the case where there is a violation of condition of the licence where the weapon has been found in the possession of other person, then there has to be a satisfaction that the licencee did not even have the constructive possession of the weapon at the point of time when the weapon was recovered.

16. Accordingly, this Court is of the considered view that merely because the weapon was found in the premises, which were controlled by cousin brother of the petitioner, cannot lead to a conclusion that the petitioner was not in control of the licensed weapon issued to him. There is no allegation that the petitioner or Sheo Pujan had ever misused the licensed weapon and accordingly, the findings recorded by the District Magistrate as well as the order passed by the appellate authority are arbitrary and accordingly set aside.

17. The writ petition is allowed. The order dated 20.09.2012 passed by the

District Magistrate, Lakhimpur Kheri as well as order dated 03.11.2015 passed by the appellate authority are hereby quashed..

(2024) 3 ILRA 1997
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 31120 of 2019
With
Writ C No. 33836 of 2019

Pyare Lal & Ors. ...Petitioners
Versus
U.O.I. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Sri Shiv Kant Mishra, Sri Krishna Kant Mishra

Counsel for the Opp. Parties:
A.S.G.I., C.S.C., Ms. Suman Jaiswal

Civil Law - Constitution of India,1950-Article 226-

Land Acquisition Act,1894-Sections 4 r/w 17-Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act,2013-Section 24(1)(a)-The land acquisition process was initiated in 2005 under the old Act, with possession taken in 2007-the new act came into force in the year 2014-petiitioners claimed that the compensation should be determined based on the new Act-Section 24 of the 2013 Act provides that if no award was made before the new Act came into effect, compensation must follow the provisions of the new Act-The court directed the Special Land Acquisition Officer to re-determine the compensation using the 2014 market value within 12 weeks.(Para 1 to 17)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Hori Lal Vs St. of U.P. & 3 Ors Writ-C No. 44731 of 2016

2. Prahlad Singh & ors. Vs St. of U.P. & ors Writ-C No. 15804 o 2016

3. Krishna Autar & 5 Ors Vs St. of U.P. & ors Writ-C No. 44720 of 2016

4. Ishan International Edu. Socy Thru' Dir Vs St. of U.P. & ors Writ-C No. 60276 of 2015

5. Smt Sabita Sharma & 2 Ors Vs St. of U.P. & ors Writ-C No. 30088 of 2022

(Delivered by Hon'ble Manoj Kumar Gupta, J., & Hon'ble Kshitij Shailendra, J.)

1. Heard Shri S.K. Mishra, learned counsel for the petitioners, Ms. Suman Jaiswal, learned counsel for respondent nos.1 and 5 in Writ-C No.31120 of 2019 and Shri Gautam Kumar, learned counsel for respondent nos.1 and 5 in Writ-C No.33836 of 2019 and Shri Rajiv Gupta, learned Additional Chief Standing Counsel for respondent nos.2, 3 and 4.

2. The petitioners in both the writ petitions have assailed the award dated 26.12.2015 passed by Special Land Acquisition Officer, Joint Organization, Bareilly, one of the respondents. The award has been purportedly made under the saving clause embodied in Section 24(1)(a) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short hereinafter referred to as 'the new Act, 2013').

3. The acquisition was initiated under the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as 'the old Act). The notification under Section 4 read with Section 17 of the old Act was issued on 17.10.2005 followed by notification under Section 6 dated 16.10.2006. Since, the provisions of Section 17(4) and 17(1) were invoked at the time of issuance of notifications under Sections 4 and 6 of the old Act respectively, therefore, the State-respondents proceeded to take possession of the acquired land on 18.01.2007, even before making the award. Before award could be made, the new Act, 2013 was enforced with effect from 01.01.2014.

4. Section 24 of the new Act, 2013, which is relevant for the controversy involved in the instant petition, is as follows:

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.–(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,—

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

5. Thus, under Clause (a) of sub-section (1) of Section 24 where no award under Section 11 of the old Act has been made, then all provisions of the new Act, 2013 relating to determination of compensation have been made applicable. However, the Special Land Acquisition Officer, while making award on 26.12.2015, admittedly, after enforcement of the new Act, 2013, determined the compensation with reference to the date of notification under Section 4 of the old Act i.e., 17.10.2005. He took into consideration the sale deeds executed three years prior to the notification under Section 4 and placing reliance on a sale deed dated 20.06.2005 executed by Nanu Ram, Moti Ram, Chatarni Lal, Hori Lal sons of Bhajan Lal in favour of Om Wati wife of Shyam Bihari in respect of Gata no.222/0.061 hectare at the rate of 60,000/hectare determined the compensation.

6. Learned counsel for the petitioners contended that in view of express language of sub-section (1) of Section 24 read with Central Government Notification dated 26.10.2015, the reference date for determining the compensation would be 1st of January, 2014 and not the date of notification under Section 4 of the old Act. In support of his contention, he placed reliance on Division Bench judgements of this Court in **Writ-C No.44731 of 2016 (Hori Lal vs. State of U.P. and 3 Others), Writ-C No.15804 of 2016 (Prahlad Singh and 6 Others vs. State of U.P. and 2 Others), Writ-C No.44720 of 2016 (Krishna Autar and 5 Others vs. State of U.P. and 3 Others), Writ-C No.60276 of 2015 (Ishan International Educational Society Thru' Director vs. State of U.P. and 3 Others) and in Writ-C No.30088 of 2022 (Smt. Sabita Sharma and 2 Others vs. State of U.P. and 2 Others)** decided on 07.04.2023.

7. On the other hand, learned counsel appearing on behalf of the Central Government tried to contend that the award impugned rightly determines the compensation with reference to the date under Section 4 of the old Act. It is urged that the compensation amount under the impugned award has already been deposited with the Special Land Acquisition Officer and, now, there is no occasion to interfere with the same.

8. Shri Rajiv Gupta, learned Additional Chief Standing Counsel appearing for the State-respondents adopts the same line of argument.

9. Thus, the main issue for consideration is the date in relation to which the value of the acquired land was to be determined while making award under the saving clause embodied in Section 24(1)(a) of the new Act, 2013.

10. In **Smt. Sabita Sharma** (supra), a Co-ordinate Bench of this Court, after examining various earlier Division Bench judgements of this Court and most of which were upheld with the dismissal of special leave petitions filed before the Supreme Court and in one case, namely, **Hori Lal vs. State of U.P. and 3 Others** with dismissal of Civil Appeal No.1462 of 2019, held that the relevant date would be 01.01.2014 i.e., the date of commencement of the new Act, 2013. The judgement takes notice of Section 113 of the new Act, 2013, which empowers the Central Government to make such provisions or give such directions not inconsistent with the provisions of the new Act, 2013, as may appear to it to be necessary or expedient for removal of the difficulty. It has been held that in exercise of said power, the Central Government had issued a D.O. No.13013/01/2014-LRD(Pt) dated 26.10.2015 wherein the issue at hand was specifically answered in reference to a query raised by the Government of Maharashtra. The relevant part of the said D.O. is extracted below:

S. No.	**Issues raised by the Government of Maharashtra**	**Opinion of the DoLR**
1.	While determining the amount of compensation under Section 27 of the RFCTLAR&R Act, 2013 of Hon'ble	Under Section 26 of the RFCTLAR&R Act, 2013 market value of land is determined while under section 27, value of all assets attached to the land is added to the

	Supreme Court's orders are followed or cost of assets have to be separately computed in addition to cost of land?	market value to determine the amount of compensation. Thus, it is not contradictory to the Supreme Court's orders quoted in the letter of Maharashtra Government.
2.	Under Section 24(1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act, 1894.	Under section 24(1), the reference date for calculating 12% interest should be date of preliminary notification under Land Acquisition Act, 1894. Department of Land Resources agrees to this, as there is no other reference date, that can be treated as equivalent to date of SIA notification under the RFCTLAR&R Act, 2013.
3.	For calculation of market value, under Section 24(1)(a), reference date should be 01.01.2014 (commencement of RFCTLAR&R Act, 2013) or date of issuing preliminary notification under Land Acquisition Act, 1894?	The reference date for calculation of market value, under Section 24(1)(a) should be 01.01.2014 (commencement of RFCTLAR&R Act, 2013), as the Section reads "in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply. Under section 26 reference date is date of preliminary notification, but section 24 is a special case of application of the Act in retrospective cases, and a later date of determination of market value is suggested (i.e., 01.01.2014) with a view to ensure that the land owners/farmers/affected families get enhanced compensation under the provisions of the RFCTLAR&R Act, 2013 (as also recommended by Standing Committee in its 31st report).

11. The Division Bench, thereafter, concluded as follows:

"From a perusal of the D.O. letter dated 26th October, 2015, issued by the concerned Ministry of the Central Government forwarded to the Principal

Secretary of the State of U.P., for information and necessary action, it is evident that the said direction was made in order to remove difficulty arose in giving effect to the provisions of the RFCTLARR Act, 2013, in the matter of calculation of market value under Section 24(1)(a), in the land acquisition proceedings initiated under the Act, 1894. The said directions issued by the Central Government being in exercise of the power under Section 113 of the RFCTLARR Act, 2013 have statutory force and are binding on all the State Government being in view of the power conferred on the Central Government to make such provision or give such directions which are not inconsistent with the provisions of the RFCTLARR Act, 2013, for removal of any difficulty arising in giving effect to the provisions of the RFCTLARR Act, 2013."

12. It is noteworthy that when same view was taken by an earlier Division Bench in **Hori Lal** (supra), the matter travelled to Supreme Court and the **Civil Appeal No.1462 of 2019 (Hori Lal vs. State of U.P. and Others)** was dismissed by the Supreme Court repelling the contention that the relevant date would be the date on which the award was made. The view taken by the Division Bench of this Court that relevant date would be 1st of January, 2014 was thereby upheld. The relevant extract from the said judgement of the Supreme Court is as follows:

"20. We, therefore, find no good ground to accept the submission of the learned counsel for the appellant when he contended that the date for determining the compensation should be the date on which the Land Acquisition Officer passed the award. This argument does not have any basis and is, therefore, not acceptable for the simple reason that such date is not provided either in the old Act, 1894 or in the Act, 2013.

21. Indeed, how the compensation is required to be determined and with reference to what date, is provided under the Act and admittedly the date suggested by the learned counsel is not the date prescribed either in the old Act or the new Act. This submission has, therefore, no merit and deserves to be rejected. It is accordingly rejected.

22. We, therefore, find no good ground to take a different view than what was taken by the High Court in the impugned order"

13. In view of the above discussion, we are of the opinion that the issue is no more *res integra*. The relevant date for determining the compensation in respect of acquisition initiated under the old Act but where award could not be made by the time the new Act, 2013 came into force, would be 1st of January, 2014 i.e., the date of commencement of the new Act, 2013.

14. Concededly, in the instant case, the market value has been determined by taking into consideration the exemplar sale deed of the year of issuance of notification under Section 4 of the old Act, which is contrary to the legislative intent and the law laid down in series of Division Bench judgements of this Court referred to above.

15. As a result, the impugned award is hereby quashed. The Special Land Acquisition Officer is directed to pass fresh award treating the relevant date with reference to which market value is to be determined as 01.01.2014, the date of commencement of the new Act, 2013.

16. The aforesaid exercise shall be completed within a period of twelve weeks from the date of communication of the instant order.

17. In the result, the writ petitions are **allowed.** No order as to costs.

(2024) 3 ILRA 2002
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2024 & 13.03.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Writ-C No. 31515 of 2023

Aidal Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Sri Om Prakash Rai, Sri Ashish Rai

Counsel for the Opp. Parties:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-Motor Vehicle Act,1988-Section 166-In the present case, the claimants lost their son in the year 2015-the application was filed for release of the money so that the petitioner's daughter could get married-Proof of this fact was also filed before the tribunal but the tribunal has failed to understand the urgency in the matter-As per law laid down by the Apex Court it is clear that the guidelines were issued to keep the amount in a Fixed Deposit for aa period of time only in the case of minors, illiterate and widow claimants-The tribunal has taken a rigid stand and has mechanically passed the order without understanding and without appreciating the distinction drawn by the supreme court-The claimants are now aged about 57 years having responsibility of two daughters and one son-Hence there is no reason to not allow the application of the petitioners.(Para 1 to 24)

The writ petition is allowed. .(E-6)

List of cases cited:

1. G.M. KRSRTC Vs Sushamma Thomas & ors. (1994)1 TAC 323

2. Zainba Vs M.A.C.T H (1999) ACC 567

3. Agnihotri Vs M.A.C.T/ ADJ,Agra & ors. (2005) LawSuit (All) 2165

4. Padma & ors. Vs R. Venugopal & ors. (2012) 3 SCC 378

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

1. Heard Sri Om Prakash Rai, learned counsel for the petitioners, learned Standing Counsel and perused the record.

2. This writ petition has been filed challenging the orders dated 05.06.2023 passed by Motor Accident Claims Tribunal, Bulandshahar in Misc. Case No. 545 of 2023 & 555 of 2023 directing for part release of the compensation awarded in claim petition i.e. Motor Accident Claim Petition No. 468 of 2015 and directing the remaining amount to be invested in a Fixed Deposit.

3. Brief facts of the case are that one Ganpat Singh son of Aidal Singh died in a road accident on 19.08.2015 at about 08:00P.M. involving fortuner car No. UP81 CB 7686. Claim petition No. 468 of 2015 was filed by the claimants i.e. parents of the deceased Ganpat Singh along with two unmarried sisters and one brother of the deceased under Section 166 of the Motor Vehicle Act. The aforesaid claim petition

was allowed by the Motor Accident Claim Tribunal/ Additional District Judge, Court No. 12, Bulandshahar vide its award dated 24.10.2017. Motor Accident Claims Tribunal awarded a sum of Rs. 15,39,000/- to be paid by the Insurance Company along with an interest @ 7% per annum from the date of filing of the application. The claimant nos. 3, 4 & 5 who were sisters and brother of the deceased Ganpat Singh were held not entitled for compensation by the tribunal as they were not dependent upon the deceased Ganpat Singh. Parents of the deceased Ganpat Singh i.e. claimant nos. 1 & 2 were given compensation in equal shares. The tribunal vide award dated 24.10.2017 directed for a payment of Rs. 2,00,000/- to each of the claimants i.e. claimant nos. 1 & 2 and directed that the remaining amount shall be deposited in a nationalized bank having maximum interest.

4. The claimants filed First Appeal From Order No. 264 of 2018 (Premwati and 4 others v. Ikbal and 2 others) before the High Court challenging the judgment and award dated 24.10.2017 and has also claimed the enhancement of compensation. The aforesaid F.A.F.O. was allowed in part by this Court by judgment dated 22.02.2022. The High Court awarded the compensation of Rs. 23,65,000/- to the claimants along with interest @ 7.5% per annum.

5. The Insurance Company in compliance of the judgment passed by this Court in F.A.F.O. No. 264 of 2018, deposited the entire amount before the Claims Tribunal.

6. The petitioner no. 1, Aidal Singh moved an application on 03.05.2023 before the Motor Accident Claims Tribunal for payment of F.D.R. No. 961094 of Rs. 2,97,300/- dated 24.02.2023 along with interest to the petitioner no. 1 on the ground that the marriage of his daughter is to be held on 11.06.2023. The aforesaid application was registered as Misc. Case No. 555 of 2023. A similar application was also moved by the petitioner no. 2 regarding F.D.R. No. 961093 of Rs. 2,97,300/- dated 24.02.2023 on the ground of settlement of marriage of her daughter Km. Vimlesh. The aforesaid application was registered as Misc. Case No. 554 of 2023. In support of their claim, the petitioners also annexed the marriage card.

7. The Motor Accident Claims Tribunal, Bulandshahar by its two separate orders dated 05.06.2023 in Misc. Case No. 554 of 2023 & 555 of 2023 directed for release of Rs. 1,50,000/- in favour of each of the claimant/petitioner and has further directed that the remaining amount shall be reinvested in a new Fixed Deposit. Being aggrieved by the order impugned dated 05.06.2023 passed by the Motor Accident Claims Tribunal, Bulandshahar, the present writ petition has been filed.

8. Contention of the learned counsel for the petitioner is that the tribunal has erred in law in not releasing the amount of F.D.R. in favour of the claimants/petitioners and the direction for further deposit of the remaining amount in Fixed Deposit is wholly arbitrary. It has also been contended by the learned counsel for the petitioner that the son of the petitioner Ganpat Singh died in the year 2015 and at that time the petitioner nos. 1 & 2 were 49 years old and now they are aged about 57 years having two unmarried daughters and one son. The application for withdrawal was moved for meeting out the

expenses likely to be incurred in the marriage of their daughter Km. Vimlesh.

9. Per contra, learned Standing Counsel appearing for respondent no. 1 contended that the orders passed by the Tribunal are perfectly just and are also in consonance with the law as laid down by the Apex Court in case of **General Manager, Kerala State Road Transport Corporation v. Sushamma Thomas and others** reported in **1994 (1) TAC 323** as well as Rule 220-B of the U.P. Motor Vehicle Rules, 1998.

10. Learned counsel for the petitioner relied upon the judgment of this Court in case of Runna v. Vth Additional District Judge/Motor Accident Claim Tribunal, Gorakhpur reported in II (1999) ACC 268, judgment of Kerala High Court in Case of **Zainba v. M.A.C.T**. reported in **II (1999) ACC 567** and in case of **Sudha Agnihotri v. M.A.C.T./Additional District Judge, Court No. 4, Agra and others** reported in **2005 LawSuit (All) 2165**.

11. Before considering the rival submissions and the law relied upon by the respective parties, it would be useful to refer the statutory provisions as contained in U.P. Motor Vehicle Rules, 1998. The relevant rule is Rule 220-B which is quoted as under:

"220-B. Securing the interest of Claimants.—(1) Where any lump-sum amount of compensation, deposited with the Claims Tribunal is payable to a woman or a person under legal disability/ such sum may be invested, applied or otherwise dealt with for the benefit of the woman or such person during his disability in such manner as the Claims Tribunal may direct to be paid to any dependent of the injured or heirs of the deceased or to any other person whom the Claims Tribunal thinks best fitted to provide for the welfare of the injured or the heir of the deceased.

(2) Where an application made to the Claims Tribunal in this behalf otherwise, the Claims Tribunal is satisfied that on account of neglect of the children on the part of the parents, or on account of the variation of the circumstances of any dependent, or for any other sufficient cause, an order of the Claims Tribunal as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependent is to be invested applied or otherwise dealt with, ought to be varied, the Claims Tribunal may make such further orders for the variation of the former order as it thinks just in the circumstances of the case.

(3) The Claims Tribunal shall, in the case of minor, order that amount of compensation awarded to such minor be invested in fixed deposits till such minor attains majority. The expenses incurred by the guardian or the next friend may be allowed to be withdrawn by such guardian or the next friend from such deposits before it is deposited : Provided that the interest payable on such deposits may be allowed to be utilized for education, maintenance and development of the minor with the permission of the Claims Tribunal.

(4) The Claims Tribunal shall, in the case of illiterate claimants, order that the amount of compensation awarded be invested in fixed deposits for a minimum period of three years, but if any amount is required for effecting purchase of any movable or immovable property for improving the income of the claimant, the Claims Tribunal may consider such a request after being satisfied that the amount would be actually spent for the

purpose and the demand is not a ruse to withdraw money.

(5) The Claims Tribunal shall, in the case of semi-literate person resort to the procedure for the deposit or award amounts set out in sub-rule (4) unless if is satisfied, for reasons to be recorded in writing that the whole or part of the amount is required for the expansion of any existing business or for the purchase of some property as specified and mentioned, in sub-rule (4) in which case the Claims Tribunal shall ensure that the amount is invested for the purpose for which it is prayed for and paid.

(6) The Claims Tribunal may in the case of literate persons also resort to the procedure for deposit of awarded amount specified in sub-rules (4) and (5) if having regard to the age, fiscal background and state of society to which the claimant belongs and such other consideration/ the Claims Tribunal in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, thinks it necessary to order.

(7) The Claims Tribunal, may in personal injury cases, if further treatment is necessary, on being satisfied which shall be recorded in writing, permit the withdrawal of such amount as is necessary for the expenses of such treatment.

(8) The Claims Tribunal may, in the matter of investment of money, have regard to maximum return by ways of periodical income to the claimant, deposit with public sector undertaking of the State or Central Government which offers higher rate of interest.

(9) The Claims Tribunal shall, in investing money, direct that the interest on the deposits be paid directly to the claimants or the guardian of the minor claimants by the institution holding the deposits under intimation to the Claims Tribunal].''

12. In **General Manager, Kerala State Road Transport Corporation v. Sushamma Thomas (Supra)** , the Supreme Court issued certain guidelines in order to safeguard the feed from being frittered away by the beneficiaries due to ignorance, illiteracy and susceptibility to exploitation. The said guidelines are extracted below:

"(i).The claims Tribunal should, in the case of minors, invariably order amount of compensation awarded to the minor invested in long term fixed deposited at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may however, be allowed to be withdrawn.

(ii). In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as agricultural implements, rickshaw, etc. to earn a living the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money.

(iii). In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out in (i) above unless it is satisfied for reasons to be stated in writing, that the whole or part of the amount is required for expending any existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid.

(iv). In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above subject to the realization set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order.

(v). In the case of widows the claims Tribunal should invariably follow the procedure set out in (i) above.

(vi). In personal injury cases, if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment.

(vii). In all cases in which investment in long term fixed deposits is made it should be an condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

(viii). In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency if the amount awarded is substantial the Claims Tribunal may invest it in more than one fixed deposit so that if need be one such F.D.R. can be liquidated."

13. These guidelines have now been incorporated by the legislature and the Rule 220-B of the U.P. Motor Vehicle Rules, 1998 have been inserted in the rules.

14. In case of **Runna v. Vth Additional District Judge (Supra)**, this Court held that there is no dispute that the petitioner is a major and hence it is for her to decide what to do with money which has been awarded, and set-aside the order dated 16.05.1996 and directed that a sum of Rs. 75,000/- alongwith interest which may have accrued thereupon be paid to the petitioner forthwith. (para-2)

15. In case of **Zainba v. M.A.C.T. (Supra)**, the money was directed to be deposited in Fixed Deposit by the Tribunal. After the Fixed Deposit matured, the petitioner moved an application for release of the said amount in order to meet the expenses of the marriage of her grand daughter. According to the petitioner her daughter is a divorcee and she require the money for their livelihood. The application was rejected by the Tribunal stating that the Tribunal was not satisfied that the need is genuine. The Kerala High Court held that since five years have already over and the petitioner is a widow lady and she is claiming only her share, there is no reason to reject her application for release of her share.

16. In case of **Sudha Agnihotri v. M.A.C.T. (supra),** this Court has held in paragraph no. 4 as under:

"4. After respective arguments have been advanced undisputed position is that husband of the petitioner met with an accient and died. Claim petition of the petitioner and two others was allowed and as far as petitioner is concerned one lac of rupees was awarded to her out of which a sum of Rs. 20,000 has been paid and

remaining eighty thousand has been invested in the fixed deposit. Award in question does not disclose as to in what way and manner said amount in question was to be paid: it merely mentioned that from the date of order aforesaid amount in question be paid with 8% simple interest. Petitioner is major and educated lady and has done beautician course from Mahila Training Centre, Shastri Nagar, Kanpur and she intends to settle herself, for which she has taken decision for opening a beauty parlour for which she needs funds. Apart from rupees eighty thousand she has got she has no other source of income. Petitioner intends to establish herself independently for which she has taken decision for opening beauty parlour. Petitioner is major and fully competent and capable to decide her future and as such withdrawal of the amount must be left at her will and as such at this staeg when petitioner took decision to start business for herself, it would be totally unfair to retain the said amount in the Nationalized Bank, in case petitioner would have been illiterate lady and could not understand her interest then position would have been different but here petitioner is well educated lady and understands her future."

17. The judgment in case of **General Manager, Kerala State Road Transport Corporation v. Sushamma Thomas (Supra)** was considered and explained by the Apex Court in case of **A.V. Padma and others v. R. Venugopal and others reported in (2012) 3 SCC 378**, wherein the Apex Court has held in para nos. 6, 7, 8, 9 & 10 as under:

"6. Even as per the guidelines issued by this Court Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit.

7. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also the Tribunal may resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that the Tribunal should. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is

necessary to invest the amount of compensation in long term fixed deposit.

8. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi-literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money.

9. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him.

10. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice."

18. From the law as laid down by the Apex Court it is clear that the guidelines were issued to keep the amount in a Fixed Deposit for a period of time only in the case of minors, illiterate claimants and widow.

19. In the instant case, the Court finds that the tribunal has taken a very rigid stand and has mechanically passed the order without understanding and without appreciating the distinction drawn by the Supreme Court. In the present case, the claimants/petitioners lost their son in the year 2015 and at that time the petitioners/claimants were aged about 49 years and when they moved the application

for release of the amount in June, 2023, they were aged about 57 years and have responsibility of three children of marriageable age. The award was passed in the year 2017 and the money was invested in Fixed Deposit.

20. The guidelines has been issued in case of **General Manager, Kerala State Road Transport Corporation v. Sushamma Thomas (Supra)** which have now been incorporated in the Rules was only to safeguard the interest of the claimants particularly the minors and the illiterate. These guidelines were not meant to understood to mean that the tribunal was suppose to take a rigid stand while considering the application of the petitioners for the release of money.

21. In the present case, the application was filed for release of the money so that the petitioners' daughter could get married. Proof of this fact was also filed before the tribunal but the tribunal has failed to understand the urgency in the matter and has mechanically passed the orders. There is nothing to show that the petitioners are illiterate on the other hand a genuine reason has been given by the petitioner for release of the balance amount.

22. Considering the facts of this case that the claimants are now aged about 57 years having responsibility of two daughters and one son and particularly that the award was passed in the year 2017 of an accident which has taken place in the year 2015, there is no reason to not allow the application of the petitioners in its entirety.

23. The Court is of the opinion that the direction for further investment in Fixed Deposit as contained in the order impugned cannot be sustained and therefore, the impugned order dated 05.06.2023 is hereby quashed to the extent its directs for depositing the remaining amount in Fixed Deposit.

24. The writ petition is **allowed**.

25. The petitioners are entitled for the release of amount as prayed by them. The tribunal is directed to release the amount and the interest accrued immediately upon receipt of the certified copy of this order.

(2024) 3 ILRA 2009
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, A.C.J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 33840 of 2023
connected with
Writ-C No. 42177 of 2023

Dr. Rajeev Sinha ...Petitioner
Versus
U.O.I. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Kalpana Sinha, Sri Navin Sinha(Sr. Advocate), Sri Utkarsh Srivastava

Counsel for the Opp. Parties:
A.S.G.I., C.S.C., Sri Pranjal Mehrotra, Sri Raghav Dwivedi

CONSTITUTION OF INDIA — Article 226 — Maintainability of writ petition — Arbitral award under National Highways Act, 1956

— Alternative remedy under Section 34 of Arbitration and Conciliation Act, 1996 — Exceptions.
Where an arbitral award passed by the Collector under Section 3G(5) of the National Highways Act, 1956 is challenged on the ground that directions issued by the District Judge in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 have been completely ignored, the writ petition under Article 226 of the Constitution is maintainable. Availability of an alternative statutory remedy is not an absolute bar where the authority has acted in defiance of judicial discipline and fundamental principles of procedure.

NATIONAL HIGHWAYS ACT, 1956 — Section 3G(5) & (7) — Determination of compensation — Duty of Arbitrator.
The Arbitrator is under a statutory obligation to independently assess market value by considering sale exemplars, potentiality of land, location, surrounding development and other parameters specified in Section 3G(7). Mechanical reliance upon the award of the Special Land Acquisition Officer or stamp duty rates, without independent application of mind, renders the award unsustainable.

ARBITRATION AND CONCILIATION ACT, 1996 — Section 34 — Effect of remand order — Binding nature.
Once an arbitral award is set aside by the District Judge under Section 34 with specific findings and directions, the Arbitrator, being a subordinate authority, is bound to decide the matter afresh strictly in accordance with such directions. Failure to comply with remand directions amounts to violation of judicial discipline and vitiates the subsequent award.

LAND ACQUISITION — Market value — Revenue entries — Relevance.
Market value of acquired land cannot be determined solely on the basis of its classification in revenue records. Absence of declaration under Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is not conclusive for denying compensation based on commercial potential where surrounding development, location and sale deeds indicate higher market value.

JUDICIAL DISCIPLINE — Subordinate authorities — Duty to follow superior court orders.
Orders passed by superior courts or appellate authorities are binding on subordinate authorities. Ignoring or bypassing directions contained in a remand order constitutes jurisdictional error and results in illegality apparent on the face of the record.

WRIT JURISDICTION — Alternative remedy — Exceptions.
The rule of exhaustion of alternative remedies is a rule of discretion and not of compulsion. Writ jurisdiction can be exercised where the authority has acted without jurisdiction, in violation of principles of natural justice, or in disregard of binding judicial directions.

ORDER — Arbitral award quashed — Matter remitted.
Arbitral award passed by the Collector after remand, without compliance of directions issued by the District Judge, held illegal and quashed. Petitioner left at liberty to seek fresh determination by the Arbitrator strictly in accordance with remand directions.

CITATIONS

1. State of U.P. v. Mohammad Nooh, AIR 1958 SC 86

2. K.S. Rashid & Son v. Income Tax Investigation Commission, AIR 1954 SC 207

3. Ram and Shyam Company v. State of Haryana, (1985) 3 SCC 267

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

1. These two connected writ petitions arise out of same controversy and, therefore, were heard together. Since all the relevant facts and arguments are covered by Writ C No.33840 of 2023, a detailed judgement is being pronounced treating the said writ petition as the leading one and after conclusion of the judgement in the

said writ petition, a separate order shall be passed in the connected Writ C No.42177 of 2023.

2. The Writ C No.33840 of 2023 under Article 226 of the Constitution of India has been filed assailing the order/award dated 28.07.2023 passed by the Collector, Jhansi in the capacity of Arbitrator under the provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') made applicable by virtue of Section 3G(6) of the National Highways Act, 1956 (hereinafter referred to as 'the Act of 1956') in Case No. 2337 of 2023 (Computerized Case No.D202306370002337) (Dr. Rajeev Sinha v. National Highways Authority of India, Jhansi), with a further prayer directing the District Magistrate /Collector /Arbitrator, Jhansi to decide the said case in terms of guidelines/directions contained in the judgment and order dated 27.04.2022 passed by the District Judge, Jhansi.

THE WRIT PETITION

3. The facts of the case are that the petitioner purchased part of land covered by Plot No.481, ad-measuring 0.230 hectares, i.e. 2300 sq. mtrs., situated in Village Koncha Bhanwar, Pargana, Tehsil and District-Jhansi, vide registered sale deeds dated 27.03.1993 and 04.02.1994. It is pleaded that, in exercise of powers under the Act of 1956, the Central Government issued a notification dated 03.09.2009 under Section 3A of the Act which was followed by notification dated 09.04.2010 under Section 3D of the Act acquiring the petitioner's land and the Special Land Acquisition Officer, assessing the market value of the land @ Rs.15 lacs per hectare and attaching certain value to the constructions existing thereon, declared an award dated 30.09.2010. The petitioner approached the Competent Authority as per Section 3G(5) of the Act of 1956 whereafter an Arbitration Case No.521 of 2012 was registered before Collector/ District Magistrate, Jhansi. The Arbitrator declared his award on 15.09.2017 on the lines of the Special Land Acquisition Officer principally on the ground that the land had not been declared as 'abadi' under Section 143 of the UP. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'U.P. Z.A. & L.R. Act') and, therefore, would continue to remain an 'agricultural land'.

4. The petitioner assailed the award dated 15.09.2017 by availing statutory remedy under Section 34 of the Act of 1996 made applicable by virtue of Section 3G(6) of the Act of 1956. The District Judge, Jhansi, by judgment and order dated 27.04.2022, passed in Misc. Case No.12 of 2017 under Section 34 of the Act of 1996, set aside the award dated 15.09.2017 and remanded the matter to the Arbitrator for fresh consideration in the light of observations made in the order itself after affording opportunity of hearing to the parties. After remand, the District Magistrate/Collector, Jhansi, as Arbitrator, has, by the order impugned dated 28.07.2023, rejected the reference holding that the compensation awarded under the award dated 30.09.2010 was according the law and that the petitioner was not entitled to any further compensation. It is this order of the Arbitrator which is under challenge in the present writ petition and has been assailed mainly on the ground that the directions contained in the order of the District Judge dated 27.04.2022 have not been followed by the Arbitrator. The detailed arguments advanced on behalf of

the petitioner shall be noted at appropriate place in this judgement.

PREVIOUS PROCEEDINGS IN THE INSTANT CASE

5. This Court, in its order dated 04.10.2023, noted the main contention advanced on behalf of the petitioner that the Collector had chosen to overlook the directions issued by the District Judge and, by making some observations, this Court directed the learned Additional Chief Standing Counsel to communicate the order to the State-respondents for due compliance. Later on, by an order dated 02.11.2023, Shri Rajiv Gupta, learned Additional Chief Standing Counsel was granted further time to enable the Collector to revisit the matter and file a fresh affidavit. Then, the order dated 08.11.2023 records that the respondent No.3 (Collector, Jhansi) has recalled the order dated 28.07.2023 fixing 10.11.2023 as date of hearing and learned counsel representing the National Highways Authority of India (hereinafter referred to as 'N.H.A.I.') was granted time to obtain instructions. Thereafter, various dates were fixed and, in the meantime, the fresh order dated 03.11.2023 passed by the Collector, Jhansi whereby he had recalled the order dated 28.07.2023 (impugned in the present writ petition) was challenged by the N.H.A.I. by filing Writ C No.42177 of 2023 (National Highways Authority Of India v. State of U.P. and Another) which was directed to be connected with the present writ petition and both the matters were heard simultaneously.

COUNTER AFFIDAVIT OF THE STATE RESPONDENTS

6. In the present case, though the State-respondents initially justified passing of the order impugned dated 28.07.2023 making various submissions in the affidavits of certain officers, later on, the State came up with the stand that since the Collector had already recalled order dated 28.07.2023, the State-Authorities were ready to comply with the directions issued by this Court or any other court of law. Therefore, the N.H.A.I. remained the only contesting party and, hence, the Court proceeds to examine the defence taken in the counter affidavit filed on behalf of N.H.A.I.

COUNTER AFFIDAVIT OF THE N.H.A.I.

7. The counter affidavit filed on behalf of N.H.A.I. principally raises an objection regarding maintainability of the present writ petition by taking aid of Section 34 of the Act of 1996 and it has been stated that since the said provision speaks that recourse to the Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3), challenge made by the petitioner to the award of the Collector by means of the present writ petition under Article 226 would tantamount to by-passing statutory alternative remedy and, hence, the writ petition should be dismissed on this ground alone. Further pleadings in the counter affidavit are that even the subsequent exercise carried out by the Arbitrator, in terms of the order dated 03.11.2023, is unsustainable due to the fact that, after making the award, the Arbitrator became functus officio, having no power/jurisdiction to make changes in his decision. The defence taken by N.H.A.I. in relation to the order dated 03.11.2023 has been made a ground of challenge by it in the connected Writ C No.42177 of 2023. Reference to certain Authorities of the

Hon'ble Supreme Court has been made to contend that writ jurisdiction cannot be invoked once the matter arises from arbitral award. The Authorities would be referred to at appropriate place in this judgement.

8. On merits of the order dated 28.07.2023, impugned in the present writ petition, it has been pleaded that as per Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as 'Act of 2013'), read with Section 3G(7)(a) of the Act, 1956, the criteria that shall be adopted by the Collector would be referable to the market value of the property acquired as specified in the Indian Stamp Act, 1899 for registration of the sale deeds or agreements to sell and it is further pleaded that the Arbitrator had considered the sale deeds of three years prior to the date of notification issued under Section 3A of the Act of 1956 and, therefore, even on merits, the writ petition has no force.

REJOINDER AFFIDAVIT

9. The petitioner has filed a rejoinder affidavit against the counter affidavit of N.H.A.I. and, by placing reliance upon certain judgements of the Apex Court (that shall be referred to herein-later), it has been pleaded that the petitioner had already availed the statutory remedy provided under the Act by approaching the District Judge against the award of the Collector, however, since the directions issued by the District Judge in the order of remand dated 27.04.2022 have been given a complete go-by, it would not be a case of by-passing the statutory remedy under Section 34 of the Act of 1996. Further stand is that when the Authority fails to adopt the judicial procedure required for taking a decision, the existence of alleged alternative remedy would not be a bar in entertainment of writ petition. On merits of the impugned award dated 28.07.2023, it has been pleaded that the Arbitrator has failed to consider the sale deeds for the purposes of determination of market value and has violated the provisions of Section 3G(7)(a) of the Act of 1956 read with Section 26 of the Act, 2013 and not only the documents placed on record but also the directions issued by the District Judge in her order dated 27.04.2022 were ignored. Further stand is that mere revenue entries cannot be construed to determine the market value of the land.

COUNSEL HEARD

10. Heard Shri Navin Sinha, learned Senior Counsel assisted by Shri Utkarsh Srivastava, learned counsel for the petitioner, Shri Raghav Dwivedi, learned counsel for respondent No.2-National Highways Authority of India and Shri Rajiv Gupta, learned Additional Chief Standing Counsel on behalf of State-respondent No.3-the District Magistrate/Collector/Arbitrator, Jhansi.

SUBMISSIONS OF THE PETITIONER

11. Shri Navin Sinha, learned Senior Counsel appearing for the petitioner has made following submissions:-

(a) Once the District Judge, in her order dated 27.04.2022, particularly in paragraph Nos.14, 15, 16 and 18 thereof, clearly observed that the Arbitrator who had passed the award dated 30.09.2010 had not proceeded to independently assess the market value of the land and had given the award only on the basis of there being no

declaration under Section 143 of the U.P. Z.A. L.R. Act and had refrained himself from going through the sale deeds filed as exemplars and had also ignored the potentiality of land ignoring certain judgements, the Collector/Arbitrator, being an Authority sub-ordinate to the District Judge, was bound in law to declare an award strictly in consonance with the observations made and guidelines issued by the Superior Court/Authority i.e. the District Judge;

(b) the remand order passed by the District Judge being not a subject matter of challenge before any superior forum, was binding upon sub-ordinate authority, i.e. the Collector and, hence, he was supposed to decide the matter strictly in accordance with the directions contained in the earlier order;

(c) the test for determining the compensation is as to what price a prospective buyer is willing to pay to the prospective seller in an open market and the utility of land would not be judged merely on the basis of its entry in the revenue records;

(d) the petitioner's land is adjoining to the existing Highway and just near to the boundary of Maharani Laxmibai Medical College, Jhansi and within proximity of about 1 to 1.5Kms, there are number of schools, nursing homes and Government Engineering College and also towards Gwalior at a distance of half kms, there is Government Para-Medical College and, further, all around the petitioner's land, commercial activities are going on and as per the circle rates notified by the District Magistrate/Collector, the land falls in the commercial category. Even for the purposes of levy of stamp duty, certain rates applicable in the area w.e.f. 07.01.2008 to 01.02.2010 have been referred to and it is submitted that the market value of the petitioner's land, at the time of notifications in reference, was about Rs.18,000/- per square mtrs. It is further argued that in view of the special location of the petitioner's land adjoining to the National Highway, a further 10 % was required to be added and, hence, the market value of the petitioner's land would become about Rs.19,800/- per sq. mtrs. Various other facts and circumstances justifying the market value towards higher side have been pointed out to the Court;

(e) As regards the objection raised by N.H.A.I. with regard to maintainability of writ petition on the ground of remedy available under Section 34 of the Act of 1996, reference to the decision of the Apex Court in the case of (**State of Himachal Pradesh & Ors. v. Gujarat Ambuja Cement Ltd & Anr.) (2005) 6 SCC 499 and another judgement in the Commercial of Income Tax and Ors. v. Chhabil Dass Agarwal (2014) 1 SCC 603** has been made and it has been argued that when the Authority fails to adopt judicial procedure required for passing a decision, the writ petition would be maintainable, even if, there is any alternative remedy; and

(f) since the Collector has recalled the order impugned dated 28.07.2023 by his subsequent order dated 03.11.2023, in any case, there has to be a fresh adjudication by the Collector on merits as per directions contained in the order dated 27.04.2022 passed by the District Judge.

SUBMISSIONS OF THE STATE RESPONDENTS

12. Shri Rajiv Gupta, learned Additional Chief Standing Counsel for the State-respondents, though initially justified passing of the order impugned by referring

to certain aspects, which according to the State, were rightly discussed by the Collector in the order impugned, however, later on, it was argued that since the Collector, in furtherance of the orders issued by this Court in the present writ petition, has already recalled the order dated 28.07.2023, the challenge made to the order impugned does not survive and the writ petition should be dismissed as infructuous but in any case, the State-Authorities are ready to comply with the directions issued by this Court or any other court of law.

SUBMISSIONS OF THE N.H.A.I.

13. Shri Raghav Dwivedi, learned counsel appearing for N.H.A.I. has vehemently opposed the writ petition and by emphatically pressing the stand taken in the counter affidavit, it has been argued that the legislative intent enshrined under Section 34(1) of the Act of 1996 is clear to the effect that challenge to the arbitral award can be made only by filing an application for setting aside such award before the principal Civil Court of original jurisdiction, i.e. the District Judge and, once the petitioner earlier approached the District Judge against the award declared on a previous occasion, the same recourse should be taken this time also. Learned counsel has referred to the decision of Supreme Court in the case of **Bhawan Constructions v. Executive Engineer, (2022) 1 S.C.C. 75** in support of his contention. He further submits that even on merits, the order impugned dated 28.07.2023 is perfectly in accordance with law as the Collector has exercised his powers as per Section 3G(7)(a) of the Act, 1956 read with Section 26 of the Act of 2013 and, hence, no interference is required.

ANALYSIS OF RIVAL CONTENTIONS

14. Having heard learned counsel for the parties, the first question that arises for consideration by this Court is as to whether, in view of a remedy provided under Section 34 of the Act of 1996 against an award passed by the Arbitrator under Section 3G(5) of the Act of 1956, the challenge made to the order dated 28.07.2023, impugned in the present writ petition, filed under Article 226 of the Constitution of India can be turned down.

15. Admittedly, in the present case, an award was made by the Special Land Acquisition Officer, Joint Organisation, Jhansi on 30.09.2010, against which, the petitioner availed remedy under Section 3G(5) of the Act of 1956 by approaching the Arbitrator/District Magistrate, Jhansi where the dispute was registered as Arbitration Case No. 521 of 2012 (Dr. Rajeev Sinha v. N.H.A.I & Others). The said Arbitrator declared his award on 15.09.2017 on merits which was set aside by the District Judge, Jhansi in exercise of powers under Section 34 of the Act of 1996 by order dated 27.04.2022 and following findings were recorded:-

(a). The Arbitrator did not consider any material on record, which could go to show the market value of the land in question. He rather took into consideration the valuation done on behalf of N.H.A.I., who is one of the opposite sides. The Arbitrator did not proceed to independently assess market value;

(b). The Arbitrator, while coming to a conclusion that there had not been any declaration of change of land use under Section 143 of the U.P. Z.A.L.R. Act, completely ignored the provisions of Section 3G(7) of the Act of 1956 which

mandates taking into consideration various parameters while determining the amount under sub-section (1) of Section 5 of Section 3(G);

(c). The Arbitrator was bound to take into consideration the market value on the date of publication of notification;

(d). As per the judgements of the High Court in **Shiv Ram Singh v. State of U.P., (2019) 6 ADJ 741** read with **P.P. Buildcon Pvt. Ltd. v. Chief Controlling Revenue & Ors., 2014 (7) ADJ 663**, as well as judgements of the Apex Court in the case of **O.N.G.C. Ltd. v. Western GECO International Ltd. (2014) 9 SCC 263** and **Union of India & Anr. v. Tarsem Singh & Ors. (2019) 9 SCC 304**, the principles for determination of compensation had not been considered;

(e). The view of the Arbitrator that sale deeds executed between 04.10.2008 and 05.10.2009, as recorded by the Special Land Acquisition Officer, were examined by the Sub Registrar, Jhansi, however, the Arbitrator, before observing that the sale deeds were not found to be of any utility by the said officials as they did not match the local conditions of the land acquired, committed a patent error in not examining the sale deeds himself;

(f). The Arbitrator, who was expected to embark on the inquiry by himself in the matter, was not justified in ignoring the potentiality of land and, hence, his order is a non-speaking one;

(g). The market value of the land is to be assessed on the basis of factors like situation, surroundings and other topographical traits as well as its probable use.

16. The District Judge, in the operative portion of the order dated 27.04.2022, while setting aside the arbitral award dated 15.09.2017, issued a clear direction to the Arbitral Tribunal, i.e. the Arbitrator/Collector, Jhansi to decide the case afresh, in the light of observations given in the body of the order after affording opportunity of hearing to both the sides. Therefore, the Arbitrator was certainly bound by the directions issued and all the observations recorded in the order of the District Judge, however, the Court finds from perusal of the order impugned dated 28.07.2023 that the Arbitrator/Collector, in one and half page, has considered absolutely nothing, except what had been recorded by the Special Land Acquisition Officer in the initial award dated 30.09.2010. The so-called reasoning recorded in the order impugned reads as follows:-

"मैंने सक्षम प्राधिकारी की पत्रावली तलब कर उसका गहनता से अध्ययन किया गया। प्रकरण में तथ्य निम्न प्रकार है। वादी द्वारा अपनी भूमि को न तो धारा-143 ज०उ० एक्ट के अन्तर्गत आवासीय घोषित कराया गया और न ही कोई इस आशय का साक्ष्य वादी द्वारा प्रस्तुत किया गया। जिससे यह स्पष्ट हो सके कि उक्त भूमि अकृषक भूमि है और इसका उपयोग अकृषक भूमि के रूप में होता रहा।

यह कि ग्राम-कोछाभावर की अर्जित भूमि के बाजारू मूल्य की जानकारी हेतु धारा 3ए की अधिसूचना दिनांक 03-09-2009 भारत के राजपत्र असाधारण दिनांक 03-09-2009 के प्रकाशन के एक वर्ष पूर्व दिनांक 04-10-2008 से 05-10-2009 तक की अबधि में निष्पादित विक्रय पत्रों का संकलन सब रजिस्ट्रार कार्यालय, झाँसी से कराया गया। उक्त विक्रय पत्रों के आधार पर आने वाली भूमि के बाजार दर के अनुरूप न होने के कारण उक्त विक्रय पत्रों को अस्वीकार करने के उपरान्त अब मात्र स्टाम्प ड्यूटी हेतु जिलाधिकारी द्वारा निर्धारित बाजार दर पर विचार करना न्यायोचित समझा। तदनुसार अर्जित भूमि में निहित समस्त गाटा संख्याओ के लिए मु०15,00,000=00 रूपया प्रति हैक्टेयर एवं परिसम्पत्ति की नाप-जोख परियोजना निदेशक, भारतीय राष्ट्रीय राजमार्ग प्राधिकरण, झाँसी द्वारा अधिकृत सुगम इंटर नेशनल संस्थान (एन०जी०ओ०) द्वारा की गयी जिसे परियोजना निदेशक, भारतीय राष्ट्रीय राजमार्ग प्राधिकरण, झाँसी द्वारा सत्यापित किया

गया। उक्त प्राप्त विवरण पत्र को सहायक अभियन्ता, प्रान्तीय खण्ड, लोक निर्माण विभाग, झाँसी द्वारा प्रतिहस्ताक्षरित किया गया। सक्षम प्राधिकारी द्वारा भूमि एवं परिसम्पत्ति के सम्बन्ध में दिनांक 30-09-2010 को एवार्ड पारित किया गया। राष्ट्रीय राजमार्ग अधिनियम की धारा-3जी(2) के अनुसार 10 प्रतिशत अतिरिक्त धनराशि भी दी गयी है।

आर०डी० 2020 (147) पेज 199 पर मा० उच्चतम न्यायालय, नई दिल्ली ने भी सिविल अपील संख्या-7346 सन् 2010 अपर आयुक्त राजस्व व अन्य बनाम अखलाक हुसैन व अन्य में स्पष्ट रूप से अवधारित किया गया है कि उ०प्र० जमींदारी विनाश एवं भूमि व्यवस्था अधिनियम, 1950 धारायें 143 एवं 3(14) भूमि की प्रकृति क्या कृषिकीय है या अकृषिकीय निर्धारित की जायेगी। अधिनियम की धारा-143 के अन्तर्गत निर्धारण के अभाव में भूमि अधिनियम की धारा-3(14) के प्राविधानों के अन्तर्गत कृषिसीय मानी जायेगी।

भूमि की वास्तविक भौतिक स्थिति जो भूमि अधिग्रहण के समय होगी उसी के आधार पर मूल्यांकन किया जाना ही विधिक व्यवस्थाओं के अनुरूप होता है। इसलिए एवार्ड दिनांक 30-09-2010 में भूमि कृषकीय थी इसलिए धारा-3(14) जमीदारी विनाश अधिनियम के अन्तर्गत अधिग्रहीत भूमि कृषकीय मानी जायेगी।

यह कि वादी द्वारा भूमि की दरों के निर्धारण के सम्बन्ध में दौरान मुकदमा प्रस्तुत किये गये अभिलेखों, भूमि अधिग्रहण सम्बन्धी मूल वाद पत्रावली पर उपलब्ध अभिलेखों इत्यादि, बहस में प्रस्तुत तर्को एवं मा० न्यायालय जिला न्यायाधीश, झाँसी द्वारा पारित आदेश दिनांक 27-04-2022 को संज्ञान में रखकर प्रकरण में अर्न्तनिहित समस्त बिन्दुओं पर विचारोपरान्त मेरा यह स्पष्ट मत है कि सक्षम प्राधिकारी / विशेष भूमि अध्याप्ति अधिकारी, झाँसी ने एवार्ड आदेश दिनांक 30-09-2010 के अन्तर्गत भूमि / परिसम्पत्ति का जो मूल्य निर्धारित किया है वह सही है। जिसे यथावत रखना उचित प्रतीत होता है और उसे निरस्त किया जाना न्यायोचित नही है। विद्वान सक्षम प्राधिकारी / विशेष भूमि अध्याप्ति अधिकारी, झाँसी ने एवार्ड के अन्तर्गत प्रतिकर राशि के अतिरिक्त 10 प्रतिशत अतिरिक्त धनराशि भी अनुमन्य की है। उपरोक्त समीक्षा के फलस्वरूप वादी अर्जित भूमि / परिसम्पत्ति के प्रतिकर के रूप में कोई अतिरिक्त धनराशि पाने का अधिकारी नही है।

आदेश

यह कि वादी को अर्जित भूमि / परिसम्पत्ति का एवार्ड दिनांक 30-09-2010 द्वारा दिया गया प्रतिकर नियमानुसार है। अतः वादी प्रतिकर के रूप में कोई अतिरिक्त धनराशि पाने का अधिकारी नही है। प्रस्तुत वादपत्र तदनुसार निर्णीत किया जाता है। पत्रावली दाखिल दफ्तर की जाये। "

17. It is apparently clear from the order impugned that not even a single direction issued by the District Judge in the order of remand dated 27.04.2022 has been obeyed and, in fact, the Arbitrator/Collector has not even discussed any of the directions in the entire order impugned. This Court seriously deprecates the approach of the Arbitrator/Collector who is vested with statutory powers to determine lawful compensation as per the scheme of the Act of 1956 and, therefore, once the Court superior to him analyzed each and every aspect of the initial award dated 30.09.2010 as well as the arbitral award dated 15.09.2017 and set aside the same after recording findings on merits of the petitioner's claim as regards market value of the land on the date of notifications acquiring the land, the Arbitrator/Collector was bound to follow the quasi-judicial discipline and record finding on each of the parameters discussed by the learned District Judge. The Court finds that the Arbitrator/Collector has simply referred to the non-declaration under Section 143 U.P. Z.A. L.R. Act and swept away the sale deeds produced by the petitioner in a single line that only the stamp duty determined by the Collector has to be considered. In the considered opinion of this Court, the Arbitrator/ Collector has expressly violated the directions issued by the District Judge in order dated 27.04.2022.

18. As regards the discretion of the High Courts to entertain writ petition under Article 226 of the Constitution of India,

despite a remedy provided under any statute, law in this regard needs reiteration.

19. The Constitution Bench of Supreme Court, in the case of **State of U.P. v. Mohammad Nooh, AIR 1958 Supreme Court 86**, has held that there is no rule with regard to Certiorari as there is with Mandamus, that it will lie only where there is no other equally effective remedy. A Writ of Certiorari will lie, provided the requisite grounds exist, although a right of appeal has been conferred by Statute. It was observed that the fact that the aggrieved party had another adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a Writ of Certiorari to quash the proceedings and decisions of inferior courts subordinate to it and, ordinarily, the superior court will decline to interfere until the aggrieved party has exhausted other statutory remedies, if any. This rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law.

20. Another Constitution Bench of the Supreme Court, in the case of **K.S. Rashid & Son v. Income Tax Investigation Commission & Ors., AIR 1954 SC 207,** observes that there are only two limitations placed upon the exercise of the powers by a High Court under Article 226 of the Constitution; one is that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the person or authority to whom the High Court is empowered to issue writs "must be within those territories" and this implies that they must be amenable to its jurisdiction either by residence or location within those territories. It is with reference to these two conditions thus mentioned that the jurisdiction of the High Courts to issue writs under Article 226 of the Constitution is to be determined.

21. The Supreme Court, in the case of **Ram and Shyam Company v. State of Haryana and Others, (1985) 3 S.C.C. 267**, laid down that ordinarily it is true that the court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate, it does not oust the jurisdiction of the Court.

22. The three judges Bench of the Supreme Court, in the case of **Sangram Singh v. Election Tribunal Kotah And Another, A.I.R. 1955 S.C. 425**, observed that the jurisdiction which Articles 226 and 136 confer, entitles the High Courts and the Supreme Court to examine the decisions of all Tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-

vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Articles 226 and 136.

23. The Supreme Court, in the case of **Commissioner of Income Tax and Others v. Chhabil Dass Agarwal, (2014) 1 S.C.C. 603**, spelt out at least five illustrative and non-exhaustive exceptions to the rule of exhaustion of remedies as follows:-

(i) Where remedy available under statute is not effective but only mere formality with no substantial relief; or

(ii) Where statutory authority not acted in accordance with provisions of enactment in question, or ;

(iii) Where statutory authority acted in defiance of fundamental principles of judicial procedure, or;

(iv) Where statutory authority resorted to invoke provisions which are repealed, or;

(v) Where statutory authority passed an order in total violation of principles of natural justice.

24. A Constitution Bench of the Supreme Court, in **State of Madhya Pradesh and Anr. Bhailal Bhai, AIR 1964 SC 1006**, held that the power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in **N.T. Veluswami Thevar v. G. Raja Nainar and Others, AIR 1959 SC 422; Municipal Council, Khurai and Anr. v. Kamal Kumar and Another, AIR 1965 SC 1321; Siliguri Municipality and Others v. Amalendu Das and Others, AIR 1984 SC 653; S.T. Muthusami v. K. Natarajan, AIR 1988 SC 616; Rajasthan SRTC v. Krishna Kant, AIR 1995 SC 1715; Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Others, AIR 2000 SC 2573; A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695; and L.L. Sudhakar Reddy and Others v. State of Andhra Pradesh and Others, (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Anr. v. State of Maharashtra and others, (2001) 8 SCC 509; Pratap Singh and Anr. v. State of Haryana, (2002) 7 SCC 484 and G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Others, (2003) 1 SCC 72.**

25. In **Harbans Lal Sahnia v. Indian Oil Corporation Ltd., (2003) 2 SCC 107**, the Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged…..... But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. Reference to another judgement of Supreme Court in the case of **Harbanslal Sahnia & Anr. v. Indian Oil Corpn. Ltd. & Ors., JT 2002 (10) SC 561** can be made, in which also the view taken by the Supreme Court is that the rule of exclusion of Writ Jurisdiction by

availability of alternative remedy is the rule of discretion and not one which is compulsory.

26. In view of the above discussion, the argument of learned counsel for NHAI that the writ petition should be dismissed on the ground of availability of alternative remedy under Section 34 of the Act of 1996, does not have any force in the facts and circumstances of the present case and this Court is satisfied that the instant case falls within the well recognised exceptions to the general rule of exhaustion of alternative remedies, as held above by the Supreme Court and, therefore, the present writ petition is not liable to the dismissed on this ground.

27. As regards the duty of a Court to which matter is remanded by its superior court/authority, a learned Single Judge of this Court, in a case arising out of U.P. Imposition of Ceiling of Land Holdings Act, 1961, reported as Ram Nagina Chaudhary v. State of U.P. and Others, 1978 AWC 610, deprecated the approach of the Prescribed Authority acting in ignorance of the directions issued by its superior court that had remanded the matter to it. This Court referred to the remand order which observed that the Prescribed Authority should have made inquiries to find out as to what was share of the appellant in the concerned plots and that the case should go back to the Prescribed Authority for fresh decision after inquiry in that respect. While referring to the operative portion of the remand order which directed the Prescribed Authority to take a fresh decision in the light of the observations made in the body of the order, this Court observed that by not following the directions contained in the remand order, not only the Prescribed Authority but also, subsequently, the Appellate Authority committed the errors and mistakes that were apparent on the face of the record and set aside the said illegal orders.

28. A learned Single Judge of the Calcutta High Court, in **Scientific Instruments Company Ltd. v. Collector of Customs & Anr., AIR 1976 Calcutta 38**, was dealing with a case arising out of Customs Act, 1962 and the rules framed thereunder and found that the Assistant Collector acted in excess of his jurisdiction and in violation of the order of the Appellate Authority. The Court held that the Assistant Collector's jurisdiction and powers were limited by the order of the Appellate Authority and it was his duty to comply with it. The High Court, having found the order being contrary to the directions of the Appellate Authority as illegal, unjustified and without jurisdiction as well as an error apparent on the very face of it, set aside the same and issued appropriate directions to the Assistant Collector of Customs to proceed to re-determine the issue involved in accordance with law in compliance of the order passed by the Appellate Authority within stipulated period of time.

29. The Supreme Court, in **Union of India And Others v. Kamlakshi Finance Corporation Ltd., 1992 Supp (1) SCC 443**, was dealing with a case under Central Excise Act, 1944 and found that order of the Appellate Collector is binding on the Assistant Collectors working within jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. It was held that the principles of judicial discipline require that the orders of the

higher appellate authorities should be followed unreservedly by the subordinate authorities and if this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration.

30. In the present case, this Court is fully satisfied that Arbitrator/Collector, Jhansi has acted in defiance of fundamental principles of judicial procedure particularly by not following the directions of the learned District Judge, as aforesaid, and in view of the above discussion, the order impugned dated 28.07.2023 cannot sustain on merits and is liable to the quashed despite the fact that it has been recalled by the Collector on 03.11.2023, inasmuch as, reasons for setting aside the order on merits were required to be recorded in the present judgement so that the fresh exercise to be carried out by the Arbitrator/Collector Jhansi even after recalling his order, should be strictly in accordance with law and based upon material on record, as noted by the District Judge in the order of remand dated 27.04.2022.

31. Accordingly, the writ petition succeeds and stands **allowed**.

32. The order impugned dated 28.07.2023, passed by the District Magistrate/Arbitrator/Collector, Jhansi in Case No.2337 of 2023 (Dr. Rajeev Sinha v. National Highways Authority of India) is hereby **quashed**.

33. It is left open to the petitioner to approach the Arbitrator/ Collector, Jhansi for passing fresh award strictly in consonance with the directions issued in the order dated 27.04.2022 passed by the District Judge, Jhansi in Misc. Case No. 12 of 2017, as reiterated in this judgement.

(2024) 3 ILRA 2021
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE SIDDHARTH VARMA, J.
THE HON'BLE SHEKHAR B. SARAF, J.

Writ-C No. 33864 of 2023

Raghunath Dubey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Sri Anil Kumar Shukla, Sri Abhishek Kumar Pandey, Sri Anil Kumar Shukla, Sri Kumar Shivam, Sri H.N. Singh(Sr. Advocate)

Counsel for the Opp. Parties:
C.S.C. Sri A.K.S. Parihar, Sri Birendra Singh, Ms. Swati Singh, Sri Shashi Nandan(Sr. Advocate)

Mining Lease – Uttar Pradesh Minor Mineral (Concession) Rules, 2021 – Rule 23(2)(d) – Right of First Refusal – Co-Sharers' Consent – Compensation for Non-Participating Co-Sharer – Validity of District Magistrate's Order

The petitioners, seven co-sharers along with respondent no. 5, owned plots (Nos. 454, 460, 461-Ka, 461-Kha, totaling 1.9330 hectares) in Village Billi Markundi, District Sonbhadra, suitable for mining Situ Rock (Dolostone). Under Rule 23(2)(d) of the 2021 Rules, they consented to mining on their private land. After e-tender, the highest bid was Rs. 400 per cubic meter by respondent no. 4. The petitioners offered Rs. 401 per cubic meter, exercising their right of first refusal, but respondent no. 5, a co-sharer, refused to bid higher. The District Magistrate, on 04.09.2023, approved the lease for respondent no. 4, which was challenged. Held: The District Magistrate's order was unsustainable as Rule 23(2)(d) allows landowners offering a higher bid than the highest tender to secure the lease, while non-

participating co-sharers, like respondent no. 5, are entitled only to compensation as fixed by the St. Government. Respondent no. 5's objections, including alleged family settlement disputes and petitioners' agreement with a third party, were irrelevant, as they did not affect the petitioners' statutory right to the lease. The availability of appellate or revisional remedies was immaterial, as no further issues required adjudication. The impugned order was quashed, and the petitioners were granted the mining lease, with respondent no. 5 entitled to compensation as per Rule 23(2)(d).

(Delivered by Hon'ble Siddharth Varma, J. & Hon'ble Shekhar B. Saraf, J.)

1. The petitioners, who are seven in number, and the respondent no.5 are co-sharers of plot no.454 area 0.5190 hectare; plot no.460 area 0.0760 hectare; plot no.461-Ka area 0.9360 hectare and plot no.461-kha area 0.4020 hectare. Out of the total area of these four plots which exceeded 1.1 hectare, an area of 1.100 hectare was found, after inspection, fit for mining of Situ Rock (Dolostone) and it was decided by the District Magistrate to invite bids by way of e-tender for mining of the minerals found in the four plots which were situated in village Billi Markundi, Pargana Agori, Tehsil Obra, District Sonbhadra.

2. Before the e-tender took place to get the highest bid for the mineral available, the petitioners and the respondent no.5 had given their consent to the District Mining Officer, Sonbhadra that they were ready and willing to get the minerals excavated from their private land as per Rule 23(2)(d) of the Uttar Pradesh Minor Mineral (Concession) Rules, 2021 (hereinafter referred to as the "Rules"). Rule 23(2)(d) of the Rules is being reproduced here as under :-

"23. Declaration of area for e-tender/e-auction/e-tender-cum-e-auction lease :

(1) .....

(2) Subject to direction issued by the State Government from time to time in this behalf--

(a) .....

(b) .....

(c) .....

(d) Naturally available in-situ-rock type mineral found in private land of minimum area one hectare shall be leased out for a maximum period of ten years through e-tender/e-auction/e-tender cum e-auction:

Provided that in respective mine area the District Officer after confirming the availability of mineral, suitability of area, certificate of land ownership, land owner's affidavit for consent, shall process e-tender/e-auction/e-tender cum e-auction after determination of quantity and period not exceeding ten years. The land owner/owners after completion of e-auction process of the are will take cognizance of the highest bid and within seven working days get an opportunity to present an offer higher than the highest bid before the District Officer having territorial jurisdiction over the concerned area. If this right of first refusal is not exercised by the land owner/owners, the lease will be approved in favour of the highest bidder and the land owner/owners will have the right to receive a compensation equal to the amount as decided by the State Government from time to time, which will be in addition to the amount payable to the State Government. Payment to land owner/owners will be mandatory along with the payment to the State Government."

3. After the land owners had given their consent for excavation of the minerals

from the four plots which were in their ownership, they had waited for the tenders to be made public and when it was found that the highest bidder i.e. the respondent no.4 had given a tender for Rs.400 per cubic meters then the petitioners and the respondent no.5 were put to notice on 19.8.2023 by the District Magistrate, Sonbhadra as per the proviso to Rule 23(2)(d) as to whether they were ready to take the mining rights at a rate higher than Rs.400 per cubic meters. In response to the notice dated 19.8.2023, the petitioners submitted their consent for taking the lease and for doing the mining work on the plots in question at the rate of Rs.401 per cubic meters. This meant that the petitioners had offered that the lease be finally executed in their favour at a rate which was Re.1/- higher than the rate which was offered by the highest bidder. However, the respondent no.5, who was also a co-sharer along with the seven petitioners, backed out and he did not give any rate for the minerals which were to be mined from the plots in question. Resultantly thereof, the District Magistrate on 4.9.2023 approved the lease in favour of respondent no.4-M/s. Mahadev Mining and passed the impugned order on 4.9.2023, which is under challenge in this writ petition.

4. Assailing the order passed by the District Magistrate on 4.9.2023, learned Senior Counsel appearing for the petitioners Sri H.N. Singh assisted by Sri Anil Kumar Shukla and Sri Abhishek Kumar, Advocates essentially raised the following grounds :-

(i) If the land owners, who had given their consent for their land to be auctioned, did not accept the mining right at a price over and above the highest bid then they would be given the compensation as would be decided and given by the State Government. In the instant case, learned counsel for the petitioners submitted that if the petitioners were given the mining rights then the respondent no.5 who was also a co-sharer and had not offered to mine at a rate higher than the highest bidder then he would definitely be given the compensation as per his share. This is the compensation he would have received had the highest bidder been given the lease.

(ii) Learned counsel for the petitioners has submitted that when initially the petitioners and the respondent no.5 were ready to give the land, which was in their possession, for mining purposes then definitely the respondent no.5, in the event he decided not to take the mining lease, would only get the compensation commensurate to his share.

(iii) Learned counsel for the petitioners has submitted that if the respondent no.5 was submitting, as it had been stated in the short counter affidavit, that the petitioners had in fact entered into an agreement with one Balwant Singh, son of Paras Singh, who according to the respondent no.5 would actually mine the minerals, then it mattered a little, as firstly the alleged agreement was an unregistered agreement and also if the petitioners would sub-lease, they would suffer the consequences of sub-letting the lease rights and, therefore, the grounds raised in the counter affidavit were of no consequence.

(iv) What is more, the petitioners had submitted that the approval dated 4.9.2023 would enable the respondent no.4 to get the letter of intent which meant that the respondent no.4 would get the lease in his favour and the respondent no.5 would get the compensation as would be fixed by the State Government. Learned counsel, therefore, submitted that if the petitioners got the lease to mine from the land in

question then also the respondent no.5 would only get the compensation fixed by the Government.

(v) Under such circumstances, it was submitted by the petitioners that if the land was to be mined by the petitioners then the respondent no.5 was only to get a compensation. It mattered little as to who would mine, the highest bidder or the owners who had given a bid higher than the highest bid.

5. Sri Shashi Nandan, learned Senior Counsel assisted by Sri A.K.S. Parihar, learned counsel appearing for respondent no.5, however, has submitted that the petitioners if were aggrieved by the impugned order, which had been passed by the District Magistrate, then they had a right of Appeal under Rule 79 of the Rules and thereafter they had a right to file a Revision. He has submitted that even though Ram Ji Dubey had 1/3rd share in the property, the family settlement dated 30.4.1992 which was being depended upon by the petitioners had given the respondent no.5 a lesser share. Learned Senior Counsel for the respondent no.5 further submitted that the petitioners had in fact sold their mining rights to Balwant Singh without the consent of respondent no.5.

6. Learned Additional Chief Standing Counsel Ms. Priyanka Midha supported the impugned order and submitted that the petitioners could not get any right once one co-sharer had refused to get the mining rights.

7. Having heard Sri H.N. Singh, learned Senior Advocate assisted by Sri Anil Kumar Shukla and Sri Abhishek Kumar, learned counsel for the petitioners; Ms. Priyanka Midha, learned Additional Chief Standing Counsel appearing for respondent nos.1, 2 and 3 and Sri Shashi Nandan, learned Senior Advocate assisted by Sri A.K.S. Parihar, learned counsel for respondent no.5, we are of the view that the order dated 4.9.2023 cannot be sustained in the eyes of law.

8. The petitioners along with the respondent no.5 had with open eyes consented to the mining of their land which was their Bhumidhari. The petitioners and the respondent no.5 would be entitled for the compensation if the respondent no.4 mined the minerals from the land in question. Also such of the owners who did not give a higher bid would get the compensation while the owners who gave a higher bid would get into the mining work. We are also of the view that the ground which had been taken by the respondent no.5 that there was no family settlement dated 30.4.1992 is not tenable. The earlier "no objection" was given on the basis of the settlement which had settled the share and now it did not lie the mouth of respondent no.5 to say he was being given a lesser share. If the respondent no.4 mines, the respondent no.5 would get only such compensation as he was entitled for. Therefore, it was wrong on the part of the respondent no.5, to say that the petitioners were lessening his share in the property and, therefore, they may not be given the right to mine. We are also of the view that the partnership which the respondent no.5 alleges had been entered into by the petitioners and one Balwant Singh was not to come in the way of the mining lease to the petitioners. If the petitioners had entered into in a partnership with any outsider and if sub-letting was not allowed then they would suffer the consequences. However, since this ground was not taken by the District Magistrate, it is not required to be dealt with in this order. Still further,

the ground taken by the respondents that the petitioners had an alternative remedy of filing an Appeal and thereafter a Revision has no legs to stand. The petitioners and the respondent no.5 had offered their lands to the District Magistrate for mining purposes as per Rule 23(2)(d) of the Rules. The bids were invited and when the petitioners had offered their bid which was higher than the highest bid then nothing further had to be decided. The respondent no.5 would get the compensation as per the proviso to Rule 23(2)(d) of the Rules just as he would have got had the highest bidder in the tender got the lease. Since nothing further had to be decided and only the question that who should be granted the mining lease had to be looked into when the respondent no.5 had refused to take the mining rights despite the fact that he had earlier given his consent, we are of the view that nothing further could have been decided by the Appellate Court and thus the case was not required to be relegated to the Appellate or Revisional forum.

9. Under such circumstances, the order dated 4.9.2023 passed by the District Magistrate, Sonbhadra is quashed and is set-aside. The petitioners may now be given the mining lease for mining on the land in question comprising plot no.454 area 0.5190 hectare; plot no.460 area 0.0760 hectare; plot no.461-Ka area 0.9360 hectare and plot no.461-kha area 0.4020 hectare situated in village Billi Markundi, Pargana Agori, Tehsil Obra, District Sonbhadra forthwith. The respondent no.5 would be given the compensation as is envisaged in the proviso to Rule 23(2)(d) of the Rules.

10. With these observations, the writ petition stands allowed.

(2024) 3 ILRA 2025
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ-C No. 35190 of 2023

M/s Neeraj Potato Preservation & Food Prod. Pvt. Ltd. ...Petitioner
Versus
U.P. Micro Small & Medium Entp. Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mushir Khan, Sri Amit Saxena (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Manish Goyal (Addl. A.G.), Sri Fuzail Ahmad Ansari(S.C.)

Civil Law - Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) – Sections 8, 18, 24 – U.P. Regulation of Cold Storage Act, 1976 – Sections 2(c), 5 & 22 – Jurisdiction of Micro and Small Enterprises Facilitation Council – Financial Services – Registration Requirement – Maintainability of Writ Petition

The petitioner, a cold storage company registered under the MSMED Act for warehousing and storage services, sought recovery of a loan of Rs. 4,09,022/- with 18% interest from farmers (respondents nos. 2 and 3) through the U.P. Micro, Small and Medium Enterprises Facilitation Council, Kanpur. The Council dismissed the claim on 29.07.2022 (signed 14.08.2023), holding it lacked jurisdiction as the petitioner was not registered for financial services under the MSMED Act, and the loan was not covered under cold storage services as per the U.P. Regulation of Cold Storage Act, 1976. The petitioner challenged

this order, arguing that financial services were incidental to cold storage under Section 22 of the 1976 Act and covered by the MSMED Act's overriding effect (Section 24). Held: Financial services are distinct from cold storage services, as defined under Section 2(c) and regulated by Sections 5 and 22 of the 1976 Act, and require separate registration under the MSMED Act (NIC Code 64). The petitioner's loan, advanced at 18% interest on 09.03.2018, exceeded the permissible rate under Section 22 and was not against pledged goods, thus falling outside the 1976 Act's scope. The petitioner's registration under the MSMED Act for warehousing (NIC Code 52101) did not cover financial services, and its application for modification of NIC Code was made post-loan (24.09.2018). As per *Silpi Industries Vs Kerala St. Road Transport Corporation* (2021) 18 SCC 790, benefits under the MSMED Act apply only to services registered at the time of the contract, not retrospectively. The Council correctly held it lacked jurisdiction. The writ petition was maintainable under Article 226 as the Council's order was not an arbitral award but a refusal to exercise jurisdiction. However, the order was upheld as no illegality was found.

Petition was dismissed.

Case Law Cited:

1. Silpi Industries Etc. Vs Kerala St. Road Transport Corporation & anr., (2021) 18 SCC 790

2. Shanti Conductors Pvt. Ltd. Vs Assam St. Electricity Board, (2019) 19 SCC 529

3. M/s India Glycols Ltd. Vs Micro and Small Enterprises Facilitation Council, Civil Appeal No. 7491 of 2023

4. Kannauj Cold Storage Vs St. of U.P., 1989 ALL.L.J. 689

5. National Seeds Corp. Ltd. Vs M. Madhusudhan Reddy, 2012 (2) SCC 506

6. M/s Chakor Cold Storage Vs District Consumer Dispute Redressal Forum, 2020 (10) ADJ 400

7. M/s Chandel Cold Storage Vs St. Consumer Disputes Redressal Commission, Misc. Single No. 5743 of 2010

8. M/s Chotey Lal Cold Storage Vs St. of U.P., 2012 (1) ADJ (LB) 528

9. St. of U.P. Vs Satya Narain Kapoor, (2004) 8 SCC 630

10. Kantaru Rajeevaru Vs Indian Young Lawyers Association, (2020) 2 SCC 1

11. Spencer & Company Ltd. Vs Vishwdarshan Distributors Pvt. Ltd., 1995 (1) SCC 259

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Amit Saxena, learned Senior Counsel assisted by Shri Mushir Khan, learned counsel for the petitioner and Shri Manish Goyal, learned Addl. Advocate General assisted by Shri Fuzail Ahmad Ansari, learned Standing Counsel for the State respondents.

Facts of the case

2. M/s Neeraj Potato Preservation and Food Products Pvt. Ltd. (in short "the petitioner company") is in the business of running cold storage at Shivrajpur. The farmers of that area grow crops and use the petitioner's facility for storage of their potatoes and other crops and for this purpose the company charges rent/ fees (for the services provided) for keeping the crop in cold storage facility. When the farmers come to take back their crop, they pay the charges according to the period of storage and area occupied in petitioner's cold storage. The respondent nos.2 and 3 are the farmers, who had used the services of the petitioner's cold storage. They had stored their potatoes to be sold in the market at a suitable time. While the produce of the

farmers is kept in cold storage, the farmers sometimes need financial assistance towards the input cost needed for fresh sowing, which may be provided by the petitioner company. Accordingly, the respondent nos.2 and 3, who needed financial assistance to sow their next crop took a loan from the petitioner company of Rs.4,09,022/-. It seems that the respondent nos.2 and 3 did not pay back the loan to the petitioner. The petitioner, claiming itself to be Micro, Small and Medium Enterprises (MSME) registered under the Micro, Small and Medium Enterprises Development Act, 2006 (in short "MSMED Act") had filed a claim petition before the 'U.P. Micro, Small and Medium Enterprises Facilitation Council, Kanpur Nagar' (in short "the Council") on 24.12.2020, which was registered as Claim Petition No.105 (127) of 2021 for the recovery of the principal amount of Rs.4,09,022/- along with interest at the rate of 18% per annum, as provided under the MSMED Act, which came out to be Rs.2,26,851/-, so the total claim was of Rs.6,35,873/-.

3. In the said proceeding, notices were issued to the respondents on 19.7.2021 calling them for settlement and to appear on 29.7.2021 for conciliation. It is contended that on 29.7.2021, the petitioner had appeared but the respondents did not appear before the Council, hence the reference could not be decided and the proceeding of Section 76 of the Arbitration and Conciliation Act, 1996 was terminated and the matter was referred for arbitration asking the respondents to file reply within 15 days.

4. It is contended that once the aforesaid case/claim of the petitioner was not being decided, the petitioner approached this Court by preferring Writ-C No.4379 of 2022 (M/s Neeraj Potato Preservation and Food Products Pvt. Ltd. v. U.P. Micro and Medium Enterprises Facilitation Council and Anr.), which was decided on 2.3.2022 directing the Council to decide the claim of the petitioner preferably within three months.

5. Inspite of aforesaid direction, once the claim of the petitioner was not decided, the petitioner preferred Contempt Application (Civil) No.7143 of 2022 (M/s Neeraj Potato Preservation and Food Products Pvt. Ltd. v. Dr. Raj Shekhar/Chairman of U.P. Micro and Medium Enterprises Facilitation Council), which was decided on 25.11.2022 according three months further time to comply with the Writ Court order.

6. In response to the aforesaid order, the claim of the petitioner was decided by the order impugned. While passing the order impugned, the Council has framed following main issues for adjudication:-

(1) Whether the Claimant/ Supplier is entitled for the claim of Rs.4,09,022/- as Principal Amount from the Buyer?

(2) Whether the Claimant/ Supplier is entitled for the claim of Rs.2,26,851/- as interest from the Buyer?.

7. While deciding the first issue, the Council opined that it has jurisdiction to decide the matter only for delayed payments in lieu of cooling & preservation services provided to customers. As per the Udyog Aadhar Registration Certificate of the claimant, the activities being done by the claimant, are related to warehousing and support activities, warehousing and storage, warehousing of refrigerated (cold storage). The claimant failed to produce

any such document, which inspires the confidence of the Council regarding the arrear of rent/ services of Cold Storage, provided to the respondents by the claimant (petitioner), which is still due on the respondents.

8. The Council has observed that the opinion/ report of Lead District Manager (L.D.M.) regarding the issue of re-finance service makes it clear that if the claimant company has provided loan against the products stored in its cold storage and the list of such borrowers, along with the receipts of their products, has been made available to the bank, only then the Council may entertain the claim petition otherwise not. The claimant has failed to produce any such document as mentioned in the opinion/ report of L.D.M. As such the Council opined that as per the provisions of MSMED Act, 2006, it has no jurisdiction to decide the matter for recovery of loan / financial services and other recovery matters and in such circumstances the Council cannot act beyond its jurisdiction. It was also observed that the claimant may approach for other alternate legal remedies for recovery of loan/ financial services.

9. While deciding the second issue, the Council observed that the claimant is not entitled to receive any interest from the respondent as there is no principal amount of delayed payment due on the respondents. Accordingly, the claim/ reference of the petitioner was dismissed by the order impugned.

10. Aggrieved by the said order, the petitioner had preferred the instant writ petition with following prayers:-

"(i) Issue a writ, order or direction in the nature of certiorari to quash/ set aside the impugned order made on 29.07.022 signed on 14.08.2023 passed by the Chairman of Divisional Micro and Small Enterprises, Facilitation Council, Kanpur.

(ii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent authorities to consider and recover the loan/ financial service as per the provision of MSMED Act.

(iii) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent authorities to decide the case of petitioner's company consider the loan/ financial service which comes under the jurisdiction of Facilitation Council as per the MSMED Act."

Arguments of the petitioner

11. Learned Senior Counsel for the petitioner has vehemently argued that the order impugned is not sustainable in the eyes of law. He has submitted that Section 22 of the U.P. Regulation of Cold Storage Act, 1976 (in short "the Act, 1976") has given the right to Company to offer service of finance to individuals, who are doing business/ work (agricultural produce), hence the petitioner is entitled and authorised to offer service of finance to the farmers. He has also submitted that after the enforcement of MSMED Act, the cold storage service stands included under the MSMED Act vide notification dated 5.11.2014 issued by Government of India and the recovery of petitioner's services of finance shall be permissible in view of Section 24 (overriding effect) of the MSMED Act and as such the finding given under the impugned order is not sustainable and contrary to law.

12. Learned Senior Counsel appearing for the petitioner has contended that, in the process of preservation of potato, the company charges rent against the potato stored by farmers as well as interest on advance loan provided to the farmers. The farmers are required to deposit the rent/ advance loan and interest on rent/ advance loan at the time to take away their potato. Sometimes, looking into the financial position of the farmers, the unpaid balance of the farmers is carried forward and is adjusted in the coming financial year. It is contended that the bank as well as the Act, 1976 both permit the petitioner to provide short terms finance to farmers in order to meet expenses and there is amicable agreement between the petitioner and the farmers.

13. It is also submitted that the company is not doing prime lending and the company is offerring amicable service to the farmers for sowing the crops for which a separate agreement was also executed by the company with farmers as per the Contract Act, 1972. The service of finance was rendered by the petitioner and the farmer is liable to pay the loan amount and interest as prescribed to the petitioner company. Since the petitioner is registered MSME, as per the provisions of MSMED Act, the Council had the jurisdiction to adjudicate the dispute.

14. It is further submitted that if the order impugned is not set aside, it will set up a very wrong precedent, inasmuch as if the farmers after taking the loan does not pay back, then the petitioner will have no efficacious remedy to recover the same, which would lead the petitioner company to insolvency.

15. It is also argued that the order impugned can not be challenged under Section 34 of the Arbitration and Conciliation Act, 1996 and the position of the petitioner is very different as more than 84 cases of the petitioner of same nature are pending before the Council and the Council had passed the order impugned without following the rule of jurisdiction. The company is at the verge of closure and only legal question is involved in the present matter as to whether the service of finance rendered by the petitioner would be covered under the MSMED Act or not. The petitioner has given all particulars with regard to genuineness of the claim in the present case but the Council has ignored the same. The petitioner is a company doing the work for the welfare of the farmers but the respondents and such other farmers are blocking the money of the petitioner as such the petitioner is not being able to settle the loan amount of the bank or advance financial assistance to other farmers, who are in need. On one hand, the petitioner is disbursing the financial assistance to the farmers and on the other hand it is not able to recover the same and as such the order impugned is not justified.

16. It is also argued that the cold storage business is a regulated business and the Act, 1976 provide for complete mechanism as to how the cold storage services are to be provided. The statement of objects and reasons discloses that the State Government was conscious of the fact that cold storages have to run smoothly and efficiently so as to mitigate the hardships of agricultural producers and hence proper control in regulation of cold storage business is necessary for public interest. The Act provides for due remedies to the farmers and balances the right of the licensee by providing the right to retain lien upon the goods so long as the charges fixed by the Government are not paid and the

discharge receipt is not issued, where the period of delivery is over.

Arguments of the respondent/State

17. On the other hand, learned Addl. Advocate General has vehemently opposed the writ petition and submitted that the order impugned has been passed strictly in accordance with law and there is no infirmity in it. He submitted that in the present matter the controversy is as to whether the loan/ financial services will be covered under the Cold Storage Services and will be falling within the jurisdiction of the Council so as to be adjudicated as per the procedure contemplated under the MSMED Act.

18. He submitted that as per the Udyog Aadhar Memorandum Certificate of the petitioner, the petitioner has been registered for the following services:-

• Warehousing and support activities for transportation.

• Warehousing and storage

• Warehousing of refrigerated (cold storage).

19. He submitted that the Council has rightly arrived at a conclusion that the petitioner has not been registered for any financial services under the MSMED Act, therefore, the Council did not possess the jurisdiction to enter into reference in terms of Section 18 of the Act, leaving it open for the petitioner to pursue the other legal remedies available to it. There was no infirmity in the impugned order passed by the Council that no recovery can be made by any instrumentality under MSMED Act unless and until the petitioner registers itself for financial services under the MSMED Act by submitting a memorandum to that effect and that too prospectively.

20. He further submitted that the order impugned has rightly been passed and no interference is required in the matter. In support of his submissions, he has placed reliance on the judgments in **Silpi Industries Etc. v. Kerala State Road Transport Corporation & Anr**., (2021) 18 SCC 790; **Kannauj Cold Storage & Ors. v. State of U.P. & Ors**., 1989 ALL.L.J. 689; **National Seeds Corporation Ltd. v. M. Madhusudhan Reddy & Anr**., 2012 (2) SCC 506; **M/s Chakor Cold Storage & Ors. v. District Consumer Dispute Redrssal Forum & Ors.,** 2020 (10) ADJ 400; **M/s Chandel Cold Storage v. State Consumer Disputes Redressal Commission, U.P. & Ors.,** Misc. Single No.5743 of 2010 dt. 17.5.2019; **M/s Chotey Lal Cold Storage & Allied Ind. v. State of U.P. & Ors.**, 2012 (1) ADJ (LB) 528; **State of U.P. & Anr. v. Satya Narain Kapoor (Dead) by Lrs. & Ors.**, (2004) 8 SCC 630; **Kantaru Rajeevaru (Sabrimala Temple Review-5J) v. Indian Young Lawyers Association through its General Secretary & Ors.**, (2020) 2 SCC 1 and **Spencer & Company Ltd. & anr. v. Vishwdarshan Distributors Pvt. Ltd. & Ors**., 1995 (1) SCC 259.

ANALYSIS

21. Heard rival submissions, perused the record as well as respectfully considered the judgments cited at Bar. In the present matter, three issues are to be adjudicated, which are as follows:-

(i) whether the loan/ financial services will be covered under the Cold Storage Services; and

(ii) whether the petitioner has been registered for any financial services under the MSMED Act.

(iii) Whether the present writ petition is maintainable or not.

22. With regard to **first issue** as to whether the financial services will be covered under the Cold Storage Services, we first need to look into the definition of 'cold storage'. The term 'cold storage' has been defined under Section 2 (c) of the Act, 1976, which provides:-

(c) "cold storage" means an enclosed chamber insulated and mechanically cooled by refrigeration machinary to provide refrigerated condition to agricultural produce stored therein, but does not include refrigerated cabinets and chilling plants having a capacity of less than 100 cubic meters.

23. For the purposes of providing cold storage services a license is to be issued inasmuch as cold storage services are regulated within the State of U.P., which is evident from perusal of Section 5 of the Act, 1976, as under:-

"5. On and after such date as the State Government may, by notification appoint in that behalf, no person shall carry on the business of storing any agricultural produce in a cold storage under and in accordance with the terms and conditions of a licence granted under this Act."

24. Section 22 of the Act, 1976 lays down as to what should be the rate of interest charged by the cold storage, in case they provide financial assistance to the farmers. Section 22 of the Act, 1976 reads as follows:-

"22. If any money is lent by the licensee to a hirer against the goods stored by some hirer in the cold storage, the rate of interest, in no case, shall be higher than one-half of one percent annum simple interest over the current rate of interest charged by the State Bank of India, at the time of the loan, for like purposes in respect of advances made by it against goods pledged in its favour."

25. The admitted facts of the present case are that the loan advanced to the hirer/ farmer by the licensee was not in terms of Section 22 of the Act, 1976 as nowhere it has been stated in the writ petition that the loan so advanced was lower than one half of one percent per annum simple interest over the current rate of interest charged by the State Bank of India. Infact the loan was advanced @ 18% per annum, which is much higher than the rate of interest charged by the State Bank of India.

26. Moreover, the loan advanced was not against the goods pledged in favour of the petitioner company but with a bond that if the payment is not done, the farmer undertakes to deposit his goods in the next agricultural year also in the cold storage of the petitioner. Hence, Section 22 of the Act, 1976 does not come into play.

27. For the purposes of MSMED Act and to provide financial services under Section 22 of the Act, 1976 the petitioner ought to have the registration under the MSMED Act, 2006 for 'financial activity', which admittedly could not be explained by the petitioner. The petitioner having not been registered under the MSMED Act for financial activity and there being a private agreement between the petitioner and the contesting respondents, the petitioner could not have sought a recovery for an alleged

loan purportedly granted under Section 22 of the Act, 1976 by taking aid of the provisions contained under MSMED Act.

28. As per Section 45 of the Act, 1976, the Government was authorised to make Rules. In pursuance of this power granted under the Act, 1976, the 'U.P. Regulation of Cold Storage (Licensing) Rules, 1976' (in short "the Rules, 1976") was framed. Rule 3 of the Rules, 1976 provides for the terms and conditions of the license and Rule 6 of the Rules, 1976 provides for specification of a cold storage. The term 'condition and the specification of the cold storage' together with the definition clauses constitute the cold storage services and, therefore, cold storage services have been properly structured under the U.P. Enactment read with modified subordinate legislation of Uttar Pradesh. Grant of loan is not incidental to a cold storage services, which is explicit from bare perusal of the definition clauses, the licence, terms and conditions and specification of cold storage. Therefore, cold storage service and credit facilities by pledging the produce stored in the cold storage are two different services, which are not directly linked with each other. Therefore, the grant of loan will not be covered under cold storage services.

29. With regard to **second issue** as to whether the petitioner has been registered for any financial services under the MSMED Act, we have to first see the objects and reasons as well as the relevant provisions of MSMED Act, which are enumerated as under:-

"Statement of Objects and Reasons

Small scale industry is at present defined by notification under section 11b. of the industries (development and regulation) Act, 1951. Section 29B of the Act provides for notifying reservation of items for exclusive manufacturing in the small Scale Industry Sector. Except for these two provisions, there exists no legal. Framework for this dynamic and vibrant sector of the country's economy. Many expert groups or committees appointed by the government from time to time as well as the small scale industry sector itself have emphasized the need for An Comprehensive Central Enactment to Provide an Appropriate Legal Framework for the Sector to Facilitate Its Growth and Development. Emergence of a large services sector assisting the small scale industry in the last two decades also warrants a composite view of the sector, encompassing both Industrial units and related service entities. The world over, the emphasis has now been shifted from "industries" to "enterprises". Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt Better and higher levels of technology and achieve- higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary in India too, the concerns of the Entire Small and Medium Enterprises Sector Are addressed and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law.

2. In view of the above-mentioned circumstances, the bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium Enterprises and learns to-

(a) Provide for Statutory Definitions of "Small Enterprise" and "Medium Enterprise":

(b) Provide for the Establishment of a National Small and Medium Enterprises Board, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and programmes for the development of small and medium enterprises;

(c) provide for classification of small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter;

(d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises;

(e) empower the State Governments to specify, by notification, that provisions of the labour laws specified in clause 9(2) will not apply to small and medium enterprises employing upto fifty employees with a view to facilitating the graduation of small enterprises to medium enterprises;

(f) make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises, in accordance with the guidelines or instructions of the Reserve Bank of India;

(g) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises;

(h) empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises;

(i) empower to prescribe harmonised, simpler and streamlined procedures for inspection of small and medium enterprises under the labour laws enumerated in clause 15, having regard to the need to promote self-regulation or self-certification by such enterprises;

(j) prescribe for maintenance of records and filing of returns by small and medium enterprises with a view to reduce the multiplicity of often-overlapping types of returns to be filed;

(k) make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment."

"8. Memorandum of micro, small and medium enterprises-

(1) Any person who intends to establish,--

(a) a micro or small enterprise, may, at his discretion; or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established--

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.

(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified, by notification, by the Central Government.

(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2).”

18. Reference to Micro and Small Enterprises Facilitation Council-

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period

of ninety days from the date of making such a reference.

20. Establishment of Micro and Small Enterprises Facilitation Council-

The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

21. Composition of Micro and Small Enterprises Facilitation Council.—

(1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from among the following categories, namely:—

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office-bearers or representatives of associations of micro or small industry or enterprises in the State; and

(iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or

(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.

(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government.

30. The preamble of the MSMED Act shows that it is an Act to provide for facilitating the promotion, development and enhancing the activities of Micro, Small and Medium Enterprises and for matters connected therewith or incidental thereto. It will be apt to quote relevant extract of the prefatory note to the enactment:-

"Whereas a declaration as to expediency of control of certain industries by the Union was made under Section 2 of the Industries (Development and Regulation) Act, 1951;

And whereas it is expedient to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto."

31. Section 8 of the MSMED Act provides for memorandum of micro, small and medium enterprises and states that whoever wishes to set up a micro, small or medium enterprise will have to file a memorandum with such authority as may be specified by the State Government or the Central government as the case may be. Sub-section (3) and sub-section (4) of Section 8 delegates the power upon the Central Government and the State Government respectively specifying the authorities through notification, which will be accepting the memorandum. Under Section 8 (2) different sector and industries have been classified.

32. Once the services provided by the petitioner is not registered under the

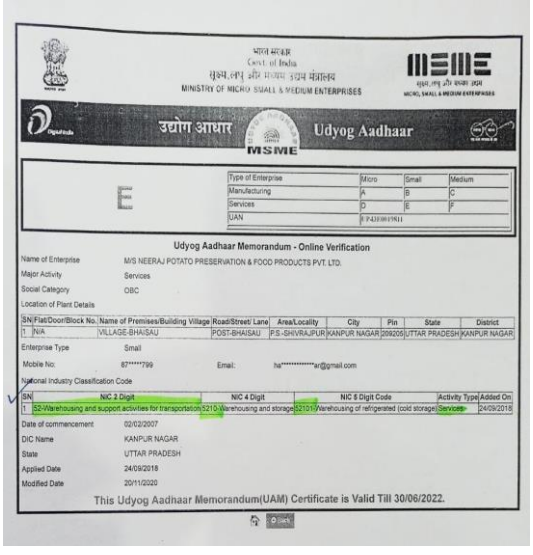
MSMED Act, Facilitation Council established under the Act, will be divested of jurisdiction to entertain any such dispute arising out of any service not registered under MSMED Act. In such a situation, the MSMED Act will not be applicable as per Section 18 of the Act.

33. Further the National Industrial Classification Data 2008 has formed the basis of providing the codification of accepting the memorandum under the Act. Part-II of detailed structure of NIC 2008 contains different divisions and Codes. Division 52 has been given to warehousing and support activities for transportation. Code 5210 has been given to warehousing and storage and Code 52101 was given to warehousing of refrigerated (cold storage). In none of the said entries, the financial activity is available, which falls under a different Code. Section 'K' deals with financial services and insurance company, which has been given Code '64'.

34. On the basis of Udyog Aadhaar Memorandum Certificate, an enterprise becomes amenable to frame work of MSMED Act. If the registration of an enterprise does not fall in a particular category, the provisions of the MSMED Act will not be applicable for that category. As per the Udyog Aadhar Memorandum Certificate of the petitioner, the petitioner has been registered for the following services:-

• Warehousing and support activities for transportation.
• Warehousing and storage
• Warehousing of refrigerated (cold storage).

35. The Udyog Aadhar Memorandum Certificate of the petitioner (valid til 30.6.2022) has been provided by the State through written submissions. The Udyog Aadhar Memorandum Certificate is reproduced below:-



भारत सरकार
Govt. of India
सूक्ष्म,लघु और मध्यम उद्यम मंत्रालय
MINISTRY OF MICRO SMALL & MEDIUM ENTERPRISES

उद्योग आधार MSME Udyog Aadhaar

Type of Enterprise	Micro	Small	Medium
Manufacturing	A	B	C
Services	D	E	F
UAN			

Udyog Aadhaar Memorandum - Online Verification

Name of Enterprise: M/S NEERAJ POTATO PRESERVATION & FOOD PRODUCTS PVT. LTD.
Major Activity: Services
Social Category: OBC
Location of Plant Details

SN	Flat/Door/Block No.	Name of Premises/Building	Village	Road/Street/ Lane	Area/Locality	City	Pin	State	District
1	N/A		VILLAGE-BHAISAU	POST-BHAISAU	P.S.-SHIVRAJPUR	KANPUR NAGAR	209206	UTTAR PRADESH	KANPUR NAGAR

Enterprise Type: Small
Mobile No: 87******799 Email: ha**********er@gmail.com
National Industry Classification Code

SN	NIC 2 Digit	NIC 4 Digit	NIC 5 Digit Code	Activity Type	Added On
1	52-Warehousing and support activities for transportation	5210-Warehousing and storage	52101-Warehousing of refrigerated (cold storage)	Services	24/09/2018

Date of commencement: 02/02/2007
DIC Name: KANPUR NAGAR
State: UTTAR PRADESH
Applied Date: 24/09/2018
Modified Date: 20/11/2020

This Udyog Aadhaar Memorandum(UAM) Certificate is Valid Till 30/06/2022.

36. Even as per the claim petition filed by the petitioner, the date of loan is shown to be 9.3.2018, wherein an amount of Rs.4,09,022/- was loaned to the respondent nos.2 and 3. However, the petitioner had made an application on 24.9.2018 for modification of NIC Code in Udyog Aadhar Card issued by MSME. Hence it is clear that on the date of the loan given by the petitioner, it was not having the registration under required Code as per NIC Data 2008. Hon'ble the Supreme Court in the matter of **Silpi Industries Etc. v. Kerala State Road Transport Corporation & Anr. (Supra)** has held in para 26 as under:-

"26. Though the Appellant claims the benefit of provisions under MSMED Act, on the ground that the Appellant was also supplying as on the date of making the claim, as provided Under Section 8 of the MSMED Act, but same is not based on any acceptable material. The Appellant, in

support of its case placed reliance on a judgment of the Delhi High Court in the case of GE T&D India Ltd. v. Reliable Engineering Projects and Marketing, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity Under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the Appellant also would not render any assistance in support of the case of the Appellant. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of Shanti Conductors Pvt. Ltd. and Anr. etc. v. Assam State Electricity Board and Ors. etc. (2019) 19 SCC 529 has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the Appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of Appellant as the unit under MSMED Act, 2006. By taking recourse to filing memorandum Under Sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which Appellant entered into contract with the Respondent. The Appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

(Emphasis supplied)

37. In the aforesaid case, Hon'ble the Supreme Court has clearly held that any services provided prior to registration of MSMED Act will not get the benefit of MSMED Act. In this case also, the loan was provided on 9.3.2018, whereas, the Code under Chapter V of the Act, 2006 was applied for modification on 24.9.2018 and the same was modified on 20.11.2020, hence the petitioner cannot even take advantage of the same.

38. From the aforesaid, this much is reflected that at the time of disbursement of loan i.e. 9.3.2018 the petitioner was not registered in the category of financial services under the MSMED Act and as such the petitioner is not entitled for any reprieve under the MSMED Act.

39. With regard to **third issue**, whether the present writ petition is maintainable or not, the State counsel had

invited attention to the recent judgment passed by Hon'ble the Apex Court in **M/s India Glycols Limited and Another v. Micro and Small Enterprises Facilitation Council, Medchal - Malkajgiri and Othe**rs, Civil Appeal No 7491 of 2023 (Arising out of SLP (C) No 9899 of 2023), wherein Hon'ble the Apex Court had held that the High Court has no jurisdiction to entertain the writ petition against the award passed by the Facilitation Council under the MSMED Act.

40. Learned Senior Counsel appearing for the petitioner repelled the said argument and submitted that the impugned order is not an award, inasmuch as the Facilitation Council has refused to exercise its jurisdiction under the Act and as such the impugned order does not amount to be an award. Therefore, the writ petition is maintainable.

41. Considering the rival submissions qua the third issue, we find that the order impugned, whereby the Facilitation Council had refused to entertain the matter under MSMED Act, as the same was not an award, therefore, the same is amenable under Art.226 of the Constitution of India. Accordingly, against the order impugned, the writ petition is maintainable.

Conclusion

42. In view of the foregoing discussion, once the alleged financial services rendered by the petitioner was not registered at the time of disbursement of the loan under the MSMED Act, then certainly the Facilitation Council, which is established under the MSMED Act, will not be having jurisdiction to entertain any such dispute arising out of any service not registered under the MSMED Act. Therefore, there is no infirmity or illegality in the order impugned so as to warrant interference under Art.226 of the Constitution of India.

43. In view of above, all the issues are decided accordingly. The writ petition sans merit and is dismissed.

(2024) 3 ILRA 2038
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR , J.

Writ -C No. 41110 of 2019
With
Writ C Nos 4532 of 2019 & 20251 of 2021

Nirmal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Dubey, Neha Singh, Sri Prateek Sinha, Sri Rishu Mishra, Sri Shashi Nandan (Sr. Advocate), Sri Anupam Lal Das (Sr. Advocate)

Counsel for the Respondent:
C.S.C., Sri Kartikeya Saran, Sri Kaushalendra Nath Singh, Sri Shivam Yadav, Sri Amit Saxena (Sr. Advocate)

Civil Law - Constitution of India,1950-Article 226-HPPL was allotted 67,941.95 square meters of land in Noida for the Lotus 300 residential project-The company collected Rs. 636 crores from homebuyers but diverted Rs.190 crores and sold a portion of the project land for Rs. 236 crores without approvals-The project was delayed incomplete and riddled with violations including increasing numbers of flats beyond sanctioned plan-HPPL defaulted on dues

owed to the Noida Authority-Promoters resigned as directors but allegedly retained control through proxies-Multiple FIRs were lodged against the promoters for fraud, leading to arrests and subsequent bail conditioned upon an MoU to complete the project which they failed to honor-The court held that the corporate veil can be pierced in cases of fraud and to identify the individuals responsible for siphoning funds and defrauding stakeholders-Promoters can be held personally liable for their actions-While insolvency proceedings under Insolvency and Bankruptcy Code place a moratorium on recovery against the corporate debtor, they do not bar actions against individuals for fraudulent acts-The court directed the Noida Authority to expedite necessary approvals for homebuyers and initiate actions to recover diverted funds from the promoters.(Para 1 to 118)

The writ petition is disposed of. .(E-6)

List of Cited Cases-

1. Rakesh Mahajan Vs St. of U.P. & ors.(2020) 2 All LJ 51

2. Ben Hashem Vs Ali Shayif (2008) EWHC 2380

3. Ajay Kumar Radheshyam Goenka Vs Tourism Fin. Crop. of India Ltd.(2023)10 SCC 545

4. Bikam Chatterji & ors. Vs U.O.I. & ors.(2019) 19 SCC 161

5. Delhi Airport Metro Express Pvt. Ltd. Vs Delhi Metro Rail Corpn Ltd.(2023) SCC OnLine Del.1619

6. Salomon Vs Salomon & Co. Ltd. (1897) AC 22

7. Littlewoods Stores Vs I.R.C.(1969)1 WLR 1241

8. St. of U.P. Vs Renusagar Power Co.(1988) 4 SCC 59

9. Balwant Rai Saluja Vs Air India Ltd.(2014) 9 SCC 407

10. St. of Raj. & ors. Vs Gotan Lime Stone Khanij Udyog Pvt Ltd. & anr.(2016) 4 SCC 469

11. St. of Kar. Vs J. Jayalalita & ors.(2017) 6 SCC 263

12. Arcelormittal India Pvt. Ltd. Vs Satish Kumar Gupta & ors.(2019) 2 SCC 1

13. Jagvir Singh Vs St. of U.P.(2012) 50 NTN 236

14. Subhra Mukharjee & anr. Vs Bharat Cooking Coal Ltd & anr. (2003) 3 SCC 312;

15. Calcutta Chromotype Ltd. Vs Collector of Central Excise Kolkata (1998)AIR SC 1631,

16. New Horizon Ltd. & anr. Vs U.O.I. & ors. (1967)AIR SC 819

17. CIT Vs. Meenakshi Mills Ltd. Madura (1967) AIR SC 819

18. Telco & ors. Vs St. of Bih.(1965)AIR SC 40 Juggilal Kamlapal Vs (1969)AIR SC 932

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

1. Heard Sri Shashi Nandan, learned Senior Advocate and Sri Anupam Lal Das, learned Senior Advocate assisted by Sri Prateek Sinha, learned counsel for the petitioner in (Writ-C No.41110 of 2019, Sri Anurag Khanna, learned Senior Advocate assisted by Sri Raghav Dev Garg, learned counsel for the petitioner in (Writ-C No.4532 of 2020), Sri Vinayak Mithal, learned counsel for the petitioner in (Writ-C No.40693 of 2019), Sri Rahul Agarwal, learned counsel for the petitioners in (Writ-C No.20251 of 2021), Sri Kartikeya Saran, learned counsel for Home Buyers, Sri Amit Saxena, learned Senior Advocate assisted by Sri Shivam Yadav and Sri Kaushlendra Nath Singh, learned counsel for Noida Authority, Sri Ambrish Shukla, Ms. Uttara Bahuguna, learned Additional Chief

Standing Counsels for the State respondents.

2. Since all the four petitions are arising out of the same issue relating to the same project therefore, all of them are clubbed and heard together.

PROLOGUE

3. This is a classic case of conning, as to how the promoters without investing any amount gets huge tracts of prime land allotted, launches a project and collects Rs.636 crores from the home buyers, out of which they again syphon off almost Rs.190 crores (then sell off a portion of land to a 3rd company, pocket and then syphon the entire sale proceeds (Rs.236 crores), and pay a pittance to Noida Authority, towards the cost of land/premium for land and lease rent, which they were supposed to pay, and defrauded the home buyers, Noida Authority, Banks and other creditors. Not only this but they have also defrauded hundreds of other home buyers in various other projects similarly launched by them with different names. As a part of that conning scheme, after launching a project, they collected money, diverted it to different other companies and then resigned from directorship of the company, and push the company into insolvency and get over with all civil or criminal liabilities. Surprisingly, even after conning everyone they have been going scot free, neither the State nor the authorities are in a position to recover the said amount.

4. The entire proceedings in this case as it gets unfurled, manifests the intention of promoters for defrauding and cheating everyone.

FACTUAL MATRIX

5. Facts of the case are that the Noida Authority floated a scheme for allotment of plots for group housing, being scheme code GH2010 ID in pursuance whereof a consortium of companies applied for, and the Noida Authority found them suitable for allotment of land in GH01 Sector107 Noida. As per the prevailing commercial practice, the allottee consortium companies were supposed to choose one of the consortium partner company to be a lead partner, who would be responsible for planning, construction and completion of the project. However, the consortium members would form a special purpose company for the execution of the project. Accordingly, in the instant matter the consortium members floated a special purpose company known as M/s Hacienda Projects Private Limited (here-in-after for the sake of brevity has been referred to as "HPPL"). This special purpose company had the following Stakeholders:-

Sl.No.	*Name of Member*	*Share Holdings*	*Status*
1.	*M/s Pebbles Infosoftech Pvt. Ltd.*	*27.73%*	*Lead Member*
2.	*M/s Three Platinum Softech Pvt. Ltd.*	*13.36%*	*Relevant Member*
3.	*M/s Credence Information Technologies Pvt. Lt.*	*13.36%*	*Relevant Member*
4.	*M/s Pebbles Prolease Pvt. Ltd.*	*17.82%*	*Relevant Member*
5.	*M/s Horizon*	*27.00%*	*Relevant*

	Crest India Real Estate		*Member*
6.	*M/s Twilzon Limited*	*0.73%*	*Relevant Member*

6. In the year 2010, Noida authority after bifurcation allotted 67,941.95 square meters of land to M/s Hacienda Project Private Limited to build and develop a residential project located in Sector 107, Noida. The Noida Authority on 31.03.2010 executed a lease deed with M/s Hacienda Projects Private Limited (HPPL) for 67,941.45 square meters land to build a housing project on it. At the time of signing of the lease deed, Mr. Nirmal Singh, Mr. Surpreet Singh Suri and Mr. Vidur Bhardwaj were the Promoters/Directors of the HPPL.

The relevant clauses of the lease deed executed between the HPPL and the Noida Authority are as follows:-

SCHEDULE OF PAYMENT

Sl. No.	*Due Date*	*Instalment (in Rs.)*	*Interest (in Rs.)*	*Total (in Rs.)*
1.	*25.09.2010*	*–*	*23103 4073*	*23103 4073*
2.	*25.03.2011*	*–*	*23103 4073*	*23103 4073*
3.	*25.09.2011*	*–*	*23103 4073*	*23103 4073*
4.	*25.03.2012*	*–*	*23103 4073*	*23103 4073*
5.	*25.09.2012*	*26253 8719*	*23103 4080*	*49357 2799*
6.	*25.03.2013*	*26253 8719*	*21659 4450*	*47913 3169*
7.	*25.09.2013*	*26253 8719*	*20215 4820*	*46469 3539*
8.	*25.03.2014*	*26253 8719*	*18771 5190*	*45025 3909*
9.	*25.09.2014*	*26253 8719*	*17327 5560*	*43581 4279*
10.	*25.03.2015*	*26253 8719*	*15883 5930*	*42137 4649*
11.	*25.09.2015*	*26253 8719*	*14439 6300*	*40693 5019*
12.	*25.03.2016*	*26253 8719*	*12995 6670*	*39249 5389*
13.	*25.09.2016*	*26253 8719*	*11551 7040*	*37805 5759*
14.	*25.03.2017*	*26253 8719*	*10107 7410*	*36361 6129*
15.	*25.09.2017*	*26253 8719*	*86637 780*	*34917 6499*
16.	*25.03.2018*	*26253 8719*	*72198 150*	*33473 6869*
17.	*25.09.2018*	*26253 8719*	*57758 520*	*32029 7239*
18.	*25.03.2019*	*26253 8719*	*43318 890*	*30585 7609*
19.	*25.09.2019*	*26253 8719*	*28879 260*	*29141 7979*
20.	*25.03.2020*	*26253 8719*	*14439 630*	*27697 8349*

SPECIAL TERMS AND CONDITIONS OF ALLOTMENT:

K. INDEMNITY

The, Lessee/Sub-lessee (s) shall execute an Indemnity bond, indemnifying the NOIDA against all disputes arising out of:

1. Non-completion of Project.

2. Quantity of construction.

3. Any legal dispute arising out of allotment/lease/Sub-lease (s).

The Lessee shall wholly and solely be responsible for implementation of the

Project and also for ensuring quality, development and subsequent maintenance of building and services till such time, alternate agency for such work/responsibility is identified legally by the Lessee. Thereafter the agency appointed by the Lessee will be responsible to the NOIDA for the maintenance of the service to the constructed flats/ building.

O. MORTGAGE

The mortgage permission shall be granted (where the plot is not cancelled or any show cause notice is not served) in favour of a scheduled Bank/Got. organization/financial institution approved by the Reserve Bank of India for the purpose of raising resources, for construction on the allotted plot. The Lessee/Sub-lessee (s) should have valid time period for construction as per terms of the lease deed/sub-lease deed or have obtained valid extension of time for construction and should have cleared up-to-date dues of the plot premium and lease rent.

The Lessee/Sub-lessee (s) will submit the following documents:

1. Sanction letter of the scheduled Bank/Govt. organization/financial institution approved by the Government of India.

2. An affidavit on non-judicial stamp paper of Rs.10/- duly notarized stating that there is no unauthorised construction and commercial activities on the Residential Area (Group Housing).

3. Clearance of upto date dues of the NOIDA.

NOIDA shall have the first charge on the plot towards payment of all dues of NOIDA.

Provided that in the event of sale or foreclosure of the mortgaged/charged property, the NOIDA shall be entitled to claim and recover such percentage, as decided by the NOIDA, of the unearned increase in values of properties in respect of the market value of the said land as first charge, having priority over the said mortgage charge. The decision of the NOIDA in respect of the market value of the said land shall be final and binding on all the parties concerned.

The NOIDA's right to the recovery of the unearned increase and the premptive right to purchase the property as mentioned herein before shall apply equally to involunary shall or transfer, be it bid or through execution of decree of insolvency from a court of law.

U. CANCELLATION OF LEASE AND SUB-LEASE DEED.

In addition to the other specific clauses relating to the cancellation, the NOIDA will be free to exercise its right of cancellation of allotment/lease/sub-lease in the case of:

1. Allotment being obtained through misrepresentation/suppression of material facts, mis-statement and/or/fraud.

2. Any violation of the directions issued or rules and regulations framed by any Authority or by any statutory body.

3. Default on the part of the Lessee/Sub-lessee for breach/violation of the terms and conditions of the registration/allotment/lease/sub-lease and/or non-deposit of the allotment amount.

4. If at the same time of such cancellation, the plot is occupied by the Lessee/sub-lessee, the amount equivalent to 25% of the total premium of the plot shall be forfeited and possession of the plot will

be resumed by the NOIa with structure(s) thereon, if any, and the Lessee/sub-lessee will have no right to claim any compensation thereof. The balance, if any, shall be refunded without any interest and no separate notice shall be given in this regiard.

5. If the allotment is cancelled on the ground mentioned in para U(1) above, the entire amount deposited by the Lessee/sub-lessee, till the date of cancellation shall be forfeited by the NOIDA and no claim whatsoever shall be entertained in this regard.

OTHER CLAUSES.

1. The NOIDA/Lessor reserves the right to make such additions/alternations or modifications in the terms and conditions of allotment/lease deed/sub-lease deed from time to time, as may be considered just and expedient and approved by the NOIDA.

5. Any dispute between the NOIDA and Lessee/Sub-Lessee(s) shall be subject to the territorial jurisdiction of the Civil Courts having jurisdiction over District Gautam Budh Nagar or the Courts designated by the Hon'ble High Court of Judicature at Allahabad.

7. After allotment of the land, the project was named as Lotus 300, the advertisement given by the company stated that only 300 apartments would be built on an area of 67,941.95 square meters. A lot of people got attracted to the vast openness in the project and booked flats in this project. Allotments were made by the HPPL in favour of the respective buyers. The Builder Buyers Agreement was executed in the year 2011. This Builder Buyers Agreement had unilateral terms and conditions and the buyers were made to sign on a printed agreement and whereunder the builder was supposed to charge a fine at the rate of 18% per annum on the delay of payment by an allottee. Floor plan was sanctioned in the year 2011 with three hundred flats on the entire area. Thereafter, the builders on 15.02.2012 sold 27,941.95 square meters of land from this project to some other company for an amount of **Rs.236 crores**. The effect of selling of 27,941.95 square meters was that the area on which 300 flats were to be built have substantially been reduced without taking flat buyers concurrence. Further 30 apartments were added in the project which was far more than the sanctioned floor-plan of 2011. The builder applied for a fresh plan sanction in April, 2013 for these additional 30 flats. All the 330 flats in six towers of the project were sold and the developer collected a whopping sum of **Rs.636 crores** from the sale/booking of the flats to the home-buyers. The project was to be completed in 39 months, however, the completion date for the project was revised to July, 2017. The HPPL is said to have completed four out of six towers and handed over possession to the flat owners.

8. The builders had collected Rs.636 crores from the booking of flats. Out of which the promoters of HPPL had syphoned away almost **Rs.190 crores**, which was supposed to be utilised for construction/development of the project. Instead of developing the project, money was diverted from the company and interest-free loans were given to other companies of the promoters, where these three promoters themselves were promoters/directors/shareholders or had other business interest. This diversion was substantiated by the balance sheet of the HPPL company.

9. The petitioner, Mr. Nirmal Singh claims to be the promoter/director in HPPL up to 15.07.2014 and also in M/s Pebbles Infosoftec Private Limited which was the lead member of the consortium to whom the land was allotted and also 50% shareholder of HPPL. According to the petitioner the resignation as directors of HPPL was tendered as follows:-

I. Nirmal Singh 15.07.2014
II.Vidur Bhardwaj 03.03.2015
III. Surpreet Singh Suri 03.03.2015

10. Towers 1 to 4 were completed and possession was handed over, but in spite of the fact that the flat owners of tower no.5 and 6 had paid the entire amount, the builder/HPPL did not complete the project, neither provided the other amenities, which was promised by the builder at the time of booking. The builder went to the extent of conveying the flat owners to take the possession of the incomplete/unfurnished flat as it is. The situation for the buyers was 'take it or leave it'. The flat owners, who had no choice took possession of the incomplete flat out of desperation. They continued asking the company and the promoters to complete the project but for the reasons best known to them they chose not to complete it.

11. The flat owners after paying the entire amount, were left high and dry and were cheated, so the home buyers on 24.03.2018 lodged an FIR, under Sections 420, 409 and 120B IPC, with the Economic Offence Wing, Delhi. Thereafter, detailed investigation was carried by the Economic Offences Wing. A charge-sheet was filed in which it was found that the builder had diverted huge amount of money out of the amount collected from the allottees to its subsidiary companies as interest free inter-corporate loan. Apart from it, the builders had started selling basement car parking for Rs. 3 lakhs. The accused persons had jointly conspired with dishonest intentions of cheating the complainants. The accused had committed offence of cheating and committed wrongful gain to themselves and loss to the flat-owners.

12 In pursuance of the F.I.R. lodged by the flat owners of HPPL, all the three directors were arrested on 30.11.2018.

13. Immediately upon their arrest, they expressed their willingness to pay up 60 crore rupees which was required to complete the project, and to avoid arrest, they entered into an MOU, where they agreed to arrange for the required fund and to complete the project in a particular time frame and obtain a 'Completion Certificate'. This MOU was signed between HPPL as a first party and Home Buyers Association as a second party. However, the confirming parties were Nirmal Singh, Vidur Bharadwaj and Surpreet Singh Suri, who had signed on behalf of the company HPPL. This MOU was a personal guarantee given by them to the home buyers to infuse funds to complete the project and pay the dues of Noida Authority.

14. In Clause 2 of the MOU, the HPPL and the promoters, who were the confirming parties agreed that they will complete the project in 9 months commencing from 15.12.2018 and further agreed that the balance cost of construction of the project which was Rs.60 crores would be paid by the first party that is HPPL and the confirming party was the three promoters (petitioners herein) Nirmal Singh, Surpreet Singh Suri and Vidur Bhardwaj who would arrange another 25

crores and infuse the same in the designated escrow accounts in the following manner- (a) 5 crores would be handed over to the second party on 04.12.2018, (b) another 5 crores would be infused on 15.01.2019 (c) 10 crores would be arranged by way of sale of plot no.16, Sector 127 Noida by the first party and the confirming party (d) a further sum of 5 crores would be infused before 03.02.2019.The first party will ensure M/s Udishi Constructions Private Limited to infuse 12 crores for the construction of unsold inventory. The first party HPPL has entered into agreement with Udishi Constructions Pvt. Ltd. wherein Udishi Constructions would infuse Rs.12 crores for construction against security of his unsolved inventory. Further, in addition to the above, any deficit amount after realizing the receivables from the allottees/buyer and after arranging funds as above shall be arranged by the first party and the confirming party by way of placing additional asset as collateral to ensure completion of the project.

15. In clause 10 of this MOU, it was further admitted that the first party, HPPL and the confirming party, which are the three promoters will arrange the funds and pay the dues of the Noida Authority.

16. On the basis of this MOU, a bail application was moved in the Court of Chief Metropolitan Magistrate, South Saket Court, Delhi wherein the Court of CMM passed the following order on 04.12.2018:-

"FIR No.74/18
PS:EOW
U/s:409/420/120B IPC
State Vs. (i) Supreet Singh Suri (ii) Vidur Bhardwaj (iii) Nirmal Singh
04.12.2018

Present: Ld Substitute APP for the State

The reply to the bail application moved on behalf of accused Nirmal Singh has been filed by the IO.

At this stage, it is submitted by Ld. Counsel for accused Vidur Bhardwaj and Spurpreet Singh Suri that the bail applications moved on behalf of accused Vidur Bhardeaj and Surpreet Singh Suri are also listed for today and the aforesaid applications may also be considered.

At this stage, IO submits that the role of all the accused persons are similar to the effect that they all were the Promoters of Hcienda Projects Pvt. Ltd.

At this stage, the copy of MOU dated 03.12.2018 between the accused company M/s Hacienda Projects Pvt. Ltd. and M/s Lotus 300 Buyers Association has been filed stating therein that a settlement agreement amongst the parties of this case has been entered into and there is going to be a general body meeting on 16.12.2018 in which every stakeholder would take part for retification of the MOU arrived between the parties.

Ld. Counsels for the accused persons submit that the prime concern of the flat buyers is to ensure that they get the delivery of the flats within stipulated time frame as mentioned in the abovesaid MOU and the interest of the flat buyers association has been taken into consideration and the demand draft for the amount of Rs.5 crores would be deposited in the escrow account, which is already opened, to ensure the compliance of the MOU as well as to ensure the construction work so that the flats may be delivered to the flat buyers who are the aggrieved parties herein.

At this stage, the demand draft bearing no.344504 dated 03.12.2018 drawn on Kotak Mahindra Bank, Sector-

18, Noida branch, UP for 1 crore and demand draft bearing no.037735 dated 03.12.2018 drawn on Federal Bank, Nehru Place branch, New Delhi for Rs.4 Crore have been handed over to Sh. Pankaj Jolly. President of Lotus 300 Buyers Association who submits that he would deposit the aforesaid demand drafts into the escrow account by tomorrow.

At this stage, the MOU dated 03.12.2018 has been signed by the accused persons who are present today and produced from police custody.

Considering the facts and circumstances, submissions made and the MOU dated 03.12.2018, accused persons namely Nirmal Singh, Vidur Bhardwaj and Surpreet Singh Suri are hereby admitted to interim bail till 20.12.2018 on furnishing personal bond in the sum of Rs.5 lacs each with one surety each in the like amount. It is made clear that the interim bail has been granted to accused persons without going into merits of this case and subject to strict compliance of MOU dated 03.12.2018 failing which the interim bail granted to accused Nirmal Singh, Vidur Bhardwaj and Surpreet Singh Suri would be cancelled. Futher, the accused persons shall not leave the country without permission of the Court and that they shall cooperate the IO in the investigation of this case. Bail bonds furnished and accepted till 19.12.1018 and bail bonds be put with the bail applications on 20.12.2018.

At request, put up for arguments on the bail applications on 20.12.2018 at 12.30 pm.

17. The interim bail was granted on a condition that there should be strict compliance of the MOU. The petitioners herein flouted the terms of the MOU, thereafter, an application was moved by the home buyers for cancellation of bail. Surprisingly, rather shockingly, the learned Court vide its order dated 21.05.2019 confirmed the interim bail and held as under:-

"Vide this common order I shall decide the bail applications of applicant Nirmal Singh, Surpreet Surri and Vidur Bhardwaj.

It is stated in the applications that the applicants are founder of '3C Group of Companies' and are directors of M/s Hacienda Project Pvt. Ltd and are involved in the work of construction. It is further stated that in the year 2011, the company got approval for construction of a project 'Lotus 300' comprising of 300 apartments but in the year 2014 on account of the order of the National Green Tribunal, the construction work got affected. It is further stated that the land acquisition proceedings were also got quashed by the Supreme Court vide order dated 05.08.2013 in civil appeal no.6353/13. It is further stated that following the difficulties in the completion of the project, complaints were filed by the investors and the present FIR was lodged. It is further stated that the applicants have fully cooperated with the investigation and no purpose will be served keeping them in custody. It is further stated that there is no apprehension that the applicants shall tamper with the evidence or free from the justice.

In his reply submitted by the IO, it is stated that the applicants have got changed the building plan from Noina and enhanced a number of apartments from 300 to 336. It is further stated that applicants collected huge amount of money from the customers in the name of project and diverted around Rs.140 crores to the subsidiary companies. It is further stated that there are more than 50 victims in the present FIR and the alleged company has

received amount to the tune of Rs.100 crores from the victims. It is further stated that there are total 328 investors and the company has received the amount to the tune of Rs.636 crores out of which the amount to the tune of Rs.219 crores has been diverted by the company into the subsidiary companies. It is further stated that there are total 6 towers in the project and all the towers have been erected and out of 6 towers, two towers are on the verge of completion. It is further stated that the accused company has applied for part completion certificate on 23.10.2018. Further, an MOU has been signed with association of buyers for completion of project on 15.05.2018 and an escrow account has been opened with one signatory from buyer side and other signatory from company side.

I have heard the arguments and perused the record.

In the present case, as per the report of the IO, all the six towers have been constructed two of which are near the completion. The applicants have also deposited Rs.25 crores and they have been complying with the conditions of the MOU dated 15.05.2018. There is no complaint or incident showing the involvement of the applicants in tampering with any evidence or intimidating any witness. The evidence in the present case is documentary in nature and all the documents have already been seized by the IO. Investors have requested that bail of the applicants may not be regularized and they should be given interim bail in accordance with the compliance of the MOU. Request is not tenable because the bail cannot be used as a tool to pressurize the accused to part with money. It's a criminal trial and the Court cannot act as a recovery agent of the investors and cannot keep handing the sword of custody over the head of the applicants in the name of compliance of the MOU. Otherwise also, extending bail of the applicants from time to time takes and considered time of the Court and it is an onerous procedure which cannot be adopted. The applicants have been enlarged on bail since a long time and there is no instance of their making any attempt to flee from the justice. There is no possibility that the presence of the applicants cannot be secured during the trial. Otherwise also, appropriate conditions can be imposed in this respect. Therefore, applicant Nirmal Singh, Surpreet Suri and Vidur Bhardwaj are admitted to bail on furnishing personal bond of Rs.5,00,000/- each with one surety each in the like amount subject to condition that applicants shall not leave the country without taking permission from this Court, they shall submit their passport in the Court, they shall not try to tamper with the evidence or intimidate any witness or commit similar offence and they will join the investigation as and when required.

Applications stands disposed of."

18. After getting the bail the Promoters (petitioners herein), who had no intention of honouring their commitment given in the MOU, defaulted to pay the entire agreed amount, and failed to complete the project, they also did not pay the Noida Authority their dues, once again they cheated the home buyers.

19. In addition to the land premium, HPPL was supposed to pay additional compensation for the land, which was supposed to be paid to the farmers by the Noida Authority, since HPPL failed to deposit Rs.54,50,51,626/- towards additional compensation and Rs.9,15,00,000/- towards time extension charge for the delayed project, hence, a

recovery notice was issued to HPPL by Noida Authority on 16.09.2019 for an amount of Rs.63,65,55,626/- along with a notice for recovery to the directors of M/s Hacienda Projects Private Limited, Mr. Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj.

20. Aggrieved by the recovery notice issued to Mr. Nirmal Singh, he has filed the instant writ petition (Writ-C No. - 41110 of 2019) seeking following reliefs:-

(a) To issue a writ, order or direction in the nature of certiorari calling for the record and quashing the impugned recovery certificate dated 16.09.2019 issued by the Tehsildar, Dadri, District Gautambudh Nagar.

(b) To issue a writ, order or direction in the nature of mandamus restraining the respondent no.2 and 3 from taking any coercive action in pursuance of impugned undated recovery certificate.

(c) To issue any other order or direction which the Hon'ble Court may deem fit and proper in the circumstances of the case.

(d) To award the cost of the petition to this petitioner.

21. Identical writ petitions were also filed by other two directors, Mr. Vidur Bhardwaj, Writ-C No.40693 of 2019 and Mr. Surpreet Singh Suri, Writ-C No.4532 of 2020. All the matters were clubbed together and this Court on 17.12.2019 proceeded to pass the following order:-

"Heard Sri Ravi Kant, learned Senior Counsel assisted by Sri Pankaj Dubey, learned Counsel for the petitioner, learned Standing Counsel and Sri Kaushalendra Nath Singh, learned Counsel for respondenot no.4.

In order to recover the dues of respondent no.5, a company incorporated and registered under the Companies Act, 2013, the recovery is being pressed against the petitioner.

The argument is that the petitioner had ceased to be the Director of the said company long before and that since company is a separate juristic person, its dues cannot be recovered from the personal assets of the petitioner. In support reliance has been placed upon the judgment and order dated 4.12.2019 in Writ Petition No.33100 of 2019 (Rakesh Mahajan Vs. State of U.P. & 4 others).

Learned Standing Counsel and Sri Kaushalendra Nath Singh are both directed to file counter affidavit within a period of three weeks. A week, thereafter, is granted to the petitioner for filing rejoinder affidavit.

Issue notice to respondent no.5.

List for admission/final disposal after expiry of the above period.

Until further order of this Court, the impugned recovery dated 16.9.2019 shall not be pressed against the petitioner, though it will be open for the respondents to release the outstanding dues from the respondent no.5 provided the petitioner surrenders his passport, if any, before the respondent no.2, District Magistrate, Gautambuddha Nagar and give on undertaking within a week to the District Magistrate that he would not leave the country without the permission of the Court."

IMPLEADMENT APPLICATION OF HOME BUYERS

22. The home buyers filed an impleadment application and also filed a counter affidavit in which they brought on

record as to how these three directors/petitioners after collecting the money from the home buyers and after selling the land, which was part of the project, together had siphoned off (Rs.190+236=426) crores from the HPPL and invested the same in their other companies, and chose not to pay the authority the premium and the lease rent and the Noida Authority for the reason best known to it had made no efforts to get the outstanding dues.

23. The learned counsel for the home buyers submitted with vehemence that the petitioners/promoters right from the inception had the nefarious intentions to cheat the flat owners, Noida authority and the banks so they schemed out a fool proof strategy to defraud people, syphon away the money, and then go scot free. Accordingly, they tendered the resignation from the HPPL company (Nirmal Singh, w.e.f. 15.07.2014, Vidur Bharadwaj and Surpreet Singh Suri w.e.f. 03.03.2015) after diverting the funds, and making a petty employee as dummy director of the company and as such still kept the full control over the company.

24. He submitted that the petitioners/promoters, who had cheated the home buyers, so the home buyers had lodged an FIR, in which after the investigation a charge sheet was filed, under Sections 409, 420 and 120B IPC. Referring to the balance sheet of HPPL with the impleadment application. He submitted that it goes to show that almost Rs.190 crores had been diverted from the company and given to other companies, which was directly or indirectly owned by the promoters, or where they had business interest. He invited attention to an order of this Court, annexed with impleadment application in which the present Director, Anand Ram, who happens to be the Store Keeper, appeared in the Court and said that he is simply an employee of the company and he has appeared before the Court on the direction of Personal Secretary of one of the Promoters, Vidur Bharadwaj, which goes to show that the petitioners even after resigning had full control of the company.

25. Learned counsel further submitted that once the promoters after their arrest had executed a MOU wherein they had undertaken before the court to comply with the conditions of Memorandum of Understanding including the payment of NOIDA dues, and had taken joint and several responsibility to comply with the said condition, hence, they cannot say now that they will not pay the dues of the Noida Authority. Therefore, the relief prayed for in the present writ petitions is not maintainable. The NOIDA dues, if payable, are to be recovered from the personal assets of the petitioners who have already undertaken personal guarantee to execute the project and pay the dues of the Noida Authority.

26. He next submitted that when the builder had abandoned the project and the home buyers were forced to take possession of incomplete flat under great duress and it is this helplessness that is being taken advantage of, by the builder to represent, as if the said flats had been fully constructed/developed. Amounts already charged towards furnishing of flats and providing other amenities, which were promised but never provided as the funds were diverted to some other companies. Later, the home buyers further had to shell out huge amount of money to make the flats habitable. There was no permanent electricity connection which was obtained

by the home buyers themselves at their own cost.

27. He further submitted that the promoters had not denied anywhere in any of their affidavit/supplementary affidavit that out of Rs.636 crores collected from the home buyers, Rs.190 crores were not diverted from Hacienda's (HPPL) accounts. This fund was to be utilized only for construction/development of the project, instead of utilizing for the same, the promoters gave interest free loans to sister concerns (where the three petitioners themselves were directors or had business interest), or utilized for servicing of loans that were not related to the project. The same conclusion has been arrived at by the Economic Offences Wingh, Delhi Police, in the charge sheet filed against the three promoters/petitioners. The sale of 27,941.95 square meter land and diversion of the sale consideration has also been established by Economic Offences Wing in their charge-sheet.

28. To buttress his argument, the learned counsel further submitted that ownership structure of the group of these companies clearly establishes how the three promoters Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj, were in complete ownership of a web of companies, including Hacienda. As far as the applicant knew, these promoters have around 60 companies. These three promoters were common directors in all the companies, where they had the same modus operandi of siphoning off the funds and then tender their resignation as directors of the company to escape civil and criminal liabilities and make their petty employee a director of these companies and still have full control of the companies. The order dated 30.04.2019 passed by this Hon'ble Court in Arbitration & Conciliation Application No.39 of 2018 and the emails brought on record goes to show that the petitioners were the actual persons controlling the affairs of HPPL even after having purportedly resigned therefrom.

29. He further submitted that IndusInd Bank granted a loan to HPPL in 2017, (on the personal guarantees of the three promoters) even though the project was fully financed by the homebuyers there was no need for the company to take loan still the loan was asked for, and the same was approved by the bank. Subsequently, on account of its poor financial condition and non-serving of said loan, IndusInd Bank filed an Insolvency Petition before the NCLT claiming about Rs.33 crores. Surprisingly, the bank has chosen not to invoke the personal guarantee of these three promoters. It is quite strange as to how the bank had given loans without carrying out the proper due diligence of the project or of the promoters, especially since Hacienda's (HPPL) balance sheets clearly showed diversion of funds to the tune of Rs.190 crores. Surprisingly, the bank after disbursing the loan did not seem to bother to check as to where the loan amount was spent. The loan amount was never put to use in the project, and was in fact, once again diverted to other entities controlled by the petitioners for their benefit. Though as per the RBI guidelines the bank has to monitor and see whether the loan amount is spent for the purpose of the loan for which it was taken or not.

30. He further submitted that the entire fraud had been committed in clear connivance of the Noida Authority, even as per the stand of Noida Authority in their affidavit only first seven instalments were paid and the eighth instalment, which fall

due on 25.03.2014 onwards are still outstanding and a recovery certificate was issued only for additional compensation and not for the outstanding instalments, which included land premium and the interest. Noida Authority had failed to monitor the project and made no effort to even ascertain the reasons for more than a decade's delay in completion of the project and payment of dues owned to it.

31. Learned counsel for the home buyers further submitted that it has become practice with all the fly by night, real-estate companies to sell the flats, and pump out all the booking amount not complete the projects, and then resign from the company and appoint dummy directors. This practice is not adopted by one company, but most of the real-estate companies are doing the same, and the State and Noida Authority keeps a blind eye on this.

32. He argues that after the interim order was passed by this Court, there was a stalemate and the builders had stopped carrying out the construction or completion of the project. The home-buyers who were left in lurch filed an impleadment application in this petition which was allowed.

33. He further argued that though the home buyers had filed an impleadment application in the writ petition filed by the promoters of HPPL but since no substantial relief could have been granted in that writ so the home buyers had filed a separate substantive writ petition, which was numbered as Writ-C No.20251 of 2021, in which the State, Noida Authority, HPPL, all the three promoters and M/s Three C Universal Developers Pvt. Ltd were the parties. This writ was tagged along with the other writ petitions filed by the promoters/directors. In this writ petition of the flat buyers, following prayers were made:-

"(a) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to issue Occupancy/Completion Certificate for the residential apartment complex "Lotus 300" at Section 107 Noida and to the respondents to execute Registered Tripartite Lease Deeds with the home buyers (including the members of the Petitioner Association) without demanding any outstanding dues of the developer from them;

(b) Issue a writ, order or direction in the nature of mandamus directing the respondent nos.1 & 2 to provide all essential services and amenities such as water, electricity, sanitation, access to the residential apartment complex "Lotus 300" at Sector 107 Noida;

(c) Issue a writ, order or direction in the nature of mandamus directing the respondent no.1 to issue such concessions, exemption or other incentives to the home buyers (including the members of the Petitioner Association) of the residential apartment complex "Lotus 300" at Sector 107 Noida from payment of stamp duty and/or other dues as compensation for the gross delay in the completion of the project on account of the dereliction of their statutory duties and trust by the respondent nos.1 and 2;

(d) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to recover all dues relating to the land and building of the residential apartment complex "Lotus 300" at Sector 107 Noida from respondent nos.3 to 7 and restrain them from taking any coercive measures against the home buyers

(including the members of the Petitioner Association) for this purpose;

(e) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to ensure that respondent nos.3 to 7 jointly and severally bring in the funds diverted/siphoned off funds paid by the petitioner buyers and/or to deposit Rs.65/- crores into an escro account of the petitioners (created for the purpose of securing funds received from the respondent developer) to complete the residential apartment complex "Lotus 300" at Section 107 Noida and complete the handover of possession of the apartments to home buyers (including the members of the petitioner association) with all amenities in accordance with original master layout plan;

(f) Issue a writ, order or direction in the nature of mandamus restraining the respondent no.s3 to 7 to sell, transfer, alienate or create any third party rights with respect to the residential apartment complex "Lotus 300" at Sector 107 Noida, their personal assets as well as the assets owned by their subsidiary/group/affiliate associate companies without the permission of this Hon'ble Court;

(g) Issue a writ, order or direction in the nature of mandamus restraining the respondent nos.4 to 6 from travelling abroad without seeking permission from this Hon'ble Court;

(h) Issue a writ, order or direction in the nature of mandamus directing the respondent nos.1 to 2 to get a forensic audit conducted into the entire assets of respondent nos.4 to 6 including their group/subsidiary companies as well as personal assets of respondent nos.4 to 6;

(i) Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

(j) Award costs of the petition to the petitioner throughout.

34. He further submitted that the incomplete flat given by the builder had been completed by the flat buyers from their own fund, so the Noida Authority may issue occupancy certificate and also execute a tripartite lease deed without asking for the outstanding dues from the flat buyers.

35. He further submitted that the Court should direct respondent no.3 to 7 (HPPL, the three promoters, and M/s Three C Universal Developers Pvt. Ltd.) to bring back the money which has been transferred to other entities. If this money is brought back then that will be sufficient to pay all the dues of Noida Authority, bank and also the home buyers who have spent in completion of the project.

36. Lastly he submitted that in the interest of justice an exhaustive audit should be conducted for the entire assets of the three promoters/directors including their group companies/subsidiary companies as well as the personal assets of these three promoters/directors. Since all the transactions and diversion of funds were sham and just to escape the legal liabilities had been done by the petitioners and even after their resigning, they still were in full control of the company, hence, it is necessary for piercing corporate veil to see who are the key personnel responsible for all the frauds and sham done under the facade of a separate juristic person.

STAND OF NOIDA AUTHORITY

37. The Noida Authority has filed a counter affidavit in June, 2020 wherein

they stated that the recovery has been initiated by the Noida Authority for the additional compensation, which was to be paid to the farmers. This amount was Rs.54,50,55,626/- along with time extension charges for the delayed project, which was Rs.9,15,00,000/-, this amounted to a total of Rs.63,65.55,626/- out of which the HPPL have only paid a sum of Rs.1,20,75,781. They further submitted that the land was allotted way back and since then the company is in arrears which warrants extreme steps to be taken against the company and its directors.

38. The Noida Authority in its counter affidavit further stated that these group of companies had applied for allotment of the plot and after allotment, a Special Purpose Company, "HPPL" was created just for the ease of doing business. Later on, sub-division of the allotted plot was allowed by the Noida Authority vide its letter/order dated 02.02.2012. It also carried a tabular chart which shows the list of directors of the participating consortium companies. It is relevant to point out here that in every company the petitioner has been shown as director, along with that the petitioners are the face of the consortium and that is why the Noida Authority has decided to issue the impugned citation against him, in order to recover the money. The company is under heavy dues of the authority and there is no response from it, as such it becomes imperative upon the Noida Authority to take coercive steps against the important members/directors of the company in order to secure the recovery of the dues.

39. The Noida Authority filed another counter affidavit on 05.09.2021 in which it stated that the petitioner is the main shareholder and partner in the HPPL, however, to save themselves from any liability, they have found an easy way out by making someone else a director in the company. As on 05.09.2021, the total amount due towards the Noida Authority is Rs.107,46,62,317/- for which the Noida Authority has sent notices from time to time. It is further stated that the petitioners are also the directors of M/s Three C Realtors Pvt. Ltd., which is a 100% subsidiary of M/s Hacienda Project Pvt. Ltd.

40. The Noida Authority issued a recovery certificate on 05.09.2019 against M/s Hacienda Project Pvt. Ltd. and on 16.09.2019 against the petitioner as they were the key persons in HPPL.

41. The Noida Authority in its counter affidavit further stated that the petitioners are in charge of the affairs of the company and that is why they entered into a MOU on 30.12.2018 and they have only resigned from the post of director just to escape the liability of the company. The MOU signed on 30.12.2018 amounts to guarantee of payment of dues towards Noida Authority.

INSOLVENCY PROCEEDINGS

42. During pendency of this case it transpires that the IndusInd Bank who had advanced loan to HPPL had moved an application under the Insolvency and Bankruptcy Code (for short "IB Code") before the NCLT, Delhi and vide order dated 11.11.2022, NCLT, Delhi (IndusInd Bank v. Hiscenda Projects) admitted the application and corporate insolvency resolution process was initiated. IRP was appointed who was directed to take over affairs of the company. Once the CIRP proceedings have commenced under the IB

Code, 2016 any proceedings against the Corporate Debtors stands suspended and are covered under the moratorium as per Section 14 of the IB Code. The said moratorium period is applicable till approval of Resolution Plan or passing of the liquidation order by the NCLT. Section 238 of the IB Code supersedes any other law, which may be contrary to its provisions.

ARGUMENT ON BEHALF OF THE PETITIONERS/PROMOTERS

43. Mr. Shashi Nandan and Mr. Anupam Lal Das, learned Senior Counsel assisted by Sri Prateek Sinha, appearing on behalf of Mr. Nirmal Singh argued that the demand of Rs.63 crores was completely incorrect. In 2017 Noida Authority had issued a no dues certificate and at that point of time there was no demand, however, in 2019 suddenly demand of Rs.63 crores comes in, which has no basis. He has filed an objection to this demand stating that they have already paid a sum of Rs.60.85 crores towards premium and lease rent. Since the objection was not decided, so, all the three directors of HPPL (against whom recovery certificate was issued) preferred the instant writ petition. It was further submitted that the Recovery Certificate was also issued against the company, and since the liability is of the company, hence, no liability of the company can be fastened upon the directors individually.

44. Learned counsel for the petitioner/promoter/director submitted that the project got delayed because of no fault attributable to the promoters. After the inception, the project was stopped by an order of NGT. It took considerable amount of time when the order was vacated. Thereafter, the acquisition of the land in question was subject matter of challenge and the acquisition was set aside. Later on, the land was given/resorted back to the company on a condition that additional compensation was to be paid to the farmers and this took considerable amount of time. He further submitted that the payment due for the period w.e.f. 25.09.2010 till 25.09.2013 could not sustain as at that point of time, the land was restored to the farmers and the Noida Authority has no legal authority to collect the premium from the petitioner. Only after the land was restored, they could realise the outstanding dues and that too from the company.

45. Learned counsel for the petitioner submitted that during pendency of this case, IndusInd Bank who had advanced loan to HPPL has moved an application under I.B. Code before the NCLT, Delhi and vide order dated 11.11.2022, NCLT, Delhi (IndusInd Bank v. Hiscenda Projects) admitted the application and corporate insolvency resolution process was initiated. IRP was appointed who was directed to take over affairs of the company and take steps in accordance with law. Hence, all the dues of HPPL towards Noida Authority, now would be paid by the Insolvency Resolution Professional, who has taken over the company by the tribunals' order and all the creditors should approach the IRP for payment of their dues.

46. The counsel for the promoters/petitioners further stated that the dues of the company cannot be recovered from the private assets of the directors of the company, unless it is specifically provided in the statute or warranted by law. He further submitted that no corporate veil can be pierced in the normal circumstances.

47. The counsel for the petitioner further placed reliance on a Division Bench judgement passed by this Court in the case of **Rakesh Mahajan vs. State of U.P. and Ors.**[1] in which it has been held :-

"50.Thus, the legal position that can broadly culled out from the above judgments are:

a) That a Company is a separate and distinct entity from its shareholders and directors.

b) Corporate veil can be pierced

(i) only in exceptional circumstances by the courts with caution and circumspection and in a restrictive manner.

(ii) For lifting of corporate veil it is essential that the case falls within the exceptions as elaborated and crstalised by Munby J. in ***Ben Hashem v Ali Shayif,[2008] EWHC 2380*** *and approved by the Apex Court in Balwant Rai Saluja (supra) and Arcelormittal India (supra)*

(iii) Where the statute itself permits l

51. The facts of the present case demonstrate that the petitioner Rakesh Mahajan was never a Director of PAN Realtors Pvt. Limited and is not even a shareholder of PAN Realtors Pvt. Limited in his personal capacity. Further, there is nothing on record to even suggest that PAN Realtors Pvt. Limited was incorporated as a 'sham' or a 'facade' for execution of the lease in question, in fact the Company was incorporated at the insistence of Noida Authority which is clear from the allotment letter. The lease deed executed in between Noida and PAN Realtors Pvt. Limited still subsists and has not even been determined.

52. Further, there is no material to suggest that the petitioners herein Rakesh Mahajan or Nirala Buildcon exercised pervasive control over Pan Developers (Pvt.) Limited. The statute in question being U.P. Urban Planning Development Act, 1973 does not have any provision for lifting the corporate veil. The petitioners are not even a signatory to the lease deed in question and thus no case is made out for piercing the veil for recovery of alleged dues of PAN Realtors Pvt. Limited from the petitioners."

48. He submitted that the ratio of **Rakesh Mahajan (supra)** is similar to the instant case, and since it cannot be said that this case is of exceptional circumstances and it does not fall under the exception elaborated in **Ben Hashem v Ali Shayif [2008] EWHC 2380**. Hence, the Court should not exercise its right in piercing of corporate veil.

49. He next submitted that since the company has gone into insolvency, the Noida Authority can only prosecute the Corporate Debtor under the IB Code, 2016. He placed reliance on judgement of Hon'ble Supreme Court in the case of **Ajay Kumar Radheshyam Goenka vs. Tourism Finance Croporation of India Ltd.**[2], wherein it was held that a creditor has no option but to join the process under the IB Code. Once a plan is approved, it would bind everyone under sun. The making of a claim under IB Code and accepting whatever share is allotted could be termed as 'Involuntary Act' on behalf of the creditor.

50. He lastly submitted that since the promoters are no longer directors and not at all involved in the affairs of the company, hence, no liability of the company can be fastened on them in personal capacity. Moreover, since the company is now in Insolvency under the Insolvency and Bankruptcy Code and the IRP has been appointed so any liability of

the company has to be recovered as per provisions of the Insolvency and Bankruptcy Code.

ARGUMENT ON BEHALF OF NOIDA AUTHORITY

51. The counsel for the Noida Authority submitted that after the original allotment of land to the consortium (which was a huge chunk of land), the plot was further divided and ultimately after the division a lease was executed by Noida Authority on behalf of the consortium members with a special purpose company known as M/s Hacienda Projects Private Limited, whose promoters and directors were Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj. Apart from being the directors, they are the main shareholders in the company. After allotment of the plot to the company (HPPL) the Noida Authority had given them two years moratorium so that they can start the business and get booking from the flat owners and pay to the authority. The company was supposed to pay six monthly instalments. The company paid only seven instalments uptill 25.09.2013 and thereafter the company failed to pay instalment, which fell due from 25.03.2014 onwards. The recovery notice of Rs.63 crores, which was initially issued, was only for the additional compensation which was to be paid to the farmers, however, the total outstanding in June, 2021 against the company was Rs.107,46,62,317.

52. The counsel for the Noida Authority further submitted that the petitioners are the main shareholders and partners in the project, however, to save themselves from any liability they have found an easy way out by resigning as directors of the company just to escape the criminal and civil liabilities of the company. Even after resigning from the position of directorship of the company they are still in complete control, and have a complete charge over the company. If the Court lifts the corporate veil it will be seen that these promoters are actually running the company and have only tendered resignation to defraud the creditors and to get away without paying the dues of Noida Authority.

ARGUMENTS ON BEHALF OF HOME BUYERS

(WRIT-C No.20251 OF 2021)

53. Learned counsel for the home buyers submitted that though the petitioner and other directors had tendered resignation but they had full control over the working of the company. After the arrest, if they were not the directors they could have very well taken a stand that they were not the directors as such they cannot be arrested. However, they chose to sign a MOU with the flat buyers wherein the 2nd party to the MOU was HPPL and all the three promoters (petitioner herein) were the confirming parties. Once they have signed the MOU and agreed to pay all the dues of Noida Authority and got the bail on the basis of MOU, they cannot be allowed to hide under the mask that they are not the directors any more and have got nothing to do with the company. The entire liability is that of the company and the company being a juristic personality is only responsible to pay the liabilities of its own.

54. Since the company itself being an artificial legal person cannot be prosecuted, it is the directors and key managerial people, who had played a fraud and are the one responsible for the conduct

of the company have to be prosecuted for the the fraud done on behalf of the company. In this case, all the money was illegally syphoned off when the promoters were the directors of the company and as such culpable fraud has been played by them, and hence, they ought to be prosecuted for all the frauds done by them as directors in charge of the company.

55. Learned counsel for the home buyers further submitted that this Court may pierce the corporate veil to see as to who are actually in control of the company, who are the key persons responsible for all the fraud and sham transactions done under the facade of the company. What relations does these promoters had in those companies where the money were parked/invested and why did HPPL never asked the money back from those entities.

56. Learned counsel for the home buyers further submitted that, the promoters obtained the interim order from this Court by concealment of material fact that they have entered a MOU whereby they have given a guarantee to pay the dues of Noida Authority. The petitioner enjoyed the interim relief for more than 4 years. The promoters have not only defrauded the home buyers but also mislead this Court by concealing the facts.

57. He next submitted that it is evident from the documents filed with the ROC that Rs.191.181 crores have been siphoned off or given interest free loan to other companies owned/managed by the three promoters. Even a loan was given to M/s Three C Universal Developers Pvt. Ltd., who is respondent no.7 in this petition and inspite of notices being issued they have not filed any reply.

58. It was further submitted that these promoters have not only cheated the home buyers in this project alone but have launched various other identical projects and have cheated hundreds of other gullible home buyers. In all the projects they have followed the same modus operandi of launching the project, collecting money from the buyers, diverting the funds to various other companies and then resigning from the directorship of the company so as to avoid any civil and criminal liabilities.

59. Learned counsel for the home buyers further submitted that these three promoters, Nirmal Singh, Surpreet Singh Suri and Vidur Bharadwaj have not only swindled the money from this project alone but they have also cheated hundreds of other home buyers of their money in other projects and in all the projects these three persons were the directors and had the same modus operandi of resigning from the directorship and making their petty employees as a poppet director. He further submitted that the FIRs have been lodged by various home buyers of different projects against these three persons, details of which are as follows:-

I. FIR No.137 of 24.08.2017 – EOW – New Delhi – Project Greenopoils.

II. FIR No. 28.8.2017 – P.S. GK New Delhi – Against Vidur Bhardwaj – Project Delhi One.

III. FIR No.72 of 19.03.2018 – EOW – New Delhi – Hacienda Pvt. Ltd- Lotus 300 – Sector 107.

IV. FIR No.74 of 24.03.2018 – EOW – New Delhi – Hacienda Pvt. Ltd- Lotus 300 – Sector 107.

V. FIR No.107 of 15.05.2018 – EOW – New Delhi – Boulevard Projects Pvt. Ltd.- Sector 100.

VI. FIR No.117 of 23.05.2018 – EOW – New Delhi – Granite Gate Properties Pvt. Ltd – Penache – Sector 110.

VII. FIR No.40 of 24.03.2020 – EOW – New Delhi - Arena Superstructures – Sector 79.

VIII. FIR No.06 of 12.01.2018 PS GB Nagar – 3C Universal Developers.

IX. FIR No.54 of 15.05.2020 – EOW New Delhi – Project Piyush IT – Nirmal Singh.

X. FIR No.49 of 27.03.2019 – EOW New Delhi – Project – Three C Projects Pvt. Ltd.

XI. FIR No.59 of 16.06.2020 – EOW New Delhi – Project Three C Shelters.

60. In this backdrop the learned counsel for home buyers submitted that a suitable investigation should be carried out by an agency competent to investigate in the siphoning off the funds and also to see who is responsible and in actual control of HPPL and further suitable endeavours should be made to get the syphoned money back into the company and appropriate legal action should be taken against all those who had conned and illegally transferred funds from HPPL .

61. He further submitted that the petitioners/builder/HPPL after collecting the entire value of the flats did not pay Noida Authority their dues and Noida Authority for the reasons best known to them never took any steps to recover the same. Now the builder has run away/gone into insolvency and hence the Noida Authority at the cost of home buyers, cannot hold back the occupancy certificate on the ground that dues of the Noida Authority have not been paid.

62. The home buyers further referred to a judgement passed by Hon'ble Supreme Court in the matter of **Bikam Chatterji and Ors. Vs. Union of India (UOI) and Ors**.[3], relevant portion of which reads as under:-

"We have also ***found that non-payment of dues of the Noida*** *and Greater Noida Authorities and the banks cannot come in the way of occupation of flats by home* ***buyers as money of home buyers has been diverted due to the inaction of Officials of Noida/*** *Greater Noida Authorities. They cannot sell the buildings or demolish them nor can enforce the charge against homebuyers/ leased land/ projects in the facts of the case. Similarly, the banks cannot recover money from projects as it has not been invested in projects.* ***Homebuyers money has been diverted fraudulently, thus, fraud cannot be perpetuated against them*** *by selling the flats and depriving them of hard-earned money and savings of entire life. They cannot be cheated once over again by sale of the projects raised by their funds. The Noida and Greater Noida Authorities have to issue the Completion/ Part Completion Certificate, as the case may be, to execute tripartite agreement and registered deeds in favour of the buyers on partcompletion or completion of the buildings, as the case may be or where the inhabitants are residing, within a period of one month."*

63. He further submitted that this is a perfect case, where the corporate veil has to be lifted. The Delhi High Court in its judgement in **Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.**[4], has held as under:-

"93. As would be evident from the decisions rendered across jurisdictions and

noticed above, the doctrine of a separate legal personality of a corporation and the situations where that veil could be pierced or lifted is well embedded. While legal systems around the world have evolved their own tests or grounds on the basis of which that doctrine may be applied, it is manifest that the shield of a separate legal personality is neither inviolable nor impenetrable. The Court is essentially called upon to ascertain and articulate the circumstances in which that principle may be justifiably invoked in law. While the tests of façade, sham, or where the corporate structure is set up to evade legal obligations are well settled, the issue which arises is whether a court would be justified in law to invoke the piercing principle absent allegations of fraud, façade or evasion of taxes or any other obligations.

94. On a review of the legal position as it prevails today across various jurisdictions, it is manifest that the doctrine of lifting of the corporate veil is no longer recognized to be applicable only in the context of the facade and sham tests that have held the field for centuries. The said principle may also in an appropriate case be liable to ***be resorted to where equity and the ends of justice may sanction such a recourse, where legal obligations are sought to be avoided as also in a setting where public*** *policy or public interest so demand and require. A decree or judgment of a competent court must necessarily be enforced. Courts of justice would be failing in their duty if a decree were left to be a mere dead letter. If decrees and judgments of courts were to be rendered inexecutable and courts were to simply be forced to stand on the sideline, it would clearly shake the confidence of the people in the legal system and its very efficacy. An obligation which flows from a decree or an award must not only be duly recognized but also enforced in accordance with law. Taking any other view would render the entire adjudicatory process meaningless and an exercise in futility.*

99. As modern commerce and the regulatory regime in respect thereof has evolved over the decades, courts have leaned towards jettisoning a rigidity of approach or being tied down by principles which may have lost relevancy. Law in any case must grow and evolve bearing in mind the felt societal needs of the time and at the same time taking into consideration technological and social changes. It must keep abreast with the march of civilization itself. Commerce today straddles borders and boundaries of regions and countries. That has indubitably thrown up its own share of original and novel questions. These transformational and normative changes warrant this Court to observe that the evolution of the laws cannot be tied down to conventional creeds. The web of complex corporate structures and which many a time spread across jurisdictions commands the courts to develop and adapt. On a more foundational ground, ***this Court deems it appropriate to recall the famous words of Cardozo and Hand both of whom had commended for acceptance the basic principle that a corporate structure should not frustrate the enforcement of an obligation or leave a party remediless. Courts should desist from becoming a mere mute spectator.***

100. The decisions of our Supreme Court noticed above had prophetically observed that the doctrine of lifting of the corporate veil must be left to develop and evolve. Those decisions had in any case, and in the considered opinion of this Court, deliberately and consciously refrained from exhaustively chronicling or enumerating the myriad circumstances in which that precept could be applied. None of those

decisions are liable to be read as recognizing fraud, façade or sham as being the solitary tests for application of the lifting doctrine. ***The power of the Court to peep behind the veil thus must be recognised and held to be justifiably invoked where questions of public policy, public interest or enforcement of settled legal obligations arise****. The aforesaid three factors must be recognised as being the cornerstones of our judicial system itself.* ***The precedents noticed above had resorted to the lifting of the veil doctrine where to overcome injustice and inequitable circumstances or results.***

101. Judgments and decrees handed down by a competent court represent and symbolize declarations which bind parties to the lis. ***No party should be permitted to wriggle out from the obligations*** *which flow therefrom.* ***Taking any other view would result in a systemic breakdown of the adjudicatory mechanism that has evolved over centuries****. It is in such situations that the issues of public policy and public interest assume significance. A corporate veil in any case should not come in the way of execution of a binding and well settled legal obligation.*

102. It would be relevant to note that when the corporate veil is pierced in situations like the present, the action is not really one which is aimed at the shareholder as ordinarily understood in law. The shareholder is identified by the court principally since it represents the body and the soul of the corporate entity itself. ***It is the absolute control*** *exercised by the shareholder over that corporate body which would convince and justify a court to proceed further. The Court also bears in mind the principle of "directing mind" as accepted by courts in the United Kingdom."*

64. The learned counsel for the home buyers, to buttress his argument further submitted that the resignation of the promoters as directors of HPPL is nothing but a sham and a facade setup to deceive the statutory bodies to evade the process of law. This is evident from the fact that:-

A. There are several e-mails written between the promoters where repeatedly concerns are being expressed by and amongst themselves about rearrangement of the affairs of the company, and other group companies irrespective the purported resignation of the promoters from these companies a long time ago.

B. The fact that the promoters are the real persons controlling the affairs of the HPPL this has been recognised by the order dated 30.04.2019 passed by this Hon'ble Court in Arbitration and Conciliation Application No.39 of 2018, wherein the newly appointed Director of HPPL was summoned who gave a statement that he was a dummy director only on paper, and he was working as a Store Keeper of the company.

C. The very fact that the promoters signed the MOUs executed in the year 2018, and owned up responsibility for completing the project (despite having resigned in between 2014-15) also shows that they are in full control of HPPL and are in a position to take a decision on behalf of the company.

D. The promoters continued to offer guarantees on behalf of sister concerns, towards the loans extended to them, to various group companies and financial institution, as late as till 2018, despite allegedly having no role to play in the company.

E. The charge-sheet filed by the Economic Offences Wing, Delhi clearly points out the manner in which the

promoters have indulged in misappropriation and siphoning of funds, and how they were/are the real brain behind the HPPL.

F. The entire web of transaction and the facts and circumstances of the present case clearly indicate that the promoters have used the HPPL and other similarly situated group companies to syphon out funds and to invest or park the same in various other entities. They were doing so as these funds were their personal properties.

65. The learned counsel lastly submitted that the averments made by the home buyers in their writ petition has not been denied by the promoters or the company and they have chosen not to file any counter affidavit to controvert the averments made therein, hence, under the provisions of law they stand admitted.

ANALYSIS

66. We have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, we have perused the pleadings, grounds taken in the petition, affidavits and annexures thereto and the reply filed by concerned parties.

67. This much is reflected from the record that as per the prevailing policy, Noida Authority allotted land to the builders without charging any upfront amount. A special concession was given to the builders by which the builders were supposed to start the construction work and pay the Noida Authority the price of the land out of the booking amount collected from the home buyers. Noida Authority allotted 67,941 square meters of land to HPPL to develop the residential project, and fixed a time schedule for payment of the land price.

68. The project was named as Lotus 300, the advertisement which was issued by the company stated that only 300 apartments would be built on an area of 67,941.95 square meters. A lot of people got attracted to the alluring presentation given to the company, vast openness in the project, and booked flats in this project. Allotments were made by the HPPL in favour of the respective buyers. The Builder Buyers Agreement was executed which apparently carried unilateral terms and conditions on a printed agreement whereunder the builder was supposed to charge a fine at the rate of 18% per annum on the delay of payment by the home buyer.

69. However, out of this land parcel 27,941 square meters were sold off by HPPL to a third company for a sum of Rs.236 crores and the entire sale consideration was transferred out of HPPL by the promoters/petitioners to some of their own companies. Surprisingly, the Noida Authority did not asked for this money neither modified the payment schedule fixed earlier.

70. The initial sanctioned map had three hundred flats on the entire stretch of 67941 square meters of land. However, the petitioners/promoters sold off 27,941.95 square meters of the land from the project. The effect was that the area on which 300 flats were to be built got substantially reduced without taking concurrence of the flat buyers. Further 30 apartments were added in the project which was against the sanctioned floor-plan of 2011. So the builder applied for a fresh sanction of plan in April, 2013 for these additional 30 flats. All the 330 flats, in six towers of the

project were booked/sold and the developer collected a whopping sum of Rs.636 crores from the home-buyers, which was supposed to be utilised for construction/developments of the project.

71. It transpires from the record and from the balance sheet of the HPPL that the directors had taken out around 190 crores from HPPL and have invested or given interest free loan to their other companies in which the promoters were either directors or had some personal interest. While HPPL could not complete the project because of the cash crunch and also chose not to pay the dues of the Noida Authority.

72. When the home buyers felt cheated they had filed a First Information Report with the Economic Offences Wing, New Delhi New Delhi under Sections 409, 420 and 120B IPC. A thorough investigation was carried out by the Economic Offences Wing and a charge sheet was filed, in which it was found that the builders have duped the home buyers, siphoned away the funds and offences under Sections 409, 420 and 120B IPC is made out.

73. Accordingly, they were arrested on 30.11.2019. Soon after the arrest all the three promoters, (who are petitioners herein) entered into the MOU, wherein they agreed to infuse Rs.60 crores in the company by opening an escrow account and complete the project in nine months. They further agreed that they will pay the entire dues of the Noida Authority, which was essential for getting the Occupancy Certificate. This MOU was executed between the home buyers, and by all the three promoters personally and also on behalf of the HPPL.

74. On the basis of the MOU and the personal assurance/guarantee given by the three promoters, they were granted bail by the Court of Chief Metropolitan Magistrate, Saket Court, Delhi. The promoters apparently, who had no intention of honouring the MOU, soon after getting the bail, stopped infusing the fund and did not complete the project nor paid Noida Authority their statutory dues. In fact they have once again not only cheated the home buyers and also the Noida Authority but have also cheated the Court by giving a wrong undertaking (which they never intended to fulfil) and getting a bail. It is evident that the petitioners/promoters have not come to this Court with clean hands and clean mind.

75. As a part of the larger conspiracy to defraud everyone the promoters/directors (petitioners herein) after syphoning off 236 crores (sale proceeds of the part of the land) and 190 crores from the total corpus of Rs.636 crores, which was paid by the flat buyers, by illegally transferring to other entities/companies directly or indirectly owned/controlled by the promoters or where they had personal interest, all the three directors resigned and made their petty employees as puppet directors of the company just to escape their liabilities. This fact is proved by an order of this Court in which the present director, Anand Ram, who happens to be the Store Keeper, appeared in the Court and said that he is simply an employee of the company, which goes to show that the petitioners even after resigning had full control of the company.

76. As far as the argument of the petitioners/directors is concerned that after the resignation they have nothing to do with the company and cannot be prosecuted

for the offences of the company and it is the present directors, who are responsible for the affairs of the company in the opinion of the Court, the moot question is to see, whether the resignation is genuine or was made as a part of the conspiracy to avoid any civil and criminal liability while secretly having full control over the company. The only way to ascertain this fact is by piercing the corporate veil and to see as to who are the key persons and in actual charge of the company and whether a fraud has been played by those persons and also to see whether they are trying to hide their fraudulent activities and themselves under the mask of the company being a separate juristic personality. It is trite law that the corporate veil cannot be lifted unless there is some impropriety or fraud been played, which is being masked as a separate juristic entity. And if so found, the veil may be pierced to see who is in actual control of the company and has created a facade and sham to camouflage the illegal action with a view to avoid payment of liabilities.

77. Due to the occurrence of the above instances of fraud and irregularities, the law has taken change with its earlier exception that the company is a separate juristic personality and the liability of the company cannot be recovered from the property of directors. In due course of time, certain exceptions have been carved out in the doctrine of separate juristic personality of the company, which are being referred in the forthcoming paragraphs.

78. The doctrine of 'piercing of corporate veil' was initially crystallized ***in In Salomon v. Salomon & Co. Ltd. [Salomon v. Salomon and Co. Ltd.***[5], , the House of Lords had observed, the company is at law, a different person altogether from the subscriber. However, the courts have come to recognise several exceptions to the said rule. While it is not necessary to refer to all of them, the one relevant to us is 'when the corporate personality is being blatantly used as a cloak for fraud or improper conduct'.

79. The doctrine of lifting corporate veil was carved out to be used whenever and wherever the situation so warranted. Lord Denning in ***Littlewoods Stores v. I.R.C., 1969 (1) WLR 1241*** held:-

"The doctrine laid down in Salomon's case has to be watched very carefully. It has been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. The way with group accounts and the rest. And the Courts should follow suit……"

80. On the doctrine of 'piercing of corporate veil' the Hon'ble Supreme Court in the matter of **State of U.P. v. Renusagar Power Co.**[6] has held that, in the expanding horizon of modern jurisprudence, the lifting of the corporate veil is not only permissible, its frontiers are unlimited and ever expanding. It further significantly observed that the lifting of the corporate veil was a changing concept and of expanding horizons.

81. The Hon'ble Supreme Court in the matter of **Balwant Rai Saluja v. Air India Ltd**.[7] has held that courts would be empowered to disregard the separate legal personality of a company and impose liabilities upon the person actually in control, the essential intent of the piercing of veil of a corporate structure must be

guided by the necessity to remedy a wrong done by persons controlling the company and that the said principle would have to be tested based upon the facts and circumstances of each case.

82. The Hon'ble Supreme Court in **State of Rajasthan and others vs. Gotan Lime Stone Khanij Udyog Private Limited and another**[8] has held as under:-

The principle of lifting the corporate veil as an exception to the distinct corporate personality of a company or its members is well recognized not only to unravel tax evasion[7] but also where protection of public interest is of paramount importance and the corporate entity is an attempt to evade legal obligations and lifting of veil is necessary to prevent a device to avoid welfare legislation[8]. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.

83. The Honble Supreme Court in **State of Karnataka vs. J. Jayalalita and others**[9] has held as under:-

It was finally held that the concept of corporate entity was evolved to encourage and promote trade and commerce and not to commit illegalities or to defraud people and thus when the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court ought to ignore the corporate character and scan the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties.

84. The Hon'ble Supreme Court in the matter of **Arcelormittal India Private Limited vs. Satish Kumar Gupta and others**[10] has observed as under:

"35. Similarly in Balwant Rai Saluja & Anr. etc. etc. v. Air India Ltd. & Ors., (2014) 9 SCC 407, this Court in following Escorts Ltd. (supra.), held:

"70. The doctrine of "piercing the corporate veil" stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation.

85. The Division Bench of this Hon'ble Court in the matter of **Jagvir Singh vs. State of U.P.**[11] has held that:-

"……by lifting the corporate veil it can be found that the corporate personalitywas used as a mask for evasion of tax and that the corporate personality was sued to recover sham and collusive transactions and that when such tactics are used to circumvent the statutory liability, the taxes could be covered from the Directors by lifting the corporate veil inspite of absence of statutory provisions.

In due course of time, certain exceptions were carved out in the doctrine of separate juristic personality of the company. The doctrine of lifting the corporate veil was carved out to be used whenever and wherever the situation so warranted. Lord Denning in Littlewoods

Stores Vs. I.R.C., 1969 (1) WLR 1241 held:-

" The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the Courts should follow suit……"

86. The principle of lifting the veil of corporate personality has been upheld in **Subhra Mukharjee & another v. Bharat Cooking Coal Ltd. & another** (2003) 3 SCC 312; **Calcutta Chromotype Ltd. vs. Collector of Central Excise Kolkata** AIR 1998 SC 1631, **New Horizon Ltd. & another vs. Union of India and others**, 1995 (1) SCC 478, **C.I.T. vs. Meenakshi Mills Ltd. Madura** AIR 1967 SC 819; **Telco & ors vs. State of Bihar** AIR 1965 SC 40; **Juggilal Kamlapal vs., AIR** 1969 SC 932.

87. This Court in the matter of **Rakesh Mahajan vs. State of U.P. and others**[12], this Court has held:-

"The principles laid down by the Ben Hashem case (supra) have been reiterated by UK Supreme Court by Lord Neuberger in Prest v. Petrodel Resources Limited and others, [2013] UKSC 34, at paragraph 64. Lord Sumption, in the Prest case (supra), finally observed as follows:

"35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The Court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."The position of law regarding this principle in India has been enumerated in various decisions. A Constitution Bench of this Court in Life Insurance Corporation of India v. Escorts Ltd. & Ors., (1986) 1 SCC 264, while discussing the doctrine of corporate veil, held that:

"90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company

and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case."

88. The most comprehensive exposition of the approach to the subject has been elucidated by the Delhi High Court in the matter of **Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd (supra)**, wherein it has been held that the doctrine of lifting of the corporate veil is no longer recognized to be applicable only in the context of the facade and sham tests that have held the field for centuries. The web of complex corporate structures, which many a time spread across jurisdictions commands the courts to develop and adapt. The power of the Court to peep behind the veil thus must be recognised and held to be justifiably invoked where questions of public policy, public interest or enforcement of settled legal obligations arise. These three factors must be recognised as being the cornerstones of our judicial system itself. The precedents noticed above had resorted to the lifting of the veil doctrine to overcome injustice and inequitable circumstances or results. It is the absolute control exercised by the key personnel over that corporate body which would convince and justify a court to proceed further.

89. In this backdrop, the ration of case law cited by petitioner in the case of **R.K. Chaddha Vs. State of U.P. (supra)** is not applicable in the present case. As in the instant matter the promoters/directors had got land allotted from Noida Authority launched project and lured people to invest/book and then sold off a major portion of the land to the third party for Rs.236 crores and then skimmed off this amount to its other companies and thereafter, out of Rs.636 crores collected from home buyers again diverted Rs.191 crores to their other group companies. To divest this amount, corporate structure was set up for masking the sham transactions and a fraud is apparently played with the bank or the public at large as well as the State. Therefore, it has become imperative on this Court to lift the corporate veil and to see who are the key persons involved behind this syphoning, layering of funds of HPPL company.

90. After piercing the corporate veil, it is evident that the three promoters/directors/petitioners have transferred/diverted funds from HPPL to different companies in which these three were either promoters/ directions/shareholders or had some business interest in it. As per their own balance sheet Rs.191 crores was given as interest free loans, and surprisingly, HPPL was facing cash crunch, they did not had the money to complete the project or pay the Noida Authority dues or the dues of the bank, but even then it did not take any steps to recover the interest free loan which they had given to other companies. Apart from this, the sale proceeds of Rs.236 crores which the company got from selling a portion of the project land, was also diverted away. The syphoning away of

funds is evident and this was done while these three petitioners were directors. They had tendered their resignation after the money was moved out of HPPL and they were responsible for doing that. Now the question is as to who has the full control of the company.

COMPLETE CONTROL OF HPPL WITH THE PROMOTERS EVEN AFTER RESIGNING

91. The promoters of the company even after resigning have a complete control over the company. This fact has been ascertained with the several emails, which have been brought on record, which goes to prove that the promoters even much after resigning have been managing the affairs of the company and had been sending emails where they have shown concerns among themselves about rearrangement of the affairs of the company and other group companies irrespective of the purported resignation given by them from these companies long time back.

92. The fact that the promoters are still in the driving seat and have a complete control on the affairs of HPPL and other group companies has also been recognized by the order dated 30.04.2019 passed by Hon'ble High Court in Arbitration and Conciliation Application No.39 of 2018, wherein, Anand Ram, the present director, in a Court proceeding has given a statement that he is just a store keeper with HPPL and has no knowledge about the working of the company and he had appeared on the direction of (Personal Secretary of one of the promoters, Vidur Bharadwaj), it was then the Court had issued summons to one of the directors/petitioners (who had resigned) to appear before the Court. This goes to show that the petitioner and the other directors are in complete control of the company throughout, and the present directors are their petty employees placed by them as puppets.

93. The very fact that the promoters signed the MOUs executed in the year 2018, and owned up responsibility for completing the project (despite having resigned in between 2014-15) also shows that they are in full control of HPPL and are in a position to take a decision on behalf of the company.

CONDUCT AND ROLE OF NOIDA AUTHORITY

94. The lease deed executed between the HPPL and the Noida Authority had a clause of cancellation of lease in case there is any default on part of the lessee or violation of any terms and condition of the lease for non-deposit of the allotment amount. The terms of the lease deed was clear that in case any amount due is not paid, the sub-lease would be cancelled but surprisingly, the allotment amount, which fell due w.e.f. 25.03.2014 to 28.03.2020 and onwards no action was taken by the Noida Authority.

95. In this backdrop, it would not be wrong to say that the officers of the Noida Authority had been allowing the petitioners to commit the fraud. Though after paying seven instalments (out of which four were of moratorium period where nothing towards the principal amount was to be paid and only interest was to be paid) they have stopped paying instalments w.e.f. 25.03.2014 onwards but the Noida Authority did not take any steps to recover the same and virtually allowed the promoters to collect money from the home buyers and syphon away the same to

some other companies. It was only in 2019, the Noida Authority got out of the slumber and issued a recovery certificate against the company and against the promoters. The impugned recovery notice issued was only against the additional compensation which the company had to pay to the Noida Authority, which in turn had to be paid to the farmers. The Noida Authority had given enough long rope for the promoters to siphon away all the funds of the company and leave the company absolutely in an insolvent condition.

96. The Noida Authority had in the year 2017 issued a list of defaulters, who had defaulting in making payments to the Noida Authority. The name of the HPPL was there but surprisingly they took no steps to recover the overdue instalments from the company.

97. There is also an indemnity clause in the lease deed executed between Noida Authority and HPPL wherein it was stated that the lessee shall be wholly and solely responsible for implementation of the project and also for ensuring quality, development and subsequent maintenance. The lessee has not completed the project as per the timeline given by the Noida Authority and for the reasons best known to the Noida Authority, they have not taken any action against the promoters. The Noida Authority did not make any effort to even ascertain the reasons for the delay of more than a decade in completion of the project.

98. When the Noida Authority permitted HPPL to sell 27,941.09 square meters of land (hey ought to have recovered the said money but they allowed the HPPL to sell the part of the allotted land) for Rs.236 crores and pocket all the sale proceeds and most surprisingly the Noida Authority did not even ask for the same. Astonishingly, when the The payment schedule was of total land area of 67,941.95 square meters, though the HPPL had sold off 27,941.09 square meters but the Noida Authority did not change the payment schedule but allowed to continue the earlier payment schedule, which was for 67,941 square meter. With this, the Noida Authority had ensured an illegal windfall gains to the promoters at the cost of the interest of Noida Authority. Had the Noida Authority recovered the premium from the sale proceeds or changed the payment schedule when a major portion of land has been sold off, this outstanding dues would have been far less . Even if they had insisted the HPPL to pay the instalments in time, there would not have been a default and the dues would not have mounted so much.

99. The affidavit filed by the Noida Authority does not explain the reason why there was a stoic silence on behalf of the Noida Authority, for making any efforts to recover the instalments which fell due from 25.03.2014 onwards. On account of gross negligence of Noida Authority in taking any steps or even ascertaining status of payment towards its dues for over a decade has led to ballooning of its dues, which is approximately Rs.166 crores as of today.

100. Apparently, the inaction of the Noida Authority speaks volumes of their conduct. It is because of their inaction against the defaulting company, the gullible home buyers have come to such a situation where they, after paying the entire money, are not getting the occupancy certificate and presently the Noida Authority is also not in a position to recover any amount

from the company, as the company is now under insolvency.

101. The Noida Authority merely acted as a private trader (rather than a trustee and regulator) selling rights of these lands to developers, who prospered by making a huge profit. The promoters/developers in cahoots with the officers of the Noida Authority kept defrauding innocent buyers. Astonishingly, while buyers were struggling to get possession of their apartments in such incomplete projects of this developer, Noida continued further to allot large tracts of land to new companies floated by one of the promoters.

102. Apparently, there is an abject failure of Noida Authority and a complete abdication of their duties to protect the rights of hapless home buyers. The Noida Authority have been singularly responsible for a series of untenable, arbitrary and irrational actions which have directly and irreversibly impacted hundreds of home buyers, their families, their life savings and their living situation.

BANK LOAN

103. The company has taken a loan from the IndusInd bank. Apparently, the loan was granted and it seems that the bank did not verify and did not carry out proper due diligence before granting the loan. If the bank had taken due care and diligence, it would have come to surface that there was no need for the loan to HPPL as the home buyers had paid the amount, which included cost of the land, (that is land premium) lease rent, cost of construction, and of-course a profit, which the builder was supposed to make. When there was enough money with HPPL for completion of the project then what was the need of taking/giving loan to the company. Even after disbursing the loan, the Bank did not bother to see or check whether the amount for which the loan was given has been utilized for the same or not.

IMPLEMENTATION OF PREVENTION OF MONEY LAUNDERING ACT

104. The Prevention of Money Laundering Act13 (in short 'PMLA Act") was enacted in 2002. For ready reference Sub-Clause (p), (u), (v), (y) and (za) of Clause 2 of Chapter I of the PMLA Act are quoted hereunder :-

(p) "money-laundering" has the meaning assigned to it in section 3;

u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

(v) "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;

Explanation.—For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;

(y) "scheduled offence" means—

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

(iii) the offences specified under Part C of the Schedule;

(za) "transfer" includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

The following provisions of IPC were included in Part A, Paragraph 1 of the Schedule. The Schedule :-

OFFENCES UNDER THE INDIA PENAL CODE (45 OF 1860)

Section Description of offence

120B Criminal conspiracy

……..

420 Cheating and dishonestly including delivery of property.

***3. Offence of money-laundering**.- Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.*

Explanation.—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

105. After the amendment in PMLA Act the offence under Section120B and Section 420 of IPC were included under the ambit of PMLA Act, 2002 and these offences would be a scheduled offence as per Section 2 (y) of PMLA Act. Since, the promoters after syphoning away huge amounts from HPPL has placed it into different companies, by layering through the corporate web and ultimately integrating to some other entity where they all had personal interest. These transactions fall within the ambit of PMLA Act and in the opinion of the Court, the appropriate agency, which is competent to look into and investigate the transactions, will be Enforcement Directorate.]

EFFECT OF INSOLVENCY PROCEEDINGS

106. The effect of insolvency proceedings on the petitioners/directors is that they will not get any benefit of moratorium as the same is only applicable to the corporate debtor. The intention of the legislature was very clear that the criminal liability and prosecution of the directors for the fraud committed by them would continue and no benefit of the protection provided in the IB Code would be extended to them.

107. Section 32A of the IB Code is as follows:-

"32A. Liability for prior offences, etc*.—(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—*

(a) a promoter or in the management or control of the corporate debtor ora related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person *who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or* ***was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section***."

108. The Hon'ble Supreme Court in the matter of Manish Kumar v. Union of India and Another reported in (2021) 5 SCC 1 has held :-

"Section 32A of the IBC has been upheld by this Court in Manish Kumar v. Union of India reported in (2021) 5 SCC 1. This Court has held that the said section does not permit the wrong-doer to get away. Thus, if the argument of allowing the signatory/director to go scot-free after the approval of the resolution plan is accepted

the same would run contrary to the legislative intent of Section 32A which has been upheld by this Court as under:

"326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision."

109. The Hon'ble Supreme Court in the matter of **Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation of India Ltd. (supra)** (Criminal Appeal No.170 of 2023) (paragraph 67b) has held that, a section has been introduced by an amendment into the IB Code which focuses on the liability of offences committed by the directors of the corporate debtor prior to commencement of the corporate insolvency resolution process. The Court further held that every person who was in any manner in charge of, or responsible of the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence shall be proceeded with, in accordance with law. It is only the corporate debtor company (with the new management) will be safeguarded.

CONCLUSION

110 . It is apparent that the promoters have played a fraud on the home buyers, Noida Authority, Bank as well as on the Court. The claim of the promoters /petitioner that they are not the directors of the company any more and had nothing to do with the company and the liability of the company can only be recovered from the company can not be sustained. If this amount which is illegally stashed / invested in other companies is brought back then all the creditors would be paid off, but unfortunately, the Noida Authority through its recovery proceedings cannot go to the extent of getting the money back which has already been parked in other companies and the company has been pushed into insolvency. As a matter of fact, IRP also

does not have the power to recover this amount, which has been illegally siphoned off by the promoters and parked/invested in other entities.

111. The entire transaction through the web of different companies goes to show that the promoters/directors/petitioners have used the HPPL and other similarly situated companies to syphon and layer the funds which they have diverted or invested in various other entities/companies owned or controlled by them. After piercing the corporate veil, it is clear that even after resigning they had the full control of the company. The resignation was just a facade and it was done to avoid any civil or criminal liabilities, and with the sole intention to cheat the home buyers and to avoid payment of dues of Noida Authority.

112. We will fail in our duty if we keep the eyes shut and allow the promoters to go scot free after having defrauded everyone and syphoning off funds from HPPL and investing in other companies.

113. After piercing the corporate veil, it is evident that, after cheating the home buyers, to avoid civil and criminal liabilities the promoters resigned as directors of the company and made their petty employees as the director of the company while still keeping the full control, and day to day running of the company. The resignation was nothing but just a sham, with the sole intention of defrauding the home buyers and Noida Authority.

DIRECTIONS OF THE COURT

114. Since the offence committed by the petitioners/promoters is a scheduled offence under the PMLA Act. The Enforcement Directorate is directed to proceed against all the directors/promoters/designated promoter/officer who is in default, companies/other entities in which money from HPPL is syphoned or parked. These entities/people are directed to cooperate in the investigation and if they do not cooperate in the investigation then Enforcement Directorate would be free to take any appropriate action against them as available under the law. The Enforcement Directorate will make all sincere efforts to recover the said amount and pay off all dues of all the creditors.

115. Since the company (HPPL) is into Insolvency, there is a moratorium as per Section 14 of the Code so no proceeding can continue against the company by any creditors to recover their dues. Hence, the Noida Authority shall put up all their claims before the Insolvency Resolution Professional.

116. The effect of moratorium under the IB code is confined only to the debtor company HPPL therefore, the director promoters/petitioners will not get any benefit and shall continue to be liable and be prosecuted for such offence.

117. The Noida Authority is directed to issue Occupancy Certificate/part Completion Certificate, as the case may be, and to execute tripartite agreement and registered deed in favour of flat buyer within a month.

118. Accordingly, the writ petitions are disposed of.

119. Registrar (Compliance) of this Court may forward this judgement to

the Enforcement Directorate for compliance.

(2024) 3 ILRA 2074
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Writ-C No. 41207 of 2023

Prateeksha & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Petitioners:
Sri Rahul Kumar Jadaun, Sri Shobhit Pratap Singh

Counsel for the Opp. Parties:
C.S.C.

Live-in Relationship – Hindu Marriage Act, 1955 – Sections 5, 12 – Protection of Women from Domestic Violence Act, 2005 – Constitution Of India,1950 - Article 226–

Eligibility for Live-in Relationship – Marriageable Age – Protection of Relationship

The petitioners, aged 19 (petitioner No. 1, female, born 29.05.2004) and 19 (petitioner No. 2, male, born 09.03.2004), sought a writ of mandamus to prevent interference in their live-in relationship by respondent No. 5 (father of petitioner No. 1) and for police protection. They claimed to be living together since August 2022 but were not married. The petitioner No. 2, though a major, was below the marriageable age of 21 under Section 5(iii) of the Hindu Marriage Act, 1955. Held: A live-in relationship must satisfy conditions akin to a common law marriage, including both parties being of legal age to marry, as per *D. Velusamy Vs D. Patchaiammal* (2010) 10 SCC 469. Since petitioner No. 2 was not of marriageable age (21 years), their relationship did not qualify as a "relationship in the nature of marriage" under the 2005 Act. No evidence was provided to show the relationship's permanence, such as joint property or bank accounts, nor was there any intent to marry. The judgments in *Deepika Vs St. of U.P.* (2013) ADJ 534 and *Nandkumar Vs St. of Kerala* (Criminal Appeal No. 597 of 2018) were inapplicable, as they did not address the requirement of marriageable age for live-in relationships. The Division Bench ruling in *Asha Devi Vs St. of U.P.* (Writ C No. 18743 of 2020) clarified that relationships not meeting marriage-like criteria, including legal age, are not protected. The court, under Article 226, cannot issue a mandamus to protect a relationship lacking legal basis, as per *Director of Settlement, A.P. Vs M.R. Apparao*.

Writ petition was dismissed.

Case Law Cited:

1. Deepika Vs St. of U.P., (2013) ADJ 534

2. Nandkumar Vs St. of Kerala, Criminal Appeal No. 597 of 2018

3. Smt. Saloni Yadav Vs St. of U.P., Criminal Misc. Writ Petition No. 7996 of 2023

4. D. Velusamy Vs D. Patchaiammal, (2010) 10 SCC 469

5. Lata Singh Vs St. of U.P., (2006) 5 SCC 475

6. Asha Devi Vs St. of U.P., Writ C No. 18743 of 2020

7. Indra Sarma Vs VSK.VS Sarma, (2013) 15 SCC 755

8. Subhash Babu Vs St. of A.P., (2011) 7 SCC 616

9. Shayara Bano Vs U.O.I., (2017) 9 SCC 1

10. Lily Thomas Vs U.O.I., (2000) 6 SCC 224

11. Director of Settlement, A.P. Vs M.R. Apparao, (2002) 4 SCC 638

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

1. Instant writ petition under Article 226 of the Constitution has been filed by the petitioners with prayer for issuing writ, order or direction in the nature of mandamus directing the respondents not to interfere in the peaceful married life of the petitioners as husband and wife and to direct the respondents No. 2 and 3 to provide protection and security to the petitioners.

2. It is submitted that the petitioner No.1 is major aged about 19 years. As per her high school certificate the date of birth of the petitioner No. 1 is 29.05.2004. It is also submitted that the petitioner No. 1 is unmarried and she fell in love with petitioner No. 2 who is aged about 19 years. It is also submitted that as per high school certificate the date of birth of petitioner No. 2 is 09.03.2004. It is also submitted that the petitioners are living in relationship since August, 2022. It is also submitted that the respondent No. 5 who is the father of the petitioner No. 1 is not happy with the choice of the petitioner No. 1 and has been constantly harassing and threatening the petitioner to their lives. It is also submitted that the petitioners moved an application to the Commissioner of Police, Kanpur Nagar seeking protection to their lives from respondent No. 5, however, no protection has been provided to the petitioners.

3. In support of the contention, learned counsel for the petitioners has relied upon the judgment of Supreme Court passed in the case of Deepika and another Vs. State of U.P. and others (2013) ADJ 534 wherein it was held that "Where a boy and girl are major and they are living with their free will then nobody including their parents have any right to interfere with living together." Reliance is also placed on the judgment of Supreme Court in ***Nandkumar and another Vs. State of Kerala and others Criminal Appeal No. 597 of 2018*** wherein it was held that "insofar as the marriage of appellant No. 1 who was less than 21 years of age on the date of marriage was not of marriageable age with girl is concerned, it cannot be said that merely because the appellant No. 1 was less than 21 years of age, marriage between the parties is null and void." Reliance is also placed on the judgment of this Court in the case of ***Smt. Saloni Yadav and another Vs. State of U.P. and other Criminal Misc. Writ Petition No. 7996 of 2023*** **.**

4. Learned Standing Counsel on the other hand submitted that the petitioner No. 1 has produced her high school certificate wherein her date of birth is mentioned as 29.05.2004 and the date of birth of petitioner No. 2 as per his high school certificate is 09.03.2004. It is also submitted that the petitioner No.2 is a major for all purposes other than marriage as prescribed by the Hindu Law. It is also submitted that as per their avernment made in the writ petition, the petitioners are living in relationship since August, 2022. It is also submitted that the petitioner No. 2 does not satisfy the eligibility criteria prescribed for a person to be in a live in relationship. Learned Standing Counsel has relied upon a judgment of a Division Bench of this Court passed in the case of ***Asha Devi and another Vs. State of U.P. Writ C No. 18743 of 2020*** to contend that the terms of live in relationship are the same as of marriage, hence, the prayer made in the writ petition is opposed.

5. I have heard the rival submissions advanced at the Bar and perused the record.

6. From the perusal of record it transpires that both the petitioners were major aged about 18 years in August, 2022 when they decided to live in relationship. Till date though the petitioner No. 2 is a major but not of marriageable age.

7. Learned counsel for the petitioners relied upon the judgment of Supreme Court in the case of ***Deepika and another Vs. State of U.P. and others (2013) ADJ 534*** wherein it was held that *"Where a boy and girl are major and they are living with their free will then nobody including their parents have any right to interfere with living together"* The case relied upon by the learned counsel for the petitioners is not applicable to the facts of this case as as in *Deepika (supra)* the question whether the boy and girl should be of marriageable age or not was not discussed. Learned counsel for the petitioners relied upon the judgment of Supreme Court in the case of ***Nandkumar and another Vs. State of Kerala and others Criminal Appeal No. 597 of 2018.*** In the above mentioned case, the girls was of 19 years and therefore was fount competent to enter into wedlock. Father of the girls filed habeas corpus petition being Writ Petition Criminal No. 149 of 2017 in the High Court of Kerala that ever since 10.04.2017 his daughter was missing and is in illegal custody of appellant No.1. The girl was produced in court on 28.04.2017. Supreme Court held that as the girls is 19 years of age and competent to marry as the marriageable age of female is 18 years, hence, she cannot be given custody of her father or anyone else and the Court set her free of her on will. The Supreme Court held that insofar as the marriage of appellant No. 1 who was less than 21 years of age on the date of marriage was not of marriageable age with girls is concerned, it cannot be said that merely because the appellant No. 1 was less than 21 years of age, marriage between the parties is null and void. ……. marriage is not void marriage under the Hindu Marriage Act, 1955 and as per the provisions of Section 12 which can be attracted in this case at the most the marriage would be voidable marriage. Sections 5 and 12 of the Hindu Marriage Act, 1955 is reproduced below for ready reference;

"5.Conditions for a Hindu marriage- A Marriage may be solemnized between an two Hindus, if the following conditions are fulfilled, namely-

xxxx

(iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage:

12. Voidable marriages.- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds namely;-

1(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5 ; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, that 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

8. Supreme Court decided the custody of the girl and set aside the order of High Court. Supreme Court also held the rights of parties living together and also the fact that the marriage is a voidable marriage if any of the parties is not of marriageable age. The matter of protection of relationship was not in issue before the Supreme Court in the instant case, hence, no benefit of this case law shall be given to this case.

9. Learned counsel for the petitioners has also relied upon the judgment of this Court in the case of ***Smt. Saloni Yadav and another Vs. State of U.P. and other Criminal Misc. Writ Petition No. 7996 of 2023***, the case relied upon is not applicable to the facts of the present case as the petitioners moved to the High Court with the prayer to quash the FIR lodged on 30.04.2023 and the Division Bench of this Court refused to indulge in the case on the ground that the petitioners are live in relationship and one of the party is minor.

10. Supreme Court in the case of ***D.Velusamy Vs. D. Patchaimmal 2010 (10) SCC 469*** rejected the claim of the respondent for maintenance under Section 125 Cr.P.C as the wife after holding that she had not married the appellant, therefore, it cannot be said that she is a divorced wife. The Apex Court considered the live in relationship from the point of view of Protection of Women from Domestic Violence Act, 2005 while considering the contention of aggrieved person as provided under Section 2 (a), Section 2 (f) and other relevant provisions in view of the term used in Section 2(f) " or through a relationship in the nature of marriage" it was observed that certain conditions are to be fulfilled and one of the said conditions was that they must be of legal age to marry.

"31. In our opinion a relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married:-

(a) The couple must hold themselves out to society as being aking to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(see 'Common Law Marriage' in Wikipedia on Google) In our opinion a 'relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a ' domestic relationship'

32. In our opinion not all live in relationship will amount to a relationship in the nature of marriage to get the benefit of Act, of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and used mainly for sexual purpose and / or as a servant it would not, in our opinion be a relationship in the nature of marriage.

33. No doubt the view we are taking would exclude many women who have had a live in relationshio from the benefit of 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression 'relationship in the nature of marriage' and not ' live in relationship'. The Court in the grab of interpretation cannot change the language of the statute."

11. The abovequoted paragraph clearly reflects that Hon'ble Supreme Court is of the opinion that while live in relationship, the relationship should be in the nature of marriage.

12. In ***Lata Singh Vs. State of U.P and another 2006 (5) SCC 475***, Supreme Court held that a live in relationship between two consenting adults of heterogenic sex does not amount to any offence in the case at hand the boy has not completed the age of 21 years, therefore, not being of marriageable age, one cannot be permitted to be in such relationship.

13. In the case of ***Asha Devi(Supra)***, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce sofar ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?"

14. In the judgment of ***Asha Devi (Supra)***, the Division Bench of this Court on the basis of various judgments of High Court held that following relationship are not recognized or approved as live-in-relationship:-

*"(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma Vs. V. K. V. Sarma.***

*(b) **Polygamy**, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.4 (paras 17 to 21, 27, 28 & 29).** Polygamy is also a criminal offence under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India 5** (paras 299.3).*

*(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy, vide **Lily Thomas and another Vs. Union of India and others**6 (Para 35). In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-*

"38. Religion is a matter of faith stemming from the depth of the heart and

mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

(Emphasis supplied)

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide ***D Velusamy Vs. D Patchaiammal (supra)*** *(para 31)."*

15. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of **"Director of Settlement, A.P. Vs. M.R. Apparao**, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. ..... One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. ....."

16. In the guidelines provided by the Supreme Court in various case laws, relationship should be of such nature which is akin to marriage. Section 5 of the Hindu Marriage Act provides that girl should be of 18 years of age and the boy should be of 21 years of age at the time of marriage to solemnize marriage under the Hindu Marriage Act.

17. In the instant case the petitioner No. 2 is not of marriageable age. The petitioners have not brought on record any documents to show that their relationship is in the nature of marriage; no statement of joint property is disclosed in their

application, no joint holding of any bank account is disclosed though they claim to be living in relationship since August, 2022. The petitioners does not even desire to get married in future as no application for marriage is moved by the petitioners before the authorities concerned so far. Petitioners have not produced any evidence to show that their relationship is of a permanent nature.

18. Petitioner No. 2 is still a student of final year of polytechnic court as disclosed in paragraph-7 of the writ petition.

19. Hence, in view of the foregoing discussions, the court is not inclined to exercise its extraordinary power under Article 226 of the Constitution and to command to the authorities to provide protection to the relationship of the petitioners.

20. The petition lacks merits and is accordingly dismissed.

(2024) 3 ILRA 2080
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.03.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ-C No. 1001289 of 2014
alongwith other connected cases

Pradeep Kumar ...Applicant
Versus
The Co Operative Tribunal U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Anupras Singh, Akshay Agarwal, Anupras Singh

Counsel for the Opp. Parties:
C.S.C., Ausaf Ahmad Khan, Aushaq Ahmad Khan, Ganga Singh, Pushkar Baghel, Raghvendra Singh, Somesh Tripathi

Civil Law - U.P. Co-operative Societies Act, 1965 - Sections 28, 29, 35 & 70 - Constitution Of India,1950 - Article 226 - Cancellation of Allotment and Membership - Cooperative Tribunal - Writ Petitions - Cancellation of allotments and memberships of original allottees by Jivan Bima Rashtriya Sahkari Avas Samiti Ltd. for default in payment of escalated flat costs upheld. Society issued multiple demand notices and reminders (dated 05.04.2004, 24.06.2004, 19.07.2004, 06.08.2004) to original allottees, who failed to comply, leading to cancellation by Administrator and subsequent ratification by elected Committee of Management on 15.05.2005. Dahiya Committee report on cost escalation, approved by Assistant Housing Commissioner, binding as 100 out of 120 members complied. Administrator's authority to cancel allotments for default, a day-to-day administrative function, valid under Section 29(6); subsequent ratification by elected Committee cured any irregularity. Original allottees' failure to challenge membership termination or subsequent allottees' membership, coupled with acceptance of refunded share money, bars their claim. Tribunal's findings of inadequate notice and non-binding Dahiya Committee report perverse, ignoring evidence of repeated notices and majority compliance. Impugned orders dated 27.01.2014 by Cooperative Tribunal and arbitral awards set aside for misappreciation of facts and material. (Paras 34-49, 50-93, 94-104)

Writ Petitions Allowed.

Case Law Cited:

1. Maharashtra St. Mining Corporation Vs Sunil (2006) 5 SCC 96 (Paras 90-91)

2. Jithendernath Vs Jubilee Hills Coop. House Building Society (2006) 10 SCC 96 (Para 103)

3. Mayurdhwaj Cooperative Group Housing Society Ltd. Vs Presiding Officer, Delhi Cooperative Tribunal (1998) 6 SCC 39 (Para 46)

4. Parmeshwari Prasad Gupta Vs U.O.I. (1973) 2 SCC 543 (Paras 90-91)

5. High Court of Judicature for Rajasthan Vs P.P. Singh (2003) 4 SCC 239 (Paras 90-91)

6. National Institute of Technology Vs Panna Lal Choudhury (2015) 11 SCC 669 (Para 91)

7. New Okhla Industrial Development Authority Vs Arvind Sonkar (2008) 11 SCC 313 (Para 23)

8. Hansa VS Gandhi Vs Deep Shankar Roy (2013) 12 SCC 776 (Para 23)

9. Geeta Vs Financial Commissioner, Govt. of NCT Delhi 2023 INSC 316 (Para 47)

10. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111 (Para 92)

11. Joint Registrar of Cooperative Societies Kerala Vs T.A. Kuttappan (2000) 6 SCC 127 (Para 31)

12. K. Shantharaj Vs M.L. Nagaraj (1997) 6 SCC 37 (Para 31)

13. Modern Dental College and Research Centre Vs St. of Madhya Pradesh (2016) 7 SCC 353 (Para 31)

14. Neelam Jain Vs Cooperative Tribunal, U.P. Writ-C No. 18732 of 2009, decided on 22.04.2011 (Para 31)

15. Navita Jain Vs Cooperative Tribunal Writ-C No. 54588 of 2008, decided on 14.05.2010 (Para 31)

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

1. This is a batch of 24 petitions preferred under Article 226 of the Constitution of India assailing the order dated 27.01.2014 passed by the Co-operative Tribunal, Uttar Pradesh whereby the award passed by the Arbitrator in proceedings under Section 70 of the U.P. Co-operative Societies Act, 1965 (hereinafter referred to as the Act of 1965) has been affirmed.

2. The issue involved in the aforesaid 24 petitions is common and is based, by and large, on almost similar facts and the issue of law involved in all petitions is same, hence, all petitions were connected and were heard together and are being decided by this common judgment.

3. To put the controversy in a perspective, the Court shall be considering the facts from the leading petition bearing No.1001289 (M/S) of 2014 alongwith W.P. bearing No. 1003095 (MS) of 2014. However, the submissions of the respective counsel for the parties which are almost the same in all petitions have been noticed and wherever necessary facts of the other petitions is required it will also be noticed at the appropriate place.

4. Primarily, the basic facts which are common in all the petitions are that the private respondent were the initial allottees of the flats in Jivan Bima Rashtriya Sahkari Avas Samiti Ltd, GH-7 Sector-6 Vasundhara Ghaziabad. Since they were defaulters and did not make the necessary payment, hence the Committee of Management of the Society took a decision to cancel the allotment of the original allottees and thereafter the flats were allotted to the present petitioners who are the subsequent allottees and are in possession. They have also got their names duly mutated in the relevant municipal records and have been paying the municipal taxes and utility bills.

5. The private respondents being aggrieved against the allotment made in favour of the petitioners, at different stages filed petitions under Section 70 of the Act,

1965. However in some cases, the private respondents had first instituted civil suits which later came to be dismissed as withdrawn and thereafter they too, filed petitions under Section 70 of the Act, 1965. In most of the cases, the subsequent allottees, initially, were not made as a party before the Arbitrator and award was passed. The impact of which was that the allotment of flats made in favour of the subsequent allottees was cancelled.

6. The subsequent allottees then assailed the said awards before the Co-operative Tribunal and who dismissed the appeals which prompted the subsequent allottees to approach this Court by means of the instant writ petitions.

7. A Co-ordinate Bench of this Court by means of order dated 03.03.2014 while issuing notice to the respondents had granted an interim order in pursuance whereof the possession of the petitioners of the writ petitions has been protected and the same is reproduced as under:-

"1. Sri J.N. Mathur, learned Senior Advocate, Assisted by Sri Anupras Singh, Advocate, appearing for the petitioner, contends that respondent no.5 did not pay the dues towards Society for constructions of the flat despite repeated reminders sent to the said respondent. Details of default and reminders given by the Society to respondent no.5 have been mentioned in para nos.16 to 18 of the writ petition.

2. Sri Mathur further submits that that by virtue of order/refund, Annexure-13, vide which share money of the respondent no.5 was returned, even membership of the respondent was cancelled. Membership of the respondent has not been restored either in arbitral award or by the tribunal, although decision has been rendered against the petitioner. Without reviving membership of respondent no.5, no benefit can flow to respondent no.5.

3. Learned counsel has further impressed on the Court that the petitioner has deposited the entire amount for the flat. The petitioner was made a member of the Society and was given possession of the flat. The petitioner continues to live in the flat. The findings returned by the arbitrator and the Tribunal to the effect that the respondent no.5 was not given sufficient opportunity, is perverse.

4. Sri Amit Swami, Advocate, appears for respondent no.5 and has filed his power-of-attorney, which is taken on record.

5. Issue notice to respondent nos.3 and 4 by speed post only.

6. Let respondent nos.3 and 4 file their counter affidavits within two weeks. Rejoinder affidavit within one week thereof.

7. Considering the nature of lis, the respondent-Society is also directed to address the court as to whether more land/plots are available to be allotted to the private respondent no.5/petitioner.

8. List on 28.3.2014.

9. In the meantime, operation of impugned orders (Annexure nos.1 and 2) shall remain stayed. "

8. During pendency of these petitions, in some case, some petitioners had expired and upon application moved for substitution, their legal heirs have been brought on record. However, for the sake of convenience, this Court shall refer to the parties as they were originally impleaded in the writ petitions.

9. The impugned orders passed by the Arbitrator and affirmed by the Cooperative

Tribunal, Uttar Pradesh have been challenged by the subsequent allottees and also by the Jiwan Beema Sahkari Awas Samiti Ltd. The writ petition has been filed by the subsequent allottee Sri Pradeep Kumar (bearing W.P. No. 1001289 (MS) of 2014) and relating to the order against Pradeep Kumar, the writ petition filed by the Society is bearing W.P. No. 1003095 of 2014; similarly, writ petition filed by the subsequent allottee Sri Rajneesh Parashar is bearing W.P. No. 1001368 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1003093 of 2014; writ petition filed by the subsequent allottee Sri Bhagwan Singh Rana is bearing W.P. No. 1001549 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1001926 of 2014; writ petition filed by the subsequent allottee Sri Dhananjay Bhardwaj is bearing W.P. No. 1001518 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1001927 of 2014; writ petition filed by the subsequent allottee Sri Rajesh Vyas is bearing W.P. No. 1001520 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1001924 of 2014; writ petition filed by the subsequent allottee Sri Deepak Rana is bearing W.P. No. 1001426 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1003094 of 2014; writ petition filed by the subsequent allottee Sri Satendra Kumar is bearing W.P. No. 1001425 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1002601 of 2014; writ petition filed by the subsequent allottee Sri Dinesh Kumar Mathur is bearing W.P. No. 1001551 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1001911 of 2014; writ petition filed by the subsequent allottee Sri Narendra Kumar Pathak is bearing W.P. No. 1001455 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1002600 of 2014; writ petition filed by the subsequent allottee Sri Ritesh Singhal is bearing W.P. No. 1001290 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1003973 of 2014; writ petition filed by the subsequent allottee Sri Prem Kumar Sharma is bearing W.P. No. 1001529 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1003972 of 2014 and lastly writ petition filed by the subsequent allottee Sri Sandeep Kumar is bearing W.P. No. 1001541 (MS) of 2014 and in the said case, the writ petition filed by the Society is bearing W.P. No. 1003974 of 2014.

10. In the petitions filed by the subsequent allottees i.e. writ petitions No. 1001289, 1001290 and 1001368 of 2014, the arguments were opened by Shri Anupras Singh, learned counsel. This was taken forward by Sri Rakesh Srivastava, learned counsel appearing for subsequent allotees in W.P. No. Civil Misc. Writ Petitions No.1001455 (MS) of 2014, 1001518 (MS) of 2014, 1001520 (MS) of 2014, 1001549 (MS) of 2014 and 1001551 (MS) of 2014, Shri Hemant Kumar Mishra learned counsel for petitioners in Civil Misc. Writ Petitions No.1001425 (MS) of 2014 and 1001426 (MS) of 2014, Shri Nirankar Singh in Civil Misc. Writ Petition No.1001455 (MS) of 2014 and Shri Sanjay Kumar Srivastava in Civil Misc. Writ Petition No.1001541 (MS) of 2014.

11. The writ petition filed by the Society as detailed above were all argued by Sri Ganga Singh, learned counsel and Sri Divyadeep Chaturvedi, learned counsel

has made his submission through video conferencing on behalf of the private respondents (the original allottees) in most of the Civil Misc. Writ Petitions bearing W.P. No.1001289, 1001368, 1003093, 1003095, 1001425, 1002601, 1001426, 1003094, 1001549, 1001926, 1001529, 1003972, 1001518, 1001927, 1001455, 1002600, 1001552 and 1001911 of 2014 and Sri Anuj Dayal, learned counsel has assisted Sri Divyadeep Chaturvedi, learned counsel in Civil Misc. Writ Petition No. 1001290, 1001455, 1001518, 1001520, 1001541 and 1001551 of 2014 appearing for the original allottees.

12. In order to appreciate the contention raised by the respective parties, it will be worthwhile to take a glance at the facts giving rise to the instant petitions.

13. Jivan Bima Rashtriya Sahakari Avas Samiti Ltd., Sector 6, Vasundhara Ghaziabad is a Co-operative Society and is governed by its by-law. It is also governed by the provisions of the Act of 1965. The Society was allotted land at GH-7, Sector-6, Vasundhara Ghaziabad by the Uttar Pradesh Avas Evam Vikas Parishad for building cheap and affordable flats for its members. The members of the Society were required to contribute towards the cost of the flats and to facilitate the same a scheme of payment was formulated by the Society.

14. While the Society had started raising the construction of the flats but since there were erratic payments from some of the members of the Society and there was change in the carpet area of the respective flats, hence there was an issue regarding the final pricing as escalated costs and increase in the area of flats was to be factored to arrive at an appropriate fixed price of the respective type of flats.

15. In all there were 120 units with the following break up:- (a) 48 units of Type-A MIG flats measuring 880 square feet and the initial price notified was Rs.6.5 lakh. Later, the area of the flats was increased to 1127 square feet, thus, the cost of Type-A flats was enhanced to Rs.8.55 lakh; (b) 44 units of Type-B HIG flats with the original area of 1150 square feet and was priced at Rs.8.5 lakh. Later, the area of these Type-B flats was enhanced to 1545.7 square feet and the price was enhanced to Rs.11.42 lakh; (c) 28 units of Type-C flats which were super HIG having an initial area of 1680 square feet and was priced at Rs.11.50 lakh, but later, the area was enhanced to 2006.21 square feet and the price was also enhanced to Rs.14.58 lakh.

16. Since there was escalation of cost on account of enhancement in the area and even otherwise there was fractured payments made by the members which also led to increased cost of the flats as the timelines were being overshot. In order to arrive at an appropriate revised costs and in absence of a consensus, the intervention of the Housing Commissioner was sought and the matter was referred to a Committee of three members (hereinafter referred to as the Dahiya Committee) who examined the matter and then furnished its report prescribing the enhanced and revised prices for different category of the flats as mentioned hereinabove.

17. The members of the Society were thereafter informed by the Society regarding the enhanced prices and the increase in the area of the flats and the members were requested to deposit the short fall so that the flats could be

completed within further time so as to avoid any further costs over runs. Society sent repeated demands to the members, however, some of them did not adhere to the timelines as a result the Society sent final calls letters requiring the members to deposit the outstanding sum, failing which, appropriate action for cancellation of the allotment would be initiated.

18. Despite the information having been conveyed to the members yet many of them did not adhere to the fiscal discipline as a result the Society took a decision of cancelling the allotment of such defaulting members. In most of the cases, none of the said defaulting members took any immediate action nor they responded at the time when the said cancellation notice and refund of money was made rather they kept silent at the said time

19. It is in the aforesaid backdrop that the Society then made fresh allotment in favour of the subsequent allottees who deposited the entire consideration towards the cost of the respective category of flats as allotted to them by the Society and they were issued the membership certificate, allotment certificate and agreement was also entered between the Society and the fresh/subsequent allottees. In furtherance of the aforesaid documentation, subsequent/fresh allottees were given possession.

20. Subsequent allottees have since then been in possession exercising their proprietary rights over the said flats as allotted to them and have got their names duly mutated in the municipal records and have been paying the municipal taxes, electricity bill and other public utility bills.

21. After about two years from cancellation, few of the defaulting members whose membership had been cancelled and their membership money was refunded including the refund of the loan amount, they raised dispute regarding the cancellation of their allotment by filing civil suits, later the suits were withdrawn and the original allottees thereafter filed petitions under Section 70 of the Act 1965. As already noticed above, the awards were passed in favour of the original allottees which was assailed by the subsequent allottees in appeal before the Co-operative Tribunal and with the dismissal of the appeal, the petitioners who are the subsequent allottees preferred the instant writ petitions.

22. In light of the aforesaid factual matrix, learned counsel for the petitioners have structured their arguments as under:-

(i) it is urged that in most of the cases filed before the Arbitrator, there is a challenge to the cancellation of the allotment by the original allottees. However, they did not challenge the cancellation of their membership nor the membership of the petitioners. It is submitted that in order to have a valid allotment it is sine qua non to have a valid membership. Once the allotment is cancelled but the membership subsists then the person concerned can be granted a fresh allotment but if the membership has been cancelled then allotment cannot be made nor it cannot be restored unless the membership is restored. In most of the cases, it has been submitted, that there is no challenge to the cancellation of membership rather it is only a challenge to the cancellation of allotment and thus the Arbitrator and the Tribunal were not justified in restoring the allotment.

(ii) It is further submitted that each case had to be dealt with by the

Tribunal separately as they were different facts but the Tribunal without looking into the aforesaid aspect and treating all matters at par has passed the impugned order which is challenged in the various writ petitions, clubbed together, indicates that there has been lack of judicial application of mind and incorrect findings have been recorded.

(iii) It is further urged that primarily the ground upon which the Arbitrator has passed the award and which has been affirmed by the Co-operative Tribunal is based on the premise that sufficient opportunity was not given to the original allottees. Moreover, when the subsequent allotments were made, there was no regular Committee of Management incharge of the affairs of the Society rather at the relevant time the Society was under the control of the Administrator who did not have the jurisdiction to enroll new members and thus the allotment made in favour of the subsequent allottees including enrolling them as new members is wholly without jurisdiction. It is submitted by the learned counsel for the petitioners that this view is incorrect for the reason that the embargo upon the Administrator to enroll new members is in context with the election of the members of the Society. It cannot be stretched to day today affairs; inasmuch as even the Administrator appointed is required to take the decision for the Society acting as its Committee of Management.

It is also urged that in the instant cases after the Administrator had enrolled the new members and made the allotment, this enrollment of membership and allotment of flats was ratified by the duly constituted elected Committee of Management of the Society. Thus any defect, if any, in enrollment of members or allotment of flats, the same stood cured upon ratification by the duly elected Committee of Management, hence it cannot be said that the membership of the subsequent allottees was bad.

(iv) It has also been pointed out by the learned counsel for the petitioners that in some cases despite the fact that the original allottees had defaulted and fresh allotment was made even then the fresh allottees had also defaulted as a result the allotment of the subsequent allottees was also cancelled and only thereafter further fresh allotment was made.

In few cases, the original allottees were allotted flats of different category and upon the request made by few of such allottees, they migrated to a different category of flat where again the said allottees defaulted and thus with their consent further fresh allotment was made. In the aforesaid circumstances where the original allottees were primarily not interested or were not alive to their rights and later when the fresh allotments were made, possession certificate were granted to the fresh allotees who started residing, then at a later stage the original allottees woke up from their slumber and raised the dispute and in such circumstances the equity does not lie in favour of the private respondents who are the defaulting original allottees and this aspect has not been considered by the Arbitrator or by the Co-operative Tribunal, hence the judgment of the Co-operative Tribunal is bad in the eyes of law.

(v) It is also urged that the Arbitrator and the Co-operative Tribunal in many of the cases noticed that the original allottees were not adequately informed of the demand as well as the cancellation, which is incorrect. It is urged that the Society had informed the said members by series of correspondence and money was refunded which was duly acknowledged by the original allottees. Without examining

this aspect as to whether they were actually served or not, the Arbitrator as well as the Tribunal has held that the order cancelling the allotment has been passed behind the back of the original allottees and has been taken as one of the grounds for allowing the claim of the original allottees and dismissing the appeal of the petitioners and this is against the material on record.

(vi) It is also submitted that the Tribunal has erred in not examining the facts of the case appropriately and a stereo type order has been passed without examining the respective contentions and the material on record which has rendered the impugned judgment of the Tribunal and the award of the Arbitrator liable to be set aside.

23. Learned counsel for the petitioners have relied upon the decision of the Apex Court in ***Maharashtra State Mining Corporation Vs. Sunil (2006) 5 SCC page 96, A Jithendernath Vs. Jubilee Hills Coop. House Building Society and another (2006) 10 SCC page 96, Myurdhwaj Cooperative Group Housing Society Ltd. Vs. Presiding Officer, Delhi Cooperative Tribunal and others (1998) 6 SCC page 39, Sri Parmeshwari Prasad Gupta Vs. The Union of India (1973) 2 SCC 543, High Court of Judicature for Rajasthan Vs. P. P. Singh and another (2003) 4 SCC 239, National Institute of Technology and another Vs. Panna Lal Choudhury and another (2015) 11 SCC 669, New Okhla Industrial Development Authority and another Vs. Arvind Sonkar (2008) 11 SCC page 313, Hansa V Gandhi Vs. Deep Shankar Roy and others (2013) 12 SCC page 776 and Geeta & others Vs. Financial Commissioner Govt. of NCT Delhi & others; 2023 INSC 316.***

24. Shri Ganga Singh, learned counsel for the Society has primarily submitted that the Society was well within its rights as per its by-laws to make demand of the costs of the flats which was required to be deposited by the members in a time frame. The by-laws of the Society empowers the Society to take action against such defaulting members and it is in furtherance thereof that the Society had sent several reminders to the defaulting members who did not respond and thus looking at the larger good for the majority of the members it cancelled the allotments including the membership of the defaulting members and the amount towards the costs of the flats as well as the membership amount was refunded to the said defaulting members which is an action taken by the Society in accordance with its by-laws and cannot be termed as arbitrary.

25. Once the allotment and the membership was cancelled it was no more open for the original members to have challenged the allotment without challenging the termination of their membership or challenging the membership of the subsequent fresh members/allottees. The Society had sent demand letter to the members at their given address which was duly served, hence it cannot be said that the process adopted for cancellation was in violation of any principles of natural justice since repeated reminder were sent and even though they were acknowledged by the defaulting members yet they did not make good the demand, hence at this stage where fresh allotment have been made and the fresh allottees have been given the possession, accordingly the claim of the original allottees has incorrectly been allowed by the Arbitrator and the appeal has been wrongly dismissed. In light of the aforesaid, the learned counsel for the

Society submits that the private respondents being defaulters they have no right to be given any allotment.

26. Shri Divyadeep Chaturvedi alongwith Shri Abhishekh Dwivedi and Shri Anuj Dayal learned counsel appearing for the private respondents have primarily urged that first and foremost the fresh allotments were bad in the eyes of law for the reason that they were made by the Administrator who did not have the right, authority or jurisdiction to enroll new members. It is urged that any act which is without jurisdiction then all subsequent acts are also rendered void, accordingly once the action of enrolling new members at the behest of the Administrator is found to be without jurisdiction, all subsequent acts including making fresh allotments and issuing possession certificates are rendered void and no rights can accrue in favour of the fresh subsequent allottees.

27. It is further urged by the learned counsel for the private respondents that the original allottees had already deposited the original sum of money as cost of the flat and if the said members could deposit the said amount, they could have easily deposited the enhanced sum also but no adequate opportunity was given rather a surreptitious method was adopted by the Society in connivance with the fresh allottees as a result the original allottees have been outsted without due process and as such the award passed by the Arbitrator is absolutely just and so is the order passed by the Tribunal dismissing the appeals of the subsequent allottees.

28. It is further submitted that where majority of the amount had already been paid by the original allottees and the dispute was only in respect of the enhanced sum, accordingly the action of cancelling membership and the allotment was not commensurate with the default. The action of the Society in this regard was arbitrary and any action which is arbitrary cannot be sustained and this has been noticed by the Arbitrator as well as the Co-operative Tribunal and in the aforesaid facts and circumstances, the aforesaid orders do not require any interference and the writ petitions deserve to be dismissed.

29. It is further submitted that the Tribunal has meticulously considered the submissions and has also passed a balanced orders so that the Society may not suffer any financial loss as directions have been issued by the Tribunal permitting the Society to recover the outstanding sum alongwith interest at the rate of 15% per annum from the original allottees and in the aforesaid circumstances the private respondents are ready to comply with the aforesaid direction, hence the writ petitions deserve to be dismissed.

30. Lastly, it has been pointed out that the recommendation of the Dahiya Committee was not binding on the members and the cancellation of the membership was a unilateral act of the Society and many of the original allottees did not take back their money voluntarily and moreover the subsequent allottees have no right as no transfer deed has been executed in their favour and they are merely licensee. Thus for all the aforesaid reasons the writ petitions deserve to be dismissed.

31. Learned counsel for the respondents has relied upon the decisions of the Apex Court in the case of ***Joint Registrar of Cooperative Societies Kerala Vs. T. A. Kuttappan and others (2000) 6***

SCC page 127, K Shantharaj and another Vs. M. L. Nagaraj and others (1997) 6 SCC page 37, Modern Dental College and Research Centre and others Vs. State of Madhya Pradesh and others (2016) 7 SCC page 353, the decision of ***Neelam Jain Vs. Cooperative Tribunal, U.P. & others*** of this Court passed in Civil Misc. Writ Petition No.18732 of 2009 decided on 22.04.2011 and ***Navita Jain Vs. Cooperative Tribunal and others*** passed in Writ-C No.54588 of 2008 decided on 14.05.2010.

32. Having heard learned counsel for the respective parties at length, the issues that crop up for consideration before this Court are :-

(A) Whether the action of the Society in terminating the Membership as well as allotment of the original allottees is bad and arbitrary for want of proper and adequate opportunity of hearing and service of notice;

(B) Whether the report of Dahiya Committee was binding on the Members;

(C) Whether the administrator could not enroll new Members for the purposes of allotment of flats and what would be the effect of the subsequent ratification by the elected Committee of Management in respect of the decisions taken by the administrator; and

(D) Whether the impugned orders are bad for violation of natural justice and whether the orders have been passed without considering the facts and material on record and thus is perverse.

33. The Court shall deal with each issues separately in seriatim.

(A) and (B)

34. Learned counsel for the private-respondents had argued that the order passed by the Society in terminating the Membership as well as cancelling the allotment is bad as no adequate opportunity of hearing was granted to them. It was also urged that the cancellation of the allotment and termination of the Membership was a unilateral act of the Society which is arbitrary.

35. On the other hand, learned counsel for the Society has categorically taken a stand that several notices were issued to the private-respondents/the original allottees and they were called upon to make the payment of the outstanding sum in respect of the flats allotted to them, but the same was not done, as a result, the Society was justified in cancelling the allotment as well as the Membership.

36. In this regard, it was the specific case of the Society that in the Annual General Meeting of the Society held on 04.08.2002, Resolution No.5 was passed and it was resolved by the Members present that the costs of the flats were to be revised. Since, there were various views including opposition from certain quarters of the Members, hence, the grievance was placed before the Assistant Housing Commissioner on 06.02.2004, who appointed a Committee which has been mentioned in the instant order as B.S. Dahiya Committee. The report of the Dahiya Committee was placed before the Administrative Committee in the meeting on 03.04.2004 wherein it was decided that demand letter be sent to all the Members for depositing the costs of the flats as determined by the Dahiya Committee.

37. It is in furtherance thereof that the Society issued letters dated 05.04.2004 to

all the Members intimating them that the Dahiya Committee report was available in the office of the Society where it could be read and perused by the Members. Demand notices were also issued requiring the Members to deposit the shortfall as per the schedule mentioned in the said notice. The said demand notices were sent at repeated intervals to the original allottees who did not choose to respond as they remained inert inasmuch as neither any reply was given nor the outstanding amount was paid.

38. It is in the aforesaid context a fresh demand notice was issued on 24.06.2004 directing the private-respondents to deposit the balance sum and it was also made clear in the said notice that in case of non-payment, the allotment would be cancelled, but there was no response to this notice as well. Despite the same, a fresh notice was again issued on 19.07.2004 by the Society which was followed by reminder dated 06.08.2004 and once the notices were served on the defaulting Members without any response and compliance from their end, the said situation was brought and placed before the Administrative Committee of the Society, who reviewed all the cases of default. Yet taking a lenient view, it was decided by the Committee that a last opportunity be given to the defaulting Members to pay the outstanding sum by 30.08.2004, however, even this letter was not responded nor the amount was paid, hence, left with no option, the Society then took a decision to cancel the allotment. By the Resolution dated 01.09.2004, the cancellation of the allotment was done by the Committee. This Resolution of the Society, which was at the relevant time under an Administrator was placed before the Assistant Housing Commissioner, who approved the same on 14.09.2004.

39. Once again the Society informed the private-respondents regarding cancellation of allotment and it was further informed that the private-respondents may submit their no objection certificate from the respective banks, from where the said Members had taken the housing loans. However, no such response was given and accordingly considering the circumstances the Society issued cheques to the defaulting Members refunding their Membership fee and the sum which was paid by such defaulting members towards the part cost of the flat was returned to the banks from whom the said Members had taken their respective loans. Most of the said Members had encashed the said cheques. This fact of sending repeated reminders and the demand notices to the defaulting Members could not be adequately disputed by the private-respondents. No cogent reason was also given as to why the private-respondents did not make good the outstanding payment regarding the escalation of the costs of the flats.

40. A feeble submission has been made by the learned counsel for the private-respondents to indicate that the report of Dahiya Committee was not binding on the Members. It was also urged that since the private-respondents were disputing the action of the Society in enhancing the cost of flats, hence, the private-respondents did not accede to pay the aforesaid sum.

41. It has further been pointed out that even the report of the Dahiya Committee did not have the unanimous approval of the three Members constituting the said Committee rather one of the Members of the said Committee namely Mr. Ramesh Gupta did not sign the same, hence, the same could not have been made binding.

42. From the pleadings and the material on record a fact that emerges and the same is undisputed is the fact that out of 120 Members of the Society, 100 Members had acceded to the enhancement of costs of the flats and they had even deposited the enhanced amount. Merely because one of the Member of Dahiya Committee did not sign the report in itself does not lead to any inference that the said report could not be made binding rather the record would indicate that the said decision of the Dahiya Committee was accepted by the Committee of Administrator which was further placed before the Assistant Housing Commissioner, who also approved the same and it was placed before the Members, who approved it and that is the reason why out of 120 Members, 100 Members paid the escalated amount.

43. Be that as it may, the fact that there was a dissent amongst the Members regarding the escalation in the costs of the flats and this issue was placed before the Committee of Administrators who in turn placed the matter before the Assistant Housing Commissioner who constituted a three Members Committee which submitted its report and the said report was approved by the Assistant Housing Commissioner. Another significant factor which is evident from the record is the fact that the carpet area of the various types of flat i.e. A, B, C, D had enhanced from the original carpet area and thus there was bound to be escalation in the price of the flats. With passage of the time there was cost over runs, hence, the experts had given their recommendations for enhancement which had been accepted and approved by the Assistant Housing Commissioner. The Society had informed all the Members regarding the aforesaid enhancement and there is no dispute to the fact that out of 120, 100 members agreed and did pay the enhanced sum. Thus, it cannot be said that the said report was not binding on the Members. The Society functions on the democratic principles and where the overwhelming majority of the Members accepted the decision and acted upon it by making the payments of the enhanced sum, in such circumstances, it cannot be said that the report of the Dahiya Committee could not be made binding on all the Members.

44. In the aforesaid backdrop if the material on record is perused, it would further indicate that the Society from time to time had issued repeated reminders and demand letters calling upon the Members to pay the outstanding sum as per the escalated costs and the overwhelming majority of the Members did pay and adhere to the schedule and rather it was a group of minority Members, who did not pay and once their allotments were cancelled, they promptly did not take any action rather as a knee-jerk reaction, some of the them filed writ petition, some filed civil suits which latter were not taken to its logical conclusion and were withdrawn/dismissed and later the original allottees filed petitions under Section 70 of the U.P. Cooperative Societies Act, 1965.

45. The material on record suggests that ample opportunities in shape of notices were issued by the Society to the defaulting Members and the said notices were sent to the Members at their known addresses as recorded in the records of the Society. By and large, the said defaulting Members, who had filed their petitions under Section 70 of the U.P. Cooperative Societies Act, 1965 did not primarily dispute that various notices and demand letters were issued by the Society was not received by them. It is only at a later stage that the said defaulting

Members developed this plea, however, in light of the averments made in the counter affidavit as well as the rejoinder affidavit filed by the petitioners, the said plea could not be successfully proved. Another fact which is apparent is that the Members while filing their petitions under Section 70 of the Act of 1965 had not raised this issue of non service of the notice, rather it is only a feeble plea raised before this Court. In light of the material placed on record of these petitions including the copy of the arbitration petition and the counter affidavit of private-respondents, this plea does not find favour with this Court.

46. This Court is fortified in its view drawing strength from the dictum of the Apex Court in **Mayurdhwaj Cooperative Group Housing Society Limited** (supra) and the relevant paragraphs read as under:-

"5.In the case ofS.C. Verma[CWP No. 1484 of 1991] it was a case of the Lawyers' Cooperative Group Housing Society Limited. In this case also, the dispute pertained to the allotment of flats in Category 'C'. Here again was the same problem, the number of applicants was larger than the number of flats to be allotted. In this case also, cut-off date to make payment was fixed as 15-5-1987. All members who paid the entire due as on this date, were to be included in the list. The amount required to be paid by this date was Rs 1,11,000. 26 members paid this amount by this date. Here also the number of flats were 30 for its 65 members. It was held:

"... The Society had to lay down a reasonable criteria for finalising the list of members. The criteria which the Society adopted was that all payments having been made in accordance with the demand which has been raised and by keeping the options and the seniority into consideration, the list was prepared as on the cut-off date of 15th May, 1987. We cannot find any infirmity in the principle so adopted. It is essential for the Cooperative Society to decide as to what is the principle which it should follow in determining or finalising the list of the members to whom flats are to be allotted. Unless and until the principles laid down by the Society are found to be arbitrary or irrational or unfair, the Court will not interfere with the same. We do not find any such infirmity in the procedure which has been adopted or established, viz., to prepare a list of members as on 15th May, 1987 who had not committed any default...."

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9.Returning to Rule 36, submission for the respondent is, when a statute provides a thing to be done in a manner it has to be done in that manner alone and not in any other manner. Other modes are excluded. The counsel for the respondent referred the cases inA.K. Royv.State of Punjab[(1986) 4 SCC 326 : 1986 SCC (Cri) 443] paras 10-11 andState of Mizoramv.Biakchhawna[(1995) 1 SCC 156] paras 7, 8 and 9. This proposition has not been disputed by learned counsel for the appellant. The question is, when a member is in default then is it that power of a society is concretised within this Rule to expel such defaulting member or can it within its peripheral jurisdiction resolve to take recourse to any other policy decision, to enable such defaulting member to deposit the balance amount either by extending time or giving any such incentive as it deems fit and proper or to take recourse to such consequential measures as it deems fit and proper. The present case is similar to the cases which arose in the Delhi High Court. The question is, in the matter of allotment of flats, can a society

not lay down its own policy as to how instalments are to be paid, within what time and in doing so can it not place certain conditions under it. In other words, can or can it not resolve that members must pay the stipulated amount by fixing any cut-off date. If, in spite of that, any member defaults, can it not cancel the allotment. Similarly, can it not decide instead of cancelling the allotment to give him an offer to get the flat in the next phased construction clearing ways for non-defaulters. The question is, can it be said that the society has no option except to allot strictly by seniority rule in spite of such members defaulting in making the payment. If power could be said to be limited then it means, let seniors default, let juniors wait as long as seniors do not pay but in no case cancel or even modify preferences in their allotment. In our considered opinion, such an interpretation would be squeezing the power of the general body of a society within the limits of Rule 36 belying all the objectives of the cooperative spirit of the Act. Thus by this, if this be so, either bear with the defaults of such members at the cost of non-defaulting members or expel them from membership. Such an interpretation would be too harsh even on senior members if the only recourse could be the latter. Even a senior member may have financial stresses resulting into default of not being able to pay for a flat even the minimum fixed amount within the stipulated time, then will it be fair to expel him? The option has to be left with the society to deal with different situations as may arise from time to time. Taking away this discretion and binding it to exercise powers under Rule 36 would be interpreting against the very objective of the Act, leaving no option with the cooperative society. The cooperative society is formed with laudable objective to inculcate spirit to work in a group freely for rendering benefit to its members through the cooperative contributions. This is only possible by conferring wide range of discretion on a society, not restricting its discretions by interpreting a law otherwise. This has to be for furthering the cause of cooperative movement. That is why various rigours of laws including taxes and fees are diluted for enhancing the spirit of the cooperative movement. We have no hesitation to hold that the power of society cannot be circumvented within Rule 36 in a case of default by its member of any of his dues. Such an interpretation would be contradictory to the very cooperative spirit or objectives of the creation of cooperative societies. Rule 36 is quoted hereunder:

"36.Procedure for expulsion of members.—(1) Notwithstanding anything contained in the bye-laws, any member who has been persistently defaulting in payment of his dues or the payment of claims made by a housing society for raising funds to fulfil its objects, has been failing to comply with the provisions of the bye-laws regarding sales of his produce through the society or other matter in connection with his dealings with the society or who, in the opinion of the committee, has brought disrepute to the society or he has done other acts detrimental to the interest or proper working of the society, the society may, by a resolution passed by a majority of not less than three-fourths of the members entitled to vote who are present at a general meeting, held for the purpose, expel a member from the society:

Provided that no resolution shall be valid, unless the member concerned has been given an opportunity of representing his case to the general body and no resolution shall be effective, unless it is approved by the Registrar.

(2) Where any member of a cooperative society proposes to bring a resolution for expulsion of any other member, he shall give a written notice thereof to the President of the society. On receipt of such notice or when the committee itself decides to bring in such resolution, the consideration of such resolution shall be included in the agenda for the next general meeting and a notice thereof shall be given to the member against whom such resolution is proposed to be brought, calling upon him to be present at the general meeting, to be held not earlier than a period of one month from the date of such notice and to show cause against expulsion to the general body of members. After hearing the member, if present, or after taking into consideration any written representation which he might have sent, the general body shall proceed to consider the resolution.

(3) When a resolution passed in accordance with sub-rule (1) or (2) is sent to the Registrar or otherwise brought to his notice, the Registrar may consider the resolution and after making such enquiry as to whether full and final opportunity has been given under sub-rule (1) or (2) give his approval and communicate the same to the society and the member concerned within a period of 6 months. The resolution shall be effective from the date of approval.

(4) Expulsion from membership may involve forfeiture of shares held by the member. The share shall be forfeited with the prior permission of the Registrar. In that event, the value of the share forfeited shall be credited to the reserve fund of the society.

(5) No member of a cooperative society who has been expelled under the foregoing sub-rules shall be eligible for readmission as a member of that society or for admission as a member of any other society of the same class for a period of three years from the date of such expulsion:

Provided that the Registrar may, on an application either by the society or the member expelled and in special circumstances, sanction the readmission or admission, within the said period, of any such member as a member of the said society or of any other society of the same class, as the case may be. Before giving such sanction for readmission or admission by the Registrar, an opportunity of hearing may be given to both the society and member concerned."

10.This Rule deals with the procedure for the expulsion of members. In case a society decides to expel its member who is persistently defaulting in making the payment of his dues, the procedure to be followed could only be what is provided under this Rule and no other. The principle referred earlier that if a thing is required to be done in a manner as provided under the law has to be done in that manner alone and no other manner will apply with equal force under Rule 36, when a society decides to expel its member. In case of expulsion, the procedure provided under it and the expulsion has to be only under the mode provided therein and no other which is mandatory in nature. But this is only after decision is made to expel its member. This Rule does not take away the discretion of the society to expel a member or not which is preceding the exercise of power under Rule 36. For this, there is nothing under this Rule which either circumscribes or webs this discretion. Since this Rule is for the expulsion of its members, it is stringent in its application. Even after giving opportunity and even after the general body passes such a resolution, it requires approval of the Registrar. Outside this, there is nothing which restricts a society to act freely and to lay down its own

policies. It is always open to it to decide on a fact to expel him or not. Its discretion to act is curtailed only by a statutory provision or any order having force of law. A policy may depend on various factors, its planning, projects, undertakings including its financial capacity etc. One society may be in a sound position and the other in a limping position thus may give to its member larger or lesser benefits as the case may be. Thus it is always open to a society to lay down its own principle for making such allotments. So consideration of prompt payment in shaping its policy which helps it to complete its project to confer on its member its fruits at the earliest may be justified exercise of its discretion. To what extent a default is going to affect a society will depend on the facts and circumstances of each case which has to be left at the discretion of each society. It is not proper even for the courts to interfere with such a discretion, except when it is arbitrary, irrational, mala fide, against any statutory provisions or against orders having the force of law. This will not be possible if a strict principle of seniority is followed. However it is open for a society to give weightage to seniority depending on the facts of each case. Within permissible limits, it is always open to lay down a principle which is just, fair and proper. When a society could decide the manner of allotment by instalments or other modes, there is no inhibition to it to modify it in case conditions are not complied by its members. Thus it is not possible to uphold that the society has no option but to proceed under Rule 36 to expel its member. Hence once a society has a discretion, it cannot be said its power is restricted to allot only under the strict rule of seniority.

11.We find that Section 28 of the Act vests final authority in the general body of a cooperative society. It has wide powers including residuary power except those not delegated to any other authority under the Act, the rules and its bye-laws. In other words, its power, if any, is only restricted by the Act, the rules, the bye-laws and any order having force of law. This exercise of power by the general body which is in issue cannot be said to be excluded by Rule 36."

47. Another decision of the Apex Court in **Geeta** (supra) also lends support to the view taken by this Court. The relevant paras read as under:-

"5. From the material on record, it is evident that society had issued notice to the late husband of appellant no.1 on 4.11.1991 for expulsion of his membership on account of default in payment of dues of the society. A notice for holding Annual General Meeting on 22.03.1992 of the society was issued on 4.3.1992 specifically for considering expulsion of members of the society who were persistent defaulters. The name of late husband of appellant no.1 was one of them. A sum of ₹1,33,920/- was shown to be due against him. On 22.3.1992, a resolution was passed in the aforesaid meeting expelling the membership of number of persons, including the late husband of the appellant, on account of default in payment. The matter was referred to Registrar, Cooperative Societies, Delhi for necessary action. Joint Registrar (II), Cooperative Societies, Delhi, vide his order dated 23.3.1993 granted time to the expelled members to deposit dues by 30.04.1993 and in default the resolution of the society was approved.

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8. The argument now raised, which had not been raised before any of the authorities including the High Court, is that there is violation of Rule 36(2) of the

Delhi Cooperative Society Rules, 1973 and the prescribed procedure for expulsion of a society member has not been followed. We are not impressed with the argument. Procedural law is subservient to justice.

9. In the case in hand the only issue is regarding default of payment of dues of the society for construction of flats, which the late husband of appellant no.1 was not ready and willing to pay at any stage, despite opportunities given. Firstly by the Society, secondly by the Joint Registrar (II), Cooperative Societies, Delhi and thereafter by the Financial Commissioner, Delhi. Even before the High Court, at the time of issuance of notice, the statement of late husband of appellant no.1 was that he is ready and willing to deposit the amount due with interest but still nothing was paid."

48. For the foregoing reasons, this Court is of the clear view that the order regarding cancellation of Membership for default cannot be said to be arbitrary or bad in the eyes of law. The Society had taken reasonable steps of calling upon the defaulting Members to deposit the outstanding sum which they failed, hence, at this stage, the private-respondents cannot be permitted to state that the order of cancellation was behind their back or no proper opportunity was given or that they were not aware of it especially when the said notices were sent at the addresses by the private respondents as recorded and known to the Society and it is not disputed that the said respondents were not living at the said addresses and/or they had informed the Society of the change in their addresses, rather before the Arbitrator the issuance of notice and its receipt was accepted.

49. Insofar as the submission of the learned counsel for the private-respondents that the order of cancellation of the allotment was not commensurate with the outstanding sum comparatively since the large amount has already been paid or to say that the original amount had been paid and once it was done there was no occasion for the private-respondents not to pay the remaining enhanced sum which was much lesser amount and the same could have been recovered by the Society by instituting proceedings along with interest but taking recourse to cancellation of the allotment was an extreme step. This plea also does not find favour with this Court for the reason that the Cooperative Society is a collective body of Members to further the common goal and the Society works through its Committee of Management which is elected from amongst the members themselves. In the instant case once the majority of Members had approved the enhanced sum and the Society had taken adequate steps for informing the Members of the escalated amount and also made several demands letters including cautioning the defaulting members that in case if they do not comply or make the payment their allotment is liable to be cancelled yet the private-respondents did not pay any heed to the same. Under such circumstances, the decision taken by the Society cannot be said to be arbitrary so as to invite the indulgence of this Court. Thus, this Court finds that the cancellation of the allotment is not arbitrary and this Court further finds that the report of the Dahiya Committee which had been approved by the Assistant Housing Commissioner and ratified by the Committee of Management and duly acted upon by overwhelming majority of the Members. Moreover, the cancellation of allotment is also not bad for want of notice or opportunity of hearing, hence, for all the said reasons the contention in this regard made by the

learned counsel for the private-respondents is turned down.

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50. The learned counsel for the private respondent has laid much emphasis that the Administrator could not enroll new members, hence, the entire exercise of the Administrator and of the Committee of Management which came in-charge of the affairs of the society was without jurisdiction, hence, neither the subsequent allotees could have been enrolled nor any allotment could have been made in their favour, thus, the order passed by the Arbitrator as well as the Appellate Tribunal does not require any interference.

51. On the other hand, the learned counsel for the petitioners/subsequent allottees is that the Administrator appointed under the provisions of the U.P. Cooperative Societies Act, 1965 is entitled to take administrative decisions and it also has the power which is generally exercised by the Committee of Management regarding the affairs and functioning of the society. Thus, if any issue relating to administration comes up before the Administrator, he is duly entitled to take a decision and it cannot be said that the said decision is bad.

52. In this regard, it will first be relevant to notice the statutory provisions relating to appointment of an Administrator and what is the general powers exercised by such Administrator.

53. It will be relevant to notice certain provisions contained in Chapter IV of the U.P. Cooperative Societies Act, 1965 which relates to management of the societies. Section 28, 29 and 35 are relevant and are reproduced hereinafter for ready reference:-

"Section 28. Final authority in co-operative society:- *Subject to the provisions of this Act and the rules the final authority of co-operative society shall vest in the general body of its members in general meeting ;*

Provided that, in such circumstances as may be prescribed, the final authority shall vest in the delegates of such members elected in the manner prescribed and assembled in general meeting and in such case all references in this Act, the rules or the bye-laws to the general body and general meeting shall be deemed to be reference to the body consisting of such delegates of members and to the general meeting of such delegates.

Section 29:-Committee of Management:- *The management of every co-operative society shall vest in a committee of management constituted in accordance with this Act, the rules and the bye-laws which shall exercise such powers and perform such duties as may be conferred or imposed by this Act, the rules and the bye-laws.*

[(2) (a) The term of every Committee of Management shall be five years and the term of elected members of the Committee of Management shall be co-terminus with the term of such Committee.

(b) The provisions of clause (a) shall apply also to a Committee of Management in existence on the date of the commencement of the Uttar Pradesh Co-operative Societies (Amendment) Act, 2002 and to the elected members of such committee.

(b) The term of a Committee of Management which has completed on or before the date of commencement of the Act

referred to in Clause (b), the period of three years from the date of its constitution and the term of its elected members shall expire on such commencement.]

(3) Election to reconstitute the Committee of Management of every Co-operative Society shall be completed in the prescribed manner under the superintendence, control and direction of the election Commission at *least fifteen days before the expiry of the term of the Committee of Management and the members so elected shall replace the Committee of Management whose term expires under sub-section (2):*

Provided that notwithstanding anything in this Act, the administrator or the Commitee of Administrator appointed under this Section as it stood before the commencement of Uttar Pradesh Cooperative Socities (Second Amendment) Act, 1994 shall continue to exercise the powers and perform the duties of the Committee of Management till the Committee of Management is reconstituted under this Act or till (December 31, 2000 whichever is earlier.

1. Subs. by U.P. Act 19 of 1998, dated 9-7-1998.

:Subs. by U.P. Act 17 of 1994 (w.e.f. 15-7-1994), the position of sub-section (2) of Section 29 as under:

(2) The term of every Committee of Management, including a Committee of Management constituted before the commencement of the U.P. Co-operative Societies (Second Amendment) Act, 1994 whose term has not expired on the date of such commencement, shall be five years and the term of the elected members of the Committee of Management shall be co-terminus with the term of such Committee.

Explanation. For the purposes of this sub-section, the expression "term" in respect of a Committee of Management constituted before the commencement of the Uttar Pradesh Co- operative Societies (Second Amendment) Act, 1994, means a period of three years.

2. Subs for the word "three" by U.P. Act 12 of 2002 (w.e.f. 4-7-2002).

3. Subs. by U.P. Act 12 of 2002 (w.e.f. 4-7-2002).

4. Sub-sections (3) and (4) substituted by U.P. Act 17 of 1994 (w.e.f. 15-7-1994).

5. Subs. by U.P. Act I of 1997 (w.e.f. 16-4-1997).

6. Subs. by U.P. Act 30 of 2000 (w.e.f. 22-7-2000) for the word and figures "June 30, 2000" as substituted by U.P Act 14 of 2000.

[Provided further that where the State Government is satisfied that circum-stances exist which render it difficult to hold the election on the date fixed by the Registrar, it may direct the Registrar to postpone the election, and thereupon the Registrar shall postpone the election, and all proceedings with reference to the election shall be commenced afresh in all respects.]

(4) It shall be the duty of the Secretary or, as the case may be, the Managing Director of the Co-operative Society to send to the Registrar, four months before the expiry of the term of Committee of Management, a requisition for conducting the election and to furnish all such information as may be required by him within such period as may be fixed by him.]

(5) (a) Where, for any reason whatsoever, the election of the elected members of the Committee of Management has not taken place or could not take place before the expiry of the term of elected members, the Committee of Management shall, notwithstanding anything to the contrary in this Act or the rules, or the bye-

laws of the society, cease to exist on the expiry of such term.

(b) On or as soon as may be after the expiry of such term, the Registrar shall appoint an Administrator or a Committee of Administrators (hereinafter, in this section, referred to as the Committee) for the management of the affairs of the society until the reconstitution of the Committee of Management in accordance with the provisions of the Act, the rules and the bye-laws of the society, and the Registrar shall have the power to change the Administrator or, as the case may be, any member of the Committee or to appoint a Committee in place of an Administrator or vice versa from time to time.

(c) Where a committee is appointed under clause (b), it shall consist of a Chairman and such other members not exceeding eight as may be nominated by the Registrar, out of which at least two shall be Government servants.

(d) The procedure for summoning and holding of meetings of the Committee. the time and place of holding such meetings, the conduct of business at such meetings and the number of members necessary to form quorum thereof shall be such as may be prescribed.

(e) So long as no Administrator or, as the case may be, the Committee is appointed under clause (b), the Secretary or the Managing Director, as the case may be, of the society shall be in charge only of the current duties of the Committee of Management.

Explanation. Where results of the election of members of the Committee of Management have not been or could not be declared, for any reason whatsoever. before the expiry of the term of the elected members of the outgoing Committee of Management, it shall be deemed that the election of the elected members of the Committee of Management has not taken place within the meaning of this sub-section.

(6) The Administrator or the Committee appointed under sub-section (5) shall, subject to any directions which the Registrar may from time to time give. have the power to perform all or any of the functions of the Committee of Management or of any officer of the society and shall be deemed for all purposes under this Act, the rules and the bye-laws of the society to be the Committee of Management and the Chairman of such Committee shall exercise the powers and perform the functions of the Chairman of the Committee of Management.]

[(7) The Administrator or the Committee, as the case may be, appomted under sub-section (5), shall as soon as may be, but not later than the expiry of [two years and six months] from the date of appointment, arrange for the re-constitution of the Committee of Management in accordance with the provisions of this Act, the rules and the bye-laws of the society to take over the management of the society from the Administrator or the Committee, as the case may be.

Provided that where an Administrator is replaced by a Committee or a Committee by an Administrator as provided in clause (b) of sub-section (5), the period of two years and six months) shall count from the date the Administrator or the Committee, as the case may be, was originally appointed.

Explanation. Notwithstanding that the process of election may have commenced before the appointment of Administrator or the Committee under sub-section (5) a fresh process of election shall commence after such appointment.]

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35. Supersession or suspension of Committee of Management. *(1) Where. in the opinion of the Registrar, the Committee of Management of any co-operative society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws of the society or commits any act which is prejudicial to the interest of the society or its members, or is otherwise not functioning properly, the Registrar after affording the Committee of Management a reasonable opportunity of being heard and obtaining the opinion of the general body of the society in a general meeting called for the purpose in the manner prescribed may, by order in writing, supersede the Committee of Management:*

[Provided that where under the prescribed circumstances it is not feasible to convene a general meeting of the general body of the society, the Registrar may dispense with the requirement of obtaining the opinion of the general body of the society.]

(2) Where the Registrar, while proceeding to take action under sub-section (1) is of opinion that suspension of the Committee of Management during the period of proceeding is necessary in the interest of the society, he may suspend the Committee of Management which shall thereupon cease to function, and make such arrangement as he thinks proper for the management of the affairs of the society till the proceedings are completed:

Provided that if the Committee of Management so suspended is not superseded it shall be reinstated and the period during which it has remained suspended shall count towards its term..

[* *]*

(3) Where the Registrar has superseded the Committee of Management under sub-section (1), he may appoint in its place, [for a period not exceeding one year) to be specified in the order of supersession,-

(a) a new committee consisting of one or more members of the society, or

(b) an administrator or administrators who need not necessarily be members of the society:

[Provided that the Registrar may, with the previous approval of the State Government, extend from time to time the period f supersession, so however, that any single extension does not exceed six months and the total extension does not exceed one year:]

Provided further that the committee or an administrator or administrators appointed [before the commencement of Section 4 of the Uttar Pradesh Co-operative Societies (Amendment) Act, 1994] shall be deemed to have been duly appointed and no action taken or power exercised or functions performed by it or him, as the case may be, shall be deemed to be invalid or shall be called in question in any court on the ground of any defect in its or his appointment as such or on the ground that the Committee of Management was not reconstituted within time or the period of supersession or the term of its or his office was not duly extended.]

(4) The Registrar shall have the power to change the committee or any members thereof or the administrator or administrators appointed under clause (a) or (b) of sub-section (3) at his discretion during the period specified under that sub-section.

(5) The committee, administrator or administrators appointed under sub-sections (3) and (4) shall, subject to any directions which the Registrar may from time to time give, have the power to

exercise all or any of the functions of the Committee of Management or of any officer of the society and shall be deemed for all purposes under this Act, the rules and the bye-laws of the society to be the Committee of Management.

[(6) Before the expiry of the period specified under sub-section (3), the committee, administrator or administrators, appointed under sub-sections (3) and (4), shall arrange for the reconstitution of the Committee of Management in accordance with this Act, the rules and the bye-laws of the society to take over the management of the co-operative society on the expiry of the said period:

Provided that the committee or an administrator or administrators whose term has expired before the commencement of [the Uttar Pradesh Co-operative Societies (Amendment) Act, 1994 shall arrange for reconstitution of the Comunittee of Management by December 31, 1994).

[(7) The provisions [***] of Section 29 shall apply in respect of re-constitution of the Committee of Management under this Section.]

35-A. (1) Without prejudice to other provisions of this Chapter, where

for two successive co-operative years [including any period before the commence-ment of this section]-

(a) more than seventy per cent of the total dues of any primary society. which is a credit society against its members during any co-operative year, remain unpaid at the end of such year; or

(b) the number of defaulting members exceeds seventy per cent of the total number of indebted members of such society, at the end of any such year,

then, the Chairman and all members of the Committee of Management of any such society shall, upon an order coming into effect under sub-section (3), vacate their respective offices as such.

(2) The provisions of sub-section (1), as they apply to a primary credit society, shall mutatis mutandis apply to a financing bank with the substitution of references to 'seventy per cent' by references to 'sixty per cent'.

(3) In relation to any society or banks as referred to in sub-section (1) or sub-section (2), the Registrar may make such arrangements as he thinks proper for the management of the affairs of such society or bank, as he thinks fit and the provisions of sub-sections (3), (4), (5) and (6) of Section 35 shall mutatis mutandis apply.]

54. Section 28 clearly reflects the sentiments that the final authority of the cooperative society vests in the general body of its members in general meeting.

55. Section 29 provides that the management of every Co-operative Society shall vests in a Committee of Management constituted in accordance with the Act, the rules and by-laws which shall exercise such powers and perform such duties as may be conferred or imposed by the Act, the rules and the bye-laws.

56. In this regard, the first proviso appended to Section 29 is relevant and it provides that notwithstanding anything contained in the Act, the Administrator or the Committee of Administrators appointed under this Section shall continue to exercise the powers and perform the duties of the Committee of Management till the Committee of Management is re-constituted under the Act. Section 29(6) also assumes significance as it is provided that the Administrator or the Committee

appointed under Section 29(5) shall subject to the directions which the Registrar may give from time to time, the Administrator or the Committee shall have the powers to perform all or any of the functions of the Committee of Management or any officer of the society and shall be deemed for all purposes under the Act, the rules and the bye-laws to be the Committee of Management and the Chairman of such Committee shall exercise the powers and perform the functions of the Chairman of the Management.

57. Thus, from the conjoint reading of the aforesaid two provisions, it would be clear that the Administrator or the Committee of Administrators so appointed exercises the powers of a duly constituted Committee of Management with whom the administration and functioning of the society vests as provided in Section 29(1) of the Act of 1965.

58. At this stage, it will also be relevant to notice the distinction between cancellation of an allotment of a flat and enrollment of a new member. Primarily, the cancellation of an allotment would be a purely administrative function and it cannot be said that any decision taken by the Administrator in this regard which is in the domain of the day to day functioning of the society cannot be exercised by the Administrator or the Committee of Administrators as the case may be.

59. The record would indicate that admittedly the society remained under the control of an Administrator w.e.f. to 22.10.2002 to 15.04.2005. By means of the letter of the Assistant Housing Commissioner dated 22.10.2002 an Administrator was appointed. Later, by means of order dated 05.06.2003, the earlier order dated 22.10.2002 was partly modified and instead of the earlier Administrator Sushil Kumar, he was replaced by Sri Narendra Kumar. A copy of the said letter is on records filed with the counter affidavit filed by the private-respondents No.5 dated 18.11.2015.

60. Later, once again, the order dated 05.06.2003 was partly modified and a two members Committee comprising of Sri Lalta Prasad and Sri R.N. Tiwari was appointed. Once again, the constitution of the Committee of Administrators was modified and a five-member Administrative Committee was constituted and thereafter some members of the Committee were replaced and later on 18.11.2004 instead of five members, a four-member administrative committee was constituted which continued to control the affairs of the society till a duly elected committee of management was handed over the charge of the society.

61. At this stage, it will be apposite to take a glance at the order dated 20.10.2022 filed along with the counter affidavit filed by the private-respondent No.5 dated 18.11.2015 in WRIT-C No.1001289 of 2014.

62. This order passed by the Assistant Housing Commissioner/Assistant Registrar indicates that out of 9 members of the Committee of Management of the Society, 5 members had furnished their resignation and since the quorum for any meeting would not be complete, hence, no meeting could be called, hence, the Committee of Management was superseded/dissolved and till constitution of a complete Committee of Management the affairs of the Society was put under the contact of the Administrator. It also reveals that the Society was

registered in the year 2000. Thus, at the relevant time, the term of the Society was 5 years i.e. till the year 2005.

63. It would also reflect that the Administrator was appointed taking into account the grounds mentioned in Section 35 of the Act of 1965 and not so for the ground mentioned in Section 29(5) of the Act of 1965 even though in the order, the Assistant Housing Commissioner has mentioned Section 29(5).

64. The circumstances under which the Administrator was appointed was clearly for lack of consensus between the members of the Committee of Management and 5 members had resigned amongst allegations of arbitrariness and corruption which were levelled against members of the Committee of Management. The Administrator so appointed was discharging his duties and functions on behalf of and as a Committee of Management. It took all reasonable measures to carry out his duties and for all major decisions, he sought to guidance of the Assistant Housing Commissioner. Cancellation of allotment for default was primarily an administrative decision. However, what is not disputed is the fact that the return of membership fee was done by the elected Committee of Management which took change in April, 2005 as the refund of membership fee was done on 25.11.2005.

65. This refund of membership fee was done by the duly constituted Committee, hence, cannot be said that the Administrator had cancelled the membership. However, the elected Committee of Management had in its meeting held on 15.05.2005 ratified all actions of the Administrator.

66. The facts on record shows prior to the appointment of the Administrator there was bickering amongst the members. While performing his functions, the Administrator attempted to resolve the deadlock regarding the issue of cost of the flats. The matter was referred to the Dhahiya Committee. The report of the Committee was accepted on 03.04.2004.

67. This is clarified from the fact that in the general meeting of the society held on 04.08.2002 by resolution no. 5, it was resolved by the members to revise the cost of the flats as there was an increase in the actual floor area of the flats than the one which was mentioned in the brochure including the cost enhancement was necessitated on account of changes in the quality of constructions and additional facilities to be provided.

68. Since no consensus could be arrived at, it is in this view that the Assistant Housing Commissioner by means of its letter dated 06.02.2004 appointed the Dahiya Committee who submitted its report on 02.04.2004 and this was placed before the Administrative Committee in its meeting held on 03.04.2004 in terms whereof the demand letters were sent to the members.

69. Another significant feature that needs to be seen is that letters for demand were sent to all members including the original allottees. Even though the demand letters were sent on 05.04.2004 yet many of the members did not deposit the amount yet they were permitted to participate in the draw of lots for the allotment of flats which was held in presence of all members and

officials of the Housing Board on 20.06.2004.

70. It is in the aforesaid draw of lots that Sri Dayanand who is the private respondent no. 5 in writ petition no. 1289 (MS) of 2014 was allotted Flat No. 806-A. Despite the allotment as mentioned above, fresh demand notice was issued to respondent no. 5 Dayanand on 24.06.2004 and he was further informed that in case if he did not pay, the allotment shall be cancelled. The respondent no. 5 Sri Dayanand did not respond or pay the outstanding sum, as a result, a fresh notice was issued on 19.07.2004 requiring him to pay the amount along with interest, this was followed by another reminder dated 06.08.2004.

71. At this stage, the committee of Administrators again reviewed all cases of default and a conscious decision was taken that one more opportunity be given to the defaulting members, however, the said defaulting members did not pay, hence, in the meting of the committee of Administrators held on 01.09.2004 by means of resolution No. 2, the provisional allotment of private respondent was cancelled. This decision and the resolution passed by the Committee of Administrators was placed before the Assistant Housing Commissioner for approval which was granted approval on 14.09.2004.

72. It is thereafter that the cancellation of the allotment was intimated to the private respondent no. 5 Sri Dayanand and he was asked to submit the no objection certificate or the certificate of loan from the bank so that the loan amount be paid directly to the concerned bank. Sri Dayanand-respondent no. 5 failed to give any reply and it is thereafter the outstanding sum was paid to the bank concerned from where the respondent no. 5 Dayanand had taken a loan. The remaining sum was returned to the respondent no. 5-Dayanand through cheque which was encashed by him. Thus, it could be seen that the exercise which was taken by the Committee of Administrators had nothing to do with the election at that point of time rather it was performing the functions which otherwise would have been done by the elected committee of management.

73. In the petition filed by the private-respondents before the arbitrator, a copy of which has been annexed with the rejoinder affidavit filed by the petitioners, the private-respondents in para 15 and 16 admitted having received the demand letter and the letter of cancellation.

74. Once, this situation had arisen, in order to keep the pace of construction and to achieve completion target, the Committee of Administrators thereafter allotted the flats to the new/subsequent allottees as the allotment of the defaulting members had been cancelled. It is in the aforesaid backdrop that the share money of the erstwhile/the defaulting members was returned on 25.11.2005 i.e. after the newly elected Committee of Management had already come into power and was in-charge of the affairs of the society.

75. Another aspect that needs to be seen that the newly elected Committee of Management held its meeting on 15.05.2005 wherein the elected Committee of Management by means of Resolution No.5 resolved that while the affairs of the society was under the Administrator/committee of Administrators and certain members had defaulted and due to the said reasons, their allotments were

cancelled and in order to cover the default, new members were enrolled who have been awarded the membership and flats were allotted in their favour, the same was ratified and the Committee of Management unanimously approving the said decision including the allotment made in favour of the subsequent allottes.

76. As already noticed above that the ultimate authority of the cooperative society vests in the general body comprising of its members and it is from the general body of the members that a Committee of Management is elected who gets the charge of the affairs of the Society and it is the said Committee of Management of the society who had ratified the actions of the Administrator, hence, such action cannot be termed as invalid simplicitor. Even though, there may not be any specific provision in the Act of 1965 or the Rules framed thereunder but the collective wisdom of the Committee of Management who approved the decision taken by the Committee of Administrator cannot be said to be totally without jurisdiction in the peculiar facts and circumstances of this case.

77. It would have been a different situation altogether where the Committee of Administrators would have taken a decision which would be running contrary to the larger interest of the members of the Society and once a duly elected committee of management came into power, it could have taken a decision to undo or correct the alleged wrong which may have been committed by the Committee of Administration, however, it is not the case here.

78. The only proposition which has been argued by the learned counsel for the respondent is on the premise that the Administrator or the committee of Administrator could not enroll new members. It is in this context that the decision of the Apex Court has been relied upon by the learned counsel for the respondents namely **K. Shantaraj** (supra) and **T.A. Kuttappan** (supra).

79. In both the cases, as noticed above, the Apex Court has held that the Administrator has no power to enroll new members and to conduct the elections by including them in the electoral college, but as discussed above, it is not the situation in the instant case. This Court is of the opinion that the proposition as laid down by the Apex Court in **K. Shantaraj** (supra) and **T.A. Kuttappan** (supra) cannot be disputed but the same may not be applicable in the instant case.

80. Both the decisions of **K. Shantaraj** (Supra) and **T.A. Kuttappan** (supra) are in context with enrollment of members viz-a-viz the elections to be held and it is in the aforesaid background that the Apex Court noticed that the power of Administrator does not include the power to enroll new members which would impact the electoral college and ultimately the outcome of the elections.

81. Needless to say that in the instant case, there is no election dispute nor there is any allegation that due to the enrollment of certain members, the electoral college had been disturbed or the elections have been marred. The record would even indicate that the respondent/the original allottees had not raised any grievance regarding the enrollment of the new members or its impact on the elected Committee of Management.

82. Once, the newly elected Committee of Management had come into the charge of the affairs of the society, it was the said committee which had taken the decision to refund/return of the share money.

83. In most of the cases, the share money was encashed and this in itself amounts to tacit acceptance at the behest of the original allottees. Once, they had accepted the aforesaid amount without any reaction at the relevant time, it cannot be said that the decision was bad or arbitrary.

84. It could not be disputed by the learned counsel for the private respondent that the society through its Secretary had issued notices regarding demand. It is not as if only one solitary letter of demand was sent rather the record indicates that several letters were sent to the defaulting members including informing them that in case if they failed to deposit the enhancement sum, the allotment can be cancelled and yet they did not respond.

85. It is thereafter that the decision was taken and since the ultimate aim was to complete the construction within a reasonable time for which the entire exercise had been done and the same may not be adversely affected, the society took the decision to enroll new members who paid the entire amount including the escalated amount and possession letters including a deed was executed in their favour.

86. The entire facts reveal that there is no election dispute. There is no challenge to the membership of subsequent allottees. There is no challenge to the refund/return of share money rather only the cancellation of allotment of the original allottees have been called in question. Though it is true that the Administrator cannot enroll new members but certainly cancellation of allotment for default could be considered by the Administrator. Since, the elected Committee of Management returned the share money, hence, it cannot be said that the Administrator has terminated the membership.

87. Significantly, the draw of lots was done in the year 2004 when the Administrator was on change and in his tenure provisional allotment was done to the private-respondent which is not disputed then for the same reason in case of default he had the right to cancel the provisional allotment. Once, the cancellation is not held to be bad then allotment in favour of the petitioner/subsequent allottees cannot be held to be bad nor their membership.

88. It will also be relevant to notice that the act of the Committee of Administrators is nothing but a decision of the Committee of Management as at the relevant time, the society was under the control of the Committee of Administrators who, as per Section 29 of the U.P. Cooperative Societies Act, 1965, also exercises the same functions as that of a duly constituted elected Committee.

89. Admittedly, the actions of the Administrator/the Committee of Administrators had no impact or connection with the elections or its outcome and the said decision of the Committee of Administrators was ratified by the newly elected Committee of Management which is also not assailed, thus, the irregularity, if any, stood corrected.

90. In this regard, the decision of the Apex Court in ***Maharashtra State Mining Corporation Vs. Sunil, S/o Pundikarao Pathak; (2006) 5 SCC 96*** in Para 7 and 8 which reads as under:-

"7.The High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently "rectified" by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maximratihabitio mandato aequiparatur, namely, "a subsequent ratification of an act is equivalent to a prior authority to perform such act". Therefore ratification assumes an invalid act which is retrospectively validated. [See P. Ramanatha Aiyar'sAdvanced Law Lexicon, (2005) Vol. 4, p. 3939 et seq.]

8.InParmeshwari Prasad Gupta[(1973) 2 SCC 543] the services of the General Manager of a company had been terminated by the Chairman of the Board of Directors pursuant to a resolution taken by the Board at a meeting. It was not disputed that that meeting had been improperly held and consequently the resolution passed terminating the services of the General Manager was invalid. However, a subsequent meeting had been held by the Board of Directors affirming the earlier resolution. The subsequent meeting had been properly convened. The Court held: (SCC pp. 546-47, para 14)

"Even if it be assumed that the telegram and the letter terminating the services of the appellant by the Chairman was in pursuance of the invalid resolution of the Board of Directors passed on 16-12-1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on 17-12-1953.

The view expressed has been recently approved inHigh Court of Judicature for Rajasthanv.P.P. Singh[(2003) 4 SCC 239 : 2003 SCC (L&S) 424] , [See alsoClaude-Lila Parulekarv.Sakal Papers (P) Ltd., (2005) 11 SCC 73.] "

91. In **Panna Lal Chaudhary** (supra) noticing the earlier decision of **Parmeshwari Prasad Gupta** (supra) and **P.P. Singh** (supra), the Apex Court in Paragraphs 29 to 33 has held as under :-

"29. The expression "ratification" means "the making valid of an act already done". This principle is derived from the Latin maxim "ratihabitio mandato aequiparatur" meaning thereby "a subsequent ratification of an act is equivalent to a prior authority to perform such act". It is for this reason, the ratification assumes an invalid act which is retrospectively validated.

30. The expression "ratification" was succinctly defined by the English Court in one old case, Hartman v. Hornsby

[Hartman v. Hornsby, 142 Mo 368 : 44 SW 242 at p. 244 (1897)] as under:

"'Ratification' is the approval by act, word, or conduct, of that which was attempted (of accomplishment), but which was improperly or unauthorisedly performed in the first instance."

31. The law of ratification was applied by this Court in Parmeshwari Prasad Gupta v. Union of India [Parmeshwari Prasad Gupta v. Union of India, (1973) 2 SCC 543] . In that case, the Chairman of the Board of Directors had terminated the services of the General Manager of a Company pursuant to a resolution taken by the Board at a meeting. It was not in dispute that the meeting had been improperly held and consequently the resolution passed in the said meeting terminating the services of the General Manager was invalid. However, the Board of Directors then convened subsequent meeting and in this meeting affirmed the earlier resolution, which had been passed in improper meeting. On these facts, the Court held: (SCC pp. 546-47, para 14)

"14. ... Even if it be assumed that the telegram and the letter terminating the services of the appellant by the Chairman was in pursuance of the invalid resolution of the Board of Directors passed on 16-12-1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, it was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorised, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on 17-12-1953."

This view was approved by this Court in High Court of Judicature of Rajasthan v. P.P. Singh [High Court of Judicature of Rajasthan v. P.P. Singh, (2003) 4 SCC 239 : 2003 SCC (L&S) 424] . 32. The aforesaid principle of law of ratification was again applied by this Court in Maharashtra State Mining Corpn. v. Sunil [Maharashtra State Mining Corpn. v. Sunil, (2006) 5 SCC 96 : 2006 SCC (L&S) 926] . In this case, the respondent was an employee of the appellant Corporation. Consequent to a departmental enquiry, he was dismissed by the Managing Director of the appellant. The respondent then filed a writ petition before the High Court. During the pendency of the writ petition, the Board of Directors of the appellant Corporation passed a resolution ratifying the impugned action of the Managing Director and also empowering him to take decision in respect of the officers and staff in the grade of pay the maximum of which did not exceed Rs 4700 p.m. Earlier, the Managing Director had powers only in respect of those posts where the maximum pay did not exceed Rs 1900 p.m. The respondent at the relevant time was drawing more than Rs 1800 p.m. Therefore, at the relevant time, the Managing Director was incompetent to dismiss the respondent. Accordingly, the High Court held [Sunil v. Maharashtra State Mining Corpn., 2005 SCC OnLine Bom 758 : (2006) 1 Mah LJ 495] the order of dismissal to be invalid. The High Court further held that the said defect could not be rectified subsequently by the resolution of the Board of Directors. The High Court set aside the dismissal order and granted consequential relief. The appellant then

filed the appeal in this Court by special leave. Ruma Pal, J. speaking for the three-Judge Bench, while allowing the appeal and setting aside the order of the High Court held as under: (Sunil case [Maharashtra State Mining Corpn. v. Sunil, (2006) 5 SCC 96 : 2006 SCC (L&S) 926] , SCC pp. 96g-h & 97a-b)

"The High Court rightly held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act could not be subsequently 'rectified' by ratification of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim ratihabitio mandato aequiparatur, namely, 'a subsequent ratification of an act is equivalent to a prior authority to perform such act'. Therefore, ratification assumes an invalid act which is retrospectively validated.

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In the present case, the Managing Director's order dismissing the respondent from the service was admittedly ratified by the Board of Directors unquestionably had the power to terminate the services of the respondent. Since the order of the Managing Director had been ratified by the Board of Directors such ratification related back to the date of the order and validated it."

33. Applying the aforementioned law of ratification to the facts at hand, even if we assume for the sake of argument that the order of dismissal dated 16-8-1996 was passed by the Principal and Secretary who had neither any authority to pass such order under the Rules nor was there any authorisation given by the BoG in his favour to pass such order yet in our considered view when the BoG in their meeting held on 22-8-1996 approved the previous actions of the Principal and Secretary in passing the respondent's dismissal order dated 16-8-1996, all the irregularities complained of by the respondent in the proceedings including the authority exercised by the Principal and Secretary to dismiss him stood ratified by the competent authority (Board of Governors) themselves with retrospective effect from 16-8-1996 thereby making an invalid act a lawful one in conformity with the procedure prescribed in the Rules."

92. At this juncture, it will also be relevant to notice the decision of the Apex Court in **Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and others, (2003) 2 SCC 111**, wherein it has been held that it is the ratio of a judgment which is binding and any difference in the facts may make a great difference in the precedential value of such a decision. The relevant portion of the said report reads as under:-

"59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See Ram Rakhi v. Union of India [AIR 2002 Del 458 (FB)], Delhi Admn. (NCT of Delhi) v. Manohar Lal [(2002) 7 SCC 222 : 2002 SCC (Cri) 1670 : AIR 2002 SC 3088], Haryana Financial Corpn. v. Jagdamba Oil Mills [(2002) 3 SCC 496 : JT (2002) 1 SC 482] and Nalini Mahajan (Dr) v. Director of Income Tax (Investigation) [(2002) 257 ITR 123 (Del)].]"

93. Thus, for all the aforesaid reasons, this Court is unable to accept the contention of the learned counsel for the private-respondents that the allotment in favour of

the petitioner and their membership was void and thus it is turned down.

(D)

94. Lastly, coming to the issue regarding the impugned orders being bad for violation of principles of natural justice and that they have been passed without considering the facts and material on record is concerned, this Court finds that the said issue can be considered in two parts:- (i) regarding the order being against the principles of natural justice;(ii) whether the impugned orders are bad that is to say perverse as they are contrary to the material available on record.

95. In so far as the first part is concerned, this plea may not be available to either parties for the reason that though it is true that in the litigation initiated by the private respondents before the Arbitrator in terms of Section 70 of the Act of 1965, it was without impleading the subsequent allottees, however, the awards of the Arbitrator were challenged before the Cooperative Tribunal who had taken note of the aforesaid and after hearing the subsequent allottes, the decision was rendered by the Cooperative Tribunal, hence, now it is not open for either party to say that the impugned orders are bad for violation of principles of natural justice and to that extent this Court is unable to agree with the submissions advanced by the learned counsel for the petitioners.

96. As far as the limb whether the judgment of the Tribunal is perverse, if examined, it would reveal that the Tribunal noticed that the original allottees did not get adequate notice or opportunity to pay the outstanding amount is apparently incorrect as the original allottees (private-respondents) before the Arbitrator did not say that they never received the notice or call letters from the Society. It was not disputed that the Society sent notices dated 05.04.2004, 26.06.2004, 01.05.2004, 16.04.2004, 19.07.2004, 23.08.2004 and 06.08.2004.

97. It could not be disputed that notices were sent at the addresses of the said respective member as recorded with the Society and they were correct addresses. Hence, the Tribunal erred in holding that the private-respondents did not get adequate notice and opportunity.

98. The Tribunal was also incorrect in stating that the recommendations of the Dahiya Committee was not binding as it was made available for the members and the decision of the Dahiya Committee was the basis for which the demand notices were sent to all members and out of 120, 100 members had deposited the escalated amount and it is only a small minority of members who did not comply, thus, to say that it was not binding on the members while the overwhelming 85% of the majority members had accepted and acted upon the said report.

99. The Tribunal also erred in stating that the cancellation of the allotment was planned since the record would indicate that several demand notices were issued to the defaulting members. Despite, the members being in default as they had not paid the difference in the original price and the escalated price yet they participated and were allotted the flats. It is only thereafter that despite several reminders the money was not paid that the allotment came to be cancelled. It was not a simplicitor case of enhancing the cost of flats rather what has missed the attention of the Tribunal is the

fact that there was increase in the floor area of the types of Flat i.e. Type-A, Type-B, Type-C and Type-D and this necessarily led to escalated prices, hence, it cannot be said that there was any planning or mischief to oust certain members.

100. The Tribunal also erred in holding that share money was returned/refunded without consent of the original allottee. What has not been seen is the facts that upon return of the loan money and followed by return of share money which was not assailed within 30 days as per Clause 15(2) Bye-laws as it had the effect of terminating the membership. Money of the original allottees had encashed the said cheques which in itself is tacit acceptance.

101. The Tribunal failed to consider that the resolution of cancellation and fresh allotment had the approval of the Assistant Housing Commissioner and only thereafter the process of cancellation and fresh allotment was initiated.

102. The Tribunal also erred in treating the subsequent allottees as merely licensee for the reason that merely because in the agreement made by the society in favour of the new allottees, it used the term licensee will not amount to conferring a license on the subsequent allottees, inasmuch as, the terms of agreement prima facie is in the nature of settlement of the flat for permitting use, occupation and possession with the allottee, getting the unit assessed in municipal taxes in their own name and unfettered possession without restrictions except certain conditions only to ensure good community living as it was a group housing and to avoid nuisance by one which may affect the right of peaceful living by the other flat-holders.

103. In many a cases of this bunch of petitions, it would be found that many original allottees did not challenge the cancellation/termination of their memberships and the only challenge was to the cancellation of the allotment. One aspect which has not been considered by the Arbitrator as well as the Appellate Tribunal is the fact that even though the allotment has been challenged without challenging the termination of the membership of the original allottees. In none of the petitions, the membership of the subsequent allottees has been challenged. In this regard, the decision of the Apex Court in **Jubilee Hills** (supra) needs to be seen wherein in Paragraphs 32 and 33, it has been held as under:-

"32.The appellant became a member of the Cooperative Society in place of his mother. As a member of the Society, nobody had a right to be allotted a plot far less a particular plot. Plot No. 39 was indisputably allotted in favour of his mother. But before the provisional allotment could fructify by making a formal allotment and executing a deed of sale in her favour, she had expired. This fact was not communicated by the appellant to the first respondent Society for a long time. He in his letter dated 16-3-1985 accepted that he was out of Hyderabad for more than two-and-a-half years. He did not deny or dispute that in the meantime the Society issued several letters in the name of all allottees to deposit the development cost. A notice had also been issued to all the allottees asking them to deposit the development charges failing which the order of allotment would stand cancelled. It stands admitted that the development charges had not been deposited in respect of Plot No. 39. It may be that no formal letter of cancellation of the said plot was

issued but in view of the admitted position that the requirements as contained in the letter dated 30-9-1982 of the first respondent having not been complied with, the allotment would in law, be deemed to be cancelled.

33.An inference as regards cancellation of the said allotment must be drawn in view of the fact that Plot No. 39 admittedly was allotted in favour of Mr Srinivas. Even if there had been no express cancellation of allotment of the said plot, by reason of a fresh allotment, the provisional allotment made in favour of the mother of the appellant must be held to have come to an end. The allotment of Plot No. 39 in favour of the mother of the appellant was a provisional one. By reason of such provisional allotment, the allottee did not derive any legal right far less an indefeasible right. Such provisional allotment would have acquired permanence provided the requirements therefor were complied with."

104. Thus, in the aforesaid circumstances where the termination of membership of original allottees is not in question nor any challenge to the membership of the new allottee has been questioned and the entire litigation is built on the cancellation of allotment for the reason of default on the ground that the original allottees did not get adequate opportunity to contest the said notice of demand and cancellation of allotment which appears from the record to be incorrect in the sense that the defaulting members despite notice failed to deposit the outstanding sum and it is in view thereof that fresh allotments were made and fresh membership was granted and the said subsequently allotted members have been in possession of the respective flats since March 2005, hence, for all the aforesaid reasons, this Court is of the clear opinion that the order passed by the Tribunal as well as the Arbitrator are bad and deserves to be set aside.

105. In so far as the reliance placed on the decision of a coordinate Bench of this Court in **Neelam Jain** (supra) is concerned, the same may not have any impact in the instant case as in the case of **Neelam Jain** (Supra), the Court clearly noticed the issue involved was different, inasmuch as, **Neelam Jain** (supra) had assailed the orders of the Arbitrator and the Cooperative Tribunal on the ground that she was not granted adequate opportunity to contest and in the aforesaid backdrop, the coordinate Bench came to the conclusion that since Neelam Jain had sought her impleadment before the Appellate Tribunal and she was heard before the Appellate Tribunal and her rights depended on the stand of the society who had preferred a writ petition but the same had been withdrawn and not pressed and there was nothing different from the stand of the society which Neelam Jain could have argued, accordingly, the ground that she was not heard did not find favour with the court and her petition was dismissed.

106. In case of **Navita Jain** (supra), the Coordinate Bench of this Court while deciding the said petition noticed that the petitioner of the said case had not approached the Court with clean hands and the petition was dismissed on the ground of material concealment.

107. Moreover, the decision of the Apex Court cited by the private-respondents in **Modern Dental College and Research Centre** (supra) has no applicability in the instant case.

108. Thus, the aforesaid decisions, do not come to the aid of the original allottees i.e. the private respondents.

109. Taking a holistic view and in light of the detailed discussions made in hereinabove, this court is of the clear view that the order dated 27.01.2014 passed by the Cooperative Tribunal, Uttar Pradesh in Appeal No. 230/2009, 219/2009, 229/2009, 228/2009 arising out of orders dated 14.10.2009 in Arbitration Case No. 21/2006-07, 23/2006-07, 22/2006-07, 20/2006-07, in Appeal No. 71/2009, 72/2009 arising out of orders dated 30.03.2009 in Arbitration Case No. 47/2007-08, 48/2007-08, in Appeal No. 134/2010 arising out of order dated 27.04.2010 in Arbitration Case No. 82/2007-08, In Appeal No. 195/2010 arising out of order dated 9.07.2010 in Arbitration case No. 19/2006-07, in Appeal No. 160/2010 arising out of order dated 01.05.2010 in Arbitration case No. 109/2007-08, In Appeal No. 151/2010 arising out of order dated 11.06.2010 in Arbitration case No. 106/2007-08, In Appeal No. 73/2010 arising out of order dated 16.03.2010 in Arbitration case No. 79 /2007-08, In Appeal No. 133/2010 arising out of order dated 05.05.2010 in Arbitration case No. 81/2007-08 passed by the arbitrators concerned are liable to be set aside.

110. A writ in the nature of certiorari is issued quashing the order passed by the Co-operative Tribunal in appeals arising out of arbitration awards passed in Arbitration Cases under Section 78 of the Uttar Pradesh Cooperative Societies Act, 1965, as mentioned hereinabove.

111. Accordingly, all the petitions are **allowed** in the aforesaid terms. Costs are made easy.

(2024) 3 ILRA 2113
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.03.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ -C No. 1003212 of 2010

M/s Haji Ramzan Abdul Rauf Cold Storage Unit-I Asopur ...Petitioner
Versus
District Consumer Dispute Redressal Forum Ambedkar Nagar ...Respondents

Counsel for the Petitioner:
G.M. Kamil

Counsel for the Respondent:
C.S.C., Indra Pratap Singh

Civil Law - Constitution of India,1950-Article 226-The petitioner challenged the order of District Consumer Dispute Redressal Forum-Petitioner is a partnership firm, consisting of four partners and is running a cold storage-The petitioner elected to move to the District Consumer Dispute Redressal Forum for grievance u/s 12 of the consumer protection Act,1986, though a parallel remedy is available u/s 24 of Uttar Pradesh Regulation of Cold storage act,1976-The court held that the High courts do not act as Courts of appeal under Article 226-However, the petitioner may file an appeal against the impugned order before the State Consumer Dispute Redressal Commission, Uttar Pradesh, Lucknow within next three weeks.(Para ` to 20)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. S.D.S Shipping (p) Ltd Vs Jay Container Services Co.(P) Ltd & ors. (2003) 9 SCC 439

2. HC Bom. thru Registrar & anr. Vs Brij Mohan Gupta (Dead) thru Lrs, & anr. (2003) 2 SCC 390
N.K. Prasad Vs GOI & ors. (2004) 6 SCC 299

3. Inder Prakash Gupta Vs St. of J&K & ors. (2004) 6 SCC 786

4. BCCI & anr. Vs Netaji Cricket Club & ors. (2005) 4 SCC 741

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

1. Heard Shri Mohammad Affan, Advocate holding brief of Shri G.M. Kamil, learned counsel for petitioner, learned Standing Counsel for the State and perused the material available on record.

2. By means of the present writ petition, the petitioner has challenged the order of District Consumer Dispute Redressal Forum, Ambedkar Nagar dated 30.04.2010 thereby he has allowed the claim preferred by respondent nos. 2 to 6 with regard to the payment of compensation for the potatoes stored in the warehouse owned by the petitioner.

3. It has been submitted by learned counsel for petitioner that the petitioner is a partnership firm, consisting of four partners and is running a cold storage unit in the name & style of M/s Haji Ramzan Abdul Rauf Cold Storage Unit-II. It has further been stated that for running the said cold storage the petitioner had obtained the necessary licence/permission from the appropriate authority/Licensing Authority and is doing the business of storing the agricultural produces, which are grown by the local farmers such as potatoes etc. For the year 2008, the petitioner had stored the potatoes, which was brought by the local farmers/respondent nos. 2 to 6 and issued a receipt of deposit. In the said receipt, the conditions were mentioned and also the validity of the said storage. The potatoes are usually are taken out by the farmers till the end of September every year but in September 2008, the rates of potatoes was very low and therefore, respondent nos. 2 to 6 did not turn up to take the potatoes, which continued to be stored in the cold storage owned by the petitioner. It seems that due to the fact that the potatoes were stored for longer length of time, the same were deteriorated and consequently, due to the damage occurred to the said storage, respondent nos. 2 to 6 preferred a complaint under Section 12 of the Consumer Protection Act, 1986 before the District Consumer Dispute Redressal Forum, Ambedkar Nagar. On being served a notice the petitioner had appeared before the District Consumer Dispute Redressal Forum, Ambedkar Nagar but he did not file any written objections. Thereafter the District Consumer Dispute Redressal Forum after considering the material on record and the evidence adduced by respondent nos. 2 to 6 returned the finding that respondent nos. 2 to 6 had deposited their potatoes in the cold storage owned by the petitioner and also took into account the published rate and its value and the value of bags and accordingly valued the potatoes for all the private respondents. The Forum concluded that there was negligence on the part of the petitioner due to which the potatoes were destroyed and allowed the claim of the private respondents directing the petitioner to pay the value of the goods as per the said judgment. It also imposed cost arising from mental physical and financial loss caused and also the cost of said litigation.

4. In the present petition the petitioner has submitted that the impugned order is without jurisdiction, inasmuch as, for the claim with regard to the destruction

of potatoes, the same issue has to be dealt under the Uttar Pradesh Regulation of Cold Storage Act, 1976. Section 24 provides for compensation for loss, destruction etc., while according to Section 25, the dispute regarding the compensation is to be referred to the Licensing Officer.

5. It is stated that the dispute pertaining to destruction of potatoes by the cold storage have to be considered and decided only as per the provisions of Section 24 and 25 of the Uttar Pradesh Regulation of Cold Storage Act, 1976. When a pointed query has been made to the petitioner, as to whether despite the fact that he participated in the said proceedings before the District Forum, whether he had raised any objections in this regard or not? The learned counsel for the petitioner fairly submits that though the petitioner participated in the said proceedings but the said objection was never filed or raised by him. Though one objection has been annexed along with the writ petition, which is undated but certainly the same has not been filed before the District Forum as the impugned order clearly states that no objection was filed by the petitioner.

6. Learned Standing Counsel for the State on the other hand has opposed the writ petition. It has been submitted that private respondents falls within the definition of "consumer" as per the Consumer Protection Act, 1986 and there is clearly evidence that the petitioner had been negligent in storage of the potatoes and consequently, it cannot be said that the District Consumer Dispute Redressal Forum did not have any jurisdiction to decide the dispute. He further submits that it is not a case where there is patent lack of jurisdiction by the District Consumer Dispute Redressal Forum. The issue of jurisdiction was never agitated before the District Consumer Dispute Redressal Forum and was never informed about the special mechanism enacted by the Uttar Pradesh Regulation Cold Storage Act, 1976 and consequently, the petitioner is estopped from taking the objection for the first time in the writ petition.

7. He further submits that once the petitioner had appeared and participated in the proceedings before the District Consumer Dispute Redressal Forum then he would be deemed to have given up his objection to the applicability of the Uttar Pradesh Cold Storage Act, 1976 with regard to the jurisdiction created therein and has voluntary submitted to the jurisdiction of the District Consumer Dispute Redressal Forum and consequently, cannot turn around and the challenge the same in the writ petition.

8. I have heard learned counsel for parties and perused the record.

9. The only question raised by the petitioner in the present writ petition is with regard to the jurisdiction of the District Consumer Dispute Redressal Forum while entertaining the dispute pertaining to destruction of the potatoes in the cold storage. According to the petitioner, the said dispute had to be decided as per the provisions contained in the Uttar Pradesh Regulation Cold Storage Act, 1976 more specifically under Section 24 and 25, where there is provision for grant of compensation by referring the dispute to the Licensing Officer and further that an appeal has also been provided under Section 36 against the order passed by Licensing Officer.

10. In the present case, respondent nos. 2 to 6 had stored their potatoes in the

cold storage owned by the petitioner and due to certain defects in the working of the cold storage, the said potatoes were damages and consequently, the private respondent nos. 2 to 6 had claimed compensation from the petitioner on account of such damage. Though there is no doubt that a special mechanism for redressal of the said dispute has been provided for under the Uttar Pradesh Regulation Cold Storage Act, 1976, but on the other hand, the said dispute also fell within the ambit of Consumer Protection Act, 1986, inasmuch as, the private respondents fell within the definition of consumer and the dispute raised also fell within the definition of consumer dispute. It was open for the petitioner to have raised a preliminary objection regarding the jurisdiction of the District Consumer Dispute Redressal Forum at the earliest but he submitted himself to the jurisdiction of the District Consumer Dispute Redressal Forum and participated in the proceedings therein without raising any objection as to its jurisdiction.

11. It is in the aforesaid circumstances, this Court is of the considered view that once the petitioner had submitted himself to the jurisdiction of the District Consumer Dispute Redressal Forum, and participated in the proceedings, he cannot turn around and question its jurisdiction for the first time in the writ petition. There is no denying the fact that the petitioner had appeared and participated in the proceedings before the District Consumer Dispute Redressal Forum and no such objection was taken by him therein. On the other hand, it is noticed that the dispute as raised by the private respondents no. 2 to 6 fell within the four corners of the Consumer Protection Act, 1986, consequently, it cannot be said that the there was patent lack of jurisdiction by the District Consumer Dispute Redressal Forum while deciding the said dispute.

12. Ordinarily, When more than one remedy is available to a party in respect of the same grievance, it is open for that party to elect or to choose his remedy. Once he chooses his remedy, all incidents attached to that remedy must follow.

13. In the present case, the petitioner has elected to move to the District Consumer Dispute Redressal Forum for grievance redressal under Section 12 of the Consumer Protection Act, 1986 , though, a parallel remedy is available under Section 24 of Uttar Pradesh Regulation of Cold Storage Act, 1976 claim compensation by referring the dispute to the Licensing Officer appointed under the said act.

14. The Court is of the view that both the parallel remedies are equally efficacious and provide similar relief. The respondents 2 to 6, being the aggrieved persons, have right to choose the remedy they prefer to avail and petitioner shall be bound by the same.

15. Mere presence of an alternate/parallel remedy does not render the relief given by the earlier forum invalid or without jurisdiction. This principle is in compliance with demand of public policy that an aggrieved person has a right to choose the forum for redressal of his grievance, when two forums are available in respect of the same subject matter for the same relief. In case, if the party is allowed to select multiple remedies in multiple forums and courts, there will obviously be multiplicity of litigation and there is every chance and likelihood that the judgments

and/or orders may also be conflicting with each other.

16. It is now well-settled that the High Courts while exercising their equity jurisdiction under Article 226 of the Constitution may not exercise the same in appropriate cases. While exercising such jurisdiction, the superior courts in India even may not strike down a wrong order only because it would be lawful to do so. A discretionary relief may be refused to be extended to the Appellant in a given case although the Court may find the same to be justified in law. [***See S.D.S. Shipping (P) Ltd. Vs. Jay Container Services Co. (P) Ltd and others (2003) 9 SCC 439***]. A similar view has been taken by the Hon'ble Supreme Court in a large number of decisions including ***High Court of Judicature at Bombay through Registrar and Another Vs. Brij Mohan Gupta (Dead) through Lrs. and another [(2003) 2 SCC 390], N.K. Prasad Vs. Government of India and others (2004) 6 SCC 299, para 26], Inder Prakash Gupta Vs. State of J & K and others [(2004) 6 SCC 786, para 42] and Board of Control For Cricket in India and another Vs. Netaji Cricket Club and others [(2005) 4 SCC 741, para 102].***

17. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not act as Courts of appeal under Article 226. The powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on, themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. The High Court cannot be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

18. It is in the aforesaid facts, this Court is of the considered view that where the authority or tribunal does not lack patent jurisdiction to entertain the dispute and when the petitioner participated in the proceedings without demur or raising any objection to its jurisdiction, they may not be permitted to raise for the first time in writ proceedings. Accordingly, this Court declines to interfere with the impugned order dated 30.04.2010 passed by the District Consumer Dispute Redressal Forum, Ambedkar Nagar.

19. For the reasons as stated above, this writ petition is dismissed.

20. Learned counsel for the petitioner at this stage submits that on merits he may be granted liberty to assail the order dated 30.04.2010 passed by the District Consumer Dispute Redressal Forum, Ambedkar Nagar before the State Consumer Disputes Redressal Commission, Uttar Pradesh, Lucknow and counsel for the respondents do not object to the prayer made by the petitioner. Considering the fact that this Court has only looked into the aspect of the jurisdiction of the District Consumer Dispute Redressal Forum for entertaining the dispute peculiar fact in the present case, it is provided that the petitioner, if so advised, may file an appeal

against the impugned order dated 30.04.2010 passed by the District Consumer Dispute Redressal Forum, Ambedkar Nagar, before the State Consumer Disputes Redressal Commission, Uttar Pradesh, Lucknow within next three weeks. In case the appeal is filed, the same shall be considered on merits in accordance with law.

(2024) 3 ILRA 2118
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.03.2024

BEFORE

THE HON'BLE ALOK MATHUR, J..

Writ -C No. 3000027 of 2011

Ganga Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pt. D.R. Shukla, Anurag Narain Srivastava, M.D. Shukla, Manoj Kr. Singh, Sanjeev Kumar Pandey, Sudhanshu Tripathi

Counsel for the Respondent:
C.S.C., Karunakar Srivastava, Mohd. Askam Khan, Nitin Srivastava

Civil Law - Constitution of India,1950-Article 226-manipulation of land records-Land(gata no.521) was declared surplus in 1964 and later allotted to Kishore in 1970-A lekhpal fraudulently inserted his name into the revenue records without proper authorization-Kishore's legal heir challenged the fraudulent mutation-Fraudulent actions by lekhpal were proven including misuse of his position to manipulate records-It is well settled proposition of law that a judgment , decree or order obtained by playing fraud on the court is a nullity and non est in the eye of law-Such a judgment ,decree or order by the first court or by the Final court has to be treated as nullity by every court, superior or inferior- Hence, all orders based on these fraudulent entries were declared null and void-the court restored the land rights to Kishore's legal heir-cost imposed.

The writ petition is allowed. .(E-6)

List of cases cited:

1. Satluj Jal Vidyut Nigam Vs Raj Kumar Rajinder Singh (2019) 14 SCC 449,

2. A.V. Papayya Sastry Vs Govt. of A.P.(2007) 4 SCC 221

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

1. Heard Sri Anurag Narain Srivastava, learned counsel for the petitioner as well as learned Standing Counsel for the State respondents and Sri Mohd. Aslam Khan, learned Senior Advocate assisted by Sri Nitin Srivastava, learned counsel for the private respondents.

2. By means of present writ petition the petitioner has challenged:

(i) the order dated **25.07.2011**, passed by the Additional Commissioner, under Section 27(4) of the Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as "the Act, 2006"), for cancellation of patta of predecessor in interest of petitioner namely Kishore.

(ii) the order dated **21.06.2011**, passed by Additional Commissioner, deleting the name of Kishore on account of his death without substituting the legal heirs of Kishore.

(iii) the order dated **16.07.2011**, passed by the Additional Commissioner whereby the recall application seeking recall of order dated 21.06.2011 has been rejected on the ground that registered will

dated 18.10.2007 executed by Kishore in favour of the petitioner since declaration was not obtained by the petitioner from the competent Court in relation to the petitioner that he is legal heir of Kishore on the basis of registered will.

(iv) order dated **26.10.1964**, pertaining to declaration of surplus land in relation to plot no. 1300, were set aside ex-parte and the recall application was also rejected on the ground that lease holder has got no right of opportunity of hearing and the petitioner has no right to file objections.

3. It is submitted by learned counsel for the petitioner that on 26.10.1964, the land of tenure holder Bhaiya Jagdish Dutt Ram Pandey was declared surplus under the provisions of the Act, 1960. The land was entered in the name of Bhaiya Jagdish Dutt Ram Pandey which is evident from the Khatauni and after about six years on 31.08.1970, out of surplus land of Bhaiya Jagdish Dutt Ram Pandey plot No. 521/1.70 acres was allotted to Kishore S/o Ram Karan being a landless labourer, it is pertinent to point out that over the patta document Ram Naresh (Lekhpal) @ Nanhe Lal Lekhpal was a witness and on the basis of patta name of Kishore was entered in the khatauni and the mutation register prepared under Rule 24.

4. It has been submitted by the petitioner that Ram Naresh (Lekhpal) had committed forgery in the revenue record as well as in UPCH Form - 45 and fraudulently got his name entered into the khatauni with intention to grab the land which was declared surplus by means of order dated 26.10.1964 by the Prescribed Authority. The Prescribed Authority had declared surplus land in relation to the original tenure holder - Bhaiya Jagdish Dutt Ram Pandey under section 10(2) of the Act of 1960 and the said order attained finality as it was never challenged by the recorded tenure holder in appeal.

5. It is stated that Ram Naresh (Lekhpal) had taken advantage of his posting as Lekhpal and entered his name in the revenue records without there being any order or title deed in his favour. Due to aforesaid act of fraud committed by Ram Naresh (Lekhpal) he got his name mutated in the revenue records pertaining to Plot No. 521/1.50 acres and also manipulated the same in UPCH Form - 45 fraudulently.

6. When the predecessor in interest of the petitioner namely Kishore (Patta holder) came to know about the fraudulent entry having been made by Ram Naresh (Lekhpal), he made a complaint, and an inquiry was ordered by the Chief Revenue Officer, Gonda. The matter was enquired into by Tehsildar, Karnelganj, Gonda. The inquiry report revealed that Ram Naresh (Lekhpal) has unauthorisedly without any order of competent authority entered his name into the revenue records pertaining to Plot No. 521/1.50 acres. It was stated that said entries in the name of Ram Naresh were fictitious and forged and they were liable to be rectified under Section 33/39 of the Land Revenue Act. There are allegations of manipulation in the revenue records regarding two other Gata Nos. also and after due inquiry it was revealed that the respondent had committed serious acts of forgery and therefore the matter was referred to the SDO, Karnelganj, Gonda for correction of entries and by means of order dated 24.08.1993, the entries made in UPCH Form - 45 was deleted and further direction was issued that the entries in the revenue records of the village may be corrected.

7. Aggrieved by the order of Chief Revenue Officer, Ram Naresh (Lekhpal) preferred two revisions being Revision No. 32 and 130 – 1992-93, before the Board of Revenue, Lucknow, which were dismissed by means of order dated 04.03.1998.

8. Being unsuccessful in proceedings before the Board of Revenue, Ram Naresh (Lekhpal) approached the Commissioner, Faizabad Division, Faizabad for cancellation of the lease granted in favour of Kishore. The application of Ram Naresh (Lekhpal) was dismissed by means of order dated 30.09.1995. Against the order dated 30.09.1995, he preferred Writ Petition (Ceiling) No. 178 (M/S) of 1995. The writ petition was dismissed on 07.12.1995. While dismissing the writ petition the Court observed that the application under Section 11(2) of the Imposition of Ceiling on Land Holdings Act which was pending, be decided on merits. It has further been stated that in the writ petition Kishore was not made party.

9. Ram Naresh (Lekhpal) after getting his name mutated in the revenue records in place of Kishore, moved an application before the Prescribed Authority under Section 11(2) of the Ceiling Act for setting aside of the order dated 26.10.1994 by which the land of Bhaiya Jagdish Dutt Ram Pandey was declared surplus stating that he has been recorded as tenure holder and therefore the order was passed by the Prescribed authority without giving notice or any opportunity of hearing and therefore prayed that the order dated 26.10.1994 be set aside and land of Gata No. 521/1050 acres be excluded from the holdings of the original tenure holder. The Prescribed Authority by means of order dated 31.10.1996 allowed the application preferred by Ram Naresh (Lekhpal) under Section 11(2) of the Ceiling Act. It is stated that the State brought to the knowledge of the Prescribed Authority that the revenue entries have been made fraudulently by Ram Naresh (Lekhpal) himself which have been ordered to be deleted, and therefore no benefit of the same could have been granted, but he ignored the said arguments and by means of order dated 31.10.1996 allowed the application under section 11(2) of Act of 1960.

10. Kishore, on coming to know about the order dated 31.10.1996, moved an application stating that he had been granted patta and was necessary party in the said proceedings but his application for recall was rejected by order dated 04.08.1997.

11. It has been submitted by learned counsel for the petitioner that Kishore had died issue less and had bequeathed his entire property in favour of petitioner by means of registered will dated 18.10.2007. It has also been stated that Ram Naresh had moved an application under Section 27(4) of the Ceiling Act, 1960 praying that the revenue entries should be made in his favour and that name of Kishore has wrongly been recorded. During the pendency of the said application Ram Naresh (Lekhpal) as well as Kishore expired and Ram Naresh was substituted by Devi Shanker Srivastava and Maya Shanker Srivastava while no substitution was made with regard to Kishore. The application filed by the respondent was allowed and the lease in favour of Kishore was cancelled and direction was made for recording of entry in name of Ram Naresh in the revenue records.

12. The petitioner being legal heir of Kishore moved an application for recall of

order dated 21.06.2011 which was rejected. Another application preferred by the petitioner for substitution was also rejected on 16.07.2011 observing that there was no decree of the Court of competent jurisdiction declaring that the petitioner was legal heir of Kishore.

13. The application preferred by Ram Naresh was finally allowed on 25/07/2011 on merits. While allowing the application it was held that initially the prescribed authority by means of order dated 26/10/1964 had declared the land of the original tenure holder Jagdish Dutt Ram Pandey as surplus, and the said order was modified on 31.10.1996 an application under section 11 (2) of the act of 1960 preferred by Ram Naresh and the plot No. 521/1.5 acres was excluded from the land which was declared surplus by means of order dated 31/10/1996. In the meanwhile, the land which was declared surplus by the prescribed authority had been allotted in favour of Kishore on 31/08/1970, and on the application of Ram Naresh under Section 27(4) of the act of 1960, the patta granted in favour of Kishore was cancelled by means of the impugned order dated 25/07/2011.

14. Sri M.A Khan ,Senior Advocate appearing on behalf of respondent 5 and 6 has vehemently opposed the writ petition. It has been submitted that the initial order passed by the prescribed authority pertaining to the land of the original tenure holder was passed on 26/10/1964 without giving any opportunity to the respondent of the petitioner was also declared surplus illegally and arbitrarily. Apparently the patta was allotted in favour of Kishore, respondent had filed an application for cancellation of the Patta under section 27(4) of the act of 1960. It was submitted that the application was illegally rejected, against which a writ petition was filed being writ petition no. 178(Ceil.) of 1995 and the petition was disposed of on 07/12/1995 and that the application under section 11(2) of the act of 1960 be disposed of by the prescribed authority. As per the directions of this court, the application under section 11(2) was allowed by means of order dated 31/10/1996 and plot No. 521 was excluded from the surplus land declared by the prescribed authority previously. In this regard it has been submitted that the order dated 21/10/1996 has not been assailed by the petitioner in any proceedings and has become final and consequently submitted that there is no error in the impugned orders.

15. The State initially filed an affidavit of compliance supporting the case of the respondents, and the deponent was none other than Parmanand Tewari, who has authored the impugned order dated 25/07/2011, and consequently this Court taking a serious view of the matter by means of order dated 10/10/2011 directed the enquiry to be conducted by the Principal Secretary, Revenue, Government of U.P.

16. The enquiry was conducted by the Principal Secretary, Revenue, Government of U.P, and submitted his report on 31/01/2012 which was filed 03/05/2015. According to the enquiry report land situated at Gata No. 1300, the new number being Gata No. 521 was declared as surplus from the original holding of Bhaiya Dutt Jagdish Ram Pandey on 26/10/1964. Subsequently a mutation entry dated 23/09/1978 is existing on record whereby name of Ram Naresh, son of Sambhu Dayal has been entered as Sirdar, but there is no order for making the said mutation

and accordingly prima facie the said entry seems to be suspect/doubtful. Even the procedure of making the said mutation seems to indicate the said mutation has been done by black ink while normal course such mutation is carried out in red writing. Another glaring infirmity is that the mutation was done when the proceedings under Section 9 of the Consolidation of Holding Act were underway. In such a situation the said mutation has to be reflected in the revenue records of the particular year, and in case the mutation has been done after the conclusion of Consolidation proceedings then the same has to be done in accordance with provisions of section 109A of the Consolidation of Holdings Act, and only after approval of the Deputy director of Consolidation the Assistant Consolidation Officer will carry out the mutation in form 45 itself while in the present case the mutation has been done by the Consolidation Lekhpal on 28/09/1978 which is on the face of it illegal and without jurisdiction.

17. It has also been stated in the report that on the said land been declared surplus by the prescribed authority. Initially the land was allotted in favour of one Devi Shanker son of Nanhey Lal by order dated 13/05/1970, but subsequently the Pargna Adhikari cancelled the said allotment and passed another allotment order in favour of Ramkishore son of Ramkaran on 31/08/1970.

18. In the aakar form 45 with regard to Khata No. 723, the fraudulent in the entry made in favour of Ram Naresh a complaint was made by Kishore to the Commissioner Faizabad mandal on 27/29/11/1991 an enquiry was got conducted by the Pargna Adikari and it came on record that the revenue entry in favour of Ram Naresh was fraudulently done by means of order dated 28/09/1978.

19. It has further been stated that a complaint was made by Kishore with regard to the fraudulent entry made by the Ram Naresh to the Commissioner, an enquiry was conducted by the Pargana Adhikari who submitted his report on 05/08/1993. The said report was forwarded to the Chief Revenue officer, who in turn directed the Pargana Adhikari to delete the mutation in the revenue records in favour of Ram Naresh, but his order was not implemented by the concerned Lekhpal.

20. Another important aspect stated in the said report is with regard to the fact that Ram Naresh, the concerned Lekhpal and was working on the said post during the period when the mutation was carried out in his favour. After the said facts have come to the knowledge of the higher authorities enquiry was been ordered. The Pargna Adhikari has also been held to be guilty of not complying with the Chief revenue Officer. It is only because in the revenue records the name of Ram Naresh continued to be recorded in Gata No. 521, which persuaded the Prescribed Authority to allow the application filed by Ram Naresh under section 11(2) of the act of 1960, and hence order was passed in his favour.

21. I have heard the counsel for the parties and perused the record. The petitioner has questioned the dated 21/06/2011 whereby on the application for substitution of Kishore, it was stated that he has died interstate and it was recorded dead in front of his name and the petitioner.

22. Considering the submissions made on behalf of parties, the point in issue

in the present case is as to whether Ram Naresh (Lekhpal) had misused his official position as Lekhpal and fraudulently manipulated the revenue record whereby the entry in his name against Gata No. 521 was recorded. This aspect gains relevance inasmuch as it is only because of the entry in the revenue record pertaining to Gata No. 521 that initially when the said entry was ordered to be deleted by the Chief Revenue Office the petition against the same were dismissed at the behest of Ram Naresh and secondly his claim for exclusion of the said land from the holdings of the original tenure holder in proceedings under Section 11(2) of the Act, 1960 was made only on the basis of entry existing in his name against Gata No. 521.

23. Though there is denial by respondent nos. 5 and 6 in their counter affidavit that Ram Naresh was the concerned Lekhpal at the time when the alleged fraudulent entry was made deleting the name of Kishore and replacing it with the name of Ram Naresh, but the enquiry conducted by the Chief Secretary (Revenue) has made it clear that it was Ram Naresh who was in fact posted as Lekhpal when the said manipulation in the revenue record took place. It is also pertinent to note that signatures of Ram Naresh were existing on the Patta given to Kishore. Further the inquiry report of Chief Secretary (Revenue) has also confirmed the fact that there was no order by any competent authority preceding the entry made in favour of Ram Naresh. Even in the entire counter affidavit filed before this Court no such order has been produced which could indicate that there was any semblance of legality in deletion of name of Kishore and its substitution in the name of Ram Naresh.

24. The weak resistance put up by the private respondents is on account of the fact that Gata No. 521 was initially allotted in the name of one Devi Shanker,son of Nanhe Lal vide order dated 13.05.1970 and the said allotment was cancelled and subsequently allotment was made in the name of Kishore S/o Ram Karan on 31.08.1970. The previous cancellation vide order dated 13.05.1970 was never assailed before any authority and consequently it became final.

25. When Kishore came to know about the deletion/modification of the entry pertaining to Gata No. 521, he had moved an application before the Commissioner, Lucknow Division, Lucknow for inquiry and for restoration of his name. An inquiry was conducted in this regard in 1993 by the Parganadhikari where it came forth that entry in the name of Ram Naresh was unauthorisedly made without there being any order and consequently the Chief Revenue Officer directed that the entry existing in the name of Kishore be restored. Despite orders having been passed by the competent authority correction as directed was never carried out and accordingly illegal entry in the name of Ram Naresh continued to exist in the revenue record.

26. On the strength of illegal and improper entry existing in the name of Ram Naresh efforts were made on the judicial side fortifying his claim on the said land and as efforts to set aside the order dated 24.08.1993 by which the entry was directed to be cancelled was rejected at the behest of Ram Naresh and he could not succeed at that stage. Subsequently, Ram Naresh filed a writ petition before this Court where liberty was granted to him to pursue his application under Section 11(2) of the Act, 1960.

27. Before the Prescribed Authority the State had informed about the order passed by the Chief Revenue Officer dated 24.08.1993, for deletion of the entry existing in the name of Ram Naresh, but this argument was not considered as in the revenue records name of Ram Naresh continued to exist and merely on the basis of said record, application under Section 11(2) of the Act, 1960 was allowed and Gata No. 521 was excluded from the holdings of the original tenure holder and also order of Prescribed Authority dated 31.10.1996, was suitably modified.

28. The Additional Commissioner (Judicial) had illegally rejected the application for impleadment preferred by the petitioner despite the fact that he had produced copy of registered will clearly indicating that the deceased Kishore had bequeathed his property in favour of petitioner. There was no other claim to the property of Kishore and no one has raised dispute in this regard and consequently rejection of his application merely on account of the fact that there was no decree from the Court of competent jurisdiction regarding declaration of the petitioner as successor in interest of Kishore, he declined to accept the application for substitution.

29. The respondents could not show any law which provides that application for substitution can be accepted only when the person claiming his rights produces a copy of decree of declaration of the competent Court that he is the successor in interest of the deceased. At the stage of consideration of the application for substitution, the court has to look only into the relevant documents and relationship claimed by the applicant on the basis of which the application for substitution has been made. It has to be borne in mind that even if the application for substitution is allowed it does not vest any substantial right in the applicant, except to contest the said case. The applicant having produced a certified copy of the registered will of the deceased, which was sufficient in itself for the concerned authority to have allowed the said application, where no doubts were expressed for its existence and validity by the other side. Accordingly, the findings of the Additional Commissioner (Judicial) in this regard are illegal and arbitrary and are set aside. The order is clearly arbitrary and illegal and also deserves to be quashed.

30. The next issue raised is with regard to the validity of the entry made in favour of Ram Naresh, and as to whether on the basis of the said entry the land was rightly excluded from the holding of the original tenure holder and the patta of the petitioner was rightly cancelled.

31. As discussed above, there is no doubt that the revenue records were tampered by the Lekhpal i.e. Ram Naresh, who was responsible for entering his name in place of Kishore illegally and without authorisation. He himself was the concerned Lekhpal and has manipulated the revenue records. We have no reasons to doubt the report submitted by the Principle Secretary,Revenue who has carefully examined the entire record and dealt with all the issues in detail. We take serious note of the fraudulent conduct of the respondent in this regard. The Hon'ble Supreme Court in a number of judgments has discussed the aspect of fraud. Some of such judgments are quoted herein below.

32. Hon'ble Apex Court in the case of ***Satluj Jal Vidyut Nigam v. Raj Kumar***

Rajinder Singh, (2019) 14 SCC 449, has held :-

"68. Fraud vitiates every solemn proceeding and no right can be claimed by a fraudster on the ground of technicalities. On behalf of the appellants, reliance has been placed on the definition of "fraud" as defined in Black's Law Dictionary, which is as under:

"Fraud: (1) A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (esp. when the conduct is wilful) it may be a crime. ... (2) A misrepresentation made recklessly without belief in its truth to induce another person to act. (3) A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. (4) Unconscionable dealing; esp., *in contract law, the unconscientious use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."*

33. The Court in ***Satluj Jal Vidyut Nigam v. Raj Kumar Rajinder Singh (supra)*** has further observed that :

"69. Halsbury's Laws of Englandhas defined "fraud" as follows:

"Whenever a person makes a false statement which he does not actually and honestly believe to be true, for purpose of civil liability, the statement is as fraudulent as if he had stated that which he did know to be true, or know or believed to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirement of the law, whether the representation has been made recklessly or deliberately, indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief.

70. In Kerr on the Law of Fraud and Mistake, "fraud" has been defined thus:

"It is not easy to give a definition of what constitutes fraud in the extensive significance in which that term is understood by Civil Courts of Justice. The courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety… Courts have always declined to define it, ... reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud ... may be said to include property (sicproperly) all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to."

71. In Ram Chandra Singh v. Savitri Devi [Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319] , it was observed that fraud vitiates every solemn act. Fraud and justice never dwell together and it cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. This Court observed as under :

"15. Commission of fraud on court and suppression of material facts are

the core issues involved in these matters.Fraud, as is well known, vitiates every solemn act. Fraud and justice never dwell together.

16. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

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23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

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25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

(emphasis supplied)

*72. In Madhukar Sadbha Shivarkar v. State of Maharashtra [Madhukar Sadbha Shivarkar v. State of Maharashtra, (2015) 6 SCC 557, this Court observed that fraud had been played by showing the records and the orders obtained unlawfully by the declarant, would be a nullity in the eye of the law though such orders have attained finality. Following observations were mad*e :

"27. The said order is passed by the State Government only to enquire into the landholding records with a view to find out as to whether original land revenue records have been destroyed and fabricated to substantiate their unjustifiable claim by playing fraud upon the Tahsildar and appellate authorities to obtain the orders unlawfully in their favour by showing that there is no surplus land with the Company and its shareholders as the valid sub-leases are made and they are accepted by them in the proceedings under Section 21 of the Act, on the basis of the alleged false declarations filed by the shareholders and sub-lessees under Section 6 of the Act. The plea urged on behalf of the State Government and the de facto complainant owners, at whose instance the orders are passed by the State Government on the alleged ground of fraud played by the declarants upon the Tahsildar and appellate authorities to get the illegal orders obtained by them to come out from the clutches of the land ceiling provisions of the Act by creating the revenue records, which is the fraudulent act on their part which unravels everything and therefore, the question of limitation under the provisions to exercise power by the State Government does not arise at all. For this purpose, the Deputy Commissioner of Pune Division was appointed as the enquiry officer to hold such an enquiry to enquire into the matter and submit his report for consideration of the Government to take further action in the matter.The legal contentions urged by Mr Naphade, in justification of the impugned judgment and

order prima facie at this stage, we are satisfied that the allegation of fraud in relation to getting the landholdings of the villages referred to supra by the declarants on the alleged ground of destroying original revenue records and fabricating revenue records to show that there are 384 sub-leases of the land involved in the proceedings to retain the surplus land illegally as alleged, to the extent of more than 3000 acres of land and the orders are obtained unlawfully by the declarants in the land ceiling limits will be nullity in the eye of the law though such orders have attained finality; if it is found in the enquiry by the enquiry officer that they are tainted with fraud, the same can be interfered with by the State Government and its officers to pass appropriate orders. The landowners are also aggrieved parties to agitate their rights to get the orders which are obtained by the declarants as they are vitiated in law on account of nullity is the tenable submission and the same is well founded and therefore, we accept the submission to justify the impugned judgment and orderBabu Maruti Dukarev.State of Maharashtra[Babu Maruti Dukarev.State of Maharashtra, 2006 SCC OnLine Bom 1268 : (2007) 2 AIR Bom R 361] of the Division Bench of the High Court."

(emphasis supplied)

73. In Jai Narain Parasrampuria v. Pushpa Devi Saraf [Jai Narain Parasrampuria v. Pushpa Devi Saraf, (2006) 7 SCC 756] , this Court observed that fraud vitiates every solemn act. Any order or decree obtained by practising fraud is a nullity. This Court held as under:

"55. It is now well settled that fraud vitiates all solemn act. Any order or decree obtained by practising fraud is a nullity. [See (1)Ram Chandra Singhv.Savitri Devi[Ram Chandra Singhv.Savitri Devi, (2003) 8 SCC 319] followed in (2)Kendriya Vidyalaya Sangathanv.Girdharilal Yadav[Kendriya Vidyalaya Sangathanv.Girdharilal Yadav, (2004) 6 SCC 325 : 2005 SCC (L&S) 785] ; (3)State of A.P.v.T. Suryachandra Rao[State of A.P.v.T. Suryachandra Rao, (2005) 6 SCC 149] ; (4)Ishwar Duttv.LAO[Ishwar Duttv.LAO, (2005) 7 SCC 190] ; (5)Lillykuttyv.Scrutiny Committee, SC & ST[Lillykuttyv.Scrutiny Committee, SC & ST, (2005) 8 SCC 283] ; (6)Maharashtra SEBv.Suresh Raghunath Bhokare[Maharashtra SEBv.Suresh Raghunath Bhokare, (2005) 10 SCC 465 : 2005 SCC (L&S) 765] ; (7)Satyav.Teja Singh[Satyav.Teja Singh, (1975) 1 SCC 120 : 1975 SCC (Cri) 50] ; (8)Mahboob Sahabv.Syed Ismail[Mahboob Sahabv.Syed Ismail, (1995) 3 SCC 693] ; and (9)Asharfi Lalv.Koili[Asharfi Lalv.Koili, (1995) 4 SCC 163] .]"

(emphasis supplied)

74. In State of A.P. v. T. Suryachandra Rao [State of A.P. v. T. Suryachandra Rao, (2005) 6 SCC 149] , it was observed that where the land which was offered for surrender had already been acquired by the State and the same had vested in it. It was held that merely because an enquiry was made, the Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud. Following observations were made :

"7. The order of the High Court is clearly erroneous.There is no dispute that the land which was offered for surrender by the respondent had already been acquired by the State and the same had vested in it. This was clearly a case of fraud. Merely because an enquiry was made, the Tribunal was not divested of the power to correct the error when the respondent had clearly committed a fraud.

8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [SeeVimlav.Delhi Admn.[Vimlav.Delhi Admn., 1963 Supp (2) SCR 585 : AIR 1963 SC 1572 : (1963) 2 Cri LJ 434] andIndian Bankv.Satyam Fibres (India) (P) Ltd.[Indian Bankv.Satyam Fibres (India) (P) Ltd., (1996) 5 SCC 550]]

9. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (SeeS.P. Chengalvaraya Naiduv.Jagannath[S.P. Chengalvaraya Naiduv.Jagannath, (1994) 1 SCC 1] .)

10. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (SeeRam Chandra Singhv.Savitri Devi[Ram Chandra Singhv.Savitri Devi, (2003) 8 SCC 319] .)

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13. This aspect of the matter has been considered recently by this Court inRoshan Deenv.Preeti Lal[Roshan Deenv.Preeti Lal, (2002) 1 SCC 100 : 2002 SCC (L&S) 97] ,Ram Preeti Yadavv.U.P. Board of High School and Intermediate Education[Ram Preeti Yadavv.U.P. Board of High School and Intermediate Education, (2003) 8 SCC 311] ,Ram Chandra Singhv.Savitri Devi[Ram Chandra Singhv.Savitri Devi, (2003) 8 SCC 319] andAshok Leyland Ltd.v.State of T.N.[Ashok Leyland Ltd.v.State of T.N., (2004) 3 SCC 1]

14. Suppression of a material document would also amount to a fraud on the court. (Gowrishankar v. Joshi Amba Shankar Family Trust [Gowrishankar v. Joshi Amba Shankar Family Trust, (1996) 3 SCC 310] and S.P. Chengalvaraya Naidu v.

Jagannath [S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1] .)

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence of fraud; as observed in Ram Preeti Yadav [Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education, (2003) 8 SCC 311] .

16. In Lazarus Estates Ltd. v. Beasley [Lazarus Estates Ltd. v. Beasley, (1956) 1 QB 702 : (1956) 2 WLR 502 : (1956) 1 All ER 341 (CA)] , Lord Denning observed at QB pp. 712 and 713 : (All ER p. 345 C)

'No judgment of a court, no order of a minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.'

In the same judgment, Lord Parker, L.J. observed that fraud 'vitiates all transactions known to the law of however high a degree of solemnity' (All ER p. 351 E-F)."

(emphasis supplied)

34. The Apex Court in the case of ***A.V. Papayya Sastry v. Govt. of A.P., (2007) 4 SCC 221*** has observed as under :-

"21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

"Fraud avoids all judicial acts, ecclesiastical or temporal."

35. The Apex Court in the case of ***A.V. Papayya Sastry v. Govt. of A.P., (2007) 4 SCC 221*** has held as under :

"22.It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of Lazarus Estates Ltd. v. Beasley [(1956) 1 All ER 341] Lord Denning observed :

"No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud."

24. In Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25.It has been said : fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).

26.Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of

another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

27. In S.P. Chengalvaraya Naidu v. Jagannath [(1994) 1 SCC 1] this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as "wholly perverse", Kuldip Singh, J. stated :

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

36. The factual matrix of the present case is no longer in dispute, considering the manner in which the mutation was carried out in favour of Ramnaresh, and these facts have been duly brought forth in the report submitted to this Court by the Principal Secretary (Revenue), Government of U.P where it is clear that the land situated at Gata No. 521 was declared surplus, and was allotted in favour of Kishore. Ramnaresh was the concerned Lekhpal, who was also a signatory to the said Patta. Thereafter the revenue records were manipulated and without there being any order of any competent authority the name of Kishore was deleted and in its place name of Ramnaresh was entered. The entire subsequent proceedings in favour of Ramnaresh were made on the basis of the forged revenue entry . The matter becomes more alarming when it has been informed that subsequent to an enquiry having been conducted, when the said forgery came to be known an enquiry was conducted by the Paragana Adhikari and orders were passed for rectification of the said entry, the order was not complied in the entry and the name of Ramnaresh continued on records. This depicts a sorry state of affairs, orders of the Superior are not complied with and no action is taken till a judicial note of the same is taken. It is only when this court had directed an enquiry to be conducted by the principal Secretary, Revenue after passage of much time, that the enquiry got conducted.

37. The golden thread of fraud is found in the entire action of Ramnaresh (Lekhpal). He himself got his name included in the revenue records illegal and unauthorizedly. The said mutation was not only without jurisdiction, there was no semblance of any legality, nor was any order passed for mutating the name of Ramnaresh in place of Kishore, who resisted compliance of the order of the Chief Revenue Officer when directions were issued for deletion of his name and restoration of the name of Kishore. The aforesaid facts clearly indicate active connivance and indulgence of Ramnaresh in the aforesaid acts of fraud and manipulation in the revenue records.

38. Applying the principles enunciated by the Supreme Court in the judgements referred to herein above, it is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first Court or by the final Court—has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. There is no doubt that all the orders passed in favour of Ramnaresh were obtained by playing fraud upon the authorities at each stage, and accordingly all the orders deserve to be set aside, restoring the land in favour of Kishore and his successors.

39. In light of the aforesaid discussions, the the impugned orders dated 21.06.2011, 16.07.2011, 25.07.2011 passed by the Additional Commissioner, Devi Patan Division, Gonda as well as orders dated 31.10.1996 and 04.08.1997 passed by the Prescribed Authority, are hereby set aside.

40. The writ petition is accordingly **allowed** with cost of Rs.50,000/- to be paid by respondent nos. 5 and 6 to the petitioner. Let the said amount be paid within two months failing which the same shall be recovered as arrears of land revenue by District Magistrate, Gonda from respondent Nos. 5 and 6 and be paid to the petitioner.
